

NO. 73716-3-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

REMIGIUS G. SHATAS,

Plaintiff/Appellant,

v.

ANDREW M. SNYDER AND JANE DOE SNYDER; CAMBRIDGE
INFORMATION GROUP I LLC; CAMBRIDGE INFORMATION
GROUP, INC.

Defendants/Respondents,

BLUCORA, INC.,

Nominal Defendant/Respondent.

**BRIEF OF NOMINAL DEFENDANT/RESPONDENT
BLUCORA, INC.**

**WILSON SONSINI GOODRICH &
ROSATI P.C.**

Barry M. Kaplan, WSBA #8661
Gregory L. Watts, WSBA #43995
John C. Roberts Jr., WSBA #44945
701 Fifth Avenue, Suite 5100
Seattle, WA 98104-7036
Telephone: (206) 883-2500
Facsimile: (206) 883-2699

*Attorneys for Nominal
Defendant/Respondent Blucora, Inc.*

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Nominal Defendant/Respondent Blucora, Inc. (“Blucora”) submits this response to Appellant’s Brief (“AB”).

INTRODUCTION

This is an appeal from King County Superior Court orders granting Blucora’s motion to dismiss for improper venue pursuant to Civil Rule 12(b)(3) and denying reconsideration of the same. Blucora is a Delaware corporation with offices in Bellevue, Washington. Its corporate bylaws contain a forum selection provision that expressly specifies Delaware courts as the exclusive forum for litigation over intra-corporate matters, including shareholder derivative suits and actions alleging breach of fiduciary duty by a Blucora director (“Forum Selection Bylaw” or “Bylaw”). Without first making a demand on the Blucora Board of Directors (“Blucora Board”), Plaintiff/Appellant Remigius G. Shatas filed a verified shareholder derivative complaint alleging breaches of fiduciary duty by a Blucora director and two affiliated entities (“Derivative Complaint”) in King County Superior Court.

Blucora moved to dismiss this action below to protect two fundamental corporate interests. First, Blucora has an interest in the proper application of its Forum Selection Bylaw, which reduces uncertainty regarding the proper forum for intra-corporate disputes, reduces the costs of litigating in multiple fora, and increases consistency in

outcomes by requiring Delaware courts to interpret and apply Delaware corporate law. Second, Blucora has an interest in litigation brought in its name. The power to control the business of a company is vested in the company's board of directors, not individual shareholders, and includes the power to control litigation.

The Honorable Beth M. Andrus correctly dismissed the Derivative Complaint for improper venue. CP 416-25. Shatas did not dispute below, and does not dispute on appeal, that the Bylaw is valid and enforceable (CP 123; AB at 5), and Judge Andrus correctly held that Shatas failed to establish that his lawsuit fell within one of the Bylaw's exceptions. The dismissal was without prejudice to Shatas, or any other Blucora shareholder, filing suit in Delaware and it was conditioned on Defendants' consent to jurisdiction in Delaware. This Court should affirm Judge Andrus's well-reasoned decisions.¹

¹ On October 26, 2015, Blucora filed a Motion on the Merits to Affirm ("Motion on the Merits"), which moves to affirm the trial court decisions pursuant to Rule of Appellate Procedure ("RAP") 18.14. It is now clear through documents filed by Shatas with this Court that Shatas has not been a Blucora shareholder since August 2012 and thus is not an "aggrieved party" entitled to appeal under RAP 3.1. Should the Motion on the Merits be granted, the Court need not consider the arguments set out in this brief. The arguments raised therein can also serve as an alternative ground for affirmance under RAP 2.5. *See infra* Section I.

ASSIGNMENTS OF ERROR

Blucora assigns no error to the trial court's May 15, 2015 order dismissing the case, CP 416-25, or its June 5, 2015 order denying Shatas's motion for reconsideration. CP 428-30. These orders should be affirmed.

ISSUES PRESENTED

1. Whether the trial court decisions should be affirmed on the ground that Shatas lacks derivative standing and has lacked it throughout this case, where Shatas did not divulge the facts establishing lack of standing until the appeal.
2. Whether Delaware courts lack personal jurisdiction over Cambridge Information Group, Inc. ("CIG") where there are four statutory bases for personal jurisdiction over CIG and CIG consented to jurisdiction in Delaware.
3. Whether CIG is an indispensable party where the Derivative Complaint alleges that Defendants are jointly and severally liable and a Delaware court would not dismiss an action for failure to join CIG.
4. Whether the Forum Selection Bylaw applies where the fiduciary duty claims brought by Shatas are governed by Delaware common law and Blucora's corporate charter and bylaws, not by the Shareholder Agreements.

STATEMENT OF THE CASE

The Parties. Defendants Andrew M. Snyder ("Snyder") and Jane Doe Snyder reside in New York. CP 2, ¶ 5. Snyder is CEO of CIG and currently sits on the Blucora Board. *Id.* Defendant CIG is a Maryland corporation with offices in New York, New York and in Bethesda, Maryland. *See* Declaration of John C. Roberts Jr. in Support of Brief of

Nominal Defendant/Respondent Blucora, Inc. (“Roberts Decl.”), ¶ 2. CIG’s Bethesda office is located at 7500 Old Georgetown Road. *Id.* Four of CIG’s seven principal officers, including two senior vice presidents, work in the Bethesda office. CP 220. CIG is the managing member of Cambridge Information Group I, LLC (“CIG I”), which is a Delaware limited liability company (“LLC”) created by CIG and used to hold Blucora stock. CP 2, ¶ 3; AB at 6. Nominal Defendant Blucora is a Delaware corporation headquartered in Bellevue, Washington. CP 2, ¶ 1.

Board’s Power to Adopt Bylaws. Blucora’s Certificate of Incorporation grants the Blucora Board the authority to adopt and unilaterally amend the Company’s bylaws: “The Board of Directors shall have the power to adopt, amend or repeal the Bylaws of the corporation; provided, however, the Board of Directors may not repeal or amend any bylaw that the stockholders have expressly provided may not be amended or repealed by the Board of Directors.” CP 81.

The Shareholder Agreements. On August 23, 2011, Blucora entered into three agreements with CIG I: a Securities Purchase Agreement, a Stockholder Agreement, and a Warrant to Purchase Common Stock (collectively, the “Shareholder Agreements” or “Agreements”). CP 152-94. Each of the Agreements contains a provision specifying that they are governed by Delaware law and that the venue for

all disputes “relating to” or “arising out of” the Agreements will be King County Superior Court. CP 167, 178, 192-93. For example, the Securities Purchase Agreement provides:

This Agreement shall be governed by, and construed in accordance with, the internal laws of the State of Delaware without regard to the choice of law principles thereof. Each of the parties hereto irrevocably submits to the exclusive jurisdiction of the courts of the State of Washington located in King County and the United States District Court for the Western District of Washington for the purpose of any suit, action, proceeding or judgment relating to or arising out of this Agreement and the transactions contemplated hereby. Service of process in connection with any such suit, action or proceeding may be served on each party hereto anywhere in the world by the same methods as are specified for the giving of notices under this Agreement.

CP 167 (emphasis added).

The Forum Selection Bylaw. On August 8, 2013, Blucora adopted the Forum Selection Bylaw, which designates Delaware as the exclusive forum for litigation over intra-corporate matters:

Unless the corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any Director, officer, or other employee of the corporation to the corporation or the corporation’s stockholders, (iii) any action asserting a claim arising pursuant to any provision of the DGCL, or (iv) any action asserting a claim governed by the internal affairs doctrine shall be a state or federal court located within the state of Delaware, in all cases subject to the court’s having personal jurisdiction over the indispensable parties named as defendants.

CP 61 (emphasis added).

Shatas Improperly Files This Action in Washington. On March 5, 2015, Shatas filed the verified Derivative Complaint in King County Superior Court. CP 1-24. The Complaint alleges that the Defendants breached their fiduciary duties to Blucora when CIG I sold 1,006,093 shares of Blucora stock on November 20, 2013, allegedly at the direction of CIG and on inside information obtained from Snyder. CP 13, ¶ 31. The Complaint asserts a single claim for breach of fiduciary duty based on insider trading, a Delaware common-law claim known as a “*Brophy* claim.” CP 13-14, ¶¶ 31-34 (citing *Kahn v. Kolberg Kravis Roberts & Co.*, 23 A.3d 831, 837-38 (Del. 2011) (discussing *Brophy* claims), and *Brophy v. Cities Serv. Co.*, 70 A.2d 5 (Del. Ch. 1949) (“*Brophy*”). The Complaint seeks disgorgement of insider trading profits—specifically, “[f]or judgment, jointly and severally, against Defendants for all profits resulting from the sale of 1,006,093 shares of Blucora common stock on November 20, 2013.” CP 21. It also seeks corporate governance reforms, attorney fees and expenses. *Id.*

The Complaint alleges that the King County Superior Court had personal jurisdiction over CIG and CIG I pursuant to Section 8(g) of the Stockholder Agreement and the settlement and final order of an unrelated

judgment in *Manos, et al. v. Voelker, et al.*, No. 08-2-43209-2 SEA (King Cnty. Sup. Ct.). CP 3, ¶¶ 7, 8. The Complaint does not mention the Forum Selection Bylaw, nor does it allege that Delaware courts lack personal jurisdiction over CIG or CIG I. CP 1-22.

The Trial Court Dismisses the Case Without Prejudice. On March 25, 2015, Blucora brought a motion to dismiss for improper venue pursuant to CR 12(b)(3). CP 28-45. Blucora argued that the Forum Selection Bylaw required Shatas to file his derivative fiduciary duty claim in Delaware. CP 32. The issues were fully briefed (CP 28-45, 111-38, 268-75), and the trial court held an hour-long oral argument on May 8, 2015, after which it took the matter under advisement.

On May 18, 2015, the trial court issued a nine-page opinion and order granting Blucora's motion to dismiss for improper venue. CP 416-25. The trial court rejected Shatas's argument that the King County Superior Court had "continuing [] jurisdiction" over the action pursuant to *Manos*. CP 418. The trial court also rejected Shatas's argument that the action "related to" the Shareholder Agreements. The trial court explained: "The source of Snyder's fiduciary duty to Blucora is not the Stockholder Agreement; that duty is imposed by Delaware corporation law. Shatas's claim is not dependent on the terms of the Stockholder Agreement for its resolution." CP 423. The trial court also held that the second exception to

the application of the bylaw did not apply because “CIG has consented in writing to the jurisdiction of Delaware courts in its joinder to Blucora’s motion.” CP 424. Out of an abundance of caution, and to guard against prejudice to Shatas, the trial court conditioned dismissal on CIG’s acceptance of jurisdiction in Delaware. *Id.*

On May 26, 2015, Shatas filed a motion for reconsideration. CP 276-85. Blucora filed its opposition to the motion on June 1, 2015, CP 288-296, and Shatas filed a reply brief in support of the motion on June 3, 2015. CP 297-304. On June 5, 2015, the trial court denied Shatas’s motion for reconsideration in a short written order. CP 428-30.

On June 30, 2015, Shatas filed a notice of appeal. CP 305-08. Less than three months after the Notice of Appeal was filed, Shatas filed a Motion to Add an Additional Plaintiff/Appellant (“Tilden Motion”), which requested the right to add Mr. Tilden, Shatas’s counsel, as an “interim” appellant. On September 25, 2015, Shatas filed his Appellant’s Brief. On October 19, 2015, the Tilden Motion was denied by Commissioner Masako Kanazawa.

STANDARD OF REVIEW

The standard of review is mixed. Orders granting motions to dismiss under CR 12(b)(3) are reviewed for abuse of discretion, a standard that defers to the trial court’s factual determinations regarding the

enforceability of a forum selection clause. *See, e.g., Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008). When a pure question of law is presented, however, a de novo standard applies as to that question. *Id.*

ARGUMENT

The decisions of the trial court below should be affirmed. As an initial matter, the decisions should be affirmed because at no time during the prosecution of the underlying lawsuit or this appeal was Shatas a shareholder of Blucora. He therefore lacks standing to bring this derivative action and the trial court decisions may be affirmed on this ground. The decisions also should be affirmed because Shatas cannot avoid application of the Forum Selection Bylaw. Shatas concedes, as he must, that the Bylaw is valid and enforceable, AB at 5, and thus Shatas must show that one of two exceptions to the Bylaw applies. The first exception is that suit may be brought outside Delaware if Delaware courts lack jurisdiction over an indispensable party. CP 61. The second exception is that suit may be brought outside Delaware if Blucora agrees to litigate the claims brought in the suit in another forum. *Id.* Shatas claims that both exceptions apply. Shatas is wrong on both counts.

I. THE TRIAL COURT SHOULD BE AFFIRMED ON THE GROUND THAT SHATAS LACKS DERIVATIVE STANDING

The trial court should be affirmed because Shatas was not a Blucora shareholder at the time of the challenged transaction, or at any point during the litigation of this action, and thus lacks standing to bring this action.

To have derivative standing, a plaintiff must show a “proprietary interest in the corporation.” *Sound Infiniti, Inc. v. Snyder*, 169 Wn.2d 199, 212, 237 P.3d 244 (2010); *see also Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 149, 750 P.2d 254 (1988). A derivative plaintiff “must be a shareholder at the time of the transaction of which he complains,” *Bolt v. Hurn*, 40 Wn. App. 54, 58, 696 P.2d 1261 (1985), and “remain a shareholder” throughout the litigation. *Sound Infiniti*, 169 Wn.2d at 212 (citation omitted).²

As explained more fully in Blucora’s Motion on the Merits, Shatas has not been a Blucora shareholder since August 2012, when his Blucora stock escheated to the State of Alabama under Alabama unclaimed

² Delaware law is in accord. *See, e.g., Tooley v. Donaldson, Lufkin & Jenrette*, Consolidated C.A. No. 18414-NC, 2003 Del. Ch. LEXIS 10 (Del. Ch. Jan. 21, 2003) (“According to Rule 23.1, derivative actions may only be maintained by shareholders of a corporation. Thus, standing to bring a derivative action is extinguished when a shareholder sells its shares in the corporation”), *rev’d in part on other grounds, aff’d in part*, 845 A.2d 1031 (Del. 2004).

property law, and the stock was sold by the State of Alabama on October 22, 2012. Shatas clearly knew that his Blucora shares had escheated and been sold by the State because, on May 12, 2014, he initiated a claim for the proceeds of the sale and, on June 25, 2014, the State issued him a check for \$2,095.14, which he then cashed.

Shatas's lack of derivative standing is an alternative ground for affirmance under RAP 2.5. *See Newman v. Veterinary Bd. of Governors*, 156 Wn. App. 132, 231 P.3d 840 (2010). Because “[f]acts establishing standing are as essential to a successful claim for relief as is the jurisdiction of the court to grant it[,] . . . the insufficiency of a factual basis to support standing may . . . be raised for the first time on appeal in accordance with RAP 2.5(a)(2).” *Roberson v. Perez*, 119 Wn. App. 928, 933, 83 P.3d 1026 (2004) (quoting *Mitchell v. Doe*, 41 Wn. App. 846, 847–48, 706 P.3d 1026 (1985)).³

³ Blucora intends to file a separate motion for compensatory damages in the amount of their attorneys' fees and costs. To the extent required by RAP 18.1 and this Court's decision in *Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 762 P.2d 356 (1988), Blucora hereby requests that the Court award them compensatory damages. The egregious facts surrounding Shatas's concealment of his lack of standing are set forth more fully in Blucora's Motion on the Merits, filed concurrently herewith.

II. THE FIRST EXCEPTION TO THE FORUM SELECTION BYLAW DOES NOT APPLY BECAUSE DELAWARE COURTS DO NOT LACK JURISDICTION OVER AN INDISPENSABLE PARTY

The Forum Selection Bylaw provides that litigation over intra-corporate matters must be brought in Delaware, “in all cases subject to the court’s having personal jurisdiction over the indispensable parties named as defendants.” CP 61. To qualify for this exception, Shatas must establish both that (i) Delaware courts lack jurisdiction over CIG, and (ii) CIG is an indispensable party. Shatas can establish neither.

A. Delaware Courts Have Jurisdiction Over CIG

Although proving a lack of jurisdiction in Delaware is pivotal to his appeal, Shatas breezes through his jurisdictional analysis in just three sentences, claiming that Delaware courts lack jurisdiction over CIG because CIG is a nonresident, does not “transact business in Delaware,” and “is not registered with the Delaware Secretary of State.” AB at 19-20. While residence in Delaware and registration with the Secretary of State can establish general personal jurisdiction in state court, Shatas fails to deal with the possible application of (1) the “bulge” provision of Federal Rule of Civil Procedure (“FRCP”) 4, FED. R. CIV. P. 4(k)(1)(B), (2) the Delaware long-arm statute, 10 Del. Code § 3104, (3) the consent-to-jurisdiction provisions of the Delaware Limited Liability Company Act

(“Delaware LLC Act”), 6 *Del. Ch.* § 18-109, (4) the consent-to-jurisdiction provisions of the Delaware Director and Officer Consent Statute, 10 Del. Code § 3114, or (5) Delaware decisional law, all of which provide means of exercising personal jurisdiction over a nonresident. In fact, Delaware courts have at least five grounds for asserting personal jurisdiction over CIG.⁴

1. CIG Is Subject To Jurisdiction Under The Bulge Provision Of FRCP 4

The so-called “bulge” provision of FRCP 4 permits a federal district court to assume personal jurisdiction over an indispensable party if that party may be served within 100 miles of the courthouse. FED. R. CIV. P. 4(k)(1)(B); *Fitzgerald v. Wal-Mart Stores E., LP*, 296 F.R.D. 392, 394 (D. Md. 2013). That party is subject to the court’s jurisdiction even if it would not be subject to the jurisdiction of the forum state, as long as the

⁴ Shatas claims that Delaware’s lack of jurisdiction over CIG is “undisputed.” AB at 1. This is not true. Blucora argued below that Delaware could exercise jurisdiction over CIG based on CIG’s express consent to jurisdiction. CP 273. Blucora did not argue that Delaware could exercise jurisdiction pursuant to other theories because Blucora had limited reply space and CIG’s consent was sufficient. This Court can affirm the trial court on any ground supported by the record. *See* RAP 2.5 (“A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.”); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997) (quoting *Hadley v. Cowan*, 60 Wn. App. 433, 444, 804 P.2d 1271 (1991)) (“[O]n appeal, an order may be sustained on any basis supported by the record.”).

party has sufficient minimum contacts with a state into which the 100-mile “bulge” extends to subject it to jurisdiction there. *Quinones v. Penn. Gen. Ins. Co.*, 804 F.2d 1167, 1177 (10th Cir. 1986); *Sprow v. Hartford Ins. Co.*, 594 F.2d 412, 416 (5th Cir. 1979); *Coleman v. Am. Exp. Isbrandtsen Lines Inc.*, 405 F.2d 250, 252 (2d Cir. 1968).⁵

CIG is subject to service of process at two locations within 100 miles of the federal courthouse for the District of Delaware. A plaintiff may serve a corporation by delivering the summons and complaint to an officer, manager, or any other agent authorized to receive it. FED. R. CIV. P. 4(h)(1)(B). CIG maintains an office and principal place of business at 7500 Old Georgetown Road in Bethesda, Maryland. *See Roberts Decl.* ¶ 2. Four of its seven principal officers, including two senior vice presidents, work in the Bethesda office, CP 220, and CIG may be served there. CIG also may be served at its resident agent for service in Maryland, The Corporation Trust, at 300 E Lombard St. in Baltimore, Maryland. *See Roberts Decl.* ¶ 2. Both of these offices are located within 100 miles of the U.S. District Court for the District of Delaware, which maintains a courthouse at 844 N. King Street in Wilmington, Delaware.

⁵ The Fifth and Tenth Circuits have held that minimum contacts with the bulge area are sufficient, while the Second Circuit requires minimum contacts with the entire state into which the bulge extends. *Quinones*, 804 F.2d at 1177; *Sprow*, 594 F.2d at 416; *Coleman*, 405 F.2d at 252. This Court need not choose between these standards, as CIG easily meets both.

Id. ¶¶ 3-5.⁶ Because CIG falls within the “bulge” of the District of Delaware, CIG could be joined in a Delaware district court action for breach of fiduciary duty under Delaware state law, assuming it were indispensable.

The exercise of such jurisdiction is constitutionally permissible because CIG is incorporated in Maryland and has its principal place of business in Bethesda, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 760, 187 L. Ed. 2d 624 (2014) (incorporation in state is “paradigm” example of general jurisdiction), and CIG’s employees actively conduct business in the “bulge” area. *See Int’l Shoe Co. v. Washington*, 326 U. S. 310, 317, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (activity of company agents provides basis for jurisdiction).

Delaware federal court would have subject-matter jurisdiction over claims brought under Delaware state law pursuant to its diversity jurisdiction, 28 U.S.C. § 1332(a)(1), as there is diversity here between

⁶ This Court may take judicial notice of the geographic relationship between two locations. *See* ER 201(b)(2); *State v. Dennison*, 72 Wn. 2d 842, 844, 435 P.2d 526 (1967) (holding that “the location of [a town] and the location of the county boundaries” are judicially noticeable).

Measured as a straight line on a map, CIG’s Bethesda office and the office of its registered agent in Baltimore are located 98 and 64.9 miles from the federal courthouse in Wilmington, respectively. *See* Roberts Decl., ¶¶ 3-5. This “as the crow flies” method is the proper way to measure whether a party lies within a bulge area. *Spro*w, 594 F.2d at 417.

plaintiff and defendants. See *Carlsberg Res. Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1257–58 (3d Cir. 1977) (noting that § 1332 requires that no plaintiff be a citizen of the same state as any defendant); *LaSala v. Bordier et Cie*, 519 F.3d 121, 126, 129 & n.8, 139–40 (3d Cir. 2008) (considering, on the basis of diversity jurisdiction, a claim that corporate insiders breached their fiduciary duties through insider trading).⁷

The “bulge” provision is fatal to Shatas’s claims regarding lack of jurisdiction over an indispensable party. This Court’s analysis of the first exception to the Forum Selection Bylaw need go no farther.

2. CIG Is Subject To Jurisdiction Under The Delaware Long-Arm Statute

Even putting the “bulge” provision to one side, CIG would also be subject to personal jurisdiction in Delaware state court pursuant to the Delaware long-arm statute. 10 Del. Code § 3104.

The long-arm statute provides, among other things, for specific personal jurisdiction over any nonresident who “[t]ransacts any business or performs any character of work or service in the State,” whether “in person or through an agent.” 10 Del. Code § 3104(c). Delaware courts

⁷ Though plaintiff is suing on Blucora’s behalf, Blucora is properly considered a defendant for diversity purposes. CP 15; see *Gabriel v. Preble*, 396 F.3d 10, 14 (1st Cir. 2005) (citing *Smith v. Sperling*, 354 U.S. 91, 96–97 (1957) (holding that, in a derivative action, the corporation is properly viewed as a defendant when its management “opposes the maintenance of the action”).

have expansively construed Section 3104 “to confer jurisdiction to the maximum extent possible under the Due Process Clause.” *Hercules, Inc. v. Leu Tr. & Banking (Bah.) Ltd.*, 611 A.2d 476, 480 (Del. 1992).

Delaware state courts apply a two-step analysis in determining personal jurisdiction over a nonresident defendant. *Hercules*, 611 A.2d at 480-81. Delaware courts first determine whether there is a statutory basis for jurisdiction over the nonresident. *Id.* They then determine whether the exercise of jurisdiction over the nonresident comports with the Due Process Clause of the Fourteenth Amendment. *Id.* The focus of the constitutional inquiry is whether a defendant should have reasonably anticipated that his or her purposeful actions might result in the forum state asserting personal jurisdiction over them, at least as to adjudications arising from those actions. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). Purposeful acts need not occur within the jurisdiction, so long as they create some substantial relationship with the forum jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

CIG’s contacts with Delaware are more than sufficient to constitute transaction of business under the long-arm statute. CIG availed itself of Delaware institutions when it formed CIG I as a Delaware entity. CP 2, ¶¶ 3-4. This constitutes transaction of business within the meaning

of the long-arm statute. *Matthew v. Flakt Woods Grp. SA*, 56 A.3d 1023 (Del. 2012) (filing of certificate of cancellation was transaction of business); *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618 (Del. Ch. 2013) (corporate filing with Secretary of State was transaction of business); *Albert v. Alex. Brown Mgmt. Servs.*, C.A. No. 762-N, C.A. No. 763-N, 2005 Del. Ch. LEXIS 133, at *53 (Del. Ch. Aug. 26, 2005) (day-to-day control over Delaware subsidiary that managed exchange funds was transaction of business).⁸

Here, CIG allegedly caused CIG I to enter into a Securities Purchase Agreement with Blucora, a Delaware corporation, to purchase shares of Blucora stock with legal situs in Delaware, 8 Del. Code § 169, and then used CIG I to hold those shares. AB at 6. CIG also allegedly caused CIG I to enter into a Stockholder Agreement, with a Delaware corporation, pursuant to which CIG I could designate a director to the Blucora Board. AB at 7. These contacts, when combined with the formation of a Delaware entity, are sufficient to establish specific personal jurisdiction under the long-arm statute. *RJ Assocs. v. Health Payors' Org. Ltd. P'ship.*, C.A. No. 16873, 1999. Del. Ch. LEXIS 161, at *12 (Del. Ch.

⁸ Unreported cases from other jurisdictions may be cited as authority where the law of the jurisdiction of the issuing court permits citation to unreported opinions. See GR 14.1(b). The Delaware Court of Chancery permits citation to unreported opinions. See CH. CT. R. 171(i).

July 16, 1999) (formation of Delaware entity in conjunction with participation in the management of the entity constituted transaction of business); *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.*, 871 A.2d 428, 439–40 (Del. 2005) (transaction of business determined on “totality of circumstances”).

Exercise of Delaware jurisdiction over CIG in this instance also comports with the Due Process Clause of the Fourteenth Amendment. The formation of a Delaware corporate entity is a contact of “paramount importance” in the due process analysis. *Sternberg v. O’Neil*, 550 A.2d 1105, 1120 (Del. 1988). “[O]wnership arising from the purposeful utilization of the benefits and protections of the Delaware Corporation Law in activities related to the underlying cause of action” is a “‘minimum contact’ sufficient to sustain the jurisdiction of Delaware’s courts.” *Papendick v. Bosch*, 410 A.2d 148, 152 (Del. 1979).

Moreover, where one has purposefully acted to create a relationship, even of some minimal kind, with the forum state, “the forum state’s interest in adjudicating the dispute” must be factored into the analysis. *World-Wide Volkswagen*, 444 U.S. at 292. And here Delaware clearly has a strong interest in matters of corporate governance. See *Armstrong v. Pomerance*, 423 A.2d 174, 178 (Del. 1980) (describing “Delaware’s interest in providing a sure forum for shareholder derivative

litigation involving domestic corporations”); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987) (“A State has an interest in promoting stable relationships among parties involved in the corporations it charters.”); *In re F5 Networks, Inc.*, 166 Wn.2d 229, 239, 207 P.3d 433 (2009) (noting Delaware’s “importance in the American scheme of corporate governance.”) (citation omitted).

With this in mind, Delaware courts have held that the purchase of Delaware stock can establish specific personal jurisdiction in Delaware, at least with regard to the rights and attributes that attach to the stock, including the right to require directors to not breach their duty of loyalty. *Hynson v. Drummond Coal Co.*, 601 A.2d 570, 579 (Del. Ch. 1991) (“[B]uying stock of a Delaware corporation” is “itself a sufficient act to establish a nexus with the jurisdiction that creates and regulates the internal governance of that corporation to render it consistent with traditional notions of fairness to bind the holder of that stock as [] to adjudications concerning the corporate rights that attach to that stock, including the equitable right to require directors to act with loyalty to the corporation and its shareholders.”) (emphasis altered).

3. CIG Is Subject To Jurisdiction Under The Delaware LLC Act

Even if the Delaware long-arm statute did not authorize jurisdiction in this case, CIG would still be subject to jurisdiction in Delaware under the consent-to-jurisdiction provisions of the Delaware LLC Act, which provides that a “manager” of an LLC is subject to personal jurisdiction in Delaware “in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the [LLC].” 6 Del. Code § 18-109.

Shatas concedes that CIG is the managing member of CIG I. AB at 6 (CIG I “is managed entirely by CIG.”). The only remaining question is whether a nexus exists between Shatas’s claims and actions taken by CIG in its capacity as manager of CIG I. *Cornerstone Techs., LLC v. Conrad*, C.A. No. 197 12-NC, 2003 Del. Ch. LEXIS 34, at *37-42 (Del. Ch. Mar. 31, 2003) (jurisdiction is proper where there is a “clear relation” to LLC business). Here, the nexus undoubtedly exists. Shatas alleges that CIG I obtained inside information from the director that it placed on the Blucora Board, CP 13-14, ¶¶ 31-34, and that CIG I sold Blucora stock on that inside information at the direction of CIG. *See, e.g.*, AB at 10 (“CIG used Snyder’s inside information to sell—through CIG I—approximately one million Blucora shares”).

It is irrelevant that CIG allegedly breached a duty to Blucora rather than a duty to CIG I because the fiduciary obligations of managers can extend to classes of persons beyond the LLC and its members. *In re USACafes, L.P. Litig.*, 600 A.2d 43, 53 (Del. Ch. 1991) (holding that directors of the corporate general partner were subject to jurisdiction under director consent statute; fiduciary duties to partnership were owed in the “capacity” of director of the corporation); *Kidde Indus., Inc. v. Weaver Corp.*, 593 A.2d 563, 565-67 (Del. Ch. 1991) (personal jurisdiction authorized over nonresident directors of Delaware corporation for alleged breach of fiduciary duties owed to a creditor of corporation).

4. CIG Is Subject To Jurisdiction Under The Delaware Director Consent Statute

Much could be made of Shatas’s heavy reliance on the novel theory that “director by deputization” rules used under Section 16 of the Securities Exchange Act of 1934 (“Exchange Act”) can be used to establish a fiduciary relationship under Delaware state law. AB at 26-28. Suffice it to say that Shatas’s attempt to borrow a Section 16 concept and use it in the context of Delaware state law is misguided.⁹

⁹ Section 16(b) imposes restrictions on short-swing trading by certain corporate insiders, including directors. 15 U.S.C. § 78p(b). The definition of “director” under Section 16(b) can include corporations that “deputize” a natural person to perform its duties on the board. *Blau v. Lehman*, 368 U.S. 403, 410, 82 S. Ct. 451, 7 L. Ed. 2d 403 (1962). Blucora is unaware

Even if one were to assume that Delaware courts would accept the novel theory that CIG could be considered a director of Blucora under a deputization theory, that very same theory would subject CIG to Delaware jurisdiction under the Delaware Director and Officer Consent Statute (“Director Consent Statute”). 10 Del. Code § 3114. Under the Director Consent Statute, every nonresident who serves as a director, trustee, member of the governing body, or officer of a Delaware corporation is deemed to have consented to personal jurisdiction in connection with all civil actions or proceedings for violation of a duty in such capacity. *Id.* Section 3114 is the most common method for effecting service of process upon nonresident directors of Delaware corporations in derivative actions and class actions involving alleged breaches of fiduciary duty. *Armstrong*, 423 A.2d at 180 (“In the context of shareholder derivative litigation, we can see no clearer dividing line between permissible and impermissible assertions of jurisdiction than the line the defendants have

of a single case in which a Delaware court has used the definition of “director” under Section 16(b) of the Exchange Act to determine whether someone was a fiduciary under Delaware state law. Indeed, Section 16 authorities doubt whether deputization exists outside of Section 16 at all. Peter J. Romeo & Alan L. Dye, SECTION 16 TREATISE & REPORTING GUIDE § 2.04, at 228 (4th ed. 2012) (“It seems unlikely . . . that a director by deputization would be deemed a director for purposes of . . . other provisions of the federal securities laws.”). Put simply, there is no “director by deputization” under Delaware state law, and thus deputization cannot be the basis for Shatas’s fiduciary claims.

already crossed, *i.e.*, accepting election as directors in a domestic corporation.”). Shatas cannot have it both ways. If CIG is a director of Blucora, Delaware could assert jurisdiction over it.

5. CIG Expressly Consented To Jurisdiction In Delaware

Even if Delaware courts lacked personal jurisdiction over CIG under the four statutes discussed above, the Forum Selection Bylaw would still be enforceable because CIG expressly consented to jurisdiction in Delaware. CP 424.

Shatas quibbles with the phrase “CIG was prepared to consent to jurisdiction in Delaware,” arguing that this indicates only that CIG might consent to jurisdiction, not that it did. AB 7-8, 21. This is hair-splitting. Moreover, the trial court explicitly found that “CIG has consented in writing to the jurisdiction of Delaware courts in its joinder to Blucora’s motion[,]” (CP 424), and its factual determination is entitled to deference. Shatas suggests that CIG’s representation is not binding in Delaware but this is not true. Judicial estoppel bars a defendant from asserting a lack of personal jurisdiction where the defendant sought and obtained dismissal of a similar suit in another jurisdiction by arguing that the dispute should be litigated in Delaware. *In re Silver Leaf, LLC*, C.A. No. 20611, 2004 Del. Ch. LEXIS 93, at *8–*9 (Del. Ch. June 29, 2004) (rejecting challenge to

personal jurisdiction where defendant represented in New Jersey court that full dispute would be litigated in Delaware). Delaware courts would consider the representation to be express consent to jurisdiction, and express consent is operative even in the absence of minimum contacts. *Sternberg*, 550 A.2d at 1111, 1116 (“An express consent to jurisdiction, in and of itself, satisfies the requirements of due process.”).

Shatas suggests that CIG’s consent to jurisdiction in Delaware is irrelevant because it constitutes “[p]ost-filing conduct” and “facts regarding personal jurisdiction are generally determined at the time suit is filed.” AB at 22. This argument is based on the false premise that a court should analyze the availability of an alternate forum in the same way it would analyze its own personal jurisdiction over a defendant. There is no reason why this should be true. Courts have no problem dismissing cases pursuant to forum selection clauses, even when the clauses were triggered by events that took place during the course of the litigation. *E.g.*, *Gen. Protecht Grp., Inc. v. Leviton Mfg. Co.*, 651 F.3d 1355, 1359 (Fed. Cir. 2011) (contractual forum selection clause triggered by defendants’ choice to assert a particular defense, leading to dismissal of the action in favor of contractual forum); *John Wyeth & Brother Ltd. v. Cigna Int’l Corp.*, 119 F.3d 1070, 1076 (3d Cir. 1997) (same). And courts have no problem deciding forum non conveniens motions based on stipulations made

during the course of the litigation. *E.g.*, *Lockman Found. v. Evangelical All. Mission*, 930 F.2d 764, 768 (9th Cir. 1991) (consent to jurisdiction suffices to establish that defendant is amenable to process in forum).

Shatas attempts to distinguish *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 21, 177 P.3d 1122 (2008), a forum non conveniens case cited by Blucora below, on the ground that the forum non conveniens doctrine “presumes another forum exists, at the time of filing, where the case could properly be brought, and which, at the time of filing, satisfied the conditions as a more convenient forum.” AB at 23. This is only half right. It is true that the first step in a forum non conveniens analysis is to determine whether an adequate alternative forum is available, and that availability is established where defendants are “amenable to service of process” in an alternate forum that offers an adequate remedy. *See, e.g.*, *Iragorri v. Int’l Elevator, Inc.*, 203 F.3d 8, 12 (1st Cir. 2000). But it is also well-settled that a defendant may satisfy the amenable-to-process prong of the test by consenting to jurisdiction in an alternate forum, even if the alternative forum would have jurisdiction only if the defendant consents. *See, e.g.*, *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 1996 (2013) (defendant amenable to process in Peru based on stipulation to service of process and consent to jurisdiction there); 14D Wright & Miller, FED. PRAC. & PROC.

JURIS. § 3828.3 (4th ed. Apr. 2015) (“Courts often allow a defendant to satisfy the availability requirement by stipulating that it will submit to personal jurisdiction in the alternative forum as a condition for the dismissal on forum non conveniens grounds.”).¹⁰

Shatas also attempts to distinguish *Worden v. Smith*, 178 Wn. App. 309, 314 P.3d 1125 (2013), a case cited by the trial court below, on the grounds that a party may not consent to jurisdiction as a “litigation tactic.” AB at 21. Without citation to authority, Shatas claims that consent to jurisdiction may be used “to deny a defendant’s motion to dismiss for lack of jurisdiction,” but not to “destroy an otherwise valid forum.” *Id.* at 21, 23. This proposition appears nowhere in *Worden*. Moreover, Shatas ignores the fact that this is exactly what happens every time a court grants a defendant’s motion for forum non conveniens based on consent to jurisdiction in the alternate forum. There is nothing improper about it. CIG’s express consent to jurisdiction is effective here.

¹⁰ See also *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 157 (2d Cir. 2005) (“[D]efendants satisfied the [amenable-to-service-of-process] prong of [the forum non conveniens] test by representing that they would all submit to the jurisdiction of Russian courts in any comparable action filed against them by plaintiff.”); *Tyco Fire & Sec. v. Alcocer*, No. 04-23127-CIV-COOKE/BANDSTRA, 2008 U.S. Dist. LEXIS 71997, at *3 (S.D. Fla. Sept. 23, 2008) (“[D]efendant must show that the proposed alternative forum is both available and adequate” by either showing “that it is amenable to service of process in that forum, or alternatively, by consenting to the jurisdiction of the alternative forum.”).

B. CIG Is Not A Necessary Or Indispensable Party

Even if Delaware courts did lack personal jurisdiction over CIG,¹¹ the first exception to the Forum Selection Bylaw would still not apply because Delaware courts would not find CIG to be a necessary or indispensable party. Because the question here is what a Delaware court would have done, non-joinder is analyzed under Delaware Court of Chancery Rule 19 (“Rule 19”).¹² Analysis under Rule 19 proceeds in two steps. Delaware courts first determine whether the absent party must be joined if feasible under Rule 19(a)—*i.e.*, whether the party is “necessary.” CH. CT. R. 19(a). When an absent party is necessary but joinder is not feasible, Delaware courts determine “whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed,” with dismissal signifying that the party was “indispensable.” CH. CT. R. 19(b). Dismissal for nonjoinder is considered “a last resort.” *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, No. 6696, 1983 Del. Ch. LEXIS 561, *15 (Del. Ch. Dec. 13, 1983).

¹¹ Since CIG has consented to Delaware jurisdiction and the trial court conditioned dismissal on consent, this question is purely hypothetical.

¹² Rule 19 is identical to Delaware Superior Court Rule 19 and virtually identical to Federal Rule of Civil Procedure 19 and Washington Superior Court Civil Rule 19. *Compare* CH. CT. R. 19(a)-(b); *with* SUPER. CT. R. 19(a)-(b); FED. R. CIV. P. 19(a)-(b); *and* CR 19(a)-(b).

Shatas does not discuss Rule 19(a) at all, and while he does recite the Rule 19(b) factors, he makes no attempt to apply them to the facts of the case. AB at 16, 19. Instead, he lumps them all together and claims, without citation to authority, that they all relate to “the ability of the plaintiff to obtain practical relief.” He then argues that joinder of CIG would make it easier for him to obtain relief. *Id.* at 18-19. Proper analysis shows CIG is neither a necessary nor indispensable party.

1. CIG Is Not A Necessary Party Under Rule 19(a)

Under Rule 19(a), an absent party need only be joined if “(1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may (i) as a practical matter impair or impede the person’s ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.” CH. CT. R. 19(a). Neither subsection applies here.

a. CIG Is Not A Necessary Party Under Subsection 19(a)(1)

Subsection 19(a)(1) does not apply because “complete relief” can be afforded from CIG I. Complete relief means relief as between those

already parties, not as between a party and the absent person whose joinder is sought. *Arkwright-Boston Mfrs. Mut. Ins. v. New York*, 762 F.2d 205, 209, (2d Cir. 1985).¹³ The effect “on the absent party is immaterial.” *Pfizer Inc. v. Advanced Monobloc Corp.*, No. 97C-04-037, 1998 WL 110129, at *6 (Del. Super. Ct. Jan. 23, 1998). In determining whether complete relief can be afforded, courts look to the relief sought. *Amvest Capital Corp. v. L. I. Charters, Inc.*, No. 86C-AU-14, 1987 WL 16734, at *2 (Del. Super. Ct. July 23, 1987).

Here, the primary relief sought by Shatas is disgorgement of profit, which the Complaint characterizes as a “judgment, jointly and severally, against Defendants for all profits resulting from the sale of 1,006,093 shares of Blucora common stock on November 20, 2013.” CP 21. Because Shatas concedes that the Defendants are jointly and severally liable, CIG is not a necessary party. The absence of a jointly and severally liable party does not make that party necessary under Delaware law. *Manley v. MAS Assocs., LLC*, 968 A.2d 492 (Del. 2009) (joint tortfeasors are not necessary parties whose joinder is mandatory); *Roberts v. Delmarva Power & Light Co.*, C.A. No. 05C-09-015 (RBY), 2007 Del. Super. LEXIS 234 (Del. Super. Ct. Aug. 6, 2007) (same); *see also Temple*

¹³ Because Rule 19 is identical to FRCP 19, “references to Federal precedent are obviously appropriate.” *Shell Oil Co.*, 1983 Del. Ch. LEXIS 561, at *2.

v. Synthes Corp., 498 U.S. 5, 7-8, 111 S. Ct. 315, 112 L. Ed. 2d 263 (1990) (same). Instead, joint and severally liable parties are considered permissive parties under Rule 20. *Manley*, 968 A.2d at *4; *see also* FED. R. CIV. P. 19, Advisory Comm. Note, 39 F.R.D. 69, 91 (1966) (Rule 19 “is not at variance with the settled authorities holding that a tortfeasor with the usual ‘joint and several’ liability is merely a permissive party to an action against another with like liability”). This is the rule everywhere, including Washington. *See Gildon v. Simon Prop. Grp.*, 158 Wn.2d 483, 503-04, 145 P.3d 1196 (2006) (“joinder not required of principals and agents or parent and subsidiary corporations which may be jointly and severally liable”). Accordingly, joinder of CIG is permissible, but not necessary.

b. CIG Is Not A Necessary Party Under Subsection 19(a)(2)

Subsection 19(a)(2) requires a Delaware court to decide whether determination of the rights of the parties before it would impair or impede the absent party’s ability to protect its interest in the subject matter of the litigation or create inconsistent obligations. CH. CT. R. 19(a)(2). Here, Shatas has not suggested that CIG’s ability to protect its rights would be impaired or impeded or that it would incur inconsistent obligations if the case proceeded without it. If anything, the Complaint suggests that CIG’s

interests are virtually identical to those of CIG I and thus are not likely to be impaired or impeded. *See Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) (“As a practical matter, an absent party’s ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit.”).

Moreover, CIG has not yet “claimed” an interest in this litigation. CH. CT. R. 19(a)(2) (requiring that the party “claims an interest relating to the subject of the action”). Should an action be filed in Delaware, CIG would be free to intervene. An absent party’s decision to forgo intervention indicates that it does not deem its own interests substantially threatened by the litigation, and a court should not second-guess this determination by concluding that the absent party’s presence was necessary for purposes of the joinder rules, at least absent special circumstances. *See United States v. San Juan Bay Marina*, 239 F.3d 400, 406-07 (1st Cir. 2001) (absent party that was “well aware” of litigation “never moved to intervene” and was “apparently of the view that its interests were not at stake or were aligned with those [already parties]”).

2. CIG Is Not An Indispensable Party Under Rule 19(b)

Even if CIG were a necessary party under Rule 19(a), the first exception to the Forum Selection Bylaw would still not apply because

CIG is not an indispensable party under Rule 19(b).¹⁴ An absent party is indispensable only if, “in equity and good conscience,” the action among the parties must be dismissed if the necessary party cannot be joined. CH. CT. R. 19(b). Rule 19(b) provides four factors for the Court to consider in determining if a necessary party is indispensable to the action:

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.

CH. CT. R. 19(b) (emphasis added). “These four factors overlap, to a large extent, the considerations required under Rule 19(a), but Rule 19(b) requires a pragmatic weighing of these four factors.” *Gen. Elec. Capital Corp. v. Sheffield Sys., Inc.*, No. 01C 6342, 2002 WL 1759823, at *2 (N.D. Ill. July 29, 2002). Here CIG is not an indispensable party.

First, Shatas cannot show prejudice to those already parties because the focus of this factor is on whether CIG would be prejudiced. 4-19 MOORE’S FEDERAL PRACTICE § 19.05 at 9 (3d ed. 2015) (“While the rule refers to prejudice to the absent party or to the ‘existing parties’ resulting from the judgment, the proper focus is on prejudice to the absent

¹⁴ Again, this point is purely hypothetical because CIG has consented to jurisdiction in Delaware.

party or to the existing defendants.”). Shatas has not even attempted to show that CIG’s interests would be harmed if the case were allowed to proceed to judgment without it being a party. Indeed, it is difficult to see how CIG would be prejudiced by a judgment when its interests are represented by, and completely aligned with, Snyder and CIG I. *See Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 134 (2d Cir. 2013) (“prejudice to absent parties approaches the vanishing point when the remaining parties are represented by the same counsel, and when the absent and remaining parties’ interests are aligned in all respects”).

Second, any potential prejudice to CIG can be avoided by “other measures,” as CIG can intervene in a Delaware action. *Miles, Inc. v. Cookson Am., Inc.*, Civ. A. No. 12,310, 1994 WL 114867, at *5 (Del. Ch. Mar. 3, 1994) (“The ability to intervene in an action, although not determinative, may be viewed as a factor that lessens any potential prejudice resulting from a future judgment.”); FED. R. CIV. P. 19, Advisory Comm. Note, 39 F.R.D. 69, 91 (1966) (“[T]he absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis.”). And any potential prejudice to Shatas can be avoided through the “shaping of relief.” The Court of Chancery has broad and complete power to fashion any form of damages where appropriate to rectify a breach of fiduciary duty. *In re S. Peru Copper*

Corp. S'holder Deriv. Litig., 52 A.3d 761, 814 (Del. Ch. 2011), *aff'd*, *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012). This includes the power to award monetary relief to remedy the violation of a breach of fiduciary duty. *E.g.*, *Actrade Fin. Techs. v. Aharoni*, C.A. No. 20168, 2003 Del. Ch. LEXIS 114, at *18 (Del. Ch. Oct. 17, 2003); *Boxer v. Husky Oil Co.*, 429 A.2d 995, 998 (Del. Ch. 1981). And disgorgement remedies in particular may take the form of a monetary award. *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) (disgorgement akin to a measure of damages).

Third, Shatas cannot show that a judgment rendered in CIG's absence would be inadequate. Here "adequacy" relates to "judicial economy and the public interest in complete and consistent settlement of controversies In other words, will this suit, if permitted, encourage piecemeal litigation, or otherwise be undesirable." *NuVasive, Inc. v. Lanx, Inc.*, C.A. No. 7266-VCG, 2012 Del. Ch. LEXIS 150, at *12 (Del. Ch. July 11, 2012) (internal quotations omitted).

Shatas does not explain how a judgment of joint and several liability against Snyder and CIG I would be inadequate. *Banner Fund Int'l*, 211 F.3d at 617 ("[A]n order to disgorge establishes a personal liability, which the defendant must satisfy regardless [of] whether he retains the selfsame proceeds of his wrongdoing."). Shatas's claim that he

might be left with a “worthless judgment against a shell entity,” AB at 19, is unfounded and based on sheer speculation. While the Complaint alleges that CIG controls CIG I, nothing in the Complaint supports Shatas’s conjecture that CIG I is a “shell” with “no assets.” Moreover, Shatas completely ignores the possibility of recovering against Snyder. Such speculation is insufficient to show inadequacy. Even if Shatas had a non-speculative claim that Snyder and CIG I did not have sufficient assets to cover a potential judgment, this would not support a finding of indispensability. *Wolgin v. Atlas United Fin. Corp.*, 397 F. Supp. 1003, 1013 (E.D. Pa. 1975) (“Whether [a] judgment can . . . be collected by the plaintiffs goes to the efficacy, not the adequacy, of the relief granted.”), *aff’d*, 530 F.2d 966 (3d Cir. 1976). And while there may be a theoretical possibility that Shatas would need to institute later proceedings against CIG, the mere prospect of a future suit is not sufficient to justify a finding of indispensability. *Pasco Int’l (London) LTD. v. Stenograph Corp.*, 637 F.2d 496, 505 (7th Cir. 1980) (prospect of later litigation insufficient to make the former employees indispensable parties).

Fourth, Delaware courts might retain jurisdiction over Shatas’s action to ensure he had an adequate remedy. Delaware courts may have a stronger claim to personal jurisdiction over CIG than Washington courts

do.¹⁵ The Complaint alleges that Washington courts have personal jurisdiction over CIG pursuant to (i) the King County Superior Court's continuing jurisdiction over *Manos*, and (ii) the Stockholder Agreement. But the trial court rejected Shatas's continuing jurisdiction claims, CP 418, and he does not challenge that aspect of the decision on appeal. AB at 2. Moreover, CIG was not a signatory to the Stockholder Agreement, so it is unclear how it creates personal jurisdiction over CIG in Washington.

Finally, it is difficult to imagine that "equity and good conscience" would require Delaware courts to hold that the parent of a Delaware subsidiary engaged in insider trading under Delaware law is indispensable to the litigation of the breach of fiduciary claims while simultaneously holding that Delaware courts could not assert jurisdiction over such a parent. Such a holding would effectively provide corporate wrongdoers with a blueprint on how to evade Delaware jurisdiction by working through corporate intermediaries with no ties to Delaware. This is not the law. *Grace Bros. v. UniHolding Corp.*, C.A. No. 17612, 2000 Del. Ch. LEXIS 101, *53 (Del. Ch. July 12, 2000) ("[I]t would ill serve 'equity and good conscience' to permit defendants who have allegedly committed breaches of fiduciary duty against stockholders of Delaware corporations

¹⁵ Shatas suggests that it is "undisputed" that King County has personal jurisdiction over CIG. AB at 1. This is not true.

to escape jurisdiction here merely because the breaches they allegedly committed to benefit non-Delaware holding entities took place outside Delaware. If this were the rule, controlling stockholders would have an incentive to create non-Delaware holding entities simply to thwart the ability of minority stockholders to obtain a reliable forum to redress fiduciary breaches.”).

3. Shatas’s Reference To Pre-1966 Case Law Cannot Substitute For A Fulsome Rule 19 Analysis

While Shatas acknowledges that Rule 19(b) should not be applied in “mechanical” fashion, AB at 16, he cites *Schenck v. Salt Dome Oil Corp.*, 37 A.2d 64, 65 (Del. Ch. 1944), for the proposition that “beneficial owners” are “essential” under Delaware law. AB at 18. *Schenck* does not control here, for two primary reasons.

First, *Schenck* is distinguishable. In *Schenck*, plaintiffs owned their stock in “street form,” and defendants claimed that the record holders of the corporate stock, who appear to have been brokers, were essential parties. 37 A.2d at 65. The *Schenck* court held that they were not, relying on *Hunter v. McCarthy*, 36 A.2d 261 (Del. Ch. 1944), where the court held that the “mere agent” who signed a contract on behalf of another could not maintain a claim for specific performance. Here, while CIG I may be controlled by CIG, there is no indication that CIG I is a “mere

agent” of CIG. The Securities Purchase Agreement specifically states that the shares purchased thereunder would be “acquired for the Investor’s own account, not as nominee or agent.” CP 162.

Second, and more fundamentally, *Schenck* is no longer persuasive because its categorical approach to indispensability predates, by more than twenty years, the adoption of the multi-factor analysis under modern Rule 19, which rejected the categorical approach. Delaware adopted the modern Rule 19 on January 1, 1968 to track substantial changes made to FRCP 19 in 1966. *Winitz v. Vivonex Corp.*, No. 3408 C.A. 1970, 1974 Del. Ch. LEXIS 115, at *4 (Del. Ch. Jan. 30, 1974). The changes were made to correct what were seen as defects in the original rule, including its “undue preoccupation with abstract classifications of rights or obligations” and failure to point to the correct basis of decision. FED. R. CIV. P. 19, Advisory Comm. Note, 39 F.R.D. 69, 90 (1966); *see also* 7 Wright & Miller, FED. PRAC. & PROC. § 1601 (3d ed. 1988) (amendments designed “to eliminate formalistic labels that restricted many courts from an examination of the practical factors of individual cases.”).

For this reason, cases decided prior to 1966 are no longer persuasive to the extent that they rest on categorical determinations of indispensability, as *Schenck* does. *Commonwealth Assocs. v. Providence Health Care, Inc.*, C.A. No. 13135, 1993 Del. Ch. LEXIS 231, at *29

(Del. Ch. Oct. 22, 1993) (“Older Delaware cases may be viewed as adhering to that earlier construction of Rule 19 which focused on labeling a party first and thereby determining that it was indispensable, as opposed to examining closely the circumstances of the case before arriving at a conclusion regarding a person’s indispensability, as is now required under Rule 19(b).”); *Highlands Ins. Co. v. Celotex Corp.*, C.A. No. 89-2258, 1989 U.S. Dist. LEXIS 15349, at *2 (D.D.C. Dec. 22, 1989) (rejecting appeal to pre-1966 authority; the intention in revising FRCP 19 was “not . . . to codify the pre-1966 body of precedent in which particular parties were categorized as indispensable”) (citation omitted) (emphasis added); *Shell Oil Co.*, 1983 Del. Ch. LEXIS 561, at *3 (Rule 19(b) analysis “different today from the process used in the past.”). This explains why *Schenck* has been cited on only three subsequent occasions by Delaware courts, and only once after 1948. *Schenck* does not control here.

III. THE SECOND EXCEPTION TO THE FORUM SELECTION BYLAW DOES NOT APPLY BECAUSE SHATAS’S CLAIMS FOR BREACH OF FIDUCIARY DUTY DO NOT “RELATE” TO THE SHAREHOLDER AGREEMENTS UNDER DELAWARE LAW

Shatas claims that the second exception to the Forum Selection Bylaw applies because the Shareholder Agreements “relate to” his fiduciary duty claims. AB at 24-33. By their terms, the Agreements are “governed by, and [must be] construed in accordance with, the internal

laws of the State of Delaware. . . .” CP 167, 178, 192-93. Shatas cannot show that the Agreements “relate to” his fiduciary duty claims under *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149 (Del. 2002), the Delaware Supreme Court decision that controls whether a forum selection clause extends to Delaware claims for breach of fiduciary duty.¹⁶

In *Parfi*, plaintiffs were minority shareholders challenging a series of transactions between the corporation and its controlling shareholder, Xcelera, including an agreement pursuant to which Xcelera allegedly increased its control of the corporation at an unfair cost. 794 A.2d at 1214-15. Xcelera moved to dismiss, arguing, as Shatas does here, that the fiduciary duty claims fell within an arbitration clause stating that any dispute, controversy or claim “arising out of or in connection with this Agreement” was subject to arbitration.¹⁷ *Id.* at 1214-15, 1217 (citation

¹⁶ The non-Delaware case law cited by Shatas on this issue is inapposite. It is also distinguishable. In *Mediterranean Enters., Inc. v. Ssanygyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983), and *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 922 (9th Cir. 2011), the courts held that arbitration clauses did not apply because plaintiffs’ claims did not relate to the interpretation of performance of the contract itself. In *McClure v. Tremaine*, 77 Wn. App. 312, 317, 890 P.2d 466 (1995), the court found that breach of fiduciary duty claims against a general partner’s legal counsel were “intimately linked” to an arbitrable dispute between the limited and general partners.

¹⁷ Although *Parfi* involved the applicability of an arbitration clause, Delaware courts have held that arbitration clauses are simply a special form of forum selection clause. See *Nat’l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt., L.L.C.*, 67 A.3d 373, 380 (Del. 2013).

omitted). The Delaware Supreme Court acknowledged that the arbitration clause was “broad” in scope and “signaled an intent to arbitrate all possible claims that touch on the rights set forth in their contract.” 817 A.2d at 155. However, the Supreme Court held that the fiduciary duty claims did not “relate to” the underwriting agreement, and thus fell outside the scope of the clause, because they were “independently grounded on Delaware corporation law.” *Id.* at 151, 155, 157. The Court explained:

An arbitration clause, no matter how broadly construed, can extend only so far as the series of obligations set forth in the underlying agreement. Thus, arbitration clauses should be applied only to claims that bear on the duties and obligations under the Agreement.

Id. at 156.

As the trial court here found, *Parfi* requires dismissal. Plaintiff identifies his sole cause of action as “Breach of Duty of Loyalty–Insider Trading[.]” CP 13, and that claim is clearly based on Delaware common law. CP 14, ¶ 33 (citing Delaware law); *see* CP 133 (“Shatas’ claims are based on ‘principles of restitution and equity.’”). Shatas’s claims are “independently grounded” on Delaware law and, in fact, have been asserted independently. Shatas concedes that there has been no breach of the Agreements. *See* CP 126-30 (failing to argue that any term of the Agreements had been breached). Thus, like the plaintiffs in *Parfi*, he “cannot point to any contract term that creates a species of obligation upon

which [he] can base a breach of fiduciary duty claim.” *Id.* at 158. As the trial court correctly noted, the inclusion of a provision requiring CIG I and Snyder to abide by federal and state insider trading laws does not change this result; it simply restates preexisting obligations. CP 423; *Parfi*, 817 A.2d at 157-59 (agreement created no obligations despite “typical warranties related to compliance with securities laws and other regulations”).

Shatas states that the trial court’s “analysis of this case under *Parfi* . . . was erroneous[,]” AB at 30, but this does not mean that *Parfi* does not control. Shatas argued below that *Parfi* was dispositive on this issue. CP 279 (“To be clear, we do not disagree with *Parfi*, its reasoning, or that *Parfi* supplies the rule to be followed on Blucora’s motion to dismiss.”). Any attempt by Shatas to retreat from this position on appeal is barred by the invited error doctrine. *Humbert v. Walla Walla Cty.*, 145 Wn. App. 185, 192-93, 185 P.3d 660 (2008).

Shatas attempts to distinguish *Parfi* by stating that “the underwriting agreement in *Parfi* did not create the fiduciary status on which the plaintiffs’ claims were based[,]” AB at 31, 32 n.6, but the question is whether the Agreements govern the fiduciary duties. The *Parfi* court rejected the idea that an underwriting agreement related to the purchase of a controlling stake in the company governed defendants’

fiduciary duties. The governing document, the Court suggested, would be something like a corporate charter or by-law. *See Douzinas v. Am. Bureau of Shipping, Inc.*, 888 A.2d 1146, 1149 (Del. Ch. 2006) (in *Parfi*, “the Supreme Court was clearly influenced by the facts that the arbitration agreement was not contained in the basic contract of the entity—the corporation’s charter—that gave rise to the fiduciary relationship[.]”).

This distinction is reflected in Delaware case law. On the one hand, there are cases like *Parfi* and *OTK Assocs., LLC v. Friedman*, 85 A.3d 696, 720 (Del. Ch. 2014), which involved underwriting agreements and transactional documents related to the purchase of shares. In these cases, courts have held that the forum selection clauses contained therein did not reach claims for breach of fiduciary duty. On the other hand, there are cases like *Douzinas* and *Elf Autochem North America, Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999), which involved forum selection clauses in LLC agreements. In these cases, courts have found that forum selection clauses in LLC agreements extend to fiduciary duty claims. But, as the Delaware Supreme Court stressed in *Elf Autochem*, an LLC is different from a standard corporation because the Delaware LLC Act “permits members to engage in private ordering with substantial freedom of contract to govern their relationship, provided they do not contravene any mandatory provisions of the Act.” *Id.* at 290. Fiduciary duties in an LLC are, in this

way, almost completely defined by the LLC agreement. *See Douzinas*, 888 A.2d at 1149. Here, the trial court correctly held that the Agreements are more like the underwriting agreements and transactional documents in *Parfi* and *OTK* than the LLC agreements in *Elf Autochem* and *Douzinas*. CP 423. This was the correct result.

Ignoring *Parfi*'s emphasis on the source of the legal obligation, Shatas attempts to transform *Parfi* into a factual "but-for" test—but for the Agreements, Shatas suggests, he never would have been a fiduciary and thus never could have breached his fiduciary duties. AB at 32-33 ("But for the Shareholder Agreements which established that status, Shatas' claim for insider trading would not exist."). This interpretation of *Parfi* is inconsistent with the facts of that case. In *Parfi*, Xcelera entered into an underwriting agreement pursuant to which it became the controlling shareholder of Mirror Image and obtained the power to elect directors to Mirror Image's board. *Id.* at 151-52. Minority shareholders in Mirror Image later brought suit against Xcelera and the Xcelera-appointed directors, claiming they breached fiduciary duties owed as controlling shareholders. *Id.* at 158-59. But for the underwriting agreement, Xcelera would not have become a controlling shareholder of Mirror Image or incurred the fiduciary obligations that go along with being a controlling shareholder. This did not make a difference in *Parfi* because how a

director gets to the board or how a controlling shareholder gains its interest is irrelevant. Similarly, here, it would not matter if Snyder became a director by contract, vote or even mistake. The Stockholder Agreement may be the agreement by which Snyder became a fiduciary, but the source of the fiduciary duty is Delaware corporation law.

Finally, Shatas claims that, without the Agreements, he would not be able to prove the first element of his insider trading claim—namely, a fiduciary relationship. AB at 29, 32. This argument misses the mark. As an initial matter, it is absurd to suggest that Shatas needs the Agreements to prove Snyder’s fiduciary status. Snyder sits on the Blucora Board. Nor could CIG’s fiduciary status be proved by reference to the Agreements. CIG is not a signatory to the Agreements and is mentioned nowhere therein. More fundamentally, however, Shatas’s focus on the proof needed to satisfy the elements of his claims is misplaced. The focus should be on the source of the legal obligation. *Parfi*, 817 A.2d at 155 (“The issue is whether the fiduciary duty claims implicate any of the rights and obligations provided for in the Underwriting Agreement.”) (emphasis added). *Parfi* requires dismissal here.¹⁸

¹⁸ Shatas suggests that the Agreements make consent to King County jurisdiction “irrevocabl[e][.]” AB at 24, but ignores the part which provides that Blucora and CIG I are free to waive the observance of the jurisdictional provision at any time. CP 166, 192 (“[T]he observance of

CONCLUSION

For the foregoing reasons, the trial court's May 15, 2015 Order Granting Blucora, Inc.'s CR 12(b)(3) Motion to Dismiss for Improper Venue, CP 416-25, and its June 5, 2015 Order Denying Plaintiff's Motion for Reconsideration, CP 428-30, should be affirmed.

Dated: October 26, 2015



Barry M. Kaplan, WSBA #8661
Gregory L. Watts, WSBA #43995
John C. Roberts, Jr., WSBA #44945
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
701 Fifth Avenue, Suite 5100
Seattle, WA 98104-7036
Telephone: (206) 883-2500
Facsimile: (206) 883-2699

*Attorneys for Nominal
Defendant/Respondent Blucora, Inc.*

any term of this Agreement may be waived (either generally or in a particular instance and either retroactively or prospectively), [] with the written consent of the Company and the Investor.”).

CERTIFICATE OF SERVICE

I certify that on the 26th day of October, 2015, I caused a true and correct copy of this Brief of Nominal Defendant/Respondent Blucora, Inc. to be served on the following by email:

Counsel for Plaintiff/Appellant
Jeffrey I. Tilden
Mark Wilner
GORDON TILDEN THOMAS & CORDELL LLP
1001 Fourth Avenue, Suite 4000
Seattle, Washington 98154
Email: jtilden@gordontilden.com
Email: mwilner@gordontilden.com

Counsel for Plaintiff/Appellant
William C. Smart
Ian S. Birk
KELLER ROHRBACK LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Email: wsmart@kellerrohrback.com
Email: ibirk@kellerrohrback.com

Counsel for Plaintiff/Appellant
David M. Simmonds
1001 Fourth Avenue, Suite 4000
Seattle, Washington 98154
Email: davemsimmonds@gmail.com

Counsel for Defendants/Respondents
Louis D. Peterson
Alexander M. Wu
HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, WA 98101
Email: lou.peterson@hcmp.com
Email: alex.wu@hcmp.com

Counsel for Defendants/Respondents

Peter L. Simmons
FRIED FRANK HARRIS SHRIVER & JACOBSON LLP
1 New York Plaza
New York, NY 10004
Email: peter.simmons@friedfrank.com

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Executed on October 26, 2015 at Seattle, Washington.



John C. Roberts Jr., WSBA #44945

I, John C. Roberts Jr., hereby declare:

1. I am an associate of the law firm of Wilson Sonsini Goodrich & Rosati, P.C., which represents Nominal Defendant/Respondent Blucora, Inc. (“Blucora”). I am licensed to practice law in the State of Washington. I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify to these facts competently.

2. On October 23, 2015 I performed a search for the official website of Cambridge Information Group, Inc. (“CIG”). The “Contact Us” page of the CIG website (www.cig.com) lists two offices: one in New York, New York and another in Bethesda, Maryland. *See* <http://www.cig.com/contact.html>. It lists the address for CIG’s Bethesda office as 7500 Old Georgetown Road, Suite 1400.

3. On October 23, 2015 I performed a search on Cambridge Information Group, Inc. (“CIG”) in the Maryland Department of Assessments and Taxation Business Information database available at <http://sdatcert3.resiusa.org/ucc-charter/Pages/CharterSearch/default.aspx>. The results indicate that CIG’s Resident Agent in the State of Maryland is The Corporation Trust, Ltd., located at 300 E Lombard St. in Baltimore, Maryland. A printed copy of the results of this search is attached as Exhibit A.

Telephone: (206) 883-2500
Facsimile: (206) 883-2699

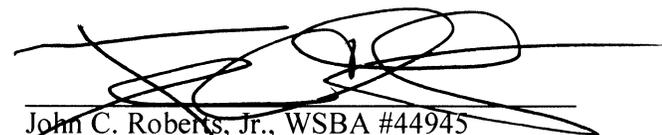
*Attorneys for Nominal
Defendant/Respondent Blucora, Inc.*

4. On October 23, 2015 my associate performed, and I verified, a search on Google Earth to determine the distance in air miles (*i.e.*, “as the crow flies”) between the United States District Court for the District of Delaware located at 844 N King St. in Wilmington, Delaware, and the offices of CIG’s Maryland resident agent, the Corporation Trust, Ltd. At 300 E Lombard St. in Baltimore. This searched indicated that these locations are 64.9 air miles apart. A printed copy of the results of this search is attached as Exhibit B.

5. On October 23, 2015 my associate performed, and I verified, a search on Google Earth to determine the distance in air miles (*i.e.* “as the crow flies”) between the United States District Court for the District of Delaware located at 844 N King St. in Wilmington, Delaware, and the offices of CIG located at 7500 Old Georgetown Rd. in Bethesda, Maryland. This searched indicated that these locations are 98 air miles apart. A printed copy of the results of this search is attached as Exhibit C.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate.

Dated: October 26, 2015



John C. Roberts, Jr., WSBA #44945
WILSON SONSHI GOODRICH & ROSATI
Professional Corporation
701 Fifth Avenue, Suite 5100
Seattle, WA 98104-7036

CERTIFICATE OF SERVICE

I certify that on the 26th day of October, 2015, I caused a true and correct copy of this Declaration of John C. Roberts in Support of the Brief of Nominal Defendant/Respondent Blucora, Inc. to be served on the following by email:

Counsel for Plaintiff/Appellant
Jeffrey I. Tilden
Mark Wilner
GORDON TILDEN THOMAS & CORDELL LLP
1001 Fourth Avenue, Suite 4000
Seattle, Washington 98154
Email: jtilden@gordontilden.com
Email: mwilner@gordontilden.com

Counsel for Plaintiff/Appellant
William C. Smart
Ian S. Birk
KELLER ROHRBACK LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Email: wsmart@kellerrohrback.com
Email: ibirk@kellerrohrback.com

Counsel for Plaintiff/Appellant
David M. Simmonds
1001 Fourth Avenue, Suite 4000
Seattle, Washington 98154
Email: davemsimmonds@gmail.com

Counsel for Defendants/Respondents
Louis D. Peterson
Alexander M. Wu
HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, WA 98101

2015 OCT 26 PM 3:23
COURT OF APPEALS
STATE OF WASHINGTON

Email: lou.peterson@hcmp.com
Email: alex.wu@hcmp.com

Counsel for Defendants/Respondents
Peter L. Simmons
FRIED FRANK HARRIS SHRIVER & JACOBSON LLP
1 New York Plaza
New York, NY 10004
Email: peter.simmons@friedfrank.com

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Executed on October 26, 2015 at Seattle, Washington.

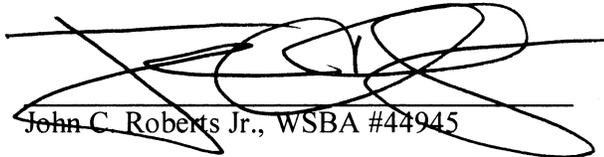

John C. Roberts Jr., WSBA #44945

Exhibit A

Maryland Department of Assessments and Taxation Business Services (w1)

[Search Help](#)

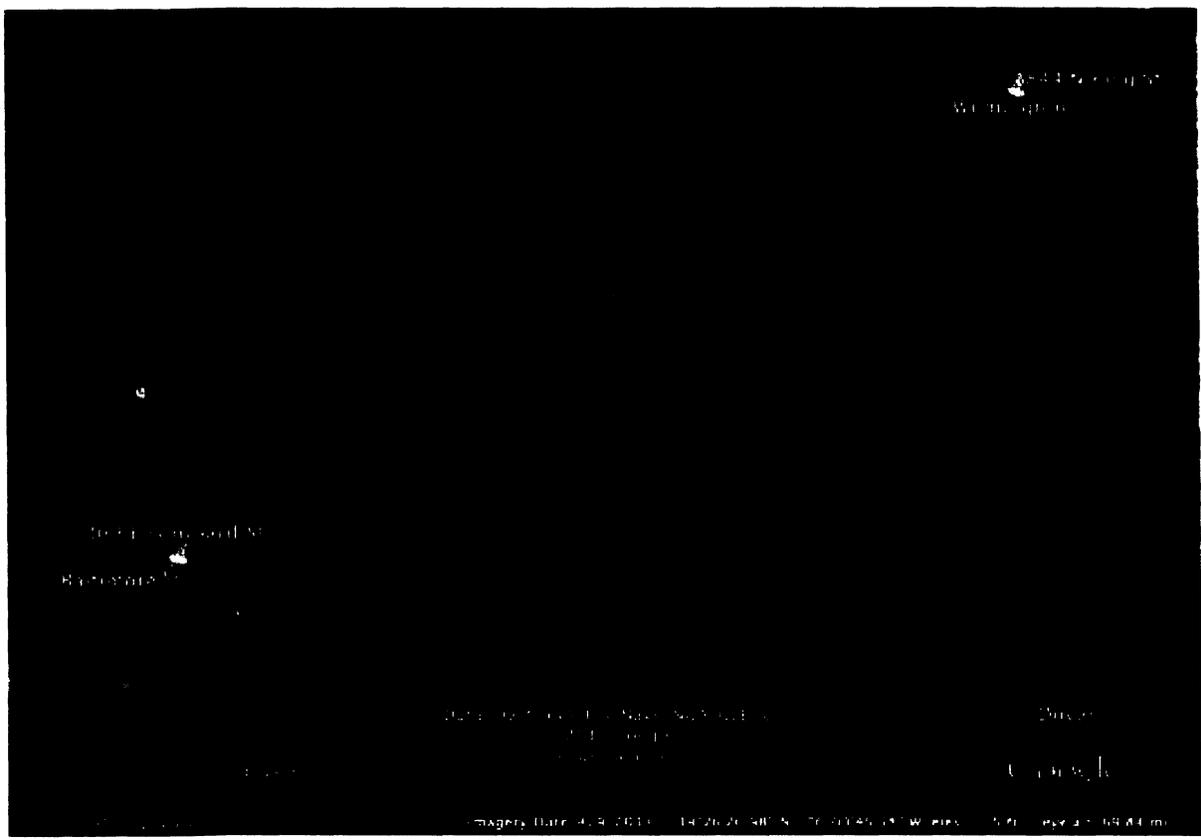
Entity Name: CAMBRIDGE INFORMATION GROUP, INC.

Department ID: D00954693

[General Information](#)
 [Amendments](#)
 [Personal Property](#)
 [Certificate of Status](#)

Principal Office (Current):	THE CORPORATION TRUST INCORPORATED 300 EAST LOMBARD STREET BALTIMORE, MD 20814
Resident Agent (Current):	THE CORPORATION TRUST INCORPORATED 300 EAST LOMBARD STREET BALTIMORE, MD 21202
Status:	INCORPORATED
Good Standing:	Yes What does it mean when a business is not in good standing or forfeited?
Business Code:	Ordinary Business - Stock
Date of Formation or Registration:	02/01/1979
State of Formation:	MD
Stock/Nonstock:	Stock
Close/Not Close:	Unknown

Exhibit B



Google Earth - Flight Path

Name: 844 N King St. TO 300 E Lombard St.

Descript...	Style, C...	Vi...	Altit...	Measureme...
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Length:	64.9 Miles	:
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Exhibit C



Images Date: 09/2011 39°36'08.43"N 77°04'46.20"W KML Link: [Link](#) Size: 21,000.00 m

Google Earth - 3D Plot

Name: 844 N. King St. TO 7500 Old Georgetown Rd.

Descript...
Style, C...
Vi...
Altit...
Measureme...

Length: 98 Miles :

Original

NO.: 73716-3-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

REMIGIUS G. SHATAS,

Plaintiff/Appellant,

v.

ANDREW M. SNYDER AND JANE DOE SNYDER; CAMBRIDGE
INFORMATION GROUP I LLC; CAMBRIDGE INFORMATION
GROUP, INC.

Defendants/Respondents,

BLUCORA, INC.,

Nominal Defendant/Respondent.

**NOMINAL DEFENDANT/RESPONDENT BLUCORA, INC.'S
COMPENDIUM OF UNPUBLISHED AUTHORITY IN SUPPORT
OF RESPONDENT'S BRIEF**

**WILSON SONSINI GOODRICH &
ROSATI P.C.**

Barry M. Kaplan, WSBA #8661
Gregory L. Watts, WSBA #43995
John C. Roberts Jr., WSBA #44945
701 Fifth Avenue, Suite 5100
Seattle, WA 98104-7036
Telephone: (206) 883-2500
Facsimile: (206) 883-2699

*Attorneys for Nominal
Defendant/Respondent Blucora, Inc.*

2015 OCT 25 PM 3:22

COURT OF APPEALS
STATE OF WASHINGTON
16

Pursuant to GR 14.1(b), Nominal Defendant/Respondent Blucora,

Inc. hereby submits copies of the following unpublished authorities:

1. *Actrade Fin. Techs. v. Aharoni*, C.A. No. 20168, 2003 Del. Ch. LEXIS 114 (Del. Ch. Oct. 17, 2003).
2. *Albert v. Alex. Brown Mgmt. Servs.*, C.A. No. 762-N, C.A. No. 763-N, 2005 Del. Ch. LEXIS 133 (Del. Ch. Aug. 26, 2005).
3. *Amvest Capital Corp. v. L. I. Charters, Inc.*, No. 86C-AU-14, 1987 WL 16734 (Del. Super. Ct. July 23, 1987).
4. *Commonwealth Assocs. v. Providence Health Care, Inc.*, C.A. No. 13135, 1993 Del. Ch. LEXIS 231 (Del. Ch. Oct. 22, 1993).
5. *Cornerstone Techs., LLC v. Conrad*, C.A. No. 197 12-NC, 2003 Del. Ch. LEXIS 34 (Del. Ch. Mar. 31, 2003).
6. *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, No. 6696, 1983 Del. Ch. LEXIS 561 (Del. Ch. Dec. 13, 1983).
7. *Gen. Elec. Capital Corp. v. Sheffield Sys., Inc.*, No. 01C 6342, 2002 WL 1759823 (N.D. Ill. July 29, 2002).
8. *Grace Bros. v. UniHolding Corp.*, C.A. No. 17612, 2000 Del. Ch. LEXIS 101 (Del. Ch. July 12, 2000).
9. *Highlands Ins. Co. v. Celotex Corp.*, C.A. No. 89-2258, 1989 U.S. Dist. LEXIS 15349 (D.D.C. Dec. 22, 1989).
10. *In re Silver Leaf, LLC*, C.A. No. 20611, 2004 Del. Ch. LEXIS 93 (Del. Ch. June 29, 2004).
11. *Miles, Inc. v. Cookson Am., Inc.*, Civ. A. No. 12,310, 1994 WL 114867 (Del. Ch. Mar. 3, 1994).
12. *NuVasive, Inc. v. Lanx, Inc.*, C.A. No. 7266-VCG, 2012 Del. Ch. LEXIS 150 (Del. Ch. July 11, 2012).
13. *Pfizer Inc. v. Advanced Monobloc Corp.*, No. 97C-04-037, 1998 WL 110129 (Del. Super. Ct. Jan. 23, 1998).

14. *RJ Assocs. v. Health Payors' Org. Ltd. P'ship.*,
C.A. No. 16873, 1999. Del. Ch. LEXIS 161 (Del. Ch. July 16,
1999).

15. *Roberts v. Delmarva Power & Light Co.*,
C.A. No. 05C-09-015 (RBY), 2007 Del. Super. LEXIS 234 (Del.
Super. Ct. Aug. 6, 2007).

16. *Tooley v. Donaldson, Lufkin & Jenrette*,
2003 Del. Ch. LEXIS 10 (Del. Ch. Jan. 21, 2003).

17. *Tyco Fire & Sec. v. Alcocer*,
No. 04-23127-CIV-COOKE/BANDSTRA, 2008 U.S. Dist.
LEXIS 71997 (S.D. Fla. Sept. 23, 2008).

18. *Winitz v. Vivonex Corp.*,
No. 3408 C.A. 1970, 1974 Del. Ch. LEXIS 115 (Del. Ch. Jan.
30, 1974).

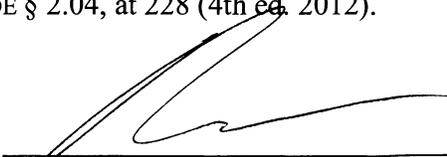
19. 7 Charles Alan Wright & Arthur R. Miller, FED.
PRAC. & PROC. § 1601 (3d ed. 1988).

20. 4-19 MOORE'S FEDERAL PRACTICE § 19.05 at 9
(3d ed. 2015).

21. 14D Wright & Miller, FED. PRAC. & PROC. JURIS.
§ 3828.3 (4th ed. Apr. 2015).

22. Peter J. Romeo & Alan L. Dye, SECTION 16
TREATISE & REPORTING GUIDE § 2.04, at 228 (4th ed. 2012).

Dated: October 26, 2015



Barry M. Kaplan, WSBA #8661
Gregory L. Watts, WSBA #43995
John C. Roberts, Jr., WSBA #44945
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
701 Fifth Avenue, Suite 5100
Seattle, WA 98104-7036
Telephone: (206) 883-2500
Facsimile: (206) 883-2699

*Attorneys for Nominal
Defendant/Respondent Blucora, Inc.*

CERTIFICATE OF SERVICE

I certify that on the 26th day of October, 2015, I caused a true and correct copy of Nominal Defendant/Respondent Blucora, Inc.'s Compendium of Unpublished Authority in Support of Respondent's Brief to be served on the following by email:

Counsel for Plaintiff/Appellant
Jeffrey I. Tilden
Mark Wilner
GORDON TILDEN THOMAS & CORDELL LLP
1001 Fourth Avenue, Suite 4000
Seattle, Washington 98154
Email: jtilden@gordontilden.com
Email: mwilner@gordontilden.com

Counsel for Plaintiff/Appellant
William C. Smart
Ian S. Birk
KELLER ROHRBACK LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Email: wsmart@kellerrohrback.com
Email: ibirk@kellerrohrback.com

Counsel for Plaintiff/Appellant
David M. Simmonds
1001 Fourth Avenue, Suite 4000
Seattle, Washington 98154
Email: davemsimmonds@gmail.com

Counsel for Defendants/Respondents
Louis D. Peterson
Alexander M. Wu
HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, WA 98101
Email: lou.peterson@hcmp.com
Email: alex.wu@hcmp.com

Counsel for Defendants/Respondents
Peter L. Simmons
FRIED FRANK HARRIS SHRIVER & JACOBSON LLP
1 New York Plaza
New York, NY 10004
Email: peter.simmons@friedfrank.com

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Executed on October 26, 2015 at Seattle, Washington.


John C. Roberts Jr., WSBA #44945

EXHIBIT 1

Actrade Fin. Techs. v. Aharoni

Court of Chancery of Delaware, New Castle

July 31, 2003, Submitted ; October 17, 2003, Decided

C.A. No. 20168

Reporter

2003 Del. Ch. LEXIS 114

ACTRADE FINANCIAL TECHNOLOGIES LTD. and ACTRADE COMMERCE, LTD., Plaintiffs, v. AMOS AHARONI, Defendant.

Subsequent History: Related proceeding at *Meer v. Aharoni*, 2010 Del. Ch. LEXIS 137 (Del. Ch., June 28, 2010)

Disposition: [*1] Defendant's motions to dismiss, to stay, and to strike denied.

Core Terms

subsidiary, parties, personal jurisdiction, motion to dismiss, disputed, companies, transfers, fiduciary duty, argues, breach of fiduciary duty, foreign subsidiary, alleges, forum non conveniens, registered agent, loan agreement, documents, mailing, lack of personal jurisdiction, litigate, reasons, lack of subject matter jurisdiction, claim for breach, appointment, convenient, equitable, Register, resident, damages, factors, serving

Case Summary

Procedural Posture

Defendant former corporate director filed a motion to dismiss an action by plaintiffs, a corporation and its wholly owned subsidiary, which alleged that the director, inter alia, breached his fiduciary duty and misappropriated monies. The director alternatively sought to stay the action pending the outcome of a foreign action, and filed a motion to strike certain allegations in the complaint.

Overview

Plaintiffs were involved in selling short-term financing agreements, and the director, an Israeli resident, was accused by plaintiffs of having engaged in

misappropriation of corporate funds by fabricating loans. The court found that it had properly obtained jurisdiction over the director pursuant to the director service statute, *Del. Code Ann. tit. 10, § 3114*. As there was no need for service of process outside of the U.S. under § 3114 in order to obtain jurisdiction over the non-resident director, the requirements of the Hague Convention were found to be inapplicable. The court also concluded that the matters raised in the substance of the complaint, which were equitable in nature, were within its jurisdiction, and that there were no necessary parties to be joined. There was no reason to dismiss or stay the action in favor of a pending action in the Cayman Islands, which involved substantially different matter and did not involve a claim for breach of fiduciary party, nor did it name the director as a party. The court denied the director's motion to strike allegations in the complaint, as it found that they were relevant to the issue of the director's wrongdoing and bad faith.

Outcome

The court denied the director's motion to dismiss, his request to stay the action, and his motion to strike various allegations.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Immaterial Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Scandalous Matters

HN1 In considering a motion to dismiss, a court views all facts in a light most favorable to the non-moving party.

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

HN2 See *Del. Code Ann. tit. 10, § 3114(a)*.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

HN3 The Delaware Supreme Court has held that a director accepts his directorship of a Delaware corporation with explicit statutory notice, via *Del. Code Ann. tit. 10, § 3114* that he could be haled into a Delaware court to answer for the alleged breaches of the duties imposed on him by the very laws which empowered him to act in his corporate capacities.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Governments > Fiduciaries

HN4 Wrongful diversions by a director from a foreign subsidiary are a breach of fiduciary duty to both the subsidiary and to its parent.

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > Service on Agents

HN5 See *Del. Code Ann. tit. 10, § 3114(b)*.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > Foreign Service

Civil Procedure > ... > Service of Process > Time Limitations > General Overview

International Law > Dispute Resolution > Service of Process

HN6 "Service" under *Del. Code Ann. tit. 10, § 3114(b)* is described in the first sentence of *§ 3114(b)* and is limited to "serving the registered agent." The additional act of mailing is required to be made "within seven days of such service." This reading is consistent with the

strong public policy of Delaware to provide a certain and easily accessible forum in which to litigate claims against those who choose to become directors of Delaware corporations. Delaware's interest in defining and enforcing these obligations is substantial and does not depend on or relate to the place of residence of the director. Delaware requires appointment of an in-state registered agent in order to effectuate service of foreign directors entirely in Delaware, hence avoiding the more difficult and time-consuming steps necessary to effect service of process on persons outside the state. The United States Supreme Court has ruled that the Hague Convention applies only to service effectuated outside the United States. For that reason, that treaty is irrelevant to *§ 3114(b)* service in Delaware.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Remedies > Damages > Monetary Damages

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

Torts > Intentional Torts > Conversion > Remedies

HN7 The Court of Chancery of Delaware has subject matter jurisdiction over claims that are equitable in nature even if monetary damages are sought in relief. *Del. Code Ann. tit. 10, § 341*. Breach of fiduciary duty is a well-established equitable claim properly invoking the subject matter jurisdiction of the court.

Civil Procedure > Preliminary Considerations > Equity > General Overview

Civil Procedure > Preliminary Considerations > Equity > Relief

Civil Procedure > Trials > Separate Trials

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN8 Once the Court of Chancery of Delaware finds equity jurisdiction over part of a case, it may, at its discretion, exercise jurisdiction over related legal claims. Factors that may cause the court to deny a motion to

sever include: to resolve factual issues; to avoid multiplicity of suits; to promote judicial efficiency; to do full justice; to avoid great expense; to afford complete relief in one action; and to overcome insufficient modes of procedure at law.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Governments > Fiduciaries

HN9 An action will be dismissed for forum non conveniens only in the rare case where a dismissal of a complaint is appropriate because the chosen forum is overwhelmingly and unduly inconvenient. A mere preference for another forum is insufficient.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN10 Factors measuring convenience in making a determination as to forum non conveniens include: (1) 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 Delaware more properly should decide than those of another jurisdiction; and (5) all other practical problems that would make the trial of the case easy, expeditious and inexpensive.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

HN11 Discretion should be freely exercised in favor of a stay when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same issues and the same parties.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN12 See Del. Ch. Ct. R. 19(a).

Estate, Gift & Trust Law > Trusts > General Overview

Estate, Gift & Trust Law > Trusts > Constructive Trusts

Evidence > Relevance > Relevant Evidence

HN13 Del. R. Evid. 401 defines relevant evidence as having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.

Counsel: Daniel A. Dreisbach, Esquire, Lisa A. Schmidt, Esquire, James H. McMackin, III, Esquire, RICHARDS, LAYTON & FINGER, Wilmington, Delaware; Daniel J. Lefell, Esquire, Stacey A. Shortall, Esquire, Ariel Cannon, Esquire, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, New York, New York, Attorneys for the Plaintiffs.

Neal J. Levitsky, Esquire, FOX ROTHSCHILD LLP, Wilmington, Delaware; Sigmund S. Wissner-Gross, Esquire, May Orenstein, Esquire, Clifford J. Bond, Esquire, HELLER, HOROWITZ & FEIT, P.C., New York, New York, Attorneys for the Defendant.

Judges: Stephen P. Lamb, Vice Chancellor.

Opinion by: Stephen P. Lamb

Opinion

MEMORANDUM OPINION AND ORDER

LAMB, Vice Chancellor.

I.

A Delaware corporation and its wholly owned foreign subsidiary sued their former Chairman and CEO, a non-US resident, for breach of fiduciary duty [*2] and misappropriation of monies. On a motion to dismiss, the court concludes that it has properly obtained jurisdiction over the non-resident defendant by means of the director service statute, *10 Del. C. § 3114*. The court also concludes that the use of that statute to obtain jurisdiction over a foreign resident does not involve the service of process outside the United States and, therefore, does not require compliance with the Hague Convention governing service abroad of judicial writs. The court also concludes that the matters asserted in the complaint are properly within its jurisdiction and that the complaint should neither be dismissed nor stayed in favor of a substantially different action pending in the Cayman Islands.

II.

A. The Parties

The plaintiff, Actrade Financial Technologies Ltd. ("Actrade DE"), is a Delaware corporation. Actrade DE wholly owns several subsidiary companies whose business is selling short-term financing agreements.¹ Actrade Commerce Ltd. ("Actrade Commerce"), an Antiguan corporation, is one of these subsidiaries and is also a plaintiff in this action. Actrade DE and Actrade Commerce are sometimes hereinafter [*3] referred to as "Actrade" or "the plaintiff."

The defendant, Amos Aharoni, a resident of the State of Israel, was the Chairman of the Board of Actrade DE and one of the company's founders. He was also the sole director and officer of Actrade Commerce, as well as other directly and indirectly owned subsidiaries of Actrade DE.

B. The Disputed Transfers

The complaint alleges that, on or about June 25, 2002, Aharoni faxed a wire transfer instruction to Banco Comercial Portuguese ("BCP") in the Cayman Islands directing BCP to transfer \$ 10,009,200 from Actrade Commerce's account at BCP to International Clearing Corporation ("ICC"). The complaint further alleges that, on or about July 12, 2002, Aharoni faxed another wire transfer instruction from Israel to BCP [*4] in the Cayman Islands ordering it to transfer \$ 21,656,700 from Actrade Commerce's account at BCP to the account of an entity called Fort. The total amount of these transfers ("disputed transfers.") is approximately \$ 31.6 million.

On August 2, 2002, Actrade DE's board of directors instructed its Audit Committee to investigate alleged improprieties in the operations of Actrade DE and its subsidiaries. On August 8, 2002, counsel for the Audit Committee wrote to Aharoni seeking to interview him and obtain all Actrade documents under his control. On August 14, Actrade DE's Chief Financial Officer e-mailed Aharoni seeking access to all documents under Aharoni's control. On August 28, 2002, the Audit Committee faxed to Aharoni's U.S. and Israeli counsels

copies of a document preservation letter that Actrade DE had received from the SEC and the U.S. Attorney's Office. On September 6, 2002, the Audit Committee again wrote Aharoni's U.S. counsel seeking all Actrade documents in Aharoni's control.

Aharoni eventually gave Actrade five loan agreement documents dated July 10, 2002.² These agreements show Actrade Commerce loaning a total of \$ 31.6 million to five foreign entities.³ Aharoni [*5] contends that these loans explain the disputed transfers and that they have already been repaid with \$ 6 million in interest. Actrade alleges that there was no legitimate business purpose for these loans and that neither Actrade DE nor any Actrade subsidiary has received any payment on them. Actrade further alleges that Aharoni controls ICC and Fort and that he fabricated the loan agreements after the disputed transfers to conceal his theft of \$ 31.6 million from Actrade Commerce.

C. The Interpleader Action

[*6] On September 26, 2002, BCP commenced an interpleader action in the Cayman Islands regarding the ICC and Fort accounts that had received the disputed transfers. BCP named Actrade DE, Actrade Commerce, Actrade Resources, Actrade S.A., ICC, Fort, Commercial Finance Institution ("CFI"), and BCP as claimants to the money in the accounts. By consent order, Actrade DE and its subsidiaries became plaintiffs in that action on May 2, 2003, leaving the remaining parties as defendants. On May 5, 2003, Actrade filed a complaint seeking an accounting, a declaration that Fort and ICC hold the disputed funds as constructive trustees for Actrade, and payment of the amount the accounting determines to be owed. The Cayman Islands action does not include a claim for breach of fiduciary duty and does not name Aharoni as a party, although Aharoni argues that he expects to eventually be named as a third-party defendant.

D. The Motion To Dismiss

Actrade filed a complaint in this court on February 20, 2003, alleging breach of fiduciary duty, misappropriation

¹ Actrade DE wholly owns Actrade International, a New York corporation. Actrade International wholly owns Antiguan corporation Actrade S.A. Actrade S.A. wholly owns Bahamian corporation Actrade Resources and Antiguan corporation Actrade Commerce Ltd.

² Through counsel, Aharoni refused to be interviewed or provide substantive information to the Audit Committee. On August 21, 2002, Aharoni resigned all director and officer positions he had held for Actrade DE and its subsidiaries. In late September 2002, Aharoni made available a group of Actrade documents that were under his control. Among these were the five loan agreements.

³ Onyx Holdings, Ltd., Garibaldi do Brazil Limitada, LLC, Vision Art Group, Manerfold Finance Corp., and LLC Setkomp.

and conversion of corporate assets, fraud, and corporate waste. Aharoni has moved to dismiss for lack of personal jurisdiction, lack of subject [*7] matter jurisdiction, *forum non conveniens*, failure to join necessary parties, and failure to state a claim for which relief can be granted. Alternatively, Aharoni moves for a stay of this action pending the outcome of the Cayman Islands action. Finally, Aharoni moves to strike the complaint's references to the document preservation letter from the SEC and the U.S. Attorney's office as immaterial and "scandalous." **HN1** In considering a motion to dismiss, this court views all facts in a light most favorable to the non-moving party.⁴

III.

Aharoni challenges this court's personal jurisdiction on two grounds. First, Aharoni claims that this court cannot rely upon *10 Del. C. § 3114* to obtain personal jurisdiction over him because he did not commit his allegedly wrongful acts in his capacity as a director of a Delaware corporation (Actrade DE), but rather in his capacity as a director of wholly owned [*8] foreign subsidiary (Actrade Commerce).⁵ Second, Aharoni argues that the attempt to serve process on him pursuant to *section 3114* violated the Hague Convention of 1963, a treaty of the United States, and therefore failed to confer jurisdiction.⁶ For reasons expressed below, neither of these arguments has merit.

A. *The Reach Of 10 Del. C. § 3114*

Actrade bases its claim of personal jurisdiction on Delaware's Director Consent statute, *10 Del. C. § 3114(a)*, which reads:

HN2 Every nonresident of this State who after September 1, 1977, accepts election or appointment as a director, trustee or member of the governing [*9] body of a corporation organized under the laws of this State or who after June 30, 1978, serves in such capacity and every resident of

this State who so accepts election or appointment or serves in such capacity and thereafter removes residence from this State shall, by such acceptance or by such service, be deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as an agent upon whom service of process may be made 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 a duty in such capacity, whether or not the person continues to serve as such director, trustee or member at the time suit is commenced. Such acceptance or service as such director, trustee or member shall be a signification of the consent of such director, trustee or member that any process when so served shall be of the same legal force and validity as if served upon such director, trustee or member within this State [*10] and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable.

This court has personal jurisdiction over Aharoni because he consented to that jurisdiction by becoming the director of a Delaware corporation. As **HN3** the Delaware Supreme Court has held, a director "accept[s] [his] directorship [of a Delaware corporation] with explicit statutory notice, via *§ 3114* that [he] could be haled into a Delaware court to answer for the alleged breaches of the duties imposed on [him] by the very laws which empowered [him] to act in his corporate capacities."⁷ [*11] Aharoni cannot escape personal jurisdiction under *section 3114* by mischaracterizing his alleged wrongful acts as having been done purely in the capacity of directorship of the foreign subsidiary. Actrade DE conducted all of its business through its foreign subsidiaries, "making oversight of subsidiaries a crucial

⁴ See e.g. *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

⁵ Memorandum of Law in Support of Motion to Dismiss the Complaint of Defendant Amos Aharoni Based, *Inter Alia*, Upon Lack of Personal Jurisdiction, Lack of Subject Matter Jurisdiction, *Forum Non Conveniens*, Prior Pending Proceeding, and Failure to Join Necessary Parties, ("Def. Op. Br.") p. 8.

⁶ Def. Op. Br. p. 12.

⁷ See *Armstrong v. Pomerance*, 423 A.2d 174, 177 (Del. 1980) (finding personal jurisdiction over foreign directors on a claim for breach of fiduciary duty to a Delaware corporation when directors had no contact with Delaware other than being directors of the Delaware corporation).

aspect of the [parent] board's function."⁸ Under *Grace*, Aharoni's oversight or lack thereof of the actions of Actrade Commerce can constitute a breach of fiduciary duty to Actrade DE.

In *Grace*, the defendants who were directors of both a Delaware parent and foreign subsidiary company allowed the subsidiary to assume control over the parent's primary asset and thus become the owner of the parent, to the detriment of the parent's stockholders but to the benefit of the subsidiary. The *Grace* court rejected the defense that "a director of a parent board ... has no duty to stop himself from injuring the parent while wearing his subsidiary hat."⁹ This court found personal jurisdiction over the defendants for the Delaware parent's claim even though the wrongful action occurred through a foreign subsidiary.

Similarly in *Technicorp Int'l II v. Johnston*,¹⁰ this court found personal jurisdiction over persons who were directors of both a Delaware [*12] parent and its foreign subsidiary for wrongful acts done in the name of the subsidiary. Under *Technicorp*, **HN4** wrongful diversions from a foreign subsidiary are a breach of fiduciary duty to both the subsidiary and to its parent.¹¹

Aharoni argues that Delaware has little or no interest in hearing this case because the disputed acts took place in either Israel or the Caribbean, directly injured only an Antiguan subsidiary, and any injury to the Delaware company was indirect and incidental. On the contrary, Delaware has a significant interest in protecting Delaware companies from breaches of fiduciary duty by their directors, regardless of where that breach occurs.¹² That interest is magnified in this case because it seems Actrade DE has no other forum in which to litigate its breach of fiduciary duty claim. Aharoni has not submitted to the personal jurisdiction of the Cayman

Islands court, nor is he [*13] named as a party in that action. Aharoni's implied consent to Delaware's personal jurisdiction through *section 3114* ensures that Actrade DE has a forum in which to litigate its injury.

Since this court has personal jurisdiction over Aharoni for Actrade DE's breach of fiduciary duty claim, that jurisdiction extends "to any and all relief that might be necessary to do justice between the parties."¹³ [*14] This includes jurisdiction over Actrade Commerce's claims. Under very similar facts, the *Technicorp* court found personal jurisdiction over defendant directors for the claims of a foreign subsidiary because those claims "arise out of the same core facts as [the claims of the parent] and because it was therefore reasonably foreseeable that [the subsidiary] as well as [the parent] would seek to recover those diverted funds in the same lawsuit."¹⁴

Aharoni's attempt to distinguish *Technicorp* is unpersuasive. He argues that Delaware has a greater interest in enforcing the fiduciary duty owed to a Delaware parent company when the subsidiary was a directly-owned buyout vehicle than when the subsidiary is indirectly owned and conducts ordinary business.¹⁵ However, Aharoni offers no reason why this difference mandates a disparate result for the same act--breaching a fiduciary duty to a parent company by converting its subsidiary's money for personal use. Since the same core facts are at issue in both of Actrade's claims, the dual-plaintiff suit was entirely foreseeable and *Technicorp* applies. This court has personal jurisdiction over Aharoni for all of Actrade's claims.

B. Service Of Process And The Hague Convention

Aharoni next contends that *10 Del. C. § 3114(b)*, as [*15] applied to him, violates the Hague Convention.¹⁶

⁸ See *Grace Bros., Ltd. v. Uniholding Corp.*, 2000 Del. Ch. LEXIS 101, 2000 WL 982401, at *12 (Del. Ch. July 12, 2000) (hereinafter *Grace*).

⁹ *Id.* at *13.

¹⁰ 2000 Del. Ch. LEXIS 81, 2000 WL 713750 (Del. Ch. May 31, 2000) (hereinafter *Technicorp*).

¹¹ *Id.* at *4.

¹² *Id.*

¹³ *Gans v. MDR Liquidating Corp.*, 1990 Del. Ch. LEXIS 3, 1990 WL 2851, at *10 (Del. Ch. Jan. 10, 1990).

¹⁴ *Technicorp* at 2000 Del. Ch. LEXIS 81, *5 n. 12.

¹⁵ Def. Op, Br. p. 9.

¹⁶ The pertinent part of § 3114(b) is as follows:

[*16] Under Aharoni's interpretation of section 3114(b), service is a two-step process that, in his case, included both (1) the service on Actrade's registered agent in Delaware, and (2) the mailing by the Register in Chancery of a copy of that process to him in Israel. Because the second part of this "service" was made on him overseas, he contends, the Hague Convention applies to invalidate the attempted service.¹⁷ Actrade responds that for the purpose of the Hague Convention, service on Aharoni pursuant to section 3114(b) was accomplished by serving Actrade's registered agent. According to Actrade, the subsequent mailing by the Register in Chancery was not a necessary part of "service," but merely an additional form of notice. Therefore, Actrade argues, the Hague Convention has no application.

As a matter of textual interpretation, Actrade's reading of the statute is by far more compelling. **HN6** "Service" under the statute is described in the first sentence of the section and is limited to "serving the registered agent." The additional act of mailing is required to be made "within 7 days of such service." This reading is also consistent with the strong public policy of this State to provide a certain and easily accessible forum in which

to litigate claims against those who choose to become directors of Delaware [*17] corporations.¹⁸ Delaware's interest in defining and enforcing these obligations is substantial and does not depend on or relate to the place of residence of the director.¹⁹ Delaware requires appointment of an in-state registered agent in order to effectuate service of foreign directors entirely in Delaware, hence avoiding the more difficult and time-consuming steps necessary to effect service of process on persons outside the state.²⁰ The United States Supreme Court has ruled that the Hague Convention applies only to service effectuated outside the United States.²¹ For that reason, that treaty is irrelevant to section 3114(b) service in Delaware.

[*18] For the foregoing reasons, Aharoni's motion to dismiss for lack of personal jurisdiction and improper service of process will be denied.²²

IV.

Aharoni challenges this court's subject matter jurisdiction by characterizing the disputed action as a simple conversion of Actrade funds that can be fully remedied by damages.²³ Aharoni argues that Actrade may invoke equity jurisdiction only if damages cannot

HN5 Service of process shall be effected by serving the registered agent (or, if there is none, the Secretary of State) with 1 copy of such process in the manner provided by law for service of writs of summons. In addition, the Prothonotary or the Register in Chancery of the court in which the civil action or proceeding is pending shall, within 7 days of such service, deposit in the United States mails, by registered mail, postage prepaid, true and attested copies of the process, together with a statement that service is being made pursuant to this section, addressed to such director, trustee or member at the corporation's principal place of business and at the residence address as the same appears on the records of the Secretary of State, or, if no such residence address appears, at the address last known to the party desiring to make such service.

¹⁷ Reply Memorandum of Law in Further Support of Motion to Dismiss the Complaint of Defendant Amos Aharoni Based, *Inter Alia*, Upon Lack of Personal Jurisdiction, Lack of Subject Matter Jurisdiction, *Forum Non Conveniens*, Prior Pending Proceeding, and Failure to Join Necessary Parties, ("Def. Rep. Br.") p. 5. The Hague Convention, if it applied, would have required that any attempt to serve process on an Israeli resident be mailed to Israel's Directorate of the Courts, rather than directly to the resident. The Register in Chancery mailed Actrade's process directly to Aharoni.

¹⁸ See *Pestolite, Inc. v. Cordura Corp.*, 449 A.2d 263 (Del. Super. 1982).

¹⁹ *Id.*

²⁰ *Id.* at 266 (§ 3114 enacted specifically to ensure jurisdiction over directors of Delaware corporations for the claims of those corporations in response to *Shaffer v. Heitner*, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977)).

²¹ See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 701, 100 L. Ed. 2d 722, 108 S. Ct. 2104 (1988).

²² Since the court has personal jurisdiction pursuant to § 3114, I decline to consider whether 10 *Del. C.* § 366(a) (the sequestration statute) could provide an alternate basis for personal jurisdiction.

²³ Def. Rep. Br. pp. 12-13.

adequately remedy Actrade's injury. He is simply wrong. **HN7** This court has subject matter jurisdiction over claims that are equitable in nature even if monetary damages are sought in relief.²⁴ Breach of fiduciary duty is a well-established equitable claim properly invoking the subject matter jurisdiction of this court.²⁵ Aharoni's motion to dismiss for lack of subject matter [*19] jurisdiction must be denied.

Aharoni next contends that even if Actrade has an equitable claim, the court should refuse to exercise jurisdiction over any related legal claims. Instead, he argues, the court should sever these claims to the Superior Court where Aharoni may receive a jury trial. The facts of this case do not warrant severance of Actrade's legal claims from the central claim alleging breach of fiduciary duty. **HN8** Once this court finds equity jurisdiction over part of a case, it may, at its discretion, exercise jurisdiction over related legal claims.²⁶ Factors that may cause this court [*20] to deny a motion to sever include: "to resolve factual issues; to avoid multiplicity of suits; to promote judicial efficiency; to do full justice; to avoid great expense; to afford complete relief in one action; and to overcome insufficient modes of procedure at law."²⁷ Actrade bases all of its claims on two allegedly wrongful wire transfers ordered by Aharoni. Since the factual inquiry for Actrade's breach of fiduciary duty claim would be identical to that of the misappropriation, fraud, and waste claims, all the factors of the *Getty Refining* test weigh against the duplicative factual inquiry that severance would cause.²⁸ The court will therefore exercise jurisdiction over all of Actrade's claims.

V.

Aharoni's motion further asserts a laundry list of reasons why this court should either dismiss or stay the complaint. The arguments [*21] made are insubstantial and will be discussed only briefly.

Aharoni's motion to dismiss under the doctrine of *forum non conveniens* fails for two reasons. First, Aharoni offers no persuasive reason why Delaware is an inconvenient forum for a director of a Delaware corporation to litigate a claim for breach of fiduciary duty. Second, Aharoni has failed to suggest a comparable action in a forum so much more convenient that this court should dismiss the present action in its favor.

HN9 An action will be dismissed for *forum non conveniens* only in "the rare case where a dismissal of a complaint is appropriate because this forum is overwhelmingly and unduly inconvenient"²⁹ A mere preference for another forum is insufficient: "While there is no doubt that [Aharoni] would prefer to litigate this case in his home [country], he cannot plausibly claim any undue inconvenience from having to defend himself against claims for breach of fiduciary duty in this court. [The defendant] voluntarily chose to serve as the director and principal operating officer of a Delaware corporation. He is an intelligent man who cannot have been ignorant of the possibility that he would face a suit [*22] in Delaware in the event of a dispute between himself and [the Delaware corporation he served]."³⁰

Additionally, Aharoni does not offer a comparable, more convenient action to which this court should defer. The only other related action currently pending is the Cayman Islands action, which is both incomparable and less convenient than this action. The Cayman Islands action neither names Aharoni as a party nor involves a claim for breach of fiduciary duty. It is difficult to see how an action prosecuting a different claim against a different party would warrant dismissal for *forum non conveniens*.

Even if the Cayman Islands action were comparable, it would certainly be no more convenient than this action. **HN10** Factors measuring convenience include "(1) the relative ease of access to proof; (2) the availability of

²⁴ See 10 Del. C. § 3114; see also *International Business Machines v. Comdisco*, 602 A.2d 74, 78 n.6 (Del. Ch. 1991).

²⁵ See e.g. *Clark v. Teeven Holding Co., Inc.*, 625 A.2d 869, 875 (Del. Ch. 1992) ("This Court thus has jurisdiction to hear such traditional, equitable matters as trusts and fiduciary relations").

²⁶ See *Getty Refining & Marketing Co. v. Park Oil, Inc.*, 385 A.2d 147, 149 (Del. Ch. 1978).

²⁷ *Id.* at 150.

²⁸ *Id.*

²⁹ See *Caithness Resources, Inc. v. Ozdemir*, 2000 Del. Ch. LEXIS 159, 2000 WL 1741941 at 1 (Del. Ch. Nov. 22, 2000).

³⁰ *Id.* at *5.

compulsory process for witnesses; (3) the possibility of the view [*23] 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; ... and [5] all other practical problems that would make the trial of the case easy, expeditious and inexpensive."

³¹ None of these factors weigh in favor of dismissal. The fact that this action may involve the laws of multiple jurisdictions or the compulsion of witnesses therefrom is not compelling because those problems would arise wherever this dispute is litigated. The central claim of this case is breach of fiduciary duty to a Delaware company. This claim requires application of Delaware law within the special expertise of this court. Finally, Aharoni has little cause to complain of inconvenience in defending an action properly before this court when he consented to its jurisdiction.

The court also declines to stay this action for the [*24] same reasons it declines to dismiss for *forum non conveniens*. Aharoni correctly argues that *HN11* "discretion should be freely exercised in favor of [a] stay when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same issues and the same parties." ³² However, a stay in favor of the Cayman Islands action is inappropriate because that case does not involve the same parties or cause of action and that court may not be able to do complete justice for lack of personal jurisdiction over Aharoni.

Aharoni is not a party to the Cayman Islands action as required by *McWane*.³³ He argues that since his alleged proxy companies are defendants there, his interests are adequately represented as well. Even if so, this argument entirely misses the point of director liability for breach of fiduciary duty. If Actrade's factual allegations are true, Aharoni [*25] is personally liable for breach of fiduciary duty, regardless of whether the proxy companies are liable.³⁴ Personal liability is especially important here because the Cayman Islands courts apparently do not have personal jurisdiction over

Aharoni. Thus, if Aharoni removed the funds from the accounts of the proxy companies, Actrade would be left without an equitable remedy. Such a result is not the "prompt and complete justice" contemplated by *McWane*.³⁵

The court also rejects Aharoni's contention that ICC, Fort, CFI, and various Actrade subsidiaries are indispensable parties without whom this court cannot do full and complete justice. Court of Chancery Rule 19(a) lists the [*26] factors making a party necessary:

- (1) *HN12* in the person's absence complete relief cannot be accorded among those already parties, or
- (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Aharoni argues that Fort, ICC and CFI are indispensable parties because they have a claim to the disputed \$ 31.6 million. This does not affect this court's ability to grant complete relief to the parties before it. The central claim here is that Aharoni breached his fiduciary duty to Actrade by stealing from Actrade Commerce. If Actrade is able to prove this claim, Aharoni will be personally liable for the \$ 31.6 million he allegedly stole, whether or not some other person or entity might also be liable to Actrade.

There is also little risk that these companies will be unable to protect their interests or that Aharoni will be [*27] subject to duplicative obligations. If, as alleged, Aharoni controls ICC, Fort and CFI, then Aharoni can adequately defend their interests. If not, this case will only decide whether the disputed transfers were within the scope of Aharoni's authority as a director of Actrade.

³¹ *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1198-99 (Del. 1997).

³² *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g. Co.*, 263 A.2d 281, 283 (Del. 1970).

³³ *Id.*

³⁴ See e.g. *Technicorp*.

³⁵ 263 A.2d at 283 (granting a stay because another action could afford the parties "all the discovery, pretrial, and trial advantages" they would have in Delaware and could grant a "speedy, just and complete disposition to the claims" of all parties before the court).

The alleged proxy companies' liability will not be at issue. The "one satisfaction" rule ensures that Actrade can actually recover the \$ 31.6 million only once, regardless of the number of actions or defendants.³⁶ Since ICC, Fort, and CFI are not necessary parties under Rule 19(a), it is unnecessary for the court to consider Aharoni's Rule 19(b) analysis.

Similarly, the other Actrade subsidiaries are not necessary parties to this action because the "one satisfaction" rule prevents duplicative recovery and because those subsidiaries are not otherwise interested.

³⁷ Aharoni offers no legitimate reason why this case cannot go forward without these unrelated [*28] parties.
³⁸

[*29] Finally, the court will deny Aharoni's motion to the extent it seeks dismissal of the claims for misappropriation,³⁹ fraud⁴⁰ [*30] and waste⁴¹ asserted in the complaint. Similarly, the court will deny the motion

to strike references to the letter from the SEC and the subpoena from the U.S. Attorney's office. These allegations tend to prove a core element of Actrade's case: that Aharoni created the loan documents after the fact to hide his wrongdoing. Actrade alleges that Aharoni knew that Actrade was under government investigation and still refused to produce the allegedly exonerating loan agreements for several weeks. If true, this fact would tend to prove bad faith and is relevant.⁴² The probative value of such evidence far outweighs any danger of unfair prejudice to Aharoni.⁴³

VI.

For all of the foregoing reasons, Aharoni's motion to dismiss for lack of personal jurisdiction, lack of subject matter jurisdiction, [*31] and *forum non conveniens* is denied. Aharoni's motion to stay or dismiss this action in favor of the Cayman Islands action is denied. Aharoni's

³⁶ See 47 Am. Jur.2d, *Judgments* § 1009.

³⁷ *Id.*

³⁸ Aharoni offers no basis for his contention that any court would force him to pay the same \$ 31.6 million multiple times to each Actrade subsidiary. Nor does Aharoni show why this case requires joining Actrade International or Actrade S.A. when those companies had nothing to do with the disputed transfers. While Aharoni may have transferred money from Actrade Resources to Actrade Commerce prior to the disputed transfers, that act appears to have been within Aharoni's director authority and is unchallenged by Actrade. Aharoni suggests his discovery will be hampered without the subsidiary companies, but it is unclear why any information about the disputed transfers, especially payment on the loan agreements, would be outside the control of Actrade DE, owner of all the companies at issue.

Finally, Aharoni worries that he will win here, be able to dismiss Actrade DE and Actrade Commerce from the Cayman Islands action, then be found liable to the other Actrade subsidiaries. This argument is wholly without merit since Aharoni is not a party to the Cayman Islands action and denies he controls the companies that are parties to that action.

³⁹ The motion to dismiss Actrade's conversion claim is premature. Neither party briefed the issue of whether Antiguan law recognizes a claim for conversion of a specific sum. Since the parties agree that Antiguan law controls, dismissal is inappropriate.

⁴⁰ According to Aharoni, "nowhere in their entire complaint do Plaintiffs allege that they were damaged from purported incorrect information contained in the financials." Def. Rep. Br. at 30. However, P97 of the complaint reads, "Aharoni's representations of fact contained in the purported loan agreements were false when made, were known to be false when made, and were made for purpose of inducing Actrade Commerce to rely on them to their detriment, which Actrade Commerce did." Further, P98 reads, "as a direct result, Actrade Commerce suffered damages in an amount to be proved at trial." This is an adequate allegation of damage.

⁴¹ In support of his motion to dismiss the waste claim, Aharoni argues that the loan agreements on their face are evidence that Actrade received reasonable consideration. Of course, the complaint alleges facts that cast doubt on the regularity of those documents. Aharoni's argument that this court is helpless to look beyond the four corners of an allegedly fraudulent document to address allegations of self-dealing waste (Def. Rep. Br. p. 31) is simply wrong.

⁴² Delaware Uniform Rule of Evidence 401 **HN13** (defining relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable").

⁴³ In passing, the court notes that the parties vigorously argue over remedies that might be available, including accounting, sequestration of stock, and constructive trusts. This discussion is premature and unnecessary to the present motion and I decline to make any ruling on it.

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motion to dismiss for failure to state a claim and for failure to join necessary parties is denied. Aharoni's motion to strike is denied. IT IS SO ORDERED. Stephen P. Lamb
Vice Chancellor

EXHIBIT 2

Albert v. Alex. Brown Mgmt. Servs.

Court of Chancery of Delaware, New Castle

July 22, 2005, Submitted ; August 26, 2005, Decided ; August 26, 2005, Filed

C.A. No. 762-N, C.A. No. 763-N

Reporter

2005 Del. Ch. LEXIS 133

TODD ALBERT, JOSEPH M. BRYAN, JR., KEVIN CALDERWOOD, KATHERINE D. CROTHALL, SCOTT W. FRAZIER, FU FAMILY REVOCABLE TRUST, ROBERT B. GOERGEN, SR., ROBERT G. GOERGEN, JR., TODD A. GOERGEN, HASAN 1995 LIVING TRUST, WAI YAN HO, WILLIS JAMES HINDMAN, JOHNSON FAMILY LIVING TRUST, MICHAEL R. KIDDER REVOCABLE TRUST, MARK AND ANN KINGTON, JEFFREY A. KOSER, MARLENKO INC., ELAINE MCKAY FAMILY, LP, DAVID MIXER, MRW TRUST, JAMES MURRAY, JIM K. OMURA 1996 TRUST, JENNIFER OWEN AND MICHAEL J. ROSS, NICHOLAS PEAY, DOUGLAS G. SMITH, FREDERICK G. SMITH, JANE VEI-CHUN SUN, MARK WABSCHALL, KAREN L. WALSH, WARMENHOVEN 1995 CHILDREN'S TRUST, YAN 1996 REVOCABLE TRUST, BARBARA J. ZALE, and CHARLES A. ZIERING, Plaintiffs, v. ALEX. BROWN MANAGEMENT SERVICES, INC.; DEUTSCHE BANK SECURITIES, INC.; DEUTSCHE BANK, AG; RICHARD HALE; GARY FEARNOW; BRUNS GRAYSON; E. ROBERT KENT, JR.; TRUMAN T. SEMANS; DC INVESTMENT PARTNERS, LLC; DOCTOR ROBERT CANTS, III; and MICHAEL W. DEVLIN, Defendants. ELIZABETH J. BAKER, BENDER 1996 REVOCABLE TRUST, DR. STEVEN J. BERLIN, ESTATE OF ROBERT B. BLOW, LUTHER C. BOLIEK, STEPHEN E. COIT, SARA CROWDER, GERALD K. AND TERESA K. FEHR, FU FAMILY REVOCABLE TRUST, RALPH GLASGAL, ROBERT G. GOERGEN, JR. 1985 TRUST, TODD A. GOERGEN 1985 TRUST, PETER O. HAUSMANN, WILLIS JAMES HINDMAN, WILLIAM F. KAISER, MARK AND ANN KINGTON, TIMOTHY K. KRAUSKOPF, WILLIAM T. MCCONNELL, PHILIP R. MCKEE, DAVID MIXER, MRW TRUST, JAMES MURRAY, PAUL D. AND JUDITH F. NEWMAN, W.L. NORTON, GREGORY PACKER, HOWARD E. ROSE, RUBEN FAMILY LIMITED PARTNERSHIP, 5 S TRUST, SALADRIGAS FAMILY LTD. PARTNERSHIP, RICARDO A. SALAS, JOSE M SANCHEZ, SAMUEL SIEGEL, SILVERMAN 1996 IRREVOCABLE TRUST,

DOUGLAS G. SMITH, FREDERICK G. SMITH, RONALD B. STAKLAND, STRAUCH KULHANJAIN FAMILY TRUST, BRUCE E. TOLL, ALEXANDER R. AND MARJORIE L. VACCARO, YANOVER FAMILY LTD. PARTNERSHIP, MICHAEL YOKELL, and JUSTIN A. ZIVIN, Plaintiffs, v. ALEX. BROWN MANAGEMENT SERVICES; DEUTSCHE BANK SECURITIES, INC.; DEUTSCHE BANK, AG; RICHARD HALE; E. ROBERT KENT, JR.; TRUMAN T. SEMANS; DC INVESTMENT PARTNERS, LLC; DOCTOR ROBERT CRANTS, III, and MICHAEL W. DEVLIN, Defendants.

Prior History: *Albert v. Alex. Brown Mgmt. Servs.*, 2005 Del. Ch. LEXIS 100 (Del. Ch., June 29, 2005)

Core Terms

Funds, complaints, unitholders, Allegations, Withdrawals, managing, Non-Disclosure, factual allegations, gross negligence, partnership agreement, partnership, fiduciary duty, derivative, breach of fiduciary duty, limited partner, general partner, plaintiffs', disclosure, liquidity, entity, limited partnership, personal jurisdiction, claim for breach, defendants', contacts, reasonable inference, fail to provide, Redemption, securities, motion to dismiss

Case Summary

Procedural Posture

In an action by plaintiff investors in a Delaware limited partnership, nominal defendant partnership and defendant fund managers moved to dismiss for failure to state a claim and for lack of personal jurisdiction the investors' claims that included breach of fiduciary duty, fraud, civil conspiracy, breach of contract, breach of covenant of good faith and fair dealing, gross negligence, and unjust enrichment.

Overview

The investors in the limited partnership, which operated two high-tech investment funds, suffered enormous losses when the value of the funds tumbled. They alleged that the managers did not bother to properly monitor funds and, in at least some instances, failed to follow the funds' established hedging procedures as the investors had been promised. The court held that certain breach of fiduciary duty claims failed to show a fiduciary duty to the investors but that the investors had made out derivative claims that might survive if, after amendment, the pleadings adequately alleged a demand for action as required by *Del. Code Ann. tit. 6, § 17-1001*. The breach of contract claims were adequately alleged based on failure to disclose and providing misleading information. Although gross negligence, the only sort of negligence for which the managers could be liable, was hard to prove, the allegations of mismanagement and neglect were sufficient to survive a motion to dismiss. Finally, the court had jurisdiction under *Del. Code Ann. tit. 10, § 3104*, even though the managers were not Delaware residents, as they had taken advantage of Delaware laws in organizing their partnership.

Outcome

The court dismissed certain breach of fiduciary duty claims, the fraud claims, the conspiracy claims, the unjust enrichment claims, and certain agency liability claims against one defendant. The motions were denied as to all other claims, and the motion to dismiss for lack of jurisdiction was denied altogether.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN1 The determination of materiality is a mixed question of fact and law that generally cannot be resolved on the pleadings.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > Limited Partnerships > Management Duties & Liabilities

HN2 For purposes of a derivative action alleging nondisclosure by management, an omitted fact is

material if under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable investor. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information made available.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > Limited Partnerships > Management Duties & Liabilities

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Governments > Fiduciaries

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN3 There is not, of course, any general duty on the part of managers to disclose information. To bring a nondisclosure claim, a party must allege either a fiduciary duty or a contractual duty to disclose.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > Limited Partnerships > Management Duties & Liabilities

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

HN4 There is not a general fiduciary duty on the part of managers to provide financial statements.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > Negligent Acts of Directors & Officers

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Duty of Care

Business & Corporate Law > Limited Partnerships > Management Duties & Liabilities

Governments > Fiduciaries

Torts > Negligence > General Overview

Torts > ... > Elements > Duty > General Overview

Torts > Negligence > Proof > General Overview

Torts > Vicarious Liability > Partners > General Overview

HN5 Director liability for breaching the duty of care is predicated upon concepts of gross negligence. A court faced with an allegation of lack of due care should look for evidence of whether a board has acted in a deliberate and knowledgeable way in identifying and exploring alternatives. "Gross negligence" has a stringent meaning under Delaware corporate (and partnership) law, one that involves a devil-may-care attitude or indifference to duty amounting to recklessness. In the duty of care context with regard to corporate fiduciaries, gross negligence has been defined as a reckless indifference to or a deliberate disregard of the whole body of stockholders or actions that are without the bounds of reason. In order to prevail on a claim of gross negligence, a plaintiff must plead and prove that the defendant was reckless uninformed or acted outside the bounds of reason.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > Limited Partnerships > Management Duties & Liabilities

HN6 Whether fund managers exercised the requisite amount of due care in managing the funds is a fact-sensitive inquiry.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Breach > General Overview

HN7 In order to survive a motion to dismiss for failure to state a breach of contract claim, a plaintiff must demonstrate: (i) the existence of a contract, (ii) a breach of an obligation imposed by that contract, and (iii) resultant damages to the plaintiff.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN8 Concomitant to a contractual duty to provide information is the duty that such information not be false or misleading.

Governments > Fiduciaries

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN9 Common law fraud in Delaware requires that: (1) the defendant made a false representation, usually one of fact; (2) the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; (3) the defendant had the intent to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted or did not act in justifiable reliance on the representation; and (5) the plaintiff suffered damages as a result of such reliance. In addition to overt representations, where there is a fiduciary relationship, fraud may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN10 Fraud claims are subject to the heightened pleading standards of Del. Ch. Ct. R. 9(b). This means that the pleading must identify the time, place and contents of the false representations, the facts misrepresented, as well as the identity of the person making the misrepresentation and what he obtained thereby.

Business & Corporate Law > General Partnerships > Formation > Partnership Agreements

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Types of Contracts > Express Contracts

Contracts Law > Types of Contracts > Contracts Implied in Fact

Contracts Law > Types of Contracts > Quasi Contracts

HN11 In some circumstances, alternative pleading allows a party to seek recovery under theories of contract or quasi-contract. This is generally so, however, only when there is doubt surrounding the enforceability or the existence of the contract. Courts generally dismiss claims for quantum meruit on the pleadings when it is clear from the face of the complaint that there exists an express contract that controls.

Banking Law > ... > National Banks > Bank Holding Companies > Affiliates & Subsidiaries

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Agents Distinguished > Special Agents

Business & Corporate Law > ... > Establishment > Elements > General Overview

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Torts > Vicarious Liability > Corporations > General Overview

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

HN12 A parent corporation can be held liable for the acts of its subsidiary under either of two theories of agency liability. The first is where piercing the corporate veil is appropriate. While many factors are considered in deciding whether to pierce the corporate veil, the concept of complete domination by the parent is decisive. Second, while one corporation whose shares are owned by a second corporation does not, by that fact alone, become the agent of the second company, a corporation--completely independent of a second corporation--may assume the role of the second corporation's agent in the course of one or more specific transactions. This restricted agency relationship may develop whether the two separate corporations are parent and subsidiary or are completely unrelated outside the limited agency setting. Under this second theory, total domination or general alter ego criteria need not be proven.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

HN13 Persuading a Delaware court to disregard the corporate entity is a difficult task. The legal entity of a corporation will not be disturbed until sufficient reason appears.

Banking Law > ... > National Banks > Bank Holding Companies > Affiliates & Subsidiaries

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

HN14 Ownership alone is not sufficient proof of domination or control for purposes of disregarding a corporate entity and imposing liability on a parent corporation.

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

HN15 Actual authority is that authority which a principal expressly or implicitly grants to an agent.

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > Liability of Principals

HN16 Apparent authority is that authority which, though not actually granted, a principal knowingly or negligently permits an agent to exercise, or which he holds him out as possessing. In order to hold a defendant liable under apparent authority, a plaintiff must show reliance on indicia of authority originated by principal, and such reliance must have been reasonable.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN17 The elements for civil conspiracy under Delaware law are: (i) a confederation or combination of two or more persons; (ii) an unlawful act done in furtherance of the conspiracy; and (iii) damages resulting from the action of the conspiracy parties.

Estate, Gift & Trust Law > Trusts > General Overview

Estate, Gift & Trust Law > ... > Private Trusts Characteristics > Trust Beneficiaries > Single Beneficiaries

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN18 Claims for civil conspiracy to commit a breach of fiduciary duty are sometimes called aiding and abetting. However, the basis of such a claim, regardless of how it is captioned, is the idea that a third party who knowingly participates in the breach of a fiduciary's duty becomes liable to the beneficiaries of the trust relationship.

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN19 A claim of civil conspiracy to commit a breach of fiduciary duty involves vicarious liability. It holds a third party, not a fiduciary, responsible for a violation of fiduciary duty. Therefore, it does not apply to defendants that owe a direct fiduciary duty.

Civil Procedure > Remedies > Equitable Accountings > General Overview

HN20 An accounting is an equitable remedy that consists of the adjustment of accounts between parties

and a rendering of a judgment for the amount ascertained to be due to either as a result.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > Limited Partnerships > General Overview

Business & Corporate Law > Limited Partnerships > Management Duties & Liabilities

HN21 See *Del. Code Ann. tit. 6, § 17-1001*.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > Limited Partnerships > General Overview

Governments > Courts > Judicial Precedent

HN22 The determination of whether a claim is derivative or direct in nature is substantially the same for corporate cases as it is for limited partnership cases. Accordingly, in deciding such issues, a Delaware court relies on corporate as well as partnership case law for its determination of a lawsuit's nature.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > Direct Actions

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > ... > Class Actions > Derivative Actions > General Overview

HN23 The determination of whether a claim is direct or derivative turns solely on the following questions: (i) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (ii) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually). The duty of the court is to look at the nature of the wrong alleged, not merely at the form of words used in the complaint. Instead the court must look to all the facts of the complaint and determine for itself whether a direct claim exists.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Duty of Care

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Duty of Disclosure

Business & Corporate Law > Limited Partnerships > General Overview

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Governments > Fiduciaries

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN24 In order to show a direct injury under Tooley, an investor must demonstrate that the duty breached was owed to him or her and that he or she can prevail without showing an injury to the corporation or limited partnership. Generally, nondisclosure claims are direct claims.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > Direct Actions

Civil Procedure > ... > Class Actions > Derivative Actions > General Overview

HN25 A claim of mismanagement represents a direct wrong to the corporation that is indirectly experienced by all shareholders. Any devaluation of stock is shared collectively by all the shareholders, rather than independently by the plaintiff or any other individual shareholder. Thus, the wrong alleged is entirely derivative in nature.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN26 If a party brings derivative claims without first making demand, and demand is not excused, those claims must be dismissed.

Business & Corporate Law > Limited Partnerships > General Overview

Business & Corporate Compliance > ... > Business & Corporate Law > Limited Partnerships > Formation

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN27 As a matter of law, by accepting the position of general partner, a corporation consents to be subjected to a Delaware court's jurisdiction if the limited partnership has chosen to incorporate under Delaware law.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN28 Where the well-pleaded allegations in complaints are not rebutted by affidavit, a court will, for the purposes of a Del. Ch. Ct. R. Rule 12(b)(2) motion, assume the truthfulness of those allegations. A trial court is vested with broad discretion in shaping the procedure by which a motion under Rule 12(b)(2) is decided.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Evidence > Burdens of Proof > General Overview

HN29 When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing a basis for the court's exercise of jurisdiction over the nonresident defendant. In determining whether it has personal jurisdiction over a nonresident defendant, the court will generally engage in a two-step analysis. First, was service of process on the nonresident authorized by statute? Second, does the exercise of jurisdiction, in the context presented, comport with due process?

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Evidence > Burdens of Proof > General Overview

HN30 On a Del. Ch. Ct. R. 12(b)(2) motion, the burden is on the plaintiff to make a specific showing that the court has jurisdiction under a long-arm statute.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN31 See *Del. Code Ann. tit. 10, § 3104*.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

HN32 *Del. Code Ann. tit. 10, § 3104* has been broadly construed to confer jurisdiction to the maximum extent possible under the due process clause.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Standards of Review > General Overview

HN33 When in personam jurisdiction is challenged on a motion to dismiss, the record is construed most strongly against the moving party.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN34 The focus of a minimum contacts inquiry is whether a nonresident defendant engaged in sufficient minimum contacts with the State of Delaware to require it to defend itself in the courts of Delaware consistent with the traditional notions of fair play and justice. In order to establish jurisdiction over a nonresident defendant, the nonresident defendant's contacts with

the forum must rise to such a level that it should reasonably anticipate being required to defend itself in Delaware's courts. The minimum contacts necessary to establish jurisdiction must relate to some act by which the defendant has deliberately created obligations between itself and the forum. Consequently, the defendant's activities are shielded by the benefits and protection of the forum's laws and it is not unreasonable to require it to submit to the forum's jurisdiction.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > Limited Partnerships > General Overview

Business & Corporate Law > Limited Partnerships > Management Duties & Liabilities

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN35 In determining whether a business entity has sufficient minimal contacts with Delaware, case law recognizes the important state interest that Delaware has in regulating entities created under its laws, and that interest can only be served by exercising jurisdiction over those who manage a Delaware entity. When a person manages a Delaware entity and receives substantial benefit from doing so, he should reasonably expect to be held responsible for his wrongful acts relating to the Delaware entity in Delaware.

Counsel: [*1] Jeffrey S. Goddess, Esquire, Jessica Zeldin, Esquire, ROSENTHAL, MONHAIT, GROSS & GODDESS, P.A., Wilmington, Delaware; Steven E. Fineman, Esquire, Hector D. Geribon, Esquire, Daniel P. Chiplock, Esquire, LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP, New York, New York, for Plaintiffs.

Michael D. Goldman, Esquire, Peter J. Walsh, Esquire, Melony R. Anderson, Esquire, POTTER, ANDERSON & CORROON LLP, Wilmington, Delaware; Christopher P. Hall, Esquire, Kevin Rover, Esquire, John Vassos, Esquire, Marilyn B. Ampolsk, Esquire, MORGAN, LEWIS & BOCKIUS, LLP, New York, New York, for Defendants Alex Brown Management Services, Inc., Deutsche Bank Securities, Inc. and Deutsche Bank A.G.

Daniel Griffith, Esquire, MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN, Wilmington,

Delaware, for Defendants DC Investment Partners, LLC, Dr., Robert Crants, III and Michael W. Devlin.

Richard D. Allen, Esquire, Thomas W. Briggs, Jr., Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware, for Defendants Richard Hale, Gary Fearnow, Bruns Grayson, E. Robert Kent, Jr. and Truman T. Semans.

Judges: LAMB, Vice Chancellor.

Opinion by: LAMB

Opinion

MEMORANDUM OPINION

LAMB, Vice Chancellor.

I.

[*2] In a recent opinion in these two related cases on the defendants' motion to dismiss under Court of Chancery Rule 12(b)(6), the court addressed the defendants' statute of limitations argument and concluded that any claims arising before November 11, 2000, the date upon which the parties entered into an agreement tolling the statute of limitations, were barred.¹ Because it was unclear which, if any, claims for relief set out in the complaints arise after that date, the court requested additional submissions from the parties.

[*3] In this opinion, the court now addresses the issues raised in the additional submissions as well as the remaining issues raised by the defendants' motion to dismiss. Included among the latter are: (i) whether any

surviving claims are derivative, rather than direct claims as to which demand was neither made nor excused; and (ii) whether the court can exercise personal jurisdiction over several defendants (the "DCIP Defendants") who served as agents, or employees of agents, of the partnerships.

II.

In the earlier opinion, the court noted that some of the factual allegations in the complaints occurred after November 11, 2000 and that, therefore, viable claims based on these factual allegations are not time-barred.² [*5] The Plaintiffs' Response Brief³ identified five other factual allegations in the complaints (all involving allegedly material misrepresentations or non-disclosures) which, they contend, support viable claims for relief. These are: (i) the Managers' failure in the December 2000 semi-annual reports (dated on or about February 28, 2001) to inform the defendants that hedging was desirable, but the Funds could not afford to do so; (ii) the allegedly misleading statement [*4] in the December 31, 2000 report to the unitholders that the Managers remained "comfortable with the broad diversification achieved by the Funds' portfolio of public securities and private investments. . . .;" (iii) the defendants' failure to inform the unitholders of the Funds' "liquidity issues," "steps that the management could take to improve liquidity," and "alternatives to raise additional liquidity," although these themes were the focus of the Management Committee meetings of October 3, 2000, March 23, 2001, and September 6, 2001; (iv) the defendants' failure to inform the unitholders that, in June of 2001, AmSouth Bank withdrew from the credit syndicates for the Funds, thereby leaving Bank of America as the only lender for

¹ The facts alleged in the complaints are recited in detail in the earlier opinion. *Albert v. Alex. Brown Mgmt. Servs.*, 2005 Del. Ch. LEXIS 100, at *43-58 (Del. Ch. June 29, 2005). Reference is made to that opinion for a complete recitation of the facts and for the definition of terms used herein. However, to avoid confusion, the court refers in this opinion to Alex. Brown Management Services, Inc. as "AB Management." Unless otherwise noted, the facts recited in this opinion are taken from the well-pleaded allegations of the complaints.

² The factual allegations specifically discussed in the earlier opinion are as follows: First, the Managers failed to provide financial statements and reports as they are required to under the Partnership Agreements and Delaware law. Second, the Managers wrongfully allowed certain withdrawals from the Funds, thereby causing or exacerbating a liquidity crisis. Specifically, the Fund II Complaint alleges that three withdrawals from Fund II occurred after November 11, 2000. These allegedly occurred on January 17, 2001, October 25, 2001, and December 31, 2001 (the "Fund II 2001 Withdrawals"). Additionally, the Fund I Complaint alleges approximately \$ 8.0 million in withdrawals occurred in December of 2000 from Fund I (the "Fund I December 2000 Withdrawals"). Third, the Managers failed to provide active and competent management of the Funds. *Alex. Brown*, 2005 Del. Ch. LEXIS 100, at *78-*79.

³ The Plaintiffs' Response Brief is titled "Plaintiffs' Brief In Response To The Court's Memorandum Opinion And Order Of June 29, 2005" and was filed on July 15, 2005.

the Funds; and (v) the defendants' failure to inform the unitholders of the Funds violation of their credit arrangements with their lenders, including their eventual defaults, on June 5, 2002 (for the Fund I loan), and June 28 and September 30, 2002 (for the Fund II loan).

All five of these factual allegations are found in the complaints. Furthermore, they allegedly occurred after November 11, 2000. Therefore, claims based on these allegations are timely. However, a threshold question is whether the information that the plaintiffs allege should have been disclosed, or was disclosed but was allegedly false and misleading, is material. If this information is not material as a matter of law, the allegations will not support claims that the Managers violated their disclosure duties. whether, under the facts alleged in the complaints, these disclosure (or non-disclosure) allegations support a reasonable inference of materiality. If they do not, these factual allegations cannot support a claim for relief.

HN1 The determination of materiality is a mixed question of fact and law that generally cannot be resolved on the pleadings. ⁴ Therefore, the court cannot (and does not) make any final findings on the [*6] materiality of these alleged disclosure allegations. However, on a Rule 12(b)(6) motion, the court must determine

HN2 An omitted fact is material if "under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix' of information made available." ⁵

The first alleged non-disclosure is that the Managers' failed in the December 2000 semi-annual reports [*7] to inform the unitholders that hedging was desirable, but the Funds could not afford to do so. This allegation of non-disclosure, viewed in the context of the allegations contained in the complaints, supports a reasonable inference that this information is material. According to the complaints, the defendants marketed the Funds as

being actively managed by experienced, professional managers. Viewed in this context, a unitholder would likely find it important to know that the Managers could not manage the Funds in what they believed to be the Funds' best interests, because they were facing liquidity problems and could not afford to purchase collars.

The second alleged non-disclosure is that the defendants failed to inform the unitholders of the Funds' "liquidity issues," "steps that the management could take to improve liquidity," and "alternatives to raise additional liquidity." As alleged in the complaints, the real cause of the Funds' losses was the lack of liquidity. The lack of liquidity allegedly prevented the Managers from properly hedging the Funds as they (allegedly) thought was best for the Funds. Viewed in that context, a reasonable investor would likely find it important [*8] to know such information.

The third alleged non-disclosure is that the defendants failed to inform the unitholders that, in June of 2001, AmSouth Bank withdrew from the credit syndicates for the Funds, thereby leaving Bank of America as the only lender for the Funds. Under the facts alleged, the court cannot reasonably infer that this information is material. The complaints allege that the unitholders understood from the very beginning that the Funds would have to borrow money. This is because the contributed securities were illiquid and the Funds needed cash to purchase collars. Given that fact, it is unlikely that a reasonable investor would find it important to know that the Funds were borrowing from one lender as opposed to multiple lenders. In fact, such information would likely only confuse an investor by giving him more information than is necessary to understand the Funds. Therefore, the plaintiffs cannot bring any claims based on this factual allegation.

The fourth alleged non-disclosure is that the defendants failed to inform the unitholders of the Funds' violations of the credit arrangements with their lenders, including the eventual defaults, on June 5, 2002 (for the [*9] Fund I loan), and June 28 and September 30, 2002 (for the Fund II loan). This allegation supports a reasonable inference of materiality. As opposed to the information

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O'Malley v. Boris, 742 A.2d 845, 850 (Del. 1999)

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Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1983) (quoting *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449, 48 L. Ed. 2d 757, 96 S. Ct. 2126 (1976)).

about a bank withdrawing from the credit syndicate, the fact that the Funds were in default on their loans directly speaks to the financial condition of the Funds. A reasonable investor would want to know this information.

Finally, the plaintiffs allege that the claim in the December 31, 2000 report that the Managers remained "comfortable with the broad diversification achieved by the Funds' portfolio of public securities and private investments" was materially false and misleading. This allegation does *not* support a reasonable inference that this information is material. It is simply a statement of the Managers' opinion. Furthermore, there is no allegation in the complaints that this statement of opinion was not honestly held, i.e. false. Therefore, the plaintiffs cannot bring any claims based on this factual allegation.

The Non-Disclosure Allegations⁶ relate to failures to disclose allegedly material information. **HN3** There is not, of course, any general duty to disclose information. To bring a non-disclosure claim, [*10] a party must allege either a fiduciary duty or a contractual duty to disclose. The plaintiffs have attempted to allege both. Therefore, the court will address the Non-Disclosure Allegations in the context of the plaintiffs' claims for breach of fiduciary duty and breach of contract.

III.

The allegations set out in the two complaints are nearly identical and the complaints are both set out in eleven counts: breach of fiduciary duty (Count 1); aiding and abetting a breach of fiduciary duty (Count 2); common law fraud (Count 3); aiding and abetting common law fraud (Count 4); breach of contract against AB Management (with respect to Fund I) and breach of contract against DCIP (with respect to Fund II) (Count 5); breach of the covenant of good faith and fair dealing against AB Management (with respect to Fund I) and breach of the covenant of good faith and fair dealing against [*11] DCIP (with respect to Fund II) (Count 6); gross negligence (Count 7); unjust enrichment against all defendants (Count 8); conspiracy liability (Count 9); an accounting (Count 10); and agency liability against

Deutsche Bank and DBSI (Count 11). The court first addresses each of the substantive claims (Counts 1, 3, 5-8, & 10). The court then considers the vicarious liability claims (Counts 2, 4, 9, & 11).

A. Breach Of Fiduciary Duty (Count 1)

1. Failure To Provide Financial Statements

The complaints allege that the Managers failed to provide the unitholders with the 2001 audited financial statements until 2003, and failed to provide any investor reports or audited financial statements for 2002. The plaintiffs argue that this amounted to a breach of the Managers' fiduciary duties.

HN4 There is not, of course, a general fiduciary duty to provide financial statements. Instead, under the Partnership Agreements, the Managers had a contractual duty to provide the unitholders with such reports.⁷ The plaintiffs have not articulated why the violation of this contractual right amounted to a breach of fiduciary duty.⁸ Thus, this factual allegation does not state a claim for breach [*12] of fiduciary duty.

2. Withdrawal Allegations

The plaintiffs argue that the Managers wrongfully allowed the Fund I December 2000 Withdrawals and the Fund II 2001 Withdrawals. The plaintiffs contend that the defendants violated their fiduciary duties "by failing to ensure that the Funds had sufficient financial resources' to accomplish their investment objectives,' and failed to ensure that the Managers were providing professional and active supervision, oversight and management of the Funds."⁹

[*13] From these factual allegations, the court cannot reasonably infer a breach of the fiduciary duty of loyalty. The complaints do not allege that the Managers benefited personally in any way by allowing the withdrawals. In fact, the amount of fees that the Managers received were based on the amount of money the Funds had under management. Therefore, if

⁶ Collectively, the court refers to the three remaining factual allegations of non-disclosure as the "Non-Disclosure Allegations."

⁷ Partnership Agreements § 11.2.

⁸ In the Plaintiffs' Response Brief, the plaintiffs argue that the Managers failed to make material disclosures, when they had a fiduciary obligation to do so. They further outline specific factual allegations, the Non-Disclosure Allegations, they contend are material and should have been disclosed. The Non-Disclosure Allegations are discussed below.

⁹ Pls.'s Resp. Br. at 7.

anything, the Managers had an incentive *not* to allow redemptions.

Likewise, the plaintiffs' allegations relating to the Fund I December 2000 Withdrawals and the Fund II 2001 Withdrawals do not rise to the level of a breach of the duty of care. **HN5** Director liability for breaching the duty of care "is predicated upon concepts of gross negligence."¹⁰ A court faced with an allegation of lack of due care should look for evidence of whether a board has acted in a deliberate and knowledgeable way in identifying and exploring alternatives.¹¹

[*14] Gross negligence has a stringent meaning under Delaware corporate (and partnership) law, one "which involves a devil-may-care attitude or indifference to duty amounting to recklessness."¹² **[*15]** "In the duty of care context with respect to corporate fiduciaries, gross negligence has been defined as a reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason."¹³ In order to prevail on a claim of gross negligence, a plaintiff must plead and prove that the defendant was "recklessly uninformed" or acted "outside the bounds of reason."¹⁴

The plaintiffs argue that the Fund I December 2000 Withdrawals and the Fund II 2001 Withdrawals were actionably wrongful. Yet, the plaintiffs specifically allege

in the complaints that the Partnership Agreements gave limited partners, in defined circumstances, the right to redeem. While the agreements also gave the Managers the power to delay or deny redemption requests "in [their] **[*16]** sole discretion,"¹⁵ it is difficult to read that discretionary power as imposing a positive duty to exercise that power to prevent or delay a withdrawal in order "to ensure that the Funds had sufficient financial resources' to accomplish their investment objectives." Thus, while the redemptions may have exacerbated the Funds' liquidity crunch, this is not enough to say that the Managers' failure to delay or deny those redemptions can give rise to a duty of care claim.

Therefore, the factual allegation that the Managers wrongfully allowed the Fund I December 2000 Withdrawals and the Fund II 2001 Withdrawals does not give rise to a claim for breach of fiduciary duty.

3. Active And Competent Management And Disclosure Allegations

First, the complaints allege that the Managers lacked the experience and expertise to manage the Funds. Second, the complaints allege that the Managers devoted inadequate time and attention to managing the Funds. The complaints also **[*17]** allege that the Managers failed to disclose material information, and made misleading disclosures.

¹⁰

Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); accord *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989).

¹¹

Citron, 569 A.2d at 66

¹²

William T. Allen, Jack B. Jacobs and Leo E. Strine, Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1300 (2001); accord *Tomczak v. Morton Thiokol, Inc.*, 1990 Del. Ch. LEXIS 47, at *35 (Del. Ch. Apr. 5, 1990) ("In the corporate context, gross negligence means reckless indifference to or a deliberate disregard of the whole body of stockholders' or actions which are without the bounds of reason.") (citations omitted).

¹³

In re Walt Disney Co. Derivative Litig., 2005 Del. Ch. LEXIS 113, at *162, A.2d. , (Del. Ch. Aug. 9, 2005) (internal citations and quotations omitted).

¹⁴

Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc., 1996 Del. Ch. LEXIS 116, at *42 (Del. Ch. Sept. 3, 1996) (citations omitted), *aff'd*, **692 A.2d 411 (Del. 1997)** (TABLE); see also *Solash v. Telex Corp.*, 1988 Del. Ch. LEXIS 7, at *24-*25 (Del. Ch. Jan. 19, 1988) (stating that the standard for gross negligence is a high one, requiring proof of "reckless indifference" or "gross abuse of discretion") (citations omitted).

¹⁵ Fund I Compl. P82; Fund II Compl. P94.

The claim that the Managers lacked the experience and expertise to manage the Funds is completely without merit. The defendants disclosed the qualifications of the Funds' Management Committee in the Private Placement Memoranda (the "PPMs") that the defendants gave to all of the unitholders. The "Management" sections of the PPMs disclosed the names, titles, affiliations, ages, educations, and experience of the Management Committee members, DCIP's principals, and DCIP's degree of experience with exchange funds.¹⁶ The unitholders received this information before they ever made their investment in the Funds. They, therefore, implicitly agreed that the Managers were sufficiently qualified to manage the Funds.

However, the plaintiffs' other claim, that the Managers devoted inadequate time and attention to managing the Funds and committed disclosure violations, [*18] is more substantial. The complaints allege that the Managers made false and misleading statements to the unitholders, and failed to disclose material information. While many of the alleged misstatements took place before November 11, 2000, some (specifically, the Non-Disclosure Allegations) took place after this date.

The complaints allege that the Managers met only sporadically, less than once a year since the inception of the Funds. During this time, the Funds were facing difficult challenges. The Managers originally set up the Funds with collars, attempting to limit the upside and downside potential of the Funds.¹⁷ The appreciation of certain contributed securities (especially Yahoo!) was causing the Funds to blow through the collars. The Managers then made the decision to remove the collars on the Funds, a decision that had beneficial effects in the short-term, but over the long-term, when the defendants failed to reinstate the collars, resulted in sharp losses.

[*19] Viewed in the light most favorable to the plaintiffs, these alleged facts do (just barely) raise a duty of care claim. **HN6** Whether the Managers exercised the requisite amount of due care in managing the Funds is, of course, a fact sensitive inquiry. In certain circumstances, meeting once a year to manage an investment vehicle would be sufficient. This would be

the case when the investment is relatively straight-forward, or where the complexity of the investment lies in its original design. In fact, a typical exchange fund could require less active management than other types of investments. These funds are often designed to avoid tax liability and to provide diversification, *not* to generate spectacular returns. Therefore, under normal circumstances, a properly hedged and diversified exchange fund might need less active management than, say, a typical mutual fund.

The facts alleged in the complaints, however, paint a picture of the Funds being faced with exceptional challenges, first by the sharply rising value of the securities that made up the Funds, and second by the rapid fall in value of those same securities. The response of the Managers was, allegedly, almost non-existent, [*20] meeting less than once a year.

Furthermore, the complaints allege that the Managers failed to disclose the challenges facing the Funds and the meager steps they were taking to meet those challenges. These alleged disclosure violations were potentially material because, had the plaintiffs known the truth, they could have asked for withdrawals, or brought suit before the value of the Funds plummeted.

It is quite possible that the Managers acted appropriately in both the amount of time they spent managing the Funds and the disclosures they made. However, the complaints paint a picture of the Managers taking almost *no* action over the course of several years to protect the unitholders' investments, while the value of the Funds first skyrocketed and later plummeted. Under the circumstances, the plaintiffs should at least be allowed discovery to find out if, as the complaints imply, the Managers received millions of dollars in fees for doing almost nothing.

Therefore, for all of the above reasons, the court holds that the plaintiffs have plead sufficient facts to give rise to a duty of care claim.

B. Breach Of Contract And The Implied Covenant Of Good Faith And Fair Dealing [*21] (Counts 5 & 6)

HN7 In order to survive a motion to dismiss for failure to state a breach of contract claim, a plaintiff must

¹⁶ See Fund I PPM at 27-29; Fund II PPM at 29-31.

¹⁷ "Collaring" is financial jargon for purchasing offsetting calls and puts on a security to limit upside and downside exposure. At the inception of the Funds, the Managers attempted to limit upside and downside exposure to roughly 10%. *Alex. Brown*, 2005 Del. Ch. LEXIS 100, at *9.

demonstrate: (i) the existence of the contract, (ii) a breach of an obligation imposed by that contract, and (iii) resultant damages to the plaintiff.¹⁸

1. Failure To Provide Financial Statements Allegations

The complaints allege that the Managers had a contractual duty under the Partnership Agreements to provide semi-annual unaudited financial statements reporting on the financial condition of the Funds, and an annual audited report. The complaint further alleges that the Managers did not provide the unitholders with these reports for 2002 and did not provide the 2001 audited financial statements until 2003. Further, the court reasonably infers from the facts alleged in the complaints that the plaintiffs were harmed by either not being able to ask for a redemption, or not being able to [*22] sue for rescission or a like remedy. Therefore, the plaintiffs have satisfied the pleading requirements for a breach of contract claim and this claim cannot be dismissed.

2. Withdrawal Allegations

The plaintiffs argue that the Fund I December 2000 Withdrawals and the Fund II 2001 Withdrawals constituted a breach of contract. They argue that the withdrawals caused, or made worse, the Funds' liquidity crunch. However, the Partnership Agreements gave the unitholders the right to withdraw their investments after two years.¹⁹ As alleged in the complaints, the unitholders' right to withdraw was limited by the power of the Managers to delay or deny redemptions "in [their] sole discretion."²⁰

This contractual provision did not create a duty for the Managers to individually assess the financial position of the Funds and the effect that such a withdrawal would have each time a unitholder requested a withdrawal. Instead, [*23] it placed a restriction on the unitholders' right to receive withdrawals. It gave the Managers the power to limit withdrawals, in their sole discretion. Therefore, the plaintiffs have not identified a contractual

obligation that the Managers have violated and this claim must be dismissed.²¹

3. Active And Competent Management And Disclosure Allegations

The plaintiffs allege that the defendants owed them a contractual duty to provide active management and to disclose all material information. The complaints allege that the Managers made false and misleading statements to the unitholders, failed to disclose material information, and that the Managers met only sporadically, less than once a year since the inception of the Funds.

As stated above, the [*24] Managers are alleged to have owed the unitholders a contractual duty to provide regular financial reports. Of course, *HN8* concomitant to the duty to provide information is the duty that such information not be false or misleading. In other words, the defendants had a contractual duty to provide the information in good faith. The complaints allege that the Managers failed to provide reports when they were contractually obligated to do so, and that, when they did provide the reports, they were false and misleading. Specifically, the plaintiffs argue that the Managers failed to disclose certain material information-the Non-Disclosure Allegations and the withdrawals.

These allegations, if proven, are sufficient to support a claim for breach of contract. Therefore, this claim survives the motion to dismiss.

C. Fraud (Count 3)

The plaintiffs' third claim is for fraud. *HN9* Common law fraud in Delaware requires that: (1) the defendant made a false representation, usually one of fact; (2) the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; (3) the defendant had the intent to induce the plaintiff to [*25] act or refrain from acting; (4) the plaintiff acted or did not act in justifiable reliance on the representation; and (5) the

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VLIW Tech., L.L.C. v. Hewlett-Packard Co., 840 A.2d 606, 612 (Del. 2003).

¹⁹ See Partnership Agreements PP6.3.

²⁰ Fund I Compl. P82, Fund II Compl. P94.

²¹ In the Plaintiffs' Response Brief, the plaintiffs implicitly admit that the Managers had the authority to allow the withdrawals. Instead of arguing this point, the plaintiffs argue that the Managers had a contractual obligation to report the withdrawals.

plaintiff suffered damages as a result of such reliance.²² In addition to overt representations, where there is a fiduciary relationship, fraud may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak.²³ **HN10** Fraud claims are subject to the heightened pleading standards of Rule 9(b). This means that the pleading must identify the "time, place and contents of the false representations, the facts misrepresented, as well as the identity of the person making the misrepresentation and what he obtained thereby."²⁴

The plaintiffs argue that the defendants committed fraud by failing [*26] to disclose material information which they had a contractual and fiduciary duty to disclose, specifically the Non-Disclosure Allegations. Obviously, this claim (resting principally on alleged omissions) is merely a rehash of Count 1's claim of breach of fiduciary duty and Count 5's claim for breach of contract. It does not independently support a claim for relief. Moreover, the plaintiffs fail to plead with particularity what the defendants obtained through their alleged fraud. The plaintiffs plead generally that the Managers received management fees based on the amount of money that the Funds had under management, thereby giving them an incentive to keep money in the Funds. But the plaintiffs' arguments on this score are inherently contradictory. While they argue that the defendants had an incentive to keep money in the Funds to earn great management fees, they also argue that the Managers wrongfully allowed withdrawals, thereby reducing the amount of money they had under management. Are the withdrawals also part of the alleged fraud?

For the above reasons, the plaintiffs have failed to adequately state a claim for fraud. Therefore, Count 3 will be dismissed without prejudice to [*27] the claims asserted in Count 1 or Count 5.

D. Gross Negligence (Count 7)

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Stephenson v. Capano Dev., Inc., 462 A.2d 1069, 1074 (Del. 1983).

23 *Id.*

24

York Linings v. Roach, 1999 Del. Ch. LEXIS 160, at *25 (Del. Ch. July 28, 1999). (internal quotations and citations omitted).

25 Partnership Agreements § 3.5.

26

Rosddeutscher v. Viacom, Inc., 768 A.2d 8, 24 (Del. 2001) (applying New York law); *ID Biomedical Corp. v. TM Tech., Inc.*, 1995 Del. Ch. LEXIS 34, *39, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995) (applying Delaware law).

The plaintiffs' fourth claim is for gross negligence. Both of the Funds' Partnership Agreements contain an exculpatory provision, limiting the liability of the Managers for losses the unitholders incurred with respect to the Funds. Except for misrepresentation or breach of the Partnership Agreements, the General Partners of the Funds (AB Management for Fund I and DCIP for Fund II), and those who perform service on their behalf, are not liable to the unitholders, unless their conduct constituted "gross negligence or intentional misconduct."²⁵ As such, the unitholders are forced to argue that the Managers' alleged misconduct amounted to gross negligence.

First, as discussed above, the allegations of the Fund I December 2000 Withdrawals and the Fund II 2001 Withdrawals do not state a claim for gross negligence. Second, also as stated above, claims for breach of the duty of care are predicated [*28] on concepts of gross negligence. The court has already found that the plaintiffs' claim for breach of the duty of care survive the motion to dismiss. Therefore, this claim survives as well.

E. Unjust Enrichment (Count 8)

The plaintiffs, in the alternative, plead both a claim for breach of contract and a claim for unjust enrichment. **HN11** In some circumstances, alternative pleading allows a party to seek recovery under theories of contract or quasi-contract. This is generally so, however, only when there is doubt surrounding the enforceability or the existence of the contract. Courts generally dismiss claims for *quantum meruit* on the pleadings when it is clear from the face of the complaint that there exists an express contract that controls.²⁶ It is undisputed that a written contract existed between the unitholders and the defendants. The Partnership Agreements for the Funds spelled out the relationship between the parties,

and the plaintiffs specifically brought claims based on these contracts.

[*29] Notwithstanding the existence of these contractual relationships, the plaintiffs make the bald claim that the Managers were unjustly enriched at the unitholders expense. This is insufficient to state a claim for unjust enrichment, when the existence of a contractual relationship is not controverted. Thus, this claim must be dismissed.

F. Agency Liability (Count 11)

The plaintiffs also bring claims against Deutsche Bank and DBSI (as controlling persons of AB Management) based on agency liability. **HN12** A parent corporation can be held liable for the acts of its subsidiary under either of two theories of agency liability. The first is where "piercing the corporate veil" is appropriate. While many factors are considered in deciding whether to pierce the corporate veil, "the concept of complete domination by the parent is decisive."²⁷

Second, while one corporation whose shares are owned by a second corporation [*30] does not, by that fact alone, become the agent of the second company, a corporation-completely independent of a second corporation-may assume the role of the second corporation's agent in the course of one or more specific transactions. This restricted agency relationship may develop whether the two separate corporations are parent and subsidiary or are completely unrelated outside the limited agency setting. Under this second theory, total domination or general alter ego criteria need not be proven.²⁸

With respect to DBSI, the plaintiffs argue that AB Management was dominated and controlled by DBSI.

In essence, the plaintiffs ask the court to disregard AB Management's corporate form²⁹ and impose liability on DBSI. The complaints allege that: (i) DBSI and AB Management operate out of the same Maryland office; (ii) AB Management, although incorporated, has no functioning board of directors and [*31] no business other than the management of the Funds; (iii) AB Management is run by its Management Committee, which is comprised of employees and executives of DBSI; (iv) DBSI provided margin accounts for the Funds; and (v) DBSI served as the placement agent and custodian for the Funds' accounts.³⁰

HN13 "Persuading a Delaware Court to disregard the corporate entity is a difficult task. The legal entity of a corporation will not be disturbed until sufficient reason appears."³¹ Allegations (i), (iv) and (v) above, while consistent with an obviously close relationship between DBSI and its wholly owned subsidiary, do not alone or together support any inference that would lead this court to disregard the separate legal existence of AB Management; nor does the allegation that AB Management's business is run by DBSI employees. However, the well pleaded factual [*32] allegation that AB Management has "no functioning board of directors," when viewed most favorably to the plaintiffs in light of the other facts alleged, if proven, could provide a basis to conclude that the corporate form should be ignored. The corporate veil may be pierced where a subsidiary is in fact a mere instrumentality or alter ego of its parent.³² The complaints allege that AB Management does not have board meetings or follow other corporate formalities. Instead, employees of DBSI allegedly perform the activities that, in a properly functioning corporation, the board of directors would perform. If these facts are true and the other relationships are shown to exist, an adequate basis for piercing the corporate veil could be established. Therefore, this claim against DBSI cannot be dismissed.

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Phoenix Canada Oil Co. v. Texaco, Inc., 842 F.2d 1466, 1477 (3d Cir. 1988).

²⁸ *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 14M, cmt. (a) (1958)).

²⁹ AB Management is a corporation, organized under the laws of Maryland.

³⁰ Fund I Compl. PP44, 45, 247, 250, 332, 334; Fund II Compl. PP54, 179, 253-259.

³¹

Mason v. Network of Wilmington, Inc., 2005 Del. Ch. LEXIS 99, at *9 (Del. Ch. July 1, 2005) (internal quotations omitted).

³²

Mabon, Nugent & Co. v. Texas Amer. Energy Corp., 1990 Del. Ch. LEXIS 46, at *14-*15 (Del. Ch. Apr. 12, 1990); *Phoenix Canada Oil*, 842 F.2d at 1477.

[*33] The complaints make additional allegations as to why AB Management is a mere agent of Deutsche Bank. These are: (i) Deutsche Bank purchased Alex. Brown, Inc. (the parent company of AB Management) thereby acquiring 100% ownership of AB Management; (ii) Deutsche Bank changed the name of the Funds the reflect the "Deutsche Bank" name; (iii) when the liquidity crisis became acute, the Management Committee decided that it needed to alert officials at Deutsche Bank; and (iv) in July of 2002, Deutsche Bank fired all the members of the Management Committee.³³

First, these factual allegations do not give rise a reasonable inference that Deutsche Bank dominated and controlled AB Management and the Management Committee. These factual allegations show little more than Deutsche Bank owned the parent company of AB Management and, indirectly, AB Management itself. **HN14** Ownership alone is not sufficient proof of domination or control.³⁴ The complaints **[*34]** allege that Deutsche Bank bought AB Management in June of 1999 and changed its name a few months later. The complaints do not allege any action by Deutsche Bank to influence or control the management of the Funds until July of 2002, when it fired the majority of the Management Committee. From these bare factual allegations, the court simply cannot infer domination or control.

Second, these factual allegations do not give rise a reasonable inference that, in the managing and/or sale of the Funds, AB Management and the Management Committee were Deutsche Bank's agent. Under the rubric of agency liability, there are two main theories-actual authority and apparent authority. Because the plaintiffs do not describe which theory of liability they assert, the court **[*35]** addresses both.

HN15 Actual authority is that authority which a principal expressly or implicitly grants to an agent.³⁵ There is simply no allegation in the complaints that Deutsche Bank expressly gave either AB Management or the Management Committee the authority to bind it as its agent.

HN16 Apparent authority is that authority which, though not actually granted, the principal knowingly or negligently permits an agent to exercise, or which he holds him out as possessing.³⁶ **[*36]** In order to hold a defendant liable under apparent authority, a plaintiff must show reliance on indicia of authority originated by principal, and such reliance must have been reasonable.³⁷ The plaintiffs have not alleged any facts showing that Deutsche Bank held out either AB Management or the Management Committee as its agent; nor have the plaintiffs alleged facts from which the court can reasonably infer reliance.

For the above reasons, the plaintiffs have failed to plead sufficient facts to support a claim for agency liability against Deutsche Bank and Count 11 against Deutsche Bank must be dismissed. However, the plaintiffs plead sufficient facts to support a claim for liability against DBSI. Therefore, Count 11 against DBSI will not be dismissed.

G. Conspiracy, Aiding And Abetting Fraud, And Breach Of Fiduciary Duty (Count 2, 4, & 9)

The plaintiffs allege that the defendants conspired to commit fraud and to commit a breach of fiduciary duty. **HN17** The elements for civil conspiracy under Delaware law are: (i) a confederation or combination of two or more persons; (ii) an unlawful act done in furtherance of the conspiracy; and (iii) damages resulting from the

³³ Fund I Compl. PP153, 163, 239-240; Fund II Compl. PP179, 253-259.

³⁴

Aronson, 473 A.2d at 815; *see also In re W. Nat'l S'holders Litig.*, 2000 Del. Ch. LEXIS 82, (Del. Ch. May 22, 2000) (holding that a 46% shareholder does not control or dominate the board due to stock ownership alone).

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Billops v. Magness Constr. Co., 391 A.2d 196, 197 (Del. 1978).

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Henderson v. Chantry, 2002 Del. Ch. LEXIS 14, at *14 (Del. Ch. Feb. 5, 2002). 2002).

³⁷

Billops, 391 A.2d at 198.

action of the conspiracy parties.³⁸ While the plaintiffs caption their claim as aiding and abetting breach of fiduciary duty, the court treats it as a claim for civil conspiracy. **HN18** Claims for civil conspiracy are sometimes called aiding and abetting.³⁹ However, the basis of such a claim, regardless [*37] of how it is captioned, is the idea that a third party who *knowingly* participates in the breach of a fiduciary's duty becomes liable to the beneficiaries of the trust relationship.⁴⁰

However captioned, **HN19** civil conspiracy is vicarious liability.⁴¹ It holds a third party, not a fiduciary, responsible for a violation of fiduciary duty.⁴² Therefore, it does not apply to the defendants which owe the unitholders a direct fiduciary duty. Instead, the plaintiffs attempt to hold Deutsche Bank and DBSI responsible for the Managers' alleged breaches of fiduciary duty. [*38]

The defendants argue that the plaintiffs have not adequately alleged that Deutsche Bank and DBSI had knowledge of the alleged wrongful acts, the breach of fiduciary duty and fraud. Where a complaint alleges fraud or conspiracy to commit fraud, the Rules of this

court call for a higher pleading standard, requiring the circumstances constituting the fraud or conspiracy to "be pled with particularity."⁴³ While Rule 9(b) provides that "knowledge . . . may be averred generally," where pleading a claim of fraud or breach of fiduciary duty that has at its core the charge that the defendant knew something, there must, at least, be sufficient well-pleaded facts [*39] from which it can reasonably be inferred that this "something" was knowable and that the defendant was in a position to know it.⁴⁴

Furthermore, Delaware law states the knowledge of an agent acquired while acting within the scope of his or her authority is imputed to the principal.⁴⁵ [*40] With respect to DBSI, the complaints allege repeatedly that its employees, acting within the scope of their employment, had knowledge of the underlying factual allegations. Specifically, the complaints allege that the Funds were run by the Management Committee, all the members of which were employees of DBSI.⁴⁶ This knowledge is thereby imputed to DBSI.

With respect to Deutsche Bank, the plaintiffs allege that AB Management and the Management Committee are

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AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., 871 A.2d 428, 437 n.8 (Del. 2005); *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149-50 (Del. 1987).

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See *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 2005 Del. Ch. LEXIS 19, at *26 (Del. Ch. Feb. 28, 2005).

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Gilbert v. El Paso Co., 490 A.2d 1050, 1057 (Del. Ch. 1984), *aff'd*, 575 A.2d 1131 (Del. 1990).

41

See, e.g., *Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1238 (Del. Ch. 2001) ("Civil conspiracy thus provides a mechanism to impute liability to those not a direct party to the underlying tort."), *rev'd on other grounds*, 817 A.2d 149 (Del. 2002).

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Gilbert, 490 A.2d at 1057.

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Atlantis Plastics Corp. v. Sammons, 558 A.2d 1062, 1066 (Del. Ch. 1989) (citing Rule 9(b), which states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

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IOTEX Communs., Inc. v. Defries, 1998 Del. Ch. LEXIS 236, at *12-*13 (Del. Ch. Dec. 21, 1998).

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J.I. Kislak Mtg. Corp. v. William Matthews Bldr., Inc., 287 A.2d 686, 689 (Del. Super. 1972), *aff'd*, 303 A.2d 648 (Del. 1972).

⁴⁶ Fund I Compl. PP45, 47-51, 247-251; Fund II Compl. PP55, 57-61, 261-266.

mere agents of Deutsche Bank. However, as discussed above, the factual allegations in the complaints are insufficient to infer that AB Management and the Management Committee are the agents of Deutsche Bank.

For the above reasons, the court holds that the plaintiffs have not adequately pleaded facts that, if proven, would support an inference that Deutsche Bank had knowledge of the alleged wrongful acts, the breach of fiduciary duty and fraud. The plaintiffs have adequately pleaded that DBSI had knowledge of the alleged wrongful acts. Therefore, with respect to Deutsche Bank, Counts 2, 4, and 9 must be dismissed. With respect to DBSI, these counts will not be dismissed.

H. Accounting (Count 10)

The plaintiffs' tenth claim is for an accounting. **HN20** An accounting is an equitable remedy that consists of the adjustment of accounts between parties and a rendering of a judgment for the amount ascertained to be [*41] due to either as a result.⁴⁷ As it is a remedy, should the plaintiffs ultimately be successful on one or more of their claims, the court will address their arguments for granting an accounting.

V.

The defendants argue that several of the claims in the complaints are derivative and that, since the plaintiffs did not make demand upon the Funds, and demand was not excused, these claims should be dismissed pursuant to Rule 23.1.⁴⁸

[*42] The demand requirement in the limited partnership context is codified in 6 Del. C. § 17-1001. That statute states:

HN21 A limited partner or an assignee of a partnership interest may bring an action in the Court of Chancery in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.

Likewise, **HN22** the determination of whether a claim is derivative or direct in nature is substantially the same for corporate cases as it is for limited partnership cases.⁴⁹ Accordingly, throughout this decision, the court relies on corporate as well as partnership case law for its determination of this lawsuit's nature.

The Delaware Supreme Court's recent decision in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.* [*43] revised the standard for determining whether a claim is direct or derivative. Now, **HN23** the determination "turn[s] solely on the following questions: (i) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (ii) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"⁵⁰ "Under *Tooley*, the duty of the court is to look at the nature of the wrong alleged, not merely at the form of words used in the complaint."⁵¹ "Instead the court must look to all the

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Jacobson v. Dryson Acceptance Corp., 2002 Del. Ch. LEXIS 4, at*12-*13 (Del. Ch. 2002).

⁴⁸ The claims that the defendants contend are derivative are as follows: breach of fiduciary duty (Count 1), aiding and abetting breach of fiduciary duty (Count 2), breach of contract (Count 5), breach of the covenant of good faith (Count 6), gross negligence (Count 7), unjust enrichment (Count 8), accounting (Count 10), and agency liability (Count 11). As the court has already dismissed the claim for unjust enrichment (Count 8) and agency liability as to Deutsche Bank (Count 11), and deferred granting the equitable remedy of an accounting (Count 10), it will not discuss those claims here.

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Litman v. Prudential-Bache Prop., Inc., 611 A.2d 12, 15 (Del. Ch. 1992).

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845 A.2d 1031, 1033 (Del. 2004).

⁵¹

In re Syncor Int'l Corp. S'holders Litig., 857 A.2d 994, 997 (Del. Ch. 2004).

facts of the complaint and determine for itself whether a direct claim exists." ⁵²

As they are factually distinct, the court deals with the claims separately. First, the court addresses the claims for breach of contract [*44] and the breach of fiduciary duty based on the Non-Disclosure Allegations. Second, the court addresses the claims for gross negligence and failing to provide active and competent management, and the fiduciary duty claims based thereon.

A. Breach Of Contract And The Non-Disclosure Allegations

The claims for breach of contract and the claims for breach of fiduciary duty based on the Non-Disclosure Allegations are direct. First, the unitholders, not the partnerships, suffered the alleged harm. **HN24** In order to show a direct injury under *Tooley*, a unitholder "must demonstrate that the duty breached was owed to the [unitholder] and that he or she can prevail without showing an injury to the [partnership]." ⁵³ The gravamen of these claims is that the Managers failed to disclose material information when they had a duty to disclose it and made other misleading or fraudulent statements, in violation of their contractual and fiduciary duties. Generally, non-disclosure claims are direct claims. ⁵⁴ Moreover, the partnerships were not harmed by the alleged disclosure violations. Any harm was to the unitholders, who either lost their opportunity to request a withdrawal from the Funds [*45] from the Managers, or to bring suit to force the Managers to redeem their interests.

Second, the unitholders would receive any recovery, not the Funds. Under the second prong of *Tooley*, in

order to maintain a direct claim, stockholders must show that they will receive the benefit of any remedy. ⁵⁵

While the best remedy for a disclosure violation is to force the partnership to disclose the information, due to the passage of time since the alleged wrongdoing, that remedy would likely be inadequate. In order to compensate the unitholders for their alleged harm, the court may find it appropriate to grant monetary damages. Such damages would be awarded to the unitholders, and not the partnerships.

[*46] For all of the above reasons, the court concludes that the claims based on the Non-Disclosure Allegations and the alleged breach of contract are direct claims and, thus, demand was not required.

B. Gross Negligence And Failure To Provide Competent And Active Management

The claims for gross negligence and failure to provide competent and active management are clearly derivative. First, as stated above, in order to show a direct injury under *Tooley*, a unitholder "must demonstrate that the duty breached was owed to the [unitholder] and that he or she can prevail without showing an injury to the [partnership]." ⁵⁶ The gravamen of these claims is that the Managers devoted inadequate time and effort to the management of the Funds, thereby causing their large losses. Essentially, this a claim for mismanagement, a paradigmatic derivative claim. ⁵⁷ The Funds suffered any injury that resulted from the Managers' alleged inattention. Any injury that the unitholders suffered is derivative of the injury to the Funds.

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Dieterich v. Harrer, 857 A.2d 1017, 1027 (Del. Ch. 2004).

⁵³

Tooley, 845 A.2d at 1039.

⁵⁴

See, e.g., *Dieterich*, 857 A.2d at 1029 (characterizing non-disclosure claims as direct claims); *Abajian v. Kennedy*, 1992 Del. Ch. LEXIS 6, at *10 (Del. Ch. Jan. 17, 1992) (same).

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Tooley, 845 A.2d at 1033.

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Tooley, 845 A.2d at 1039.

⁵⁷

[*47] Second, the Funds, not the unitholders, would receive any recovery. Again, under the second prong of *Tooley*, in order to maintain a direct claim, stockholders must show that they will benefit from the remedy.⁵⁸ If the court finds that the Managers violated their fiduciary duties by failing to devote adequate time and effort to managing the Funds, any recovery would go to the party harmed, namely the Funds. Thus, these claims are derivative claims.

HN26 If a party brings derivative claims without first making demand, and demand is not excused, those claims must be dismissed.⁵⁹ **[*48]** In this case, the plaintiffs have not alleged that they made demand on the Fund, nor have they alleged why demand should be excused. Accordingly, the derivative claim must be dismissed. However, in the interest of justice, the court dismisses these claims with leave to replead.⁶⁰

VI.

The DCIP Defendants argue that, with respect to the Fund I Complaint, this court lacks personal jurisdictions over them. With respect to the Fund II Complaint, they

argue that this court lacks personal jurisdiction over Crants and Devlin.⁶¹

[*49] In support of their Rule 12(b)(2) motion, the DCIP Defendants adduced affidavits of both Devlin and Crants. The plaintiffs have not adduced any affidavits rebutting the Devlin and Crants affidavits, nor have they asked to take discovery. Instead, they have decided to rely on the well-pleaded allegations in their complaint. Moreover, since they have not been rebutted, the court must take as true the facts contained in the Devlin and Crants affidavits. However, **HN28** where the well-pleaded allegations in the complaints are not rebutted by affidavit, the court will, for the purposes of this Rule 12(b)(2) motion, assume the truthfulness of those allegations.⁶²

According to the **[*50]** Devlin and Crants affidavits, DCIP is a Tennessee limited liability company, with its principal place of business in Nashville, Tennessee. Both Crants and Devlin are residents of Tennessee and perform the vast majority of their duties from their office in Nashville. Neither Crants nor Devlin recall ever traveling to Delaware. None of the DCIP Defendants solicit any business in Delaware or engage in any regular conduct with Delaware.

See, e.g., *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) **HN25** ("A claim of mismanagement . . . represents a direct wrong to the corporation that is indirectly experienced by all shareholders. Any devaluation of stock is shared collectively by all the shareholders, rather than independently by the plaintiff or any other individual shareholder. Thus, the wrong alleged is entirely derivative in nature.").

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Tooley, 845 A.2d at 1033.

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Haber v. Bell, 465 A.2d 353, 357 (Del. Ch. 1983).

⁶⁰ In a letter to the court, the plaintiffs stated that AB Management sent letters to all the unitholders of the Funds (the "Redemption Letters"), stating that the Managers would allow the unitholders to redeem their units and that the Managers are pursuing the dissolution of the Partnerships. The plaintiffs argue that the Redemption Letters bolster their contention that their claims are direct, not derivative. However, the complaints do not contain the information in the Redemption Letters and the Redemption Letters are not referenced in the complaints. Therefore, these documents are not properly before the court on a Rule 12(b)(6) motion.

⁶¹ DCIP is the General Partner of Fund II. As such, there is no dispute that the court has personal jurisdiction over DCIP viz. Fund II. See *RJ Assocs. v. Health Payors' Org. Ltd. P'ship.*, 1999 Del. Ch. LEXIS 161, at *12 (Del. Ch. July 16, 1999) (quoting 6 Del. C. § 17-109(a) and holding that, **HN27** as a matter of law, by accepting the position of general partner, a corporation consents to be subjected to a Delaware court's jurisdiction if the limited partnership has chosen to incorporate under Delaware law).

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See *Hart Holding Co. v. Drexel Burnham Lambert, Inc.*, 593 A.2d 535, 539 (Del. Ch. 1991) (citing *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2nd Cir. 1981)) (stating that a trial court is vested with broad discretion in shaping the procedure by which a motion under Rule 12(b)(2) is resolved).

HN29 When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing a basis for the court's exercise of jurisdiction over the nonresident defendant.⁶³ [*51] In determining whether it has personal jurisdiction over a nonresident defendant, the court will generally engage in a two-step analysis. First, was service of process on the nonresident authorized by statute? Second, does the exercise of jurisdiction, in the context presented, comport with due process?⁶⁴

A. The Long-Arm Statute

The plaintiffs argue that the court has personal jurisdiction over the DCIP Defendants under *10 Del. C. § 3104*, the Delaware long-arm statute. *Section 3104(c)* provides, in relevant part: **HN31** "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 . . . who . . . (1) Transacts any business or performs any character of work or service in the State . . . [or] (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. . . ." **HN32** *Section 3104* has been broadly construed to confer jurisdiction to the maximum extent possible under the *due process clause*.⁶⁵ Furthermore, **HN33** when *in personam* jurisdiction [*52] is challenged on a motion to dismiss, the record is construed most strongly against the moving party.⁶⁶

The complaints lay out detailed allegations of the connections between the DCIP Defendants and the Funds. The Funds were established as Delaware limited

partnerships and are governed by Delaware law. DCIP is the Sub-Advisor of Fund I and the General Partner and Sub-Advisor of Fund II. Crants and Devlin are the managing members and owners of DCIP. DCIP acts principally through Crants and Devlin. The PPMs touted the DCIP Defendants' experience and qualifications in order to sell units in the Funds.

The PPMs also state that DCIP is responsible for the day-to-day management of the Funds. DCIP, in the persons of Crants and Devlin, attended every meeting of the Management Committee (none of which took place in Delaware). Also, DCIP, which acted through Crants and Devlin, was primarily responsible for choosing the securities [*53] included in the Funds.

In *RJ Associates*, Justice (then-Vice Chancellor) Jacobs held that this court could exercise personal jurisdiction over a limited partner in a Delaware limited partnership under *Section 3104(c)(1)*. Justice Jacobs held that the following three contacts, taken together, were sufficient to constitute "transacting business" under the Delaware long-arm statute: (i) the limited partner participated in the formation of the limited partnership, (ii) the limited partnership indirectly participated in the limited partnership's management by controlling' the general partner, and (iii) the limited partner caused the Partnership Agreement to be amended to alter the method of distributions to the partners.⁶⁷

The operative facts of this case, as alleged in the complaints, are similar to those in *RJ Associates*. First, DCIP participated in the formation of the Funds. In fact, DCIP was primarily responsible for selecting the initial

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See *Plummer & Co. Realtors v. Crisafi*, 533 A.2d 1242, 1244 (Del. Super. 1987); see also *Finkbiner v. Mullins*, 532 A.2d 609, 617 (Del. Super. 1987) (stating that, **HN30** on a Rule 12(b)(2) motion, "the burden is on the plaintiff to make a specific showing that this Court has jurisdiction under a long-arm statute.") (citing *Greenly v. Davis*, 486 A.2d 669 (Del. 1984)).

⁶⁴

LaNuova D & B, S.P.A. v. Bowe Co., 513 A.2d 764, 768 (Del. 1986).

⁶⁵ *Id.*

⁶⁶

RJ Assocs., 1999 Del. Ch. LEXIS 161, at *13.

⁶⁷

RJ Assocs., 1999 Del. Ch. LEXIS 161, at *18.

[*54] securities accepted by the Funds.⁶⁸ Second, DCIP not only participated in the management of the Funds, DCIP was primarily responsible for the management of the Funds. The PPMs state that "the Sub-Advisor will provide day-to-day management and administration of the Fund and investment advisory services, including, among other matters, the screening of contributed securities, advice regarding the selection of the illiquid Assets and hedging and borrowing strategies."⁶⁹ Finally, DCIP received millions of dollars in fees to manage the two Delaware entities.

With respect to Crants and Devlin, the complaints allege that they are the owners and managing partners of DCIP. The complaints further allege that DCIP only acts through Crants and Devlin. In essence, the complaints allege that it was Crants and Devlin who selected the securities for the Funds, and managed the Funds on a day-to-day basis.

The court **[*55]** finds that these contacts are sufficient to constitute "transacting business" under the long-arm statute.

B. Due Process

HN34 The focus of a minimum contacts inquiry is whether a nonresident defendant engaged in sufficient minimum contacts with the State of Delaware to require it to defend itself in the courts of the state consistent with the traditional notions of fair play and justice.⁷⁰

[*56] In order to establish jurisdiction over a nonresident defendant, the nonresident defendant's contacts with the forum must rise to such a level that it should reasonably anticipate being required to defend

itself in Delaware's courts.⁷¹ The minimum contacts which are necessary to establish jurisdiction must relate to some act by which the defendant has deliberately created obligations between itself and the forum.⁷² Consequently, the defendant's activities are shielded by the benefits and protection of the forum's laws and it is not unreasonable to require it to submit to the forum's jurisdiction.⁷³

In addition to the contacts outlined above that the complaints allege between DCIP Defendants and the Funds, the plaintiffs also allege that the DCIP Defendants enjoyed the benefits of Delaware law. They claim that the DCIP Defendants have received millions of dollars in fees for managing the Delaware partnerships and are entitled to claim limited liability under the terms of the Partnership Agreements, which established the Funds and limit the DCIP Defendants' liability to cases of gross negligence.⁷⁴

In *RJ Associates*, Justice Jacobs found that the following contacts were sufficient **[*57]** to satisfy due process: (i) the limited partner took an active role in establishing the Delaware Partnership; (ii) the limited partner owned a 50% interest in the partnership's general partner, and appointed four of the general partner's seven board members; (iii) the limited partner received 49.5% of the partnership's cash flow distributions; (iv) the limited partner allegedly controlled the partnership; (v) the limited partner allegedly caused the partnership agreement to be amended under Delaware law to change the agreed-upon cash flow distribution payments to the limited partners; and (vi) the limited partner agreed to a Delaware choice of law provision in the partnership agreement.⁷⁵

⁶⁸ See Fund I Compl. P71; Fund II Compl. PP82, 241.

⁶⁹ Fund I PPM at 3-4, Fund II PPM at 3.

⁷⁰

AeroGlobal, 871 A.2d at 440 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945)).

⁷¹ *Id.*

⁷²

Sternberg v. O'Neil, 550 A.2d 1105, 1120 (Del. 1988).

⁷³

Id.; see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (U.S. 1985) (requiring "purposeful availment" of the benefits of the state's laws to satisfy the minimum contacts test).

⁷⁴ Partnership Agreements § 3.5.

⁷⁵

While not exactly the same, the contacts that DCIP has with Delaware are substantially similar to those in *RJ Associates*. DCIP took part in the formation of the Funds, two Delaware entities. DCIP managed the Funds on a day-to-day basis and received [*58] millions of dollars in fees for doing so. In addition, the Partnership Agreements which established the Funds limited the DCIP Defendants' liability to cases of gross negligence.⁷⁶ They have, thereby, benefited by expressly limiting their liability under Delaware law. Given all of these contacts, DCIP should have reasonably expected to be haled before the courts in Delaware.

Crants and Devlin also should have reasonably expected to be haled before the courts of this state. As stated above, the complaints allege that DCIP could only act through Crants and Devlin. All the actions attributed to DCIP were really performed by them. Moreover, in the case of Fund II, Crants and Devlin are alleged to be the managing partners of the general partner of a Delaware limited partnership. In the case of Fund I, Crants and Devlin are alleged to have managed a Delaware limited partnership, despite the fact that DCIP is not that entity's general partner.

In *In re USACafes*, former Chancellor [*59] Allen found that the directors of a corporation that was the general partner of a Delaware limited partnership were subject to the jurisdiction of this state's courts, due to their positions with the general partner.⁷⁷ Chancellor Allen focused on **HN35** the important state interest that Delaware has in regulating entities created under its laws, and how that interest could only be served by exercising jurisdiction over those who managed the Delaware entity.

The relationship between the General Partner and the limited partners was created by the law of

Delaware. The state empowered defendants to act, and this state is obliged to govern the exercise of that power insofar as the issues of corporate power and fiduciary obligation are concerned. These factors bear importantly on the fairness of exercising supervisory jurisdiction at this point in the relationship of the various parties. The wrongs here alleged are not tort or contract claims unconnected with the [*60] internal affairs or corporate governance issues that Delaware law is especially concerned with.⁷⁸

Likewise, the wrongs alleged in this case go essentially to the management of a Delaware limited partnership. The DCIP Defendants voluntarily undertook to manage the Funds and received millions of dollars in compensation for doing so. Now, limited partners in the Delaware entity seek to hold them accountable for alleged wrongs they committed. It is both necessary and proper for the courts of this state to ensure that the managers of a Delaware entity are held responsible for their actions in managing the Delaware entity. When a person manages a Delaware entity, and receives substantial benefit from doing so, he should reasonably expect to be held responsible for his wrongful acts relating to the Delaware entity in Delaware.⁷⁹

[*61] For the above reasons, the court concludes that it has personal jurisdiction over the DCIP Defendants in both cases. Therefore, the DCIP Defendants' motion to dismiss pursuant to Rule 12(b)(2) must be denied.

VII.

For the above reasons, the defendants' motion to dismiss is GRANTED in part and DENIED in part. The defendants are directed to submit a form of order, on notice, within 10 days.

RJ Assocs., 1999 Del. Ch. LEXIS 161, at *19-*20.

⁷⁶ Partnership Agreements § 3.5.

⁷⁷

600 A.2d 43, 52 (Del. Ch. 1991).

⁷⁸ *Id.*

⁷⁹

See *Assist Stock Mgmt. L.L.C. v. Rosheim*, 753 A.2d 974, 975 (Del. Ch. 2000) ("When nonresidents agree to serve as directors or managers of Delaware entities, it is only reasonable that they anticipate that . . . they will be subject to personal jurisdiction in Delaware courts.").

EXHIBIT 3

1987 WL 16734

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Delaware, Kent County.

AMVEST CAPITAL CORPORATION,
a Virginia corporation, Plaintiff,

v.

L. I. CHARTERS, INC., a
Delaware corporation, Defendant.

Submitted: June 35, 1987.

| Decided: July 23, 1987.

Defendant's Motion to Dismiss, DENIED.

Attorneys and Law Firms

William A. Denman, Schmittinger & Rodriguez, P.A., Dover,
for plaintiff.

William M. Chasanov, and David T. Pryor, Brown, Shiels &
Chasanov, Georgetown, for defendant.

ORDER

RIDGELY, Judge.

*1 Upon consideration of defendant L. I. Charters, Inc.'s motion to dismiss, the briefs of counsel, and the record in this case, it appears that:

(1) The complaint filed by Amvest Capital Corporation ('Amvest') seeks a declaratory judgment with respect to a controversy arising from a lease transaction between Northern Telecom Acceptance Corporation ('Northern') and L. I. Charters, Inc. ('Charters') in which Amvest acted as broker. Charters has moved to dismiss the complaint for failure to join an indispensable party under Superior Court Rule 19(a)(1) or, alternatively, under the doctrine of forum non conveniens.

(2) Charters leased an aircraft from Northern in August 1982, with Amvest acting as broker in arranging the lease. The lease document provided an option for Charters to purchase the aircraft at the expiration of the lease term for 'fair market

value.' Amvest indicates that such value might exceed a sum of \$238,967.50. Charters contends that Mr. Jose Mayoral, a former Amvest employee, had provided to Charters a letter representing a purchase option price of \$238,967.50. Purportedly, that letter issued from Northern when Charters discovered a discrepancy between the lease wording and its understanding of a negotiated provision that the aircraft could be purchased for a fixed amount at the end of the lease. Neither party alleges that Mayoral signed the letter, but Charters asserts that Mayoral orally confirmed the fixed-price purchase option. Subsequently, when Charters learned that Northern still insisted that the 'full market value' term in the lease would apply to any purchase option, Charters cancelled the lease and returned the aircraft. Northern, a Delaware corporation with its principal place of business in Nashville, Tennessee, has sued Charters in Tennessee for amounts owed under the lease as well as for aircraft repossession costs.

The agreement also provided for Charters to pay Amvest a commission as broker. Charters executed a promissory note to Amvest evidencing a part of the brokerage commission. Amvest has sued Charters in Puerto Rico for nonpayment on the balance due under the note. On August 18, 1986, Amvest filed for declaratory judgment in this Court seeking a declaration that it is not liable to Charters for any excess of the 'fair market value' of the aircraft over the sum of \$238,967.50 at the expiration of the lease.

(3) The first issue involves whether Mr. Jose Mayoral is an indispensable party to the pending declaratory judgment action before this Court. Charters argues that Mayoral is such a party under the provisions of Superior Court Civil Rule 19(a)(1) because only Mayoral can testify firsthand to the negotiations, the intended terms of the lease, and the authenticity of the Northern letter regarding a fixed-sum aircraft purchase price at the end of the lease term. On the other hand, Amvest asserts the facts do not require that Mayoral be joined as a party since (a) the Court can accord complete relief in the declaratory judgment between itself and Charters, (b) presumably Mayoral is available in person or by deposition, and (c) other persons from Charters, Amvest, and Northern who participated in the lease negotiations can testify by person or deposition for evidence of the terms of the lease.

*2 Superior Court Civil Rule 19(a)(1) states that a party shall be joined if '... in his absence relief cannot be accorded among those already parties.' In resolving this first issue, the Court must look to the relief sought. The record shows Amvest has asked that this Court declare, pursuant to 10 Del. C. § 6501, that Amvest is not liable to Charters for

any excess of the aircraft's 'fair market value' at lease-term expiration over the sum certain of \$238,967.50. Accordingly, it appears that an appropriately narrow declaration could be provided to Amvest if subsequent evidence supports granting such relief. Amvest's narrow declaration does not seek the adjudication of Mayoral's potential personal liability to Charters or of Charter's potential liability to Northern under the lease. Fashioning the declaratory action in this restrictive way provides Amvest with access for seeking relief and satisfies the requirements of Rule 19(a)(1). E. I. duPont de Nemours & Co. v. Shell Oil Co., Del. Ch., C.A. No. 6696, Longobardi, V.C. (Dec. 13, 1983). The present record does not show that Mayoral must be joined as an indispensable party. Having concluded that Mayoral does not meet the requirement of Rule 19(a)(1), it is unnecessary to proceed to an application of Rule 19(b). Id.

(4) Charters alternatively asks the Court to grant its motion to dismiss under the doctrine of forum non conveniens, which would prevent Amvest from exercising a plaintiff's right to a forum of its choosing. In the application of this doctrine, Charters must meeting certain criteria. See Harry David Zutz Insurance, Inc. v. H.M.S. Associates, Ltd., Del. Super., 360 A.2d 160 (1976). The Court must consider (a) the relative ease of access to proof, (b) the availability of compulsory process for witnesses, (c) the possibility of view of the premises, if appropriate, (d) the pendency of a similar action on the issue in another jurisdiction, (e) other practical problems that may make the trial expeditious and inexpensive, as well as (f) the applicability of Delaware law. Id. See also General Foods Corp. v. Cryo-Maid, Inc., Del. Supr., 198 A.2d 681 (1964). Dismissal under this doctrine may occur 'only in the rare case in which the combination and weight of the factors to be considered balance overwhelmingly in favor of the defendant.' Kolber v. Holyoke Shares, Inc., Del. Supr., 213 A.2d 444 (1965).

The record does not show an overwhelming balance in favor of Charters. Amvest's declaratory action has been filed first and only within the Delaware forum. It is in this forum that the pleadings first raise the issue of the aircraft purchase option and any potential liability of one party to the other on that issue. The action in Puerto Rico relates to default on a promissory note which Charters provided to Amvest as part of a broker's commission. There is no showing by Charters that the issues have been broadened in either suit so as to establish a conflict between courts. Delaware courts have held that litigation should be confined to the forum in which it is first commenced. See ANR Pipeline Co. v. Shell Oil Co., Del. Supr., No. 100, 1987, per curiam (May 14, 1987)

(slip opinion); Air Products and Chemicals, Inc. v. Lummus Co., Del. Ch. 235 A.2d 274 (1967); McWane Cast Iron Pipe Corp. v. McDowell-Wellman E. Co., Del. Supr., 263 A.2d 281 (1970).

*3 Notwithstanding the general rule stated above, Charters contends that the holding in Winsor v. United Air Lines, Inc., Del. Super., 154 A.2d 561 (1958), should apply to support its motion to dismiss under the doctrine of forum non conveniens. Amvest contends the Winsor case is clearly inapposite on the basis of significant factual differences, thus Amvest argues that Kolber v. Holyoke Shares, Inc., supra, controls this issue.

While Winsor is distinguishable on its facts, the Court finds it instructive for the purpose of determining whether to apply the doctrine of forum non conveniens. Some factors lend weight toward Charter's position. To the extent the choice of law provisions of the Charters-Northern lease may apply to the Amvest-Charters declaratory action, the leasing parties have contracted that, as to them, the law of Tennessee may govern the lease. Further, it is alleged that one witness which Charters may wish to call is probably located within Florida, and while depositions may be acquired, that witness may not be subject to compulsory process in Delaware.

However, other factors weigh against application of the forum non conveniens doctrine. Maintaining the original jurisdiction of Delaware as the forum does not burden access to proof for the parties. While the quantities of records and willing witnesses are not enumerated in the record, there is indication that Charters and Amvest generally control both of those types of evidentiary resources at their present respective business locations. The parties indicate that any view of the premises is not applicable. Amvest's filing of a complaint seeking a declaratory judgment on the issues presented has occurred first and only in this Court in Delaware. Charters has not demonstrated that its cost to participate in Delaware courts would exceed Amvest's cost to pursue its claim in the courts of Puerto Rico. This Delaware Court can proceed expeditiously to determine the declaratory action and provide a timely decision concerning parties' liabilities, if any, that are supported by the evidence. While some aspects of the action may require application of the laws of another jurisdiction, that alone is not controlling. It is not unusual for Delaware courts to deal with questions of the law of other states or of foreign countries. It has previously occurred, and the record does not show sufficient reason for making an exception in this case. Naturally, both parties will prefer witnesses present in the Court to provide 'live testimony' as contrasted with

depositions. However, this Court has noted that ‘ . . . litigants are constantly obliged to resort to depositions under our broad discovery procedures, even where the facts are in hot dispute. . . .’ Kolber v. Holyoke Shares, Inc., supra. There is insufficient showing in the record to make an exception in this case.

Under the foregoing circumstances, the Court finds no overwhelming balance in favor of defendant Charters for a

dismissal of Amvest's complaint on grounds of forum non conveniens.

*4 NOW, THEREFORE, it is ORDERED that defendant's motion to dismiss is DENIED.

All Citations

Not Reported in A.2d, 1987 WL 16734

End of Document

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EXHIBIT 4

Commonwealth Assocs. v. Providence Health Care, Inc.

Court of Chancery of Delaware, New Castle

October 21, 1993, Submitted ; October 22, 1993, Decided

Civil Action No. 13135

Reporter

1993 Del. Ch. LEXIS 231

COMMONWEALTH ASSOCIATES, Plaintiffs, v. PROVIDENCE HEALTH CARE, INC., LAWRENCE B. CUMMINGS, HARVEY WERSHBALE, THOMAS W. JANES and BRIAN A. LINGARD, Defendants.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Core Terms

Providence, shares, stock, solicitation, Underwriting, shareholder, issuance, per share, acquisition, voting, negotiations, rights, consents, parties, terms, common stock, cash flow, injunction, stock purchase agreement, good faith, company's, factors, preliminary injunction, indispensable party, board of directors, option to purchase, fair dealing, circumstances, offering, cases

Case Summary

Procedural Posture

Plaintiff shareholder filed a motion for a preliminary injunction against defendants, corporation, chairman, and directors. The shareholder sought an order preventing the corporation from effectuating its alleged plan to thwart the effect of the successful completion of the shareholder's consent solicitation by precluding the counting of the vote of any of the shares issued to a healthcare corporation.

Overview

In order to determine whether or not to issue a preliminary injunction, the court held that the shareholder had to demonstrate a reasonable probability of success on the merits, that the irreparable harm would occur in the absence of the requested relief, and that the harm risked by the denial of the

injunction outweighed the harm to the defendants if the injunction was granted. The court concluded that the shareholder demonstrated a strong probability of success on the merits as to its claim that the issuance of stock to the healthcare corporation was a breach of its agreement with the defendants. The court also found that the violation of statute and fiduciary duty and breach of contract would cause injury that was difficult or impossible to quantify and that in such circumstances the violation of duty supported findings of irreparable injury. The court could not conclude that the absence of the healthcare corporation as a party precluded the court from enjoining the defendants from effectuating the plan that had been preliminarily proven to thwart the exercise of stockholder consent rights.

Outcome

The court approved the issuance of an injunction enjoining the defendants from treating the stock issued to the healthcare corporation as validly issued stock for purposes of voting or exercising rights to consent.

LexisNexis® Headnotes

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1 An injunction may be issued where plaintiff demonstrates a reasonable probability of success on the merits; that irreparable harm will occur in the absence of the requested relief; and that the harm risked by the denial of the injunction outweighs the harm to the defendant if the injunction is granted.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Securities Law > Initial Offerings of Securities > Underwriting Agreements

HN2 The duty of good faith and fair dealing serves to protect the justified expectations of the parties to a contract.

Business & Corporate Law > ... > Directors & Officers > Compensation > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Duty of Loyalty

HN3 The exercise of legal power over the corporation by a board of directors is subject to a duty of loyalty to the corporation and, in certain contexts, to the stockholders directly.

Business & Corporate Law > ... > Directors & Officers > Compensation > General Overview

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Duty of Loyalty

Business & Corporate Law > ... > Directors & Officers > Scope of Authority > General Overview

Business & Corporate Law > ... > Directors & Officers > Terms in Office > General Overview

Business & Corporate Law > ... > Meetings & Voting > Annual Meetings > Director Elections & Removals

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > General Overview

HN4 The legal power of directors is subject to an overriding duty of loyalty. The shareholder franchise occupies a place of importance in the theory of corporation law. It is only by reason of their election by shareholders that individuals are granted the right, for a period, to exercise the power of corporate directors. Thus, it has been held that action taken for the sole or primary purpose of impeding the effectiveness of the shareholder vote is deeply suspect and could be sustained only upon the showing of some compelling justification.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN5 Del. Ch. Ct. R. 19(b) analysis has afforded trial courts the opportunity to consider a richer factual context in determining whether a party is indispensable or not. Rule 19(b) itself provides four factors: first, to what

extent a judgment rendered in the person's absence might be prejudicial to him 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 the 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.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN6 The list in Del. Ch. Ct. R. 19(b) does not exhaust the possible considerations the trial court may take into account. It simply identifies those that will be most significant in most cases. Moreover, Del. Ch. Ct. R. 19 does not state what weight is to be given each factor. This must be determined by the trial court in terms of the facts of a given case and in light of the governing equity-and-good-conscience test. Thus, to a substantial degree the effective operation of the rule depends on the careful exercise of discretion by the trial court.

Counsel: [*1] Stephen E. Jenkins, Esquire, Richard D. Heins, Esquire and Christopher S. Sontchi, Esquire, of ASHBY & GEDDES, Wilmington, Delaware; OF COUNSEL: Robert W. Forman, Esquire, of GREENBERGER & FORMAN, New York, New York; Attorneys for Plaintiffs.

Lawrence A. Hamermesh, Esquire and Seth D. Rigrodsky, Esquire, of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; OF COUNSEL: FREEBORN & PETERS; SCHIFF, HARDIN & WAITE, Chicago, Illinois; Attorneys for Defendants.

Judges: ALLEN

Opinion by: ALLEN

Opinion

MEMORANDUM OPINION

ALLEN, CHANCELLOR

Pending is a motion for preliminary injunction restraining Providence Health Care, Inc. ("Providence") from counting the votes of shares of its stock recently issued to NuMed Home Health Care, Inc. ("NuMed"), a Nevada

corporation headquartered in Ohio operating home health care services in Pennsylvania and Florida. Commonwealth Associates, the plaintiff in this action, is a shareholder of the defendant, Providence. Individual defendants include Lawrence B. Cummings, Providence's chairman and chief executive officer, and the other directors of Providence, Thomas W. Janes, Brian A. Lingard, and Harvey Wershale.¹

[*2] This litigation arises from a September 10, 1993 transaction in which (1) Providence acquired 40% of the voting stock of NuMed, together with an option, exercisable until June 30, 1995 to acquire an additional 10% of NuMed's common stock and (2) NuMed acquired 20% of the voting stock of Providence. NuMed immediately granted a consent to Mr. Cummings to retain the incumbent board to vote these shares. Lawrence Cummings, his brothers and family own about 30% of Providence's stock on a fully diluted basis.

On August 27, 1993 Commonwealth, a registered broker dealer that had been the underwriter in Providence's February 1992 initial public offering of common stock, commenced a shareholder consent solicitation pursuant to Section 228 of the Delaware General Corporation Law. The purpose of the consent solicitation was to replace Mr. Cummings and other members of the Providence board of directors.

Under the Underwriting Agreement through which the public shares of Providence were distributed, Commonwealth allegedly has a right for a period of two years to preclude Providence from issuing any additional voting stock but was under an obligation not to unreasonably withhold its consent to [*3] such an issuance. Following the initiation of the consent solicitation, Providence apparently felt itself no longer bound by this restriction. In all events, Providence did not give Commonwealth notice of or seek its consent to the transaction in which new stock representing 20% of its voting power was issued to an entity which would in turn be owned at least 40% by Providence.

This suit was initiated by Commonwealth on September 20, 1993. It attacks the Providence/NuMed transaction as representing a radical redesign of a transaction intended to interfere with the ability of shareholders

effectively to exercise their statutory consent power. In addition, it attacks the issuance of shares by Providence as a flagrant violation of its contractual duty to plaintiff, which cannot be remedied by money. Moreover, Commonwealth contends that Providence has been guilty of making false and misleading statements to the effect that its consent solicitation has been rendered moot by the acquisition of 20% of Providence's voting stock by NuMed.

The suit seeks equitable relief to remedy these alleged wrongs. Specifically plaintiff seeks an order preventing Providence from effectuating its alleged [*4] plan to thwart the effect of the successful completion of Commonwealth's consent solicitation by precluding the county of the vote of any of the shares issue to NuMed. It also seeks an order extending the time in which it might collect consents beyond the sixty days provided for in Section 228² and other relief.

I turn first to a statement of the facts as they appear at this stage of the proceeding.

I.

Commonwealth is a broker-dealer with its principal place of business in New York. In February 1992 Commonwealth underwrote on a firm commitment basis an initial public offering of 2,875,000 shares of Providence at \$ 5.25 per share pursuant to an Underwriting Agreement of February 13, 1992. Providence had been formed in 1989 to acquire nursing home facilities primarily in Ohio by Mr. Lawrence Cummings. Among other terms [*5] of the Underwriting Agreement, Providence provided a covenant, with some exceptions not pertinent here, that it would:

For a period of 24 months after the date of the Prospectus, *not, without your prior written consent, which shall not be unreasonably withheld, offer, issue, sell, contract to sell, grant any option for the sale of, or otherwise dispose of, directly or indirectly, any shares of Common Stock or other securities of the Company*

Dukes Deposition Ex. A § 5(g) (emphasis added). The

¹ Mr. Wershale, an accountant for over twenty years, had worked at a number of accounting firms, most recently his own in Cleveland, and acquired substantial knowledge of the nursing home industry.

² This relief is beyond the power of the Court to grant as the terms of the statutory language imposing a 60 day period within which consents may be accumulated is quite clear, precise and binding.

Underwriting Agreement is governed by New York law.

Providence is, a small company, with less than \$ 500,000 in total net income for 1992. ³ [*6] Amory Cummings, Lawrence Cummings' brother holds a significant number of Providence shares and is Providence's secretary. His law firm, Freeborn & Peters in Chicago, serves as counsel to Providence and advised the company in the NuMed transaction. ⁴ Ogden Cummings, a former real estate broker is also a large shareholder and is on retainer by Providence to find real estate acquisitions.

Providence did not fulfill market expectations after the public offering and the stock began to decline. Mr. Cummings was also apparently unhappy about being a public company. ⁵ When the shares declined from the initial offering price, Providence repurchased 256,000 shares in 1992, 216,850 shares in the first quarter of 1993 and additional shares by July of 1993. Mr. Cummings maintained the belief that the market undervalued providence stock, then selling at more than \$ 4.00 per share.

[*7] After the public offering there were disagreements between Providence and Commonwealth, including over whether additional shares or options might be issued. ⁶ When its prior consent was solicited twice in 1992, Commonwealth refused to approve issuances of options to Mr. Cummings, but did agree to issue 127,000 options to Providence employees. Prior to its transaction with NuMed in September 1993, Providence had approximately 3,700,000 shares of which 2,875,000 were distributed to the public in 1992. The shares are publicly traded on the NASDAQ system.

Another crucial player in this story, but not a party to this action, is NuMed. Along with his family, Mr. Jugal Taneja, NuMed's chairman and chief executive officer, owned approximately 40% of NuMed's approximately 5.3 million outstanding shares prior to the Providence transaction. Mr. Taneja also owns [*8] Bancapital Finance Corporation of which a subsidiary is A.T. Brod & Company, a small brokerage firm.

In March 1993, a member of A.T. Brod called Mr. Cummings and introduced him to Mr. Taneja and NuMed. ⁷ Mr. Cummings' initial conception of a small, toe-hold, cash investment in NuMed with future options, is well reflected in a March 23, 1993 memorandum he circulated to his directors and certain managers in which he wrote:

The sellers are asking for a sale price of \$ 8 million which would be approximately 1 x 1994 projected revenues It is generally felt that it is important to leave the sellers with a substantial amount of stock in order to incent them to continue to grow the business.

I would prefer a structure by which Providence would minimize the use of its own stock, minimize the use of cash, and avoid any requirement to continue to fund this acquisition if we decide in the future that we do not believe this industry is a good fit.

Cummings Dep. Ex. 6 (emphasis added). Cummings early on was not disposed to issue stock to pay for a portion of NuMed.

[*9] From the outset of discussions, the transaction under discussion was a two-step deal, with a relatively

³ Cummings received almost \$ 470,000 in compensation in 1992.

⁴ Freeborn & Peters was paid \$ 450,000 for its services in 1992.

⁵ Kamal Mustafa, an investment banker operating through Hamilton Capital Partners, stated in his deposition:

Larry Cummings expressed distaste for being public, indicated that he had a lot of investors who were being very demanding and who were extremely unhappy with the stock's performance, specifically the company's poor performance three months after the offering, and indicated that he didn't see the price would rise.

And his statement, to the best of my knowledge, was along the lines of, "Well, if the stock drops low enough, maybe the best thing I can do is do a leveraged buy-out and take the company private."

Mustafa Dep. at 17.

⁶ Commonwealth attempted to nominate Kamal Mustafa to Providence's board pursuant to provisions of the Underwriting Agreement, but his nomination was not approved.

⁷ A.T. Brod was ultimately paid a \$ 75,000 finder's fee for this introduction.

small cash investment and a large second-step acquisition of stock. At first, Mr. Cummings and Providence dragged their heels to chip away at the cash price of a small stake in a small company, while Mr. Taneja and NuMed were eager to get the deal moving and concluded. The size of the transaction's second step option increased to a maximum 40% stake in NuMed as negotiations continued, but the second step was seen always as more remote and contingent upon positive performance by NuMed. If the investment did not pan out, it could be dropped quickly and relatively painlessly.

Letters between the parties and memoranda from Mr. Cummings to his board reveal the terms of the deal at its inception, and Providence's evaluation of it. Already by early June, Cummings received a proposal that would be followed, if accepted, by a stock purchase agreement. That proposal offered Providence 335,000 shares (about 6%) of NuMed for \$ 1.50 per share at the outset and an option to purchase 300,000 additional shares at \$ 1.75 per share within six months, and 300,000 more shares at \$ 2.00 with a year. [*10] The ultimate total consideration sought was \$ 1,627,500 for a 20% stake. In addition to registration and preemptive rights, Providence would have the "observer rights" at NuMed board meetings. The proposal did not mention the use of Providence stock as consideration.

The parties' negotiations continued slowly through June and July, with Cummings seeking a lower price and a larger contingent stake, without sacrificing Providence's ability to drop NuMed if that investment failed to grow. Cummings took the position that the price asked, effectively valuing NuMed as a whole at \$ 8.4 million, was far too high, but liked the liquidity of the investment. Cummings wrote in a June 14 memo that the total value implied a cash flow multiple of over 8 times: "Mr. Taneja is in effect buying 'wholesale' and selling 'retail' to us." Yet he continued: "An attractive feature to this acquisition is the fact that we will be getting a marketable

security. Our initial investment in NuMed would allow NuMed to be listed on the AMEX, giving us further liquidity." Cummings Dep. Ex. 12.

By late June the parties contemplated a transaction initially for 335,000 shares at \$ 1.25 per share, or five times NuMed's [*11] cash flow per share, with variation on the price and timing of the option to purchase additional shares.⁸ By June 29, Cummings and Taneja preliminarily outlined a transaction in which Providence would purchase 335,000 shares of newly issued NuMed common at \$ 1.25 per share, and receive an option to purchase a cumulative total of 40% of NuMed on a fully diluted basis.

In a June 30 memo to his board Mr. Cummings outlined the basic structure of the transaction as it existed then: first 8.4% at \$ 1.25 per share; then another 8.4% by November 15, 1993 and any quantity at \$ 1.50 per share, if Providence wanted to take such a stake, or it could [*12] hold off until the second quarter of 1994 and buy at a fixed multiple of cash flow.⁹ [*13] Cummings noted that the transaction would place Providence in the desirable position of being able to augment its investment if NuMed were to prosper, while retaining the ability to get out: "We also, of course, will have some liquidity to sell our investment if we choose to." This memo demonstrates that from the outset, the transaction with NuMed was to provide Providence investment to test the waters with an option to acquire a larger stake later if NuMed fulfilled expectations by making successful acquisitions itself and enabling the companies to realize synergies in their service areas.¹⁰ As late as July 6, liquidity continued to be considered an advantage: "[Providence] would not be irrevocably tying up capital in NuMed Unlike a nursing home acquisition, we can sell our stock. Any loss on 335,000 shares would not be large." Cummings Dep. Ex. 19.

After almost another month of negotiations, the deal got only slightly better, with the per share price on the last

⁸ Cummings sought a three year option to purchase up to 40% at a price to be determined as equal to cash flow per share for the preceding two quarters; Taneja countered with up to 20% to be purchased in the first year at \$ 1.50; and 10% in each of the following two years for five times cash flow, with a minimum tranche of \$ 500,000 in any single purchase. Cummings Dep. Ex. 14.

⁹ The initial \$ 1.25 price was 5.7 times NuMed's estimated cash flow for 1993. The transaction would have enabled Providence to purchase more shares in the second quarter of 1994 at a fixed 5 times cash flow.

¹⁰ Providence chiefly operates nursing homes whereas NuMed focuses on home health care of patients who have been recently released from such on-site care, or who will need such care shortly. Referrals between the enterprises were a anticipated.

segment of the option dropping from \$ 1.50 to \$ 1.25, at the expense of the disgruntlement of NuMed's principals.¹¹ At that point, and without a deal, Taneja left for India, and did not return until August 26 or 27.

* * *

In stark contrast to the protracted negotiations between March and July, the events in late August and early September leading up to this motion proceeded with telling [*14] alacrity, so much so that a daily chronology at this point is most helpful.

1. On Thursday August 26, Mr. Cummings sent a marked-up version of Mr. Taneja's July 29 letter outlining the transaction -- Providence to buy 6% of NuMed shares for \$ 500,000 with an option exercisable over 2 years to purchase up to 40% of NuMed's stock. That letter stated that it would probably be possible to close the deal in time to reflect in on NuMed's September 30 financial statements.

2. On Friday August 27, Commonwealth filed a Schedule 13D and Preliminary Consent Statement with the Securities and Exchange Commission.

3. On Monday August 30, Messrs. Taneja and Cummings met and worked out the final points of their transaction and agreed to proceed with a contract. On this same day, Freeborn & Peters learned of the initiation of the consent solicitation. Tom Fitzgerald, a partner at the firm and counsel to Providence, immediately researched New York and Delaware¹² law regarding a possible breach of the Underwriting Agreement with Commonwealth.

[*15] 4. On Tuesday August 31, Lawrence Cummings learned of the consent solicitation at about 9:30 a.m. Mr. Cummings immediately consulted with lawyer Fitzgerald and his brother Amory. Mr. Fitzgerald advised Mr. Cummings that, in his opinion, Commonwealth's consent solicitation constituted a breach of the implied covenant of good faith and fair dealing of the Underwriting Agreement, as well as Commonwealth's fiduciary duties as underwriter to Providence. Moreover Fitzgerald expressed the view that since, in his view, Commonwealth had first breached the contract,

Providence was no longer obligated to abide by the stock sale restrictions of the Underwriting Agreement, and could issue shares of Providence in the NuMed transaction.

5. On Wednesday September 1, Cummings hired MacKenzie Partners as proxy solicitors. On this same day, Mr. Taneja saw a newspaper article reporting Commonwealth's 13D filing and he called Mr. Cummings asking if their deal were still "on" Cummings responded affirmatively. Mr. Taneja had faxed a copy of the terms agreement as it had just been worked out. But later that day, Cummings, with Mr. Fitzgerald on the line, called Mr. Taneja and asked him if he would entertain [*16] doing the entire deal in a single step. Mr. Taneja responded that he was unable to conclude anything on the phone, but that Mr. Cummings should come to Cleveland and they would consider a deal.

6. The next day Mr. Cummings was in Cleveland. A new deal was negotiated. Taneja described the tenor of the negotiations: "Busy discussions between me and Larry [Cummings]. We were using four conference rooms of [NuMed counsel] and were trying to negotiate the whole deal." Messrs. Cummings and Taneja agreed to terms which became finalized in the Stock Purchase and Exchange Agreement ("Stock Purchase Agreement") executed September 10 between NuMed and Providence.

7. On Friday September 3, Providence hired Mesirov Financial, Inc., a Chicago based firm, to issue a fairness opinion on the terms reached the previous day. The opinion was to be delivered orally at the September 7 board meeting. On this same day, Freeborn & Peters sent a draft of the final agreement to NuMed's counsel, Arter & Hadden in Cleveland.

8. Over the Labor Day weekend, September 4 through 6, Mesirov conducted due diligence and performed its financial analyses on NuMed using NuMed's estimated projected earnings.

9. On Tuesday [*17] September 7 and Wednesday September 8, the Providence board held a special meeting and discussed both the NuMed transaction and the consent solicitation. Mr. Fitzgerald repeated the

¹¹ In his memo, Cummings wrote that the principals "have clearly grown discouraged by our protracted negotiations. They have asked for a final indication" Cummings Dep. Ex. 20.

¹² During discovery, Commonwealth sought information about the legal advice rendered at this time but defendants claimed that the attorney-client privilege protected that information from disclosure.

advice he had given Mr. Cummings earlier regarding "Commonwealth's breach of the underwriting agreement and [Providence's] new ability to issue and sell stock free of the restriction on such activities." Fitzgerald Aff. at 3. On September 8, the Mr. Cummings and his friends and directors Lingard and Janes voted to approve the transaction, although Mr. Wershbale, the accountant, abstained, claiming that he felt he lacked necessary financial calculations to make an informed decision.¹³

[*18] 10. On Friday September 10, the Stock Purchase Agreement was signed and the transaction closed the same day. Unlike the two step transaction contemplated throughout the spring and summer, the contract agreement provided for a compressed, one shot acquisition of 40% of NuMed with an option to purchase 10.1% more of NuMed within three years in exchange for 20% of Providence plus cash.

Under the Stock Purchase Agreement, Providence purchased 3,350,500 shares of NuMed common stock (about 40%) and an immediately exercisable warrant to purchase 1,695,328 more shares for \$ 2,966,824 with a June 30, 1995 expiration date, for an ultimate total of 50.1% stake in NuMed on a fully diluted basis. For its investment, Providence would also have the power to name four directors to NuMed's board which was increased by NuMed from seven to eleven directors. In the transaction, NuMed received 925,000 shares of

Providence common stock or 20% of its outstanding stock,¹⁴ **[*19]** a cashier's check dated September 7 for \$ 500,000 (allocated \$ 375,000 for the NuMed shares and \$ 125,000 for the warrant), and a seat on Providence's now five-member board of directors.¹⁵

As interesting as the financial aspects of the deal were voting provisions and ancillary agreements concerning the transaction.¹⁶ Section 4.1(b) provided that:

without the prior written consent of the Board of Directors of the other party, neither party shall, directly or indirectly, alone or in concert with and other Person: . . . (iii) make, or in any way participate, directly or indirectly, in any solicitation of proxies, consents, or authorizations (as such terms are used in the proxy rules of the SEC) to vote, or seek to advise or influence any person with regard to the voting of, any equity securities, in opposition to a position the board of directors has taken.

Taneja Dep. Ex. 1 (emphasis added). This provision, plaintiffs claim, has the effect of locking up NuMed's votes in any consent solicitation. In a September 10 letter agreement which referenced the indemnification **[*20]** provision of the contract, Providence agreed to indemnify NuMed against any violations of the Commonwealth Underwriting Agreement.¹⁷ In other September 10 letters, Messrs. Cummings and Taneja each agreed as shareholders of their respective companies that they would vote their shares in favor of

¹³ Mr. Wershbale stated that during the meeting he had asked:

if the earnings per share would be negatively or positively impacted, and was advised of certain possibilities that were calculated during the course of the actual board meeting. And I was of the opinion that it should be done more exactly. And once I had that information, I would be in a position to vote on the deal.

Wershbale Aff. at 67.

¹⁴ This number of shares was calculated based on a 30 day trading average prior to the closing of \$ 3.50 per share.

¹⁵ The cash infusion was a crucial part of the deal for Taneja who himself wanted to make an acquisition in Florida and had pledged personal assets to obtain credit and wanted to release his own funds.

¹⁶ It is also interesting to note that as part of the agreement, Providence would make available to NuMed a \$ 1 million line of credit for acquisitions to be approved by Providence, and \$ 500,000 in working capital for a home health care expansion joint venture in Ohio, of which Providence would take a 75% interest.

¹⁷ The letter signed by both parties stated:

PHC hereby agrees to indemnify, defend and hold harmless NuMed from and against any and all costs, expenses, obligations, liabilities, damages, recoveries and deficiencies, including interest, penalties and reasonable attorneys' fees, that NuMed shall actually incur as a result of any claim or assertion of liability brought by Commonwealth Associates against PHC and/or NuMed *relating to the Underwriting Agreement dated as of February 13, 1992, between PHC and Commonwealth Associates, or the transactions contemplated by this Agreement.*

the other company's representatives for their respective boards of directors.

[*21] 11. On September 13, MacKenzie Partners issued a press release stating that NuMed and Providence had concluded a transaction.

12. On September 15, Providence announced that it had effectively won the control contest against Commonwealth by noting that shareholders representing over 50% of the company's outstanding common stock had tendered their consents in favor of the current Providence board. Even were Commonwealth's consent solicitation successful, the results would be immediately reversible based on the consents obtainable from Mr. Cummings (30%) and NuMed alone. The announcement included a statement by Mr. Taneja: "The current composition of Providence's board has NuMed's full support." Messrs. Taneja and Cummings each had tendered written consents in favor of the Providence board.

II.

The standard for the issuance of a preliminary injunction is well settled and familiar. **HN1** An injunction may issue where plaintiff demonstrates a reasonable probability of success on the merits; that irreparable harm will occur in the absence of the requested relief; and that the harm risked by the denial of the injunction outweighs the harm to the defendant if the injunction is granted. *Allen v. Prime Computer Inc., Del. Supr. 540 A.2d 417, 419 (1988)*. **[*22]**

III.

Breach of Contract Claim

Commonwealth has presented a strong probability of success on its claim that the issuance of common stock to NuMed constituted a breach of the Underwriting Agreement.

The Underwriting Agreement itself appears clear in its requirements that Providence receive the consent of Commonwealth to any stock issuance for a term of two years, and that Commonwealth's consent is not to be

unreasonably withheld. It is also undisputed that Providence failed to seek Commonwealth's consent to the stock issuance.

Furthermore, Commonwealth's exercise of its statutory right to seek consents from other shareholders is unlikely to be found to be a violation of an implied covenant of good faith and fair dealing under the Underwriting Agreement as defendants contend. **HN2** The duty of good faith and fair dealing serves to protect the justified expectations of the parties to a contract. See *Restatement of Contracts 2d § 205*. Thus, to find that the solicitation of consents constitutes a breach of this duty, one must find that it was a justified expectation of the parties to this contract that Commonwealth, as a stockholder, would be restricted under the Agreement from exercising **[*23]** a statutorily granted right inherent in stock ownership. Such a conclusion is not supported by the record, nor by any authority cited by Providence. ¹⁸ Indeed, there is authority to support the contention that a decision to deny consent to a transaction is not a violation of the duty of good faith and fair dealing where that decision is made for a legitimate business purpose. *Bonady Apts. v. Columbia Banking Fed. Sav. & Loan Assoc., N.Y. Supr., 465 N.Y.S.2d 150, 154 (1983), modified, 472 N.Y.S.2d 221 (4th Dept. 1984)*.

Finally, it seems clear that Commonwealth, as a public shareholder, could reasonably have disapproved of the issuance of stock to NuMed, in light of the implications the transaction **[*24]** has in forming a powerful control structure. I do not know if the business terms of the transactions are good, from Providence's point of view, or not. Nor need I know that. I suppose that reasonable minds might disagree about it. But without regard to the business terms it seems perfectly clear that public shareholders could reasonably resist a transaction that they could interpret as placing control of the corporation in Mr. Cummings in a much more entrenched way than heretofore.

Thus I regard Providence's argument that it was not required to seek Commonwealth's consent to the issuance because a denial by Commonwealth of its consent would have been *per se* unreasonable to be transparently incorrect.

Taneja Dep. Ex. 1 (emphasis added).

¹⁸ It should here be noted that although Providence submitted an affidavit of counsel to the effect that counsel advised Cummings that the consent solicitation violated the duty of good faith and fair dealing, no authority is cited which leads to this conclusion.

For these reasons, I conclude that Commonwealth has demonstrated a strong probability of success on the merits as to its claim that the issuance of stock to Numed was a breach of the Underwriting Agreement.

IV.

Intentional Interference with Voting Rights

HN3 The exercise of legal power over the corporation by a board of directors is subject to a duty of loyalty to the corporation and, in certain contexts, to the stockholders directly. This duty is of old, indeed ancient, origins -- findings [*25] early expression in the development of the use and trust by the English Chancellors, in which equitably enforced duties were first held to constrain the exercise of incontestable legal power -- but it is vital to the functioning of corporate law today. The corporation form has utility in large part because owners of capital are willing to commit their capital to an enterprise in exchange for a security with no maturity date or enforceable right to a return. In a technological, market economy these corporate enterprises require broad power and discretion in the hands of boards and managers in order to enable the enterprise to adapt to changing markets in a timely way. These two factors -- the need for some assurance of fair treatment and the need for open-ended assignments of power to corporate boards -- define the need for a post-hoc judiciary fiduciary remedy; such a remedy will in fact make the corporate form more useful.

Delaware cases have recognized that **HN4** the legal power of directors is subject to an overriding duty of loyalty. *E.g., Schnell v. Chris-Craft Industries, Del. Supr., 285 A.2d 437 (1971); Condec Corporation v. Lunkenheimer Company, Del. Ch., 43 Del. Ch. 353, 230 A.2d 769 (1967); [*26] Mills Acquisition Co. v. Macmillan, Inc., Del. Supr., 559 A.2d 1261 (1989)*. Our cases have also noted that the shareholder franchise occupies a place of importance in the theory of corporation law. It is only by reason of their election by shareholders that individuals are granted the right, for a period, to exercise the power of corporate directors. Thus, it has been held that action taken for the sole or primary purpose of impeding the effectiveness of the shareholder vote is deeply suspect and could be sustained only upon the showing of some compelling justification. *Blasius Industries, Inc. v. Atlas Corp., Del. Ch., 564 A.2d 651 (1988)*.

It is, of course, the case that acts taken in the ordinary course of the company's business, or indeed

extraordinary transactions, may have collateral effects upon a forthcoming vote. Any such effect, however, does not constitute an equitable wrong; directors duty of loyalty to shareholders does not require them to stop managing the enterprise in good faith while a proxy contest or consent solicitation goes forward.

In this case, however, a preliminary assessment of the record is radically [*27] inconsistent with the interpretation that Mr. Cummings happened to negotiate the sale of 20% of Providence stock into friendly hands (so friendly indeed that Cummings indirectly controls 40% of its vote and has an option on another 10%) just three days after learning of the commencement of the solicitation of consent. Plainly the effect that stock placement had on the consent solicitation was not collateral or secondary but was the main, principal, indeed probably the sole reason to acquire immediately, and for Providence stock, a larger interest in NuMed that had only days earlier been thought a contingent future proposition.

V.

Threats of Irreparable Injury

Plainly the effect of the transaction is to place Mr. Cummings in a securely entrenched position. Indeed, promptly after the transaction closed a press release announced in effect that plaintiff's consent solicitation was futile. And if the last minute changes in this transaction are valid, so it is.

If one concludes that Section 228 creates a right in corporate shareholders to take effective action and that the duty of loyalty ought to bar those in control of the corporation from taking action designed solely or primarily to [*28] thwart effective exercise of that right, then I conclude that it follows that the bare-bones facts not in dispute show that it is quite likely that a wrong has been done here. More to point, that violation of statute and fiduciary duty and breach of contract will cause injury that is difficult or impossible to quantify. In these circumstances the violation of duty shown supports findings of irreparable injury. *See Prime Computer Inc. v. Allen, Del. Ch., C.A. 9557, Allen, C. (Jan. 23, 1988)*

VI.

Indispensable Parties

Although an order granting the relief sought will impact the legal rights of an absent party, NuMed, a close

examination of the unusual circumstances of this case in conjunction with a reading of Rule 19(b) leads me to conclude that a preliminary injunction against Providence is not precluded by NuMed's absence.

Amended Rule 19(b) sets forth a structure for the relevant factors to be considered in determining whether the absence of NuMed, a Nevada corporation, prevents the issuance of a preliminary injunction against a Delaware corporation and its board in an action. Rule 19(b) was amended in 1966 to reflect the more fact and circumstances oriented "equity and good [*29] conscience" test and to reject the old style, mechanistic application of the rule generally adopted by courts prior to 1966. See 7 Wright, Miller & Kane, *Federal Practice and Procedure* § 1607 (1986).

Older Delaware cases may be viewed as adhering to that earlier construction of Rule 19 which focused on labeling a party first and thereby determining that it was indispensable, as opposed to examining closely the circumstances of the case before arriving at a conclusion regarding a person's indispensability, as is now required under Rule 19(b). See, e.g., *Chappel v. Standard Scale & Supply Corp., Del. Ch., 15 Del. Ch. 333, 138 A. 74 (1927)*; *Bouree v. Trust Francaise des Actions de la Franco-Wyoming Oil Co., Del. Ch., 14 Del. Ch. 332, 127 A. 56 (1924)*. In *Hodson v. Hodson Corp.*, the Chancery Court conclusively stated: "It is the rule, long settled in this state, that the owner of shares of stock in a Delaware corporation is an indispensable party to an action to cancel such shares or to restrain the voting of or the payment of dividends on such shares. As the owner of the shares in controversy, Jessie Blanche Price is, therefore, and indispensable [*30] party." *Hodson v. Hodson Corp., Del. Ch., 32 Del. Ch. 76, 80 A.2d 180, 181 (1951)* (citations omitted) (finding individual defendant an indispensable party in an action for fraud in the issuance of shares to her and requiring surrender and cancellation of her shares for relief). The *Hodson* court's determination that a person was indispensable without any consideration of the circumstances of the case illustrates the early formulaic application of Rule 19(b). In considering now whether a shareholder is an indispensable party to an action adjudicating rights arising from stock, one might reach the same result as the earlier cases, but if so it would be by a different route.

More recent *HN5* Rule 19(b) analysis has afforded courts the opportunity to consider a richer factual context in determining whether a party is indispensable or not. Rule 19(b) itself provides four factors:

first, to what extent a judgment rendered in the person's absence might be prejudicial to him 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 the [*31] 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.

Ch. Ct. R. 19(b) (1987). Other relevant factors may also be considered, and no hierarchy of factors exists:

HN6 the list in subdivision (b) does not exhaust the possible considerations the court may take into account; it simply identifies those that will be most significant in most cases. Moreover, the rule does not state what weight is to be given each factor. This must be determined by the court in terms of the facts of a given case and in light of the governing equity-and-good-conscience test. Thus, to a substantial degree the effective operation of the rule depends on the careful exercise of discretion by the [trial] court.

7 Wright, Miller & Kane, *supra* § 1607.

In this case, the standard four factors plus one additional relevant factor do tip in favor of the issuance of a preliminary injunction against the voting or the counting of the votes of Providence shares recently issued to NuMed. I understand that NuMed may be prejudiced by this injunction, and that the order cannot be fashioned in such a way as to [*32] prevent such prejudice. Nevertheless, a judgment rendered that does not affect NuMed's stock interest will plainly be inadequate and Commonwealth will not have an adequate remedy if no relief with respect to NuMed's stock can be given for want of NuMed as a party since it will have lost its ability fairly to engage in this consent solicitation.

I must consider an additional factor in this case, that is, the protection afforded NuMed in these proceedings by Providence's diligent defense of the validity of the transaction. Providence's and NuMed's interests, for all purposes relevant here, are essentially congruent. In *Hynson v. Drummond*, this court held that a properly administered class action, without opt-out rights could be employed to bind all absent, nonresident shareholders and potential plaintiffs to a final judgment in an action that would determine the rights attaching to

corporate stock. *Hynson v. Drummond Coal Co., Inc.*, *Del. Ch.*, 601 A.2d 570, 575, 576 (1991) ("I suggest that it would be radically inconsistent with our history to suppose that binding an absent shareholder to an actual adjudication in the corporate domicile of the corporate [*33] rights of holders of stock is in any sense unfair to that absent shareholder (assuming notice and opportunity to heard has been afforded)."). In defending itself in this action, Providence has effectively sought to protect its investment in NuMed, an investment integrally related to the voting power of NuMed's shares in conjunction with Mr. Cummings' own. Since an adequate defense of the transaction has been put on by Providence, prejudice to NuMed must be considered in a different light than it might have been had Providence not acted, *de facto*, as its champion.

In equity and good conscience, the absence of NuMed should not preclude the order sought upon consideration of the following facts.

First, NuMed knew of the February 13, 1992 Underwriting Agreement and bargained for not only an indemnification provision in the Stock Purchase Agreement, but also a letter agreement upon closing that Providence would indemnify NuMed specifically for any expense or liability it might incur as a result of a breach of that agreement.

Furthermore, Mr. Taneja knew about the consent solicitation and understood the connection between his transaction and the control contest. In light of the consent [*34] solicitation he pointedly called Mr. Cummings and asked whether the deal was still "on." It would not be unreasonable to conclude further that Mr. Taneja realized that due to pressure to place a significant

number of shares in friendly hands he was in a much better bargaining position on September 1 than he had been just days before. Including voting provisions in the Stock Purchase Agreement and granting consents and voting support for board members in letters at the September 10 closing just days after both parties learned of the consent solicitation, Messrs. Cummings and Taneja concluded their speedy negotiations with a purpose in mind.

Finally, as a result of notice ordered by this court, NuMed has been apprised of this action and has chosen not to appear. Mr. Taneja, a nonparty, was voluntarily deposed, but he has chosen, perhaps at the suggestion of defense counsel, not to appear.

In light of all of these considerations I cannot conclude that the absence of NuMed as a party precludes the court from enjoining Providence and the individual defendants from effectuating finally the plan that has been preliminarily proven to thwart the exercise of stockholder consent rights.

** [*35] *

An injunction will issue enjoining the corporation or its agents, until further order of this court, from treating the stock issued to NuMed as validly issued stock for purposes of voting or exercising rights to consent. I will be prepared to try the case on a rapid schedule so that the situation may be quickly and finally resolved. In reaching this conclusion I have considered the off-setting claims of loss that issuance of the injunction might occasion, but on balance the issuance of the injunction appears the better and fairer course.

Plaintiffs may submit a form of implementing order.

EXHIBIT 5

Cornerstone Techs. L.L.C. v. Conrad

Court of Chancery of Delaware, New Castle

March 11, 2003, Submitted ; March 31, 2003, Decided

C.A. No. 19712-NC

Reporter

2003 Del. Ch. LEXIS 34

CORNERSTONE TECHNOLOGIES, LLC, ARASTRA, LLC, KOR HOLDINGS, LLC, and PETER A. KANJORSKI, Plaintiffs, v. BRUCE E. CONRAD and THOMAS UNGER, Defendants.

Subsequent History: Reargument denied by *Cornerstone Techs., LLC v. Conrad*, 2003 Del. Ch. LEXIS 46 (Del. Ch., Apr. 22, 2003)

Disposition: [*1] Unger's motion to dismiss for lack of personal jurisdiction granted; Conrad's motion to dismiss for lack of personal jurisdiction denied; and Conrad's motion for a stay granted.

Core Terms

Companies, operating agreement, personal jurisdiction, Counts, removal, limited liability company, purported, ownership, parties, entity, terms, exercise of personal jurisdiction, disputes, nonresident, motion to dismiss, minimum contact, twenty percent, termination, offering, provides, issues, owns, preliminary objection, ownership interest, service of process, amended complaint, settlement offer, appointment, declaration, plaintiffs'

Case Summary

Procedural Posture

Plaintiffs were two limited liability companies (LLCs) and two of their unit holders. They had operations based in another state, but were domiciled in Delaware. Plaintiffs sued defendants, two individuals, in both states, seeking declaratory, injunctive, and monetary relief. Both defendants moved to dismiss for lack of personal jurisdiction. One defendant requested that the action be stayed or dismissed in favor of the other state's litigation.

Overview

Plaintiffs complained that defendants were making certain false claims of ownership in the companies. As a result, uncertainty existed about who could make company decisions. Plaintiffs relied solely on Delaware's long-arm statute, *Del. Code Ann. tit. 10, § 3104*, to support their claim of personal jurisdiction over one defendant. The court found that plaintiffs pointed to only two acts committed in Delaware that had any relevance to the instant litigation, which were the actions of forming each company as limited liability companies in Delaware. There was no indication whatsoever that the one defendant had any role in the founding or formation of either. Therefore, the court lacked personal jurisdiction. As to the other defendant, jurisdiction was proper as he was a founder, large unit holder, and top officer that had been voted off as a manager of both companies. *Del. Code Ann. tit. 6, §§ 18-110(a) and 18-109(a)* provided a basis for the exercise of personal jurisdiction and minimum contacts were shown. However, the court found it to be a mystery as to why plaintiffs had chosen to spread their claims over two states, and a stay of the Delaware action was appropriate.

Outcome

One defendant's motion to dismiss for lack of personal jurisdiction was granted, and the other's was denied. The other defendant's motion for a stay was granted, and the stay was to remain in effect indefinitely, but plaintiffs could perfect service of process on the other defendant and could move to lift the stay no earlier than a certain date, or on the date of the termination of the equity action in the other state.

LexisNexis® Headnotes

Business & Corporate Law > Limited Liability Companies > General Overview

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN1 Del. Code Ann. tit. 6, § 18-109(a) permits an exercise of personal jurisdiction over a manager, as that term is defined in § 18-109(a), in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited liability company.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2 On a Del. Ch. Ct. R. 12(b)(2) motion, the court may consider the pleadings, affidavits, and any discovery of record, and may even hold an evidentiary hearing. The burden of showing a basis for the court's exercise of personal jurisdiction over a nonresident defendant rests with the plaintiffs. In a case when no evidentiary hearing has been held, the plaintiffs' burden is a relatively light one--i.e., they must only make a prima facie showing that the exercise of personal jurisdiction is appropriate. And, in such a case, the record is construed in the light most favorable to the plaintiff.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN3 The Fourteenth Amendment requires that a nonresident defendant have certain "minimum contacts" with the forum jurisdiction such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN4 See Del. Code Ann. tit. 10, § 3104(c)(1).

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN5 Del. Code Ann. tit. 10, § 3104(c)(1) is a "single act" provision of the long-arm statute, Del. Code Ann. tit. 10,

§ 3104. As such, Del. Code Ann. tit. 10, § 3104(c)(1) supplies a basis for personal jurisdiction only with respect to claims that have a nexus to such forum-related conduct.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN6 Del. Code Ann. tit. 10, § 3104(c) is to be broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause.

Business & Corporate Law > Limited Liability Companies > General Overview

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Business & Corporate Law > Limited Liability Companies > Member Duties & Liabilities

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN7 The Delaware Limited Liability Company Act, Del. Code Ann. tit. 6, § 18-110(a), allows the Delaware Court of Chancery, upon the application of a member or manager of a limited liability company, to determine the validity of any admission, election, appointment, removal, or resignation of a manager and the right of any person to become or continue to be a manager and, in case the right to serve as a manager is claimed by more than one person, to determine the person or persons entitled to serve as managers.

Business & Corporate Law > Limited Liability Companies > General Overview

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

HN8 See Del. Code Ann. tit. 6, § 18-110(c).

Business & Corporate Law > Limited Liability Companies > General Overview

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > State & Territorial Governments > Elections

HN9 By the plain terms of Del. Code Ann. tit. 6, § 18-110(a), the Delaware Court of Chancery may hear

and determine the validity of any admission, election, appointment, removal, or resignation of a manager of a limited liability company.

Business & Corporate Law > Limited Liability Companies > General Overview

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN10 Del. Code Ann. tit. 6, § 18-109(a) permits an exercise of personal jurisdiction over a manager, as that term is defined in that subsection, in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited liability company or a violation by the manager of a duty to the limited liability company, or any member of the limited liability company.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN11 When a defendant is subject to personal jurisdiction under Del. Code Ann. tit. 6, § 18-109 as to certain claims, the court may exercise personal jurisdiction over him as to other sufficiently related claims.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN12 Once jurisdiction is properly obtained over a non-resident director pursuant to Del. Code Ann. tit. 10, § 3114, such non-resident director is properly before the court for any claims that are sufficiently related to the cause of action asserted against such directors in their capacity as directors.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN13 Under Del. Code Ann. tit. 10, § 3114, the relief sought is not the guiding factor because if jurisdiction attaches at all under the statute, the nonresident is before the court for any and all relief that might be necessary to do justice between the parties by virtue of the fact that the jurisdiction conveyed by the statute is in personam jurisdiction.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN14 Once a nonresident director is properly before a Delaware court by reason of Del. Code Ann. tit. 10, § 3114, that director is properly before the court for any relief that the facts may require, even if such relief technically operates against the director in some other capacity, such as that of a stockholder.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN15 The due process clause of the Fourteenth Amendment requires that a nonresident defendant have certain minimum contacts with the forum jurisdiction such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. When determining whether these "minimum contacts" are present, the court should inquire whether the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. Once the defendant's minimum contacts with the forum have been established, the court should turn its analysis to issues of fairness and justice.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN16 Delaware has a strong interest in providing a forum for disputes relating to the ability of managers of

a limited liability company formed under its law to properly discharge their respective managerial functions.

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Res Judicata

HN17 When a party can raise all claims it has against a defendant in one forum at one time, it is generally obligated to do so. The rule against claim splitting is an aspect of the doctrine of res judicata and is based on the belief that it is fairer to require a plaintiff to present in one action all of his theories of recovery relating to a transaction, and all of the evidence relating to those theories, than to permit him to prosecute overlapping or repetitive actions in different courts or at different times. The courts of Delaware have long adhered to the generally accepted view disfavoring the splitting of claims.

Counsel: Daniel L. McKenty, Esquire, Gerald J. Hager, Esquire, McCULLOUGH & McKENTY, P.A., Wilmington, Delaware; Richard A. Breuer, Esquire, Malvern, Pennsylvania, Attorneys for Plaintiffs.

John M. Bader, Esquire, THOMAS S. NEUBERGER, P.A., Wilmington, Delaware, Attorneys for Defendant, Thomas Unger.

Bruce E. Conrad, Weatherly, Pennsylvania, Pro se.

Judges: STRINE, Vice Chancellor.

Opinion by: STRINE

Opinion

MEMORANDUM OPINION

STRINE, Vice Chancellor

This opinion resolves motions brought by the two defendants in this case, Thomas Unger and Bruce E.

Conrad, to dismiss the complaint for lack of personal jurisdiction.¹ The opinion also addresses defendant Conrad's request that this action be stayed or dismissed in favor of litigation pending in the state courts of Pennsylvania. Candidly, the clarity of the factual record and of the parties' legal arguments is less than ideal, making summarization of this opinion difficult, and the body of the opinion more cumbersome and ambiguous.

[*2] In rough terms, this case involves an unwieldy dispute between the Kanjorski family and defendants Unger and Conrad, arising out of their involvement in two limited liability companies whose operations are based in Pennsylvania, but which are domiciled in Delaware. The names of those companies are Cornerstone Technologies, LLC and Arastra, LLC (collectively, the "LLCs" or the "Companies"); both are named plaintiffs. The other plaintiffs are Peter A. Kanjorski, who claims to own 20% of the units of the two LLCs, and Kor Holdings, LLC, a Kanjorski family holding entity, claiming to own 60% of the LLCs' units.

Defendant Unger joined the Companies as an employee sometime after their formation and is alleged by the plaintiffs to claim an ownership share in them.

Defendant Conrad (who is representing himself *pro se*) is alleged to have been one of the original members and managers of both of the LLCs, and to have been granted a 20% ownership interest in each.

In this case, the plaintiffs seek various forms of declaratory, injunctive, and monetary relief against Unger and Conrad.

As to Unger, the plaintiffs seek a declaration that he does not own any units of either LLC. The problem **[*3]** with this request is that the instrument upon which Unger supposedly bases his claim to units was executed entirely in Pennsylvania well after the LLCs were first formed and only references his possible receipt of units

¹ On January 9, 2003, the plaintiffs filed an amended complaint. The defendants' motions are technically directed at that earlier complaint, as opposed to the more recent -- and more important -- amended complaint. The plaintiffs point out that "defendants declined the opportunity to file new motions to the amended complaint and elected to treat the motions and briefs already filed as being addressed to the amended complaint." Pls.' Answering Br. at 2. In any event, the parties have proceeded on the understanding that the motions to dismiss (along with the associated briefs) are responsive to the amended complaint.

in another entity, not the two LLCs.² Thus, the sole theory that the plaintiffs press regarding the propriety of personal jurisdiction over Unger is that he is subject to jurisdiction under § 3104(c)(1) of the Delaware long-arm statute. The transactions of business in Delaware that the plaintiffs seek to attribute to Unger are the acts of the original founders of the LLCs in forming those entities in Delaware -- acts that occurred before Unger was even involved with the LLCs in any manner. The plaintiffs claim that these prior acts can be attributed to Unger because he allegedly claims to have become a member of the LLCs well after they were formed. As a factual matter, of course, this chain of inference is impossible without attributing supernatural powers to Unger and therefore § 3104(c)(1) is not satisfied. For that and other reasons, Unger's motion to dismiss is granted.

[*4] As to Conrad, the questions are a bit more difficult and numerous. The plaintiffs have made a *prima facie* showing that Conrad was a founding member, manager, and high-level officer of each of the LLCs. In two counts of their complaint, the plaintiffs seek a declaration that Conrad was properly removed as a manager of the two LLCs. Under *6 Del. C. § 18-110(a)*, Conrad may be served with process over these claims.

Somewhat more problematic are certain other claims against Conrad. Stated summarily, these allege that Conrad violated a provision of the LLCs' operating agreements that require their members, among other things, to offer their units to the other members before trying to sell them to third-parties. The plaintiffs seek various forms of relief tied to that central contention, the primary being declaratory relief clarifying exactly the ownership interests that Conrad (and impliedly others) hold or (the plaintiffs hope) do not hold in the LLCs.

Because there is *prima facie* evidence of Conrad's status as a manager of the LLCs, the plaintiffs argue that jurisdiction over him as to these counts exists under *6 Del. C. § 18-109(a)* [*5], **HN1** which permits an exercise of personal jurisdiction over a manager (as that term is defined in that subsection) "in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited liability

company . . ."³ These counts seek to resolve disputes regarding the manner in and price at which units of the Companies can be transferred under the Buy-Out Provision. This Provision can be viewed as touching on important aspects of the Companies' governance and basic nature, reflecting as it does a commitment by the founding members -- of which Conrad was one -- that the original members should have the opportunity to buy the other members' units before they passed into the hands of strangers.

Moreover, the (albeit confusing) record suggests that Conrad has in the past asserted that the Companies issued -- or committed to issue -- units to certain employees (including Unger), and that these units are therefore exempt from the reach of the Buy-Out [*6] Provision. Given the relation of all these issues to the business of the LLCs, § 18-109(a) is a proper basis for the assertion of personal jurisdiction under the teaching of *Assist Stock Management L.L.C. v. Rosheim*.⁴ Furthermore, as a founding manager, member, and top ranking officer of the two Delaware LLCs who personally participated in the choice to invoke the laws of this state to govern the internal affairs of those entities and the contractual duties running among their members, Conrad's constitutional right to due process is not offended by requiring him to face suit here on all the claims raised by the plaintiffs in this case.

For these reasons, I therefore grant Unger's motion to dismiss but deny Conrad's.

In the last portion of the opinion, I address Conrad's motion to stay this litigation in favor of other litigation filed against him by Cornerstone in Pennsylvania. Although this motion has been briefed in a somewhat sketchy way, I am convinced [*7] that a stay is in order. At the same time it seeks to have Conrad answer substantial claims in this court, Cornerstone -- at the instance of the Kanjorskis -- has filed serious breaches of fiduciary duty claims against Conrad in Pennsylvania and has secured a trial date for later this year. No sensible reason suggests itself why Cornerstone has split its claims against Conrad in this way because the fiduciary duty claims could have obviously been filed here, and there appears no obstacle to the claims filed here being asserted in the Pennsylvania action.

² As I shall also note later, Unger actually disclaims owning units in either of the Companies, and contends that he owns shares in another entity related to the Companies, which is not a party to this case.

³ Emphasis added.

⁴ 753 A.2d 974 (Del. Ch. 2000).

Furthermore, the Pennsylvania case has the added advantage that Unger is a party there and that others with a possible interest in the suit (e.g., the other possible recipients of unit transfers from Conrad) can be joined to that action. The absence of Unger (and other possible transferees of units from Conrad) from this suit, moreover, has a possible effect none of the parties has addressed. To the extent the plaintiffs seek (in Count I of their complaint) to rescind supposed transfers to Unger and other persons not before the court, the important policy concerns of Court of Chancery Rule 19 will also be implicated.

Although [*8] I will not dismiss this action in favor of the Pennsylvania action at this time, it is inefficient and needlessly burdensome for this action to proceed against Conrad simultaneously with a Pennsylvania action that is on a fast track to trial before the end of this year. Although a plaintiff's choice of forum is to be respected, its choice to multiply forums for no apparent purpose need not be indulged at the expense of the defendant's interests and the interests of judicial economy.

I. Procedural Framework

As a preliminary matter, it is useful to set forth the procedural framework that governs this motion. **HN2** On a Rulé 12(b)(2) motion, the court may consider the pleadings, affidavits, and any discovery of record, and may even hold an evidentiary hearing.⁵ The burden of showing a basis for the court's exercise of personal jurisdiction over a nonresident defendant rests with the plaintiffs.⁶ In a case like this one, when no evidentiary hearing has been held, the plaintiffs' burden is a relatively light one -- *i.e.*, they must only make "a prima facie showing that the exercise of personal jurisdiction is appropriate."⁷ And, in such a case, "the record is construed in the light [*9] most favorable to the plaintiff."⁸

A. The Facts

⁵ See 1 Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 3-3 (2003).

⁶ See *id.*; 2 James Wm. Moore et al., *Moore's Federal Practice* § 12.31(4) (3d ed. 2002).

⁷ 1 Wolfe & Pittenger, § 3-3; see *Hart Holding Co. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 539 (Del. Ch. 1991); *Francosteel Corp. v. M/V Charm*, 19 F.3d 624, 626 (11th Cir. 1994); 2 Moore, § 12.31(5).

⁸ 1 Wolfe & Pittenger, § 3-3; see *Computer People, Inc. v. Best Int'l Group, Inc.*, 1999 Del. Ch. LEXIS 96, 1999 WL 288119, at *5 (Del. Ch. Apr. 27, 1999); 2 Moore, § 12.31(5).

⁹ Cornerstone Operating Agreement § 6.5; Arastra Operating Agreement § 6.5.

1. The Formation of the Companies and the Pertinent Features of their Operating Agreements

Cornerstone and Arastra were both formed by three original members -- plaintiff Kor Holdings, plaintiff Peter A. Kanjorski, and defendant Conrad. The plaintiffs have made a *prima facie* showing that [*10] each of these three members -- including Conrad -- signed the operating agreement for each Company. In one of many unusual aspects to this case, Conrad admits signing the Cornerstone operating agreement but claims that the signature that purports to be his on the Arastra agreement was forged. For purposes of this motion, however, I must draw the inference that the signature on the Arastra agreement was put there by Conrad's own hand.

According to each operating agreement, Kor Holdings has a sixty percent membership interest, while Peter A. Kanjorski and Conrad each hold a twenty percent membership interest. Each of the operating agreements has a provision that requires a member to offer his interest in the Company to the other members and, if they decline, to the Company itself before offering to transfer such an interest to any other person (collectively I refer to the two provisions singularly as the "Buy-Out Provision"). Under each of the operating agreements, a member who does not comply with the Buy-Out Provision

shall . . . indemnify and hold harmless the Company and the other Members from all cost, liability, and damage that any such indemnified Persons may incur (including [*11] incremental tax liability and lawyers' fees and expenses) as a result of such Transfer or attempted Transfer and efforts to enforce the indemnity granted hereby.⁹

Each operating agreement provides for a board of managers to manage or direct the management of the business and affairs of the Company. And each

operating agreement establishes certain corporate offices, to be appointed by the board of managers. The Chief Executive Officer of each Company is the officer who is, under the operating agreements, responsible for the general management of the Company.

Finally, each operating agreement has a provision that authorizes the actions necessary to form each Company as a Delaware limited liability company.¹⁰ In other words, the members of the Companies contemplated that certain steps (e.g., a filing with the Delaware Secretary of State) would be necessary to formally form Cornerstone and Arastra as Delaware limited liability [*12] companies.

2. Conrad's Involvement with the Companies

At various points, Conrad served as President, Chief Executive Officer, and manager of Cornerstone and Arastra. The plaintiffs have produced evidence, in the form of a draft September 18, 2000 letter from Conrad to Richard M. Pell, to support their assertion that Conrad was formerly an officer of Cornerstone and Arastra. In that letter, Conrad claims to have been the President and Chief Executive Officer of Cornerstone, Arastra, and a related company.¹¹ [*13] And, according to the operating agreements, "the Chief Executive Officer shall serve as one of the Managers."¹²

3. Unger's Involvement with the Companies

Unger served as an employee of Cornerstone from December 1999 to May 2001. The plaintiffs allege that Unger claims to have come into possession of units in and thus become a member of the Companies. Unger allegedly came into possession of whatever units he owns by way of a September 18, 2000 purported assignment by Conrad to Unger and a May 20, 2001 purported assignment by David Carpenter to Unger.

In keeping with the odd nature of this record, Unger disclaims any ownership of units in either of the Companies. His co-defendant, Conrad, however, claims that Unger was promised a significant block of units to be issued to him once he became an employee.

4. The Chain of Events Leading to this Suit

There is little clarity about the precise nature of the disputes between the Kanjorskis and Unger and Conrad; what is relevant and can be discerned now follows.

It appears that at some point in time Conrad felt that certain employees of the Companies had been promised [*14] an equity stake of some kind in an August 15, 2000 agreement. I infer this from a September 18, 2000 letter attached to the complaint and a later letter. The September 18, 2000 letter purports to be from Conrad to Richard M. Pell, and states in pertinent part that:

As you know, on August 4, 2000, you signed an Equity Agreement dated August 15, 2000, which I countersigned in my capacity as President and CEO of Arastra . . . [and] Cornerstone. . . . At that time it was understood by me that the majority shareholders of the Companies had fully authorized the execution of that Agreement. I have since been informed otherwise.

If the majority shareholders do not ultimately authorize equity grants to you in an acceptable form, I am committed to making you whole for the commitment I made to each of you, Bob Marshall and Tom Unger, from equity which is totally in my control. If this document is accepted by you, I hereby cause to be assigned to you an undivided interest in my 20% holding in the Companies, such that you will have a call on the value of the 20% of the 20% held by me. While I cannot actually deliver shares to you, I intend to bind the value of this 4% equity interest [*15] to you as though it were formally held by you through the ownership of share certificates therefor.¹³

That is, all told Conrad (going only by the draft letter) purports to have attempted to transfer three-fifths of his twenty percent portion, or twelve percent of the Companies. The letter does not reflect any mention of

¹⁰ Cornerstone Operating Agreement § 1.1; Arastra Operating Agreement § 1.1.

¹¹ See Am. Compl. Ex. D ("As you know, on August 4, 2000, you signed an Equity Agreement dated August 15, 2000, which I countersigned in my capacity as President and CEO of Arastra, LLC, Cornerstone Technologies LLC, and Pennsylvania Micronics, LLC . . .").

¹² Cornerstone Operating Agreement § 3.3(b); Arastra Operating Agreement § 3.3(b).

¹³ Am. Compl. Ex. D.

the Buy-Out Provision. Also relevant is the implicit suggestion that Pell, Marshall, and Unger had been promised units in the Companies by Peter Kanjorski and Conrad, acting as Company managers. It is not clear from the record whether Pell, Marshall, or Unger accepted Conrad's offer.

The record then fast-forwards to May 6, 2001. On that day, a number of important events occurred involving the governance of Cornerstone and Arastra. First, Kor Holdings and Peter A. Kanjorski (as purported holders of a total of eighty percent of the original membership units of Cornerstone and Arastra, respectively, in accordance with the literal terms of the operating agreements) [*16] executed written consents that (1) removed Conrad as manager of Cornerstone and Arastra; (2) increased the number of managers of each Company to four; and (3) installed Peter A. Kanjorski, Russell P. Kanjorski, Mark A. Kanjorski, and Paul Eric Kanjorski (the "Kanjorskis") as the new managers. Second, the newly constituted boards of managers (1) removed Conrad from his position as President of each Company; (2) removed him from any other position with the Companies; (3) terminated his employment with the Companies; and (4) ended Conrad's ability to act on behalf of the Companies. Third, the boards elected Peter A. Kanjorski to the offices of Chief Executive Officer and President and Paul Eric Kanjorski to the offices of Secretary and Treasurer.

As might be expected, this action triggered the likelihood of lawsuits. In anticipation of legal action, it appears that on May 20, 2001, an individual named David Carpenter executed an assignment that purported to transfer Carpenter's entire interest in Cornerstone and Arastra to Conrad and Unger.¹⁴ According to the terms of the purported assignment, Conrad and Unger were each to receive fifty percent of Carpenter's (unspecified) holdings [*17] in the Companies. In exchange, Carpenter received one dollar and other "valuable consideration."

Also, in the May 20 document, Carpenter purported to "assign[] any rights he may have in litigation against Peter Kanjorski and others with respect to the [Companies]." ¹⁵ That assignment of litigation rights was to be equally divided between Conrad and Unger.

Notably, the assignment letter purporting to assign Carpenter's ownership interest does not indicate any attempt to comply with the Buy-Out Provision. Nor does the document explain how Carpenter acquired his interests in the Companies or his causes of action against Kanjorski and certain unnamed others, except to reference a supposed May 15, 1997 agreement.

In other litigation, Conrad has asserted that the May 15, 1997 agreement gave himself, [*18] Carpenter, and Unger nearly sixty percent of Cornerstone's equity -- and that the Kanjorski family was to own nearly 40%. Conrad implies that the equity allocation expressly set forth in the operating agreements is misleading, because Kor was only supposed to hold Unger's nearly twenty percent equity share until Unger became an employee. As indicated, consistent with the generally confusing nature of the record, Unger expressly disclaims any ownership interest in either of the Companies.

On May 30, 2001, Barry H. Dyller, who was then Conrad's lawyer, sent a letter to the plaintiffs' lawyer offering to sell to "the Kanjorski family or any member you designate" Conrad's twenty percent interest in Cornerstone for \$ 3.9881 million.¹⁶ This offer was expressly made as a confidential offer of settlement.

Finally, on August 16, 2002, the members of each Company voted to ratify the earlier May 6 appointment of managers and to elect those persons appointed on May 6 to the board of managers. That [*19] is, the Kanjorskis were elected to the board. On all of the motions made at the members' meetings, Peter Kanjorski and Kor Holdings (as represented by Peter Kanjorski) voted "yes." Bruce Conrad was absent and therefore did not vote on each measure.

B. The Pennsylvania Actions

There are three Pennsylvania state court actions that relate to the dispute before me. The first is an action filed by defendant Unger on February 12, 2002 in the Court of Common Pleas of Northampton County (the "Employment Action") against Cornerstone. In his complaint, Unger claims that Cornerstone unlawfully terminated him from his position as an executive

¹⁴ See Am. Compl. Ex. A.

¹⁵ *Id.*

¹⁶ Am. Compl. Ex. E.

employee of the Company. Unger argues that this termination violated the provisions of (1) an employment contract between Unger and Cornerstone and (2) the *Pennsylvania Human Relations Act*, in that Unger's termination was supposedly motivated by Unger's age. In the Employment Action, Unger does not assert any ownership interest in either Cornerstone or Arastra. Unger and Cornerstone are the only parties to the Employment Action.

The second of the related actions was filed against Conrad by Cornerstone in the Court of Common Pleas of Carbon County on [*20] July 2, 2002. In that action, Cornerstone sought the return of a company computer (or damages equal to its value) allegedly retained by Conrad after his termination by Cornerstone (the "Replevin Action"), as well as compensatory damages, punitive damages, and an award of attorneys' fees.

In response to the complaint in the Replevin Action, Conrad raised a number of preliminary objections, including that: (1) the actual owners of Cornerstone had not authorized the Replevin Action because Cornerstone is "59.5% owned by Mr. Conrad, Mr. Unger and Dr. Carpenter" ¹⁷; (2) there were two prior-filed actions (namely, the "Employment Action" and this Delaware action); and that (3) Cornerstone had failed to join certain indispensable parties. On January 15, 2003, the Northampton County Court of Common Pleas denied Conrad's preliminary objections in the Replevin Action. ¹⁸ Cornerstone and Conrad are the only parties to the Replevin Action.

[*21] The third action was filed by Cornerstone against Conrad and Unger on July 2, 2002 in the Court of Common Pleas of Carbon County (the "Equity Action"). In the Equity Action, Cornerstone complained that Conrad and Unger had breached their fiduciary duties, their duties as employees, and their obligations under certain confidentiality agreements, to Cornerstone, by, among other things, improperly disclosing Cornerstone trade secrets and engaging in illicit competition with the Company. Additionally, Cornerstone sought an injunction ordering Conrad and Unger to relinquish control over certain "tangible media" owned by Cornerstone, enjoining them from disclosing

Cornerstone trade secrets, and requiring them to account to Cornerstone for any benefit they received as result of any improper disclosure of Cornerstone trade secrets. And, Cornerstone sought a judicial declaration that certain inventions are its property.

Conrad filed preliminary objections to the Equity Action that were identical to the preliminary objections he filed in the Replevin Action, and reiterated his contention that Conrad, Unger, and Carpenter own 59.5% of Cornerstone's equity. On December 20, 2002, the Northampton [*22] County Court of Common Pleas overruled all of Conrad's (and Unger's separate) preliminary objections in the Equity Action. ¹⁹ In the Equity Action, Cornerstone is the only plaintiff, and Conrad and Unger are the only defendants.

On the same day that the judge overruled Conrad's and Unger's preliminary objections in the Equity Action, he entered an order coordinating that Action with the Employment Action and Replevin Action, with the result that all three Pennsylvania Actions will proceed in an essentially consolidated manner. That court, the Northampton County Court of Common Pleas, has set a schedule for the consolidated action that mandates that discovery be completed by July 1, 2003, that all dispositive motions be filed by July 15, 2003, and that trial begin on December 15, 2003. ²⁰

[*23] C. The Counts of the Complaint

In summary, the plaintiffs complain that Conrad and Unger are making certain false claims of ownership in Cornerstone and Arastra and that, as a result, uncertainty exists about who can make decisions for the Companies, an uncertainty that supposedly hampers the Companies' ability to deal with third parties. While conceding that Conrad enjoys a twenty percent stake in Cornerstone and Arastra, the plaintiffs seek a judicial declaration that Conrad's interest in the Companies is no more (or less) than that twenty percent and that Unger has no interest at all in the Companies.

The precise counts of the complaint can be grouped as follows:

1. The Ownership Count

¹⁷ Conrad's Prelim. Objections & Mot. for Summ. J. at 3 (capitalization and bold emphasis omitted).

¹⁸ See *Cornerstone Techs., LLC v. Conrad*, No. C0048CV20027475, order at 1 (Pa. Ct. Com. Pl. Jan. 15, 2003).

¹⁹ See *Cornerstone Techs., LLC v. Conrad*, No. C0048CV2002-7475, slip op. at 5 (Pa. Ct. Com. Pl. Dec. 20, 2002).

²⁰ See *Cornerstone Techs., LLC v. Conrad*, No. C0048CV2002007475, order at 2 (Pa. Ct. Com. Pl. Jan. 31, 2003).

In Count I, the plaintiffs seek a judicial declaration that Conrad owns solely a twenty percent stake in each of the Companies and that Unger enjoys no such ownership stake whatsoever. The Ownership Count is linked in an important way to the Buy-Out Counts, which I next summarize. The reason is that it is the conduct that is alleged in the Buy-Out Counts that gives rise to the plaintiffs' concern about the proportion of the Companies' equity that is owned by Conrad and Unger.

2. The [*24] Buy-Out Counts

In Count II, the plaintiffs complain that Conrad's offer to transfer four percent interests in the Companies to each of Pell, Marshall, and Unger violated the Buy-Out Provision. In other words, Conrad should have made an offer to sell the interests to his fellow members and the Companies before making such offers to Pell, Marshall, and Unger.

It is not clear from the record whether the plaintiffs allege that any of Conrad's offers were accepted. To the extent that Pell, Marshall, and/or Unger accepted Conrad's offer, I read the complaint as requesting an invalidation of the transfer(s). Even if the offers were not accepted, the complaint seems to seek a mandatory injunction requiring Conrad to offer the units he offered to Pell, Marshall, and Unger to the other members and/or the Companies who have rights under the Buy-Out Provision at the price that the Provision would have dictated as of September 18, 2000.²¹

In Count III, the plaintiffs argue that Conrad's settlement [*25] offer, by way of his attorney's letter, to sell his entire stake in Cornerstone to the Kanjorski family also violated the Buy-Out Provision of that Company's operating agreement. As in Count II, Count III seeks to require Conrad to put his equity to the parties having rights under the Buy-Out Provision in accordance with the terms that Provision would have dictated at the time Conrad made his settlement offer.²²

In Count IV, the plaintiffs request an award of attorneys' fees and other litigation expenses incurred in their

attempt to enforce the Buy-Out Provision. The plaintiffs argue that the operating agreements require any party that violates the Buy-Out Provision to indemnify the members and the Companies for all costs associated with enforcing the Buy-Out Provision and the indemnity provisions.

3. The Removal Counts

In Counts V and VI, the plaintiffs seek judicial confirmation of Conrad's removal as a manager and officer of the Companies. Furthermore, the plaintiffs want me to [*26] approve the managers' subsequent appointment of Peter Kanjorski as President and CEO and Paul Eric Kanjorski as Secretary and Treasurer of the Companies.

II. Analysis

To determine whether this court may exercise personal jurisdiction over Unger and Conrad, I must engage in a two-part analysis.²³ First, I must ask whether a statute of this state authorizes the exercise of personal jurisdiction over each of them. Second, I must determine whether such an exercise of jurisdiction would comport with the due process requirements of the *Fourteenth Amendment to the United States Constitution*.²⁴ **HN3** *The Fourteenth Amendment* requires that a nonresident defendant have certain "minimum contacts" with the forum jurisdiction "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"²⁵

[*27] I begin my analysis with defendant Unger.

A. Statutory Analysis

1. Unger

²¹ Am. Compl. at 5.

²² Am. Compl. at 6.

²³ See 1 Wolfe & Pittenger, § 3-3.

²⁴ See *Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd.*, 611 A.2d 476, 480-81 (Del. 1992), cert. dismissed, **507 U.S. 1025, 123 L.Ed. 2d 463, 113 S. Ct. 1836 (1993)**.

²⁵ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339 (1940)); see also *La Nuova D & B, S.p.A. v. Bowe Co.*, 513 A.2d 764, 769-70 (Del. 1986) (applying *International Shoe*).

The plaintiffs rely solely on the provisions of Delaware's long-arm statute²⁶ to support their claim that this court has personal jurisdiction over Unger. The plaintiffs concede²⁷ that the only relevant part of the long-arm statute is 10 Del. C. § 3104(c)(1), which provides:

HN4 (c) 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 or service in the State . . .

Section 3104(c)(1) HN5 is a "single act" provision of the long-arm statute.²⁸ As such, § 3104(c)(1) supplies a basis for personal jurisdiction "only with respect to claims that have a nexus to such [*28] forum-related conduct."²⁹ The plaintiffs have only pointed to two acts committed in the State of Delaware that have any relevance to this litigation -- *i.e.*, the acts of forming (1) Cornerstone and (2) Arastra as Delaware limited liability companies.

But the plaintiffs have not even alleged that Unger committed or caused to be committed either of these acts in the State of Delaware. Unger's name is noticeably absent from the operating agreements. He did not sign those agreements. He is not listed as a member in either agreement. There is no indication whatsoever that he had any role in the founding and formation of either Cornerstone or Arastra. Undeterred by these facts, the plaintiffs advance a novel legal argument -- that because Unger allegedly became a member of the Companies *later*, he should be treated for jurisdictional purposes as if he had *earlier* authorized these acts.

I refuse [*29] to adopt the plaintiffs' invitation to engage in metaphysics. Section 3104(c)(1), by its own terms, requires that the transaction of business in question be performed "in person or through an agent."³⁰ The plaintiffs have not produced any evidence showing that

Unger had anything to do with the filing of the limited liability company documents for Cornerstone and Arastra. Therefore, the plaintiffs have not met their burden to show that Unger transacted any business (either personally or through an agent) in Delaware. Section 3104(c)(1) thus does not supply this court with personal jurisdiction over Unger and his motion must be granted.

2. Conrad

I now turn to the plaintiffs' argument as to why personal jurisdiction exists over Conrad. As with Unger, the plaintiffs initially rely upon § 3104(c)(1). The plaintiffs argue that Conrad, by signing the operating agreements, authorized an individual (*i.e.*, an agent) to take certain actions in Delaware [*30] to effect the formation of Cornerstone and Arastra as Delaware LLCs.³¹ The plaintiffs contend that these acts in Delaware are sufficient to bring Conrad within the scope of § 3104(c)(1). Unlike Unger, however, Conrad cannot as easily disclaim his connection to the acts in Delaware necessary to form the Companies as Delaware LLCs because he was a founding member and top manager of them -- *i.e.*, he was an original joint venturer.

Two questions emerge regarding the act of forming the LLCs in Delaware. First, is it a transaction of business to form two Delaware LLCs through the Secretary of State's office? Second, if it is, do the claims against Conrad have a sufficient nexus to those acts to satisfy § 3104(c)(1)

I decline to reach either question, because I believe the plaintiffs have raised other more direct statutory grounds for the assertion of personal jurisdiction over Conrad. The second question is an important [*31] one and it is preferable to avoid addressing it without the necessity

²⁶ 10 Del. C. § 3104.

²⁷ See Pls.' Answering Br. at 6.

²⁸ See 1 Wolfe & Pittenger, § 3-5(a)(1)(i).

²⁹ *Id.*; see La Nuova, 513 A.2d at 768.

³⁰ 10 Del. C. § 3104(c).

³¹ See Cornerstone Operating Agreement § 1.1; Arastra Operating Agreement § 1.1.

to do so, especially given the less than ideal state of the briefing.³² of process:

[*32] I find it unnecessary to explore the outer regions of § 3104(c)(1)'s reach because two separate provisions of Delaware's LLC statute provide a sufficient basis to exercise personal jurisdiction over Conrad and no constitutional problem arises with their use.

First, § 18-110(a) sustains jurisdiction over Conrad as to those parts of the Removal Counts relating to his alleged removal and replacement as a manager of the Companies. Second, § 18-109 provides a basis for jurisdiction against Conrad on the other counts of the complaint. I begin with the manager Removal Counts.

a. 6 Del. C. § 18-110 and the Manager Removal Counts

HN7 The Delaware Limited Liability Company Act, 6 Del. C. § 18-110(a), allows this court, upon the application of a member or manager of a limited liability company, to

determine the validity of any admission, election, appointment, removal or resignation of a manager . . . and the right of any person to become or continue to be a manager . . . and, in case the right to serve as a manager is claimed by more than 1 person, [to] determine the person or persons entitled to serve as managers [*33]³³

Section 18-110(a) also provides for constructive service

HN8 In any such application, the limited liability company shall be named as a party and service of copies of the application upon the registered agent of the limited liability company shall be deemed to be service upon the limited liability company and upon *the person or persons whose right to serve as a manager is contested and upon the person or persons, if any, claiming to be a manager or claiming the right to be a manager*³⁴

Put simply, § 18-110(a) provides a clear basis for jurisdiction over Conrad as to those parts of the Removal Counts relating to his alleged removal and replacement as a manager of the Companies. In attempting to resist jurisdiction pursuant to § 18-110, Conrad makes an unusual argument. Namely he argues that he "cannot dispute [his removal as manager because] that has never occurred." Why [*34] was he never removed? Because Conrad claims that he "has never served as a manager of the companies nor has there ever been a board of managers [of the companies]." ³⁵ As such, Conrad in essence argues that he does not fall within the ambit of § 18-110(a) because he is not claiming to be a manager and his right to be a manager cannot be properly contested because the Companies have never had managers. And, indeed, with respect to Arastra, Conrad argues that its operating agreement is a forgery and therefore inoperative.³⁶

³² The reason the issues are important may be stated thusly. As to the first question, the Delaware Supreme Court's instruction that § 3104(c)(1) be read expansively would seem to counsel in favor of a conclusion that the actual formation of a Delaware entity, by way of a transaction with the Secretary of State, constitutes a transaction of business in Delaware. See *Hercules*, 611 A.2d at 480 ("[Section] 3104(c) **HN6** is to be broadly construed to confer jurisdiction to the maximum extent possible under the **Due Process Clause**."). Certainly, such a reading does no great violence to the statutory text as an actual transaction has been consummated that involves the payment of money in exchange for the right to form a new legal entity.

The more knotty policy question then becomes one of nexus. Should any claim for a later breach of the terms of the governing instrument of an entity be deemed to have the required nexus to the original transaction in Delaware that gave legal life to that instrument as a legally viable contract? If answered affirmatively, § 3104(c)(1) would operate -- subject to constitutional limitations -- to ensure service of process against any founder of a Delaware entity to whom the act of formation in Delaware can be attributed in any case involving the proper interpretation or possible breach of that entity's governing instrument. This broad sweep may possibly fulfill the our Supreme Court's command that the long-arm statute be construed liberally, but there is no reason to use this case to test that theoretical possibility.

³³ 6 Del. C. § 18-110(a).

³⁴ Emphasis added.

³⁵ Conrad's Answering Br. at 8.

³⁶ See *id.* at 8 & 10. I have inspected the copy of Arastra Operating Agreement submitted as an exhibit to the amended complaint and it appears that Conrad's signature is authentic. At this point in the proceedings, I therefore must conclude that the plaintiffs have met their *prima facie* burden of showing that Arastra has a valid operating agreement that Conrad signed.

If anything, Conrad's answering brief makes me more likely to believe there [*35] is a dispute regarding the governance and management of the Delaware LLCs at issue in this case. Conrad calls into question, among other matters, (1) his purported removal as manager and an officer of the Companies; (2) whether Arastra's operating agreement is valid; and (3) whether the Companies have boards of managers.

Moreover, Conrad's rather odd arguments do not suffice to defeat this court's jurisdiction over him. The plaintiffs have produced sufficient evidence to meet their *prima facie* burden to show that Conrad at one time claimed to be a manager -- and CEO -- of Cornerstone and Arastra. By the literal terms of the operating agreements, the CEO of the Companies was also to be a manager.³⁷ Thus, it is not irrational for the plaintiffs to wish to have a judicial declaration of the validity of Conrad's removal as manager.

[*36] **HN9** By the plain terms of § 18-110(a), "the Court of Chancery may hear and determine the validity of any admission, election, appointment, *removal* or resignation of a manager of a limited liability company."³⁸ And, the plaintiffs may constructively serve Conrad under § 18-110(a) because he is a "person . . . whose right to serve as a manager is contested." If, upon reflection, Conrad adheres to his view that he was never a manager of either Company, he is free to enter into a stipulated judgment to that effect. But his disclaimer of that status does not operate to divest this court of personal jurisdiction over him under § 18-110(a).

Furthermore, I conclude that because of Conrad's status as a manager, he can also be fairly asked to contest any question of his removal as President (and other offices, such as CEO) in this same action. As with § 3114 of the Delaware General Corporation Law, § 18-110(a) ought to be read sensibly to sweep in sufficiently related claims against an LLC manager [*37] so long as there would be no constitutional offense. Conrad was purportedly removed as President of the Companies (and from all other offices at the Companies) on the same day as he was allegedly removed as a manager.

There is thus a close nexus between these claims. And if there were any question on that score, it is obvious that another provision of our LLC statute subjects Conrad to this court's jurisdiction over his purported removal as CEO and President: § 18-109 of the LLC statute.

b. § 18-109 and the Removal, Ownership and Buy-Out Counts

Section 18-109 provides a basis for this court's exercise of personal jurisdiction over Conrad with respect to all of the counts of the complaint. Section 18-109(a) **HN10** permits an exercise of personal jurisdiction over a manager (as that term is defined in that subsection) "in all civil actions or proceedings brought in the State of Delaware *involving or relating to the business of the limited liability company or a violation by the manager . . . of a duty to the limited liability company, or any member of the limited liability company.*"³⁹

[*38] Clearly, the question of whether Conrad was properly removed as a manager, CEO, and President of the Companies relates to the business of the Companies. Therefore, § 18-109(a) covers the Removal Counts.

The broad scope of § 18-109(a) also allows this court to exercise personal jurisdiction over Conrad with respect to the Ownership and Buy-Out Counts of the complaint. In this case, the issue as to who owns what part of Cornerstone and Arastra (*i.e.*, the issue in the Ownership Count) is "related in some respect" to the management disputes underlying this case -- *i.e.*, it relates to the business of the Companies.⁴⁰

What is alleged is that a small group of joint venturers formed two Delaware LLCs under a contract with strict controls on who could join the ranks of members. To control that membership right, they put in place a strict Buy-Out Provision that required that members wishing to sell first offer [*39] their units back to the other founders, and if they decline, to the Companies themselves.

³⁷ This fact, coupled with Conrad's status as a founder, large unitholder, and top officer, as well as the reality that the Kanjorskis went to the trouble to vote Conrad off as a manager of both Companies, provides a sufficient factual foundation for me to assume that Conrad was a manager at all relevant times before his purported removal in May 2001.

³⁸ Emphasis added.

³⁹ Emphasis added.

⁴⁰ See Assist Stock Mgmt. L.L.C. v. Rosheim, 753 A.2d 974, 981 (Del. Ch. 2000).

The equity ownership of the Companies is allegedly clouded because of Conrad's purported failure to abide by that important term in the Companies' operating agreements. As critical, the debate about who owns what has its origins in a dispute about whether Conrad and Peter Kanjorski -- as managers and joint venturers -- agreed to issue equity in the Companies to Unger and the mysterious David Carpenter in 1997 as well as to certain employees in the year 2000.

In view of the importance of these issues to the capital structure and control of closely-held Delaware LLCs, they obviously relate to the business of those Companies and fall within the literal terms of § 18-109. Put simply, the confusion about ownership arises out of disputed managerial acts. Did the companies promise to issue units to Carpenter and Unger in 1997 and to Unger and certain other employees in 2000? That is, the question of who owns what units depends in a material way on actions Conrad and others took as managers of the Companies. Likewise, these issues also bear a relationship to the validity of the votes removing Conrad [*40] as a manager because they

relate to the question of whether the plaintiffs had sufficient voting power to cast Conrad out. That is, all of these issues relate to the business of the Companies and therefore satisfy the literal terms of § 18-109(a).

In so concluding, I reach a conclusion consistent with this court's well-reasoned decision in *Assist Stock Management L.L.C. v. Rosheim*.⁴¹ In that decision, Vice Chancellor Lamb respected the General Assembly's decision to write § 18-109 more broadly than § 3114 of the DGCL, by investing this court with personal jurisdiction over managers in disputes "involving or relating to the business of" their LLCs.⁴² [*41] He held that this language must be given effect and that protection against an unconstitutional application of the statute can be afforded by the minimum contacts analysis.⁴³

Here, I conclude that all of the Counts bear a clear relation to the business of the LLC and that § 18-109 is satisfied, subject to a minimum contacts analysis.⁴⁴

[*42] B. Constitutional Analysis

⁴¹ 753 A.2d 974 (Del. Ch. 2000).

⁴² In *Assist*, Vice Chancellor Lamb held that a dispute about the ownership interests a manager had in an LLC could be adjudicated when "the ownership question is related in some respect to the [management] matter" in dispute. *Id.* at 981.

⁴³ See *Assist*, 753 A.2d at 980.

⁴⁴ I bear some concern about the Buy-Out Count dealing with Conrad's offer to sell his stake in Cornerstone to the Kanjorski family (Count III). As Conrad has noted, it is clear that Conrad's offer was part of a confidential settlement proposal, and, as such may be inadmissible under Delaware Uniform Rule of Evidence 408. Indeed, Conrad's attorney's letter is clearly marked "**FOR SETTLEMENT PURPOSES ONLY**." In other words, by making his settlement offer, Conrad was attempting to terminate a dispute by offering to sell his interests to the Kanjorskis -- the functional equivalent of offering his units to Kor and Peter Kanjorski. Whether such an offer to settle can be conceived of as a breach of the Buy-Out Provision is obviously a matter of some doubt.

Notwithstanding any doubts about the ultimate sustainability of Count III, Conrad can be subjected to this court's personal jurisdiction as to that count. Although Conrad's offer to settle was made after his purported removal as manager of the Companies, Count III is sufficiently related to the other counts in the complaint such that an exercise of personal jurisdiction over Conrad with respect to Count III is proper. *Assist*, 753 A.2d at 981 **HN11** (when a defendant is subject to personal jurisdiction under § 18-109 as to certain claims, the court may exercise personal jurisdiction over him as to other sufficiently related claims, and citing a § 3114 decision, *Manchester v. Narragansett Capital, Inc.*, 1989 Del. Ch. LEXIS 141, 1989 WL 125190 (Del. Ch. Oct. 18, 1989), in support of that proposition); see also *Infinity Investors Ltd. v. Takefman*, 2000 Del. Ch. LEXIS 13, 2000 WL 130622, at *6 (Del. Ch. Jan. 28, 2000) **HN12** ("Once jurisdiction is properly obtained over a non-resident director pursuant to § 3114, such non-resident director is properly before the Court for any claims that are *sufficiently related to the cause of action* asserted against such directors in their capacity as directors."), clarified by, 2000 Del. Ch. LEXIS 39, 2000 WL 268302 (Del. Ch. Feb. 17, 2000); *Jaffe v. Regensberg*, 1980 WL 3039, at *2 (Del. Ch. Jan. 10, 1980) **HN13** ("under § 3114, the relief sought is not the guiding factor because if jurisdiction attaches at all under the statute, the nonresident is before the Court for any and all relief that might be necessary to do justice between the parties by virtue of the fact that the jurisdiction conveyed by the statute is in personam jurisdiction."); 1 Wolfe & Pittenger, § 3-5(a)(2)(iv) (discussing Delaware cases holding that **HN14** "once a nonresident director is properly before a Delaware court by reason of Section 3114, that director is properly before the court for any relief that the facts may require, even if such relief technically operates against the director in some other capacity, such as that of a stockholder.").

Because 6 Del. C. §§ 18-109 and 18-110 provide statutory bases for an exercise of personal jurisdiction with respect to Conrad, I briefly address the constitutional inquiry. As I noted earlier, **HN15** the due process clause of the Fourteenth Amendment requires that a nonresident defendant have certain "minimum contacts" with the forum jurisdiction "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."⁴⁵ When determining whether these "minimum contacts" are present, the court should inquire whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."⁴⁶ [*43] Once the defendant's minimum contacts with the forum have been established, the court should turn its analysis to issues of fairness and justice.⁴⁷

With respect to the "minimum contacts" analysis, it is clear that Conrad purposefully availed⁴⁸ himself of the benefits and protections of Delaware law and that he cannot be surprised to face this lawsuit here. Conrad and his co-venturers could have formed Cornerstone and Arastra as Pennsylvania entities. Instead, they purposely looked to a neighboring state as a place to domicile their Companies and to provide the governing law for their relations. Not only that, Conrad took on the position of manager, CEO, and President of these Delaware Companies, knowing that as a manager he would be subject to jurisdiction for disputes here relating to the business of the Companies.

As such, Conrad should not be surprised that he has been haled into a Delaware court when disputes have arisen over the governance [*44] of those Delaware LLCs relating to such fundamental issues as whether he is still a manager or officer, whether he violated the Buy-Out Provision and what that Provision means, and

whether he, as manager, issued equity to certain individuals.⁴⁹

Nor is there anything unfair or unjust about the exercise of personal jurisdiction over Conrad by this court. As a resident of a neighboring state who purposely participated in the founding of the LLCs in Delaware, Conrad will face only minimal inconvenience by having to respond to the claims made against him in this Delaware court action regarding those entities. Moreover, this state has a strong interest in resolving disputes regarding the internal affairs of LLCs formed under its laws.⁵⁰

[*45] Because personal jurisdiction over Conrad is authorized by Delaware statutory law and is not constitutionally infirm, his motion to dismiss for lack of personal jurisdiction will be denied.

III. Service of Process

I recognize, as pointed out by Conrad,⁵¹ that service of process on him was not properly effected pursuant to 6 Del. C. § 18-109. Instead, the plaintiffs served the defendants under 10 Del. C. §§ 3104 and, inexplicably, 3114. Conrad never raised this issue by way of a formal motion. Given this fact, along with the fact that Conrad received *actual notice* of this suit, equity and common sense counsel in favor of giving the plaintiffs leave to properly serve defendant Conrad pursuant to 6 Del. C. § 18-109.⁵² Thus, the plaintiffs shall have leave until April 15, 2003 to effect proper service.

IV. Conrad's Motion to Dismiss or Stay this Action in Favor of the Pending Pennsylvania Consolidated Case

In various of his letters to the court, *pro se* defendant Conrad pointed to the inconvenience of facing litigation

⁴⁵ Int'l Shoe Co., 326 U.S. at 316 (citation and internal quotation marks omitted).

⁴⁶ World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980).

⁴⁷ See Burger King Corp. v. Rudzewicz, 471 U.S. 462 at 476-77, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).

⁴⁸ See Burger King Corp., 471 U.S. 462 at 475.

⁴⁹ See Burger King Corp., 471 U.S. 462 at 474; World-Wide Volkswagen Corp., 444 U.S. at 297.

⁵⁰ Cf. Assist, 753 A.2d at 981 **HN16** ("Delaware has a strong interest in providing a forum for disputes relating to the ability of managers of an LLC formed under its law to properly discharge their respective managerial functions.").

⁵¹ See Letter from Bruce Conrad to Vice Chancellor Leo E. Strine, Jr. 2 (Mar. 7, 2003).

⁵² See Assist, 753 A.2d at 982 (permitting plaintiff to cure a technical defect in service of process when it appeared that proper service, if made, would be effective to invoke the court's personal jurisdiction over the defendant).

from Cornerstone in both this state and Pennsylvania. To surface the issue, the court asked the parties to file submissions relating to whether I should stay or dismiss this action pursuant to *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*⁵³ or on other grounds.

Without burdening the reader with a fulsome explanation of the difficulty of applying *McWane* here,⁵⁴ [*47] I proceed to articulate why I believe that I should use my inherent discretion to control my docket and enter a stay.⁵⁵

In the Equity Action, Cornerstone -- a key plaintiff here who is putatively controlled by the Kanjorskis through Kor -- seeks to litigate breach of fiduciary duty claims against Conrad. That action also involves defendant Unger, whom I have concluded is not subject to this court's personal jurisdiction. The Equity Action, and the other related Pennsylvania actions, are all set to go to trial as consolidated cases later this year.

It remains mysterious to me why the plaintiffs have chosen to spread their claims against Conrad over the court systems of two states. By all measures, it is (modestly) more geographically convenient to litigate this case in Pennsylvania for everyone concerned. Given Cornerstone's own choice to litigate certain Delaware claims -- *i.e.*, the fiduciary duty claims -- in Pennsylvania, its desire to have a Delaware court adjudicate its other Delaware law claims is inexplicable. Furthermore, it is apparent that the Pennsylvania courts can exercise jurisdiction over Unger and the other [*48] parties to whom the plaintiffs believe Conrad either sold or offered to sell the Companies' units.

Given these realities, it is not at all apparent why commercially sensible litigants would engage in litigation

tactics of the kind the plaintiffs here have. Whatever the motivation, proper or improper, this court need not indulge the plaintiffs' whim for simultaneous conflict in two different forums of its own choosing against one *pro se* defendant.

Instead, I will stay this action indefinitely, with a view towards permitting Cornerstone to complete its lawsuits against Conrad and Unger in Pennsylvania in accordance with the schedule already established in that case. This will conserve the parties' resources, as well as those of this court. If the plaintiffs are concerned about this method of proceeding, they might usefully consider whether they are actually permitted to split their claims in the fashion they have⁵⁶ and whether it might not be more sensible for them to raise all of their claims against Conrad, Unger, and related parties in one forum that is convenient. In this regard, it is noteworthy that the plaintiffs have failed to provide any reason to believe that the claims [*49] they plead here could not be asserted in the consolidated action pending in Pennsylvania. Put simply, any inconvenience to the plaintiffs of the method of proceeding I have imposed is self-inflicted and is outweighed by the burden to Conrad of fighting two battles on two separate fronts at once for no substantial reason.

[*50] Therefore, I grant Conrad's motion for an indefinite stay.

V. Conclusion

For the reasons expressed, (1) Unger's motion to dismiss for lack of personal jurisdiction is granted; (2) Conrad's motion to dismiss for lack of personal jurisdiction is denied; and (3) Conrad's motion for a stay is granted. The stay shall remain in effect indefinitely, but the plaintiffs may perfect service of process on

⁵³ 263 A.2d 281 (Del. 1970).

⁵⁴ One of the reasons it is awkward to shoe-horn this case under *McWane* is that none of the other actions were filed in the first instance by Conrad. Indeed, the two relevant Pennsylvania Actions were filed by Cornerstone and basically involve the Kanjorskis litigating (through Cornerstone) as plaintiffs against Conrad as a defendant.

⁵⁵ See *Joseph v. Shell Oil Co.*, 498 A.2d 1117, 1123 (Del. Ch. 1985).

⁵⁶ Both this state and Pennsylvania frown on claim splitting. *HN17* When a party can raise all claims it has against a defendant in one forum at one time, it is generally obligated to do so. See, e.g., *Maldonado v. Flynn*, 417 A.2d 378, 382 (Del. Ch. 1980) ("The rule against claim splitting is an aspect of the doctrine of *res judicata* and is based on the belief that it is fairer to require a plaintiff to present in one action all of his theories of recovery relating to a transaction, and all of the evidence relating to those theories, than to permit him to prosecute overlapping or repetitive actions in different courts or at different times."); *Coleman v. Coleman*, 361 Pa. Super. 446, 522 A.2d 1115, 1120 (Pa. Super. Ct. 1987) ("The courts of this Commonwealth have long adhered to the generally accepted view disfavoring the splitting of claims.").

Conrad and may move to lift the stay no earlier than March 1, 2004 or the date of the final termination of the Pennsylvania Equity Action.⁵⁷ IT IS SO ORDERED.

⁵⁷ Of course, whatever actions the plaintiffs will need to take to effect proper service of process over Conrad by April 15, 2003 are exempt from the stay.

EXHIBIT 6

E.I. DUPONT DE MEMOURS & CO. v. SHELL OIL CO.

Court of Chancery of the State of Delaware, New Castle

December 13, 1983

No. 6696

Reporter

1983 Del. Ch. LEXIS 561

E.I. DUPONT DE MEMOURS & CO. v. SHELL OIL CO.

LexisNexis® Headnotes

Core Terms

parties, joined, joinder, indispensable party, declaration, Appeals, License, decree, cases, judgment rendered, Provident, feasible, courts, rights

Case Summary

Procedural Posture

In plaintiff licensor's declaratory judgment action, the licensor and defendant licensee sought a ruling as to whether a non-party should have been joined as a party under Fed. R. Civ. P. 19.

Overview

The licensor brought a declaratory judgment action against the licensee to determine if a contract between the licensee and a non-party violated a no sub-licensing provision of a licensing agreement between the licensor and the licensee. The court, *sua sponte*, raised the question as whether the non-party should have been made a party to the suit pursuant to Fed. R. Civ. P. 19. The court concluded that the non-party was not an entity as described in Fed. R. Civ. P. 19(a)(1) or Fed. R. Civ. P. (a)(2), thus it was not an indispensable party. The court held that by confining the licensor to direct its proof to a construction of the licensing agreement only, without reference to the contract between the licensee and the non-party, the licensor could obtain complete relief. Thus, the court held, it was not necessary to join the non-party.

Outcome

In the licensor's declaratory judgment action against the licensee, the court held that a non-party need not be joined as a party to the suit.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Parties > General Overview

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN1 Fed. R. Civ. P. 19(a) reads as follows: (a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the Court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN2 Fed. R. Civ. P. 19(b) states: (b) Determination by Court Whenever Joinder Not Feasible. If a person as

described in paragraph (a)(1) and (2) hereof cannot be made a party, the Court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the Court include: First, to what extent a judgment rendered in the person's absence might be prejudicial to him 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.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN3 The four interests which are to be weighed in the balancing procedure are outlined in Fed. R. Civ. P 19(b) as follows: First, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provision 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. Fed. R. Civ. P. 19(b); Del. Ch. Ct. R. 19(b).

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

Civil Procedure > Judgments > Entry of Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > Nonparties Affected by Judgment

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN4 To say that a court must dismiss in the absence of an indispensable party and that it cannot proceed without him puts the matter in the wrong way around: a court does not know whether a particular person is indispensable until it has examined the situation to determine whether it can proceed without him. The

decision requires the term indispensable to be treated in a conclusory fashion and not in an evaluative way. The analysis a court should utilize in order to reach the conclusory stage is as follows: After it is settled that a party should be joined if feasible but cannot be joined, the four interests of Fed. R. Civ. P. 19(b) are implicated. Since the outsider is not before the court, he cannot be bound by the judgment rendered. This means, however, only that a judgment is not res judicata as to, or legally enforceable against a nonparty. It obviously does not mean either (a) that a court may never issue a judgment that, in practice, affects a nonparty or (b) that to the contrary, a court may always proceed without considering the potential effect on nonparties simply because they are not bound in the technical sense. Instead, as Fed. R. Civ. P. 19(a) expresses it, the court must consider the extent to which the judgment may as a practical matter impair or impede his ability to protect his interest in the subject matter.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN5 Fed. R. Civ. P. 19(b) also directs a district court to consider the possibility of shaping relief to accommodate the four interests. And the Rule now makes it explicit that a court should consider modification of a judgment as an alternative to dismissal. If the court is unconvinced that the threat to the non-joined party is trivial, it can nevertheless avoid all difficulties by a proper phrasing of the decree.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN6 A party should be joined if: (1) in his absence complete relief cannot be accorded among those already made parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may(i) as a practical matter impair or impede his ability to protect that or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. Del. Ch. Ct. R. 19(a)(1), (2).

Opinion by: [*1] LONGOBARDI

Opinion

LONGOBARDI, Vice-Chancellor

In 1968, E.I. du Pont de Nemours and Company, Incorporated ("DuPont") and Shell Oil Company

("Shell") entered into a patent license agreement ("License Agreement") which granted Shell the following: "a nonexclusive license, without the right to sublicense, to become effective January 1, 1973, to make, have made, use and sell for use and resale METHOMYL . . . under the DuPont Patents Rights."

In 1981, Shell entered into two agreements with Union Carbide Agricultural Products Company, Inc. ("Carbide"). One was a Toll Conversion Agreement and the other a Purchase and Sale Agreement ("Shell/Carbide Agreements"). Under the Toll Conversion Agreement, Carbide will manufacture methomyl for Shell. Under the Purchase and Sale Agreement, Carbide will purchase most of the methomyl that it produces for Shell. In February, 1982, DuPont brought this declaratory judgment action claiming that the Shell/Carbide Agreements constitute a sublicense in violation of the License Agreement.

Based on a pretrial conference, the documents in the record and the statements of counsel, the Court raised sua sponte the question of whether Carbide should not be [*2] made a party to this action. The Court received briefs from parties and heard oral argument. This is the Court's decision on that issue.

Suffice it to say that up to this point, the record is replete with references to the Shell/Carbide Agreement and Plaintiff's requests that the Shell/Carbide Agreements be declared in violation of the License Agreement. It was these generalized references to the relief requested that prompted the Court to query whether this action should proceed without Carbide. Considering the thrust of the legal arguments made, the Court became concerned that it was being inextricably drawn into a controversy that was apparently between Shell and DuPont but which would inevitably lead to a construction of the Shell/Carbide Agreement. All of this would have been done in Carbide's absence from the case. The final question was whether this case should proceed to trial without Carbide being joined as a party.

Chancery Court Rule 19(a) and (b) are identical to Federal Rule 19(a) and (b). Consequently, references to Federal precedents are obviously appropriate. The Rule has a long and complicated history replete with references to "indispensable party." The [*3] designation has a place in the current rule but the context of its use has been sorely misused. Indeed, the words "indispensable party" can be found in Rule 19(b) but the process of utilizing the term is somewhat different today from the process used in the past.

The idea of necessary joinder of parties extends back to the English Court of Chancery. Equity required all persons whose interests might be affected to be before the court because a decree, as opposed to a judgment of law, was to be a meaningful and complete resolution of the controversy. See Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich. L. Rev. 327, 331 (1957). This result could only be achieved if every party to be affected by the decree and bound by it was before the Chancellor.

The guidelines employed by the seventeenth century Chancery Court were highly practical and sensible. Generally, all interested persons were required to be joined as parties except where it was impossible, inconvenient or unduly burdensome. This joinder decision was made on a case-by-case basis. In one situation, however, joinder was almost always ordered: where the defendant was in substantial risk of being subject to [*4] multiple liability. See Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Col. L. Rev. 1254, 1260-62 (1961).

What became known as the "necessary party rule" developed during the seventeenth and eighteenth centuries and it provided the Chancery Court with rules to make the necessary determinations.

Decisions emanating during the late eighteenth and nineteenth centuries, however, posed a confusing analysis of the procedural rules. Out of the dicta of both the "wrongly" decided cases and the properly decided cases grew a concept quite contrary to a pragmatic approach to compulsory joinder. The courts began to avow that equity must do complete justice or none at all. Stated differently, if the proposed decree did not completely and finally resolve all issues in the case at bar, the case had to be dismissed. This additional requirement to the "necessary party rule" displaced much of the sensibility of that previous approach and this new transformation was referred to as the "indispensable party doctrine."

In 1787, Lord Chancellor Thurlow remarked that because of absent parties, his decree could not dispose of the case in its entirety and it, therefore, [*5] should not be forthcoming. *Fell v. Brown*, 2 Bro.C.C. 276, 29 Eng.Rep. 151 (Ch. 1787). Although the perplexities of the case discussed by the Chancellor were merely dicta, it nevertheless had the effect of producing a long line of cases applying the Chancellor's thought as a

hard and fast rule. The irony of the situation is that the actual holding in *Fell v. Brown*, supra, turned on the fact that the Chancellor decided to have the case "stand over" because the missing party would soon be within the court's jurisdiction and, thus, could then be joined. *Fell v. Brown*, supra, at 279. But, as is often the result, the dicta in *Fell v. Brown*, supra, had a much stronger impact than did its holding.

The American courts borrowed the English courts' approach on the joinder problem, spreading the ill-conceived "indispensable party" analysis across America. The federal courts, being in special need of a rule for joinder of parties, adopted the English approach¹ and regrettably preserved that analysis for American jurisprudence for many years thereafter.

[*6] Probably one of the most influential United States Supreme Court cases dealing with the "indispensable party" issue was *Shields v. Barrow*, 58 U.S. (17 How.) 130 (1854). The *Shields* case defined both necessary parties and indispensable parties, was often quoted and relied on in subsequent federal and state courts and, consequently, was a compelling force behind the formulation of the 1938 Federal Rules of Civil Procedure 19.

The definitions suggested by the *Shields* court are workable and make sense. Necessary parties were:

Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it . . . but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties.

Shields, 58 U.S. at 139.

Indispensable parties were: "Persons who not only have an interest in the controversy, but an interest [*7] of such a nature that a final decree cannot be made without either affecting that interest, or leaving the

controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. . ." Id. The unfortunate aspect is that the United States Supreme Court, instead of applying its own definitions to the circumstances in the case, fell prey to the less-reasoned approach of simply labelling the parties involved and relying on the accuracy of those labels to reach its conclusion. The *Shields* court held that because the circuit court could not have done "complete and final justice" "as between the parties originally before it," the original bill should have been dismissed. *Shields*, supra, at 146.

After many years of decisions based on assumptions gleaned from cases such as *Fell v. Brown*, supra, *Milligan v. Milledge*, supra, and *Shields v. Barrow*, supra, in 1938, the Federal Rules of Civil Procedure were adopted including Rule 19 which stated in pertinent part:

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side [*8] as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance of if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

¹ Hazard points out the primary reason why the federal courts eagerly used the English joinder rule was because of the inherent difficulties found in reconciling joinder and diversity jurisdiction. This particular problem served only to add to the confusion in applying the Rule. The first reported federal case to employ the "indispensable party" doctrine was *Milligan v. Milledge*, 7 U.S. (3 Chanc) 220 (1805). See Hazard, Indispensable Party, 61 Col.L.Rev. at 1277.

This Rule has since been changed ²; it is now entitled "Joinder of Persons Needed for Just Adjudication" and **HN1** reads as follows:

(a) **[*9]** Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the Court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

HN2 (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in paragraph (a)(1) and (2) hereof cannot be made a party, **[*10]** the Court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the Court include: First, to what extent a judgment rendered in the person's absence might be prejudicial to him 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. ²

Perhaps the most telling example illustrating why the reformulation of Rule 19 was a necessity is found in the opinion of the United States Court of Appeals for the Third Circuit in *Provident Tradesmens B. & T. Co. v. Lumbermens Mut. Cas. Co.*, 365 F.2d 802 (3d Cir. 1966), **[*11]** vacated and remanded sub nom *Provident Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). The timing involved in this case is noteworthy: The Court of

Appeals heard argument on June 9, 1966; new Rule 19 was adopted on July 1, 1966; the Court of Appeals' decision was published on August 30, 1966.

Provident Tradesmens B. & T. Co. v. Lumbermens Mut. Cas. Co., *supra*, involved an automobile accident in which the driver of a car owned by Edward S. Dutcher, Donald Cionci, and his passenger, John R. Lynch, were killed when they struck a truck driven by Thomas W. Smith. Another of Cionci's passengers, John L. Harris, was injured. Lynch's estate obtained a default judgment in the United States District Court for Pennsylvania against Cionci's estate because the insurance carrier for the car, Lumbermens Mutual, refused to defend the suit on the grounds that Cionci was allegedly without authority from Dutcher to have driven to the place where the accident occurred. Lynch then filed suit against Lumbermens Mutual and Cionci in the same court for a declaration that the insurance policy, in fact, covered the accident. Lumbermens Mutual joined Smith's estate and Harris but Dutcher was not joined.

[*12] The District Court held for plaintiff and Lumbermens Mutual appealed.

During argument before the Court of appeals, a circuit judge questioned whether Dutcher was an indispensable party to the declaratory action. The Court of Appeals ultimately found that Dutcher, the named insured in the policy, was an indispensable party who was not joined at the trial level and, therefore, vacated and remanded the case with directions to dismiss the action.

The United States Supreme Court granted certiorari because the decision in the Court of Appeals "presented a serious challenge to the scope of the newly amended Rule 19. . . ." *Provident Bank & Trust Co. v. Patterson*, *supra* at 107. The United States Supreme Court reversed the opinion "[c]oncluding that the inflexible approach adopted by the Court of Appeals . . . exemplifies the kind of reasoning that the Rule was designed to avoid. . ." *Id.*

The Patterson court reasoned that Dutcher was a party to be "joined if feasible" and, therefore, fulfills the Rule 19(a) subsection. Joinder of Dutcher, however, would have denied the District Court of jurisdiction, thus preventing the plaintiff from bringing suit. The Under States Supreme Court **[*13]** was thereby presented a

² For a comprehensive discussion of the events which led to the amended Federal Rules of Civil Procedure 19, see Fink, Indispensable Parties and the Proposed Amendment to Federal Rule 19, 74 Yale L.J. 403 (1965).

Rule 19(b) situation (where joinder is not feasible) and the analysis which was then undertaken was a balancing of factors for determining whether the suit had to be dismissed.

HN3 The four "interests" which are to be weighed in the balancing procedure are outlined in Rule 19(b) as follows:

First, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provision 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.

Fed. R. Civ. P. 19(b); Ch. Ct. R. 19(b). In considering these four factors "in equity and good conscience", the United States Supreme Court vacated and remanded the decision of the Court of Appeals preserving the District Court's judgment.

This Court regards the United States Supreme Court's decision in *Patterson* as the final word on Rule 19 applications. It sheds a discerning light on an area of the law strewn with [*14] a multitude of contradictory decisions. Suffice it to say that most would be impossible to reconcile. This disturbing state of affairs is not solely due to a misunderstanding of Rule 19; it is partly the effect of a Rule that inherently must be applied on a case-by-case basis requiring, at times, what must appear to be disparate results.

The passage in *Patterson* which perhaps carries the most significance is this:

HN4 To say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him puts the matter in the wrong way around: a court does not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him.

Patterson, 390 U.S. at 119. The decision requires the term "indispensable" to be treated in a conclusory fashion and not in an evaluative way.

The analysis a court should utilize in order to reach the conclusory stage is also set out in *Patterson*. After it is

settled that a party should be joined if feasible but cannot be joined, the four "interests" of Rule 19(b) are implicated. Not intending to diminish the importance of the other "interests", the United [*15] States Supreme Court emphasized the "interest" held by the nonjoined party, likening that "interest" to the one expressed in Rule 19(a)(2)(i);

Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered. This means, however, only that a judgment is not *res judicata* as to, or legally enforceable against a nonparty. It obviously does not mean either (a) that a court may never issue a judgment that, in practice, affects a nonparty or (b) that (to the contrary) a court may always proceed without considering the potential effect on nonparties simply because they are not "bound" in the technical sense. Instead, as Rule 19(a) expresses it, the court must consider the extent to which the judgment may "as a practical matter impair or impede his ability to protect" his interest in the subject matter.

Patterson, 390 U.S. at 110 (footnotes deleted).

Above and beyond the consideration a court is to give to the four interests enunciated in Rule 19(b), it must be remembered that the policy for which the amended Rule stands is that dismissal of a case is a last resort. This overriding policy is abundantly clear in the *Patterson* opinion, as well [*16] as in the Rule itself. The words of the United States Supreme Court evidence this intent: **HN5** "Rule 19(b) also directs a district court to consider the possibility of shaping relief to accommodate these four interests. . . [A]nd the Rule now makes it explicit that a court should consider modification of a judgment as an alternative to dismissal." *Patterson, 390 U.S. at 111-12* (footnotes deleted); and, "If the [court] was unconvinced that the threat to [the non-joined party] was trivial, it could nevertheless . . . avoid [. . .] all difficulties by a proper phrasing of the decree."

Following the analysis suggested by the United States supreme Court in *Patterson* and by this Court in *Rittenhouse Associates, Inc. v. Frederic A. Potts & Co., Inc., Del.Ch., C.A. No. 6286, Longobardi, V.C. (August 1, 1983)*, this Court must first determine whether Carbide is a party as described in Rule 19(a). As quoted above, Carbide **HN6** should be joined if:

(1) in his absence complete relief cannot be accorded among those already made parties, or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may

(i) as a practical [*17] matter impair or impede his ability to protect that or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Ch.Ct.R. 19(a)(1), (2).

In order to resolve that question, the Court must look to the relief sought by the parties. DuPont has requested "the Court declare, pursuant to 10 Del.C. § 6501, et seq., that Shell's arrangements with Carbide is not pursuant to, or authorized by, Shell's agreement with DuPont." (See DuPont Complaint, D.E. 1). At argument on the Rule 19 issue held on October 19, 1983, counsel for DuPont stated affirmatively that DuPont was not asking the Court to construe and/or declare any rights under the Shell/Carbide Agreements. Considering that fact, it appears that an appropriately narrow declaration could be granted if the evidence supports granting Plaintiff the relief it requests. The implications of such a conclusion dictate the parameters of the issues and the scope of evidentiary latitude that must be observed during the course of trial. If, for instance, DuPont is confined to directing its proof to a construction of [*18] the License Agreement, complete relief can be afforded the parties to this law suit. Under no circumstances will the issues and evidence at trial or the declaration that may emanate from the trial construe the Shell/Carbide

Agreement. Fashioning the declaration in this restrictive way provides DuPont with all the relief it finally has requested and it satisfies the requirements of Rule 19(a)(1).

Although it may not be necessary, the Court is satisfied that Rule 19(a)(2) is also not applicable. Without being a party, any declaration would certainly not be considered *res judicata* and, as a legal and practical matter, Carbide could easily have its rights under the Shell/Carbide Agreement construed by another forum. This is not to say that the implications of any declaration concerning the License Agreement will not have ramifications between Shell and Carbide. It may very well have implications that reflect on their relationship. But this in no way detracts from the validity of this Court's jurisdiction to deal with issues that arise from the relationship between DuPont and Shell. This is not the kind of situation that Rule 19(a)(2)(ii) addresses when it talks about "multiple" [*19] obligations. Cf. Annot., 22 A.L.R. Fed. 765 (1973) and related cases therein of lessors and lessees.

Having concluded that Carbide is not a party described by either Rule 19(a)(1) or (2), it is not necessary to proceed to an application of Rule 19(b). The foregoing analysis precludes any conclusion that Carbide is an indispensable party.

Trial on this matter may proceed as scheduled.

IT IS SO ORDERED.

EXHIBIT 7

Cases that cite this headnote

2002 WL 1759823

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.

GENERAL ELECTRIC CAPITAL
CORPORATION, Plaintiff,

v.

SHEFFIELD SYSTEMS, INC., an
Illinois corporation, Defendant.

No. 01 C 6342. | July 29, 2002.

In action for breach of equipment leases, defendant moved to dismiss for failure to join an indispensable party. The District Court, Guzman, J., held that non-party, an alleged co-lessee whose joinder was precluded by bankruptcy, was not an indispensable party.

Motion denied.

West Headnotes (1)

[1] **Federal Civil Procedure**

↳ Lessors and Lessees

Federal Civil Procedure

↳ Nonjoinder in Particular Actions

Non-party was a necessary party in action for breach of equipment leases, where it was at least a co-lessee, and defendant alleged that the contract signatories were not authorized to contract on its behalf and that the equipment was for the sole use of the non-party; however, non-party, whose joinder was precluded by bankruptcy, was not an indispensable party, so that dismissal was not required, as dismissal for nonjoinder would leave plaintiff without any remedy, and defendant would not be prejudiced by a failure to join the non-party since its defense, that it was not a party to the contract, could be fully and completely litigated without joining the non-party. 11 U.S.C.A. § 362(a); Fed.Rules Civ.Proc. Rule 19(a)(2), (b), 28 U.S.C.A.

MEMORANDUM OPINION AND ORDER

GUZMAN, J.

*1 Pending is Defendant Sheffield Systems, Inc.'s ("Sheffield") motion to dismiss Plaintiff General Electric Capital Corporation's ("GECC") complaint pursuant to Federal Rules of Civil Procedure 12(b)(7) ("Rule 12(b)(7)") and 19 ("Rule 19"). For the reasons set forth below, Defendant's motion to dismiss for failure to join an indispensable party is denied.

BACKGROUND FACTS

On November 29, 2001 Plaintiff General Electric Capital Corporation ("GECC") filed a first amended complaint against Defendant Sheffield Systems, Inc. ("Sheffield") alleging two counts of breach of contract. On or about September 14, 1991, Sheffield and non-party, co-lessee, U.S. Buying Group, Inc. entered into two equipment leases with Sheffield. The equipment pursuant to the terms of the contract was then delivered, installed and accepted by the lessees. Sheffield and/or U.S. Buying Group then made 5 payments under the terms of the Lease Agreements but ceased making payments in July of 2000. U.S. Buying Group filed a voluntary petition for bankruptcy pursuant to 11 U.S.C. § 101 et seq. GECC has filed the instant lawsuit against Sheffield only.

DISCUSSION

On a motion to dismiss under Rule 12(b)(7) for failure to join a necessary and indispensable party under Rule 19, the court "may go outside the pleadings and look to extrinsic evidence." *English v. Cowell*, 10 F.3d 434, 437 (7th Cir.1993); *See also Capital Leasing Co. v. Fed. Dep. Ins. Corp.*, 999 F.2d 188, 191 (7th Cir.1993). The court will rely on Rule 19 so as to protect "all materially interested parties" and "avoid wasting judicial resources." *Moore v. Ashland Oil, Inc.* 901 F.2d 1445, 1447 (7th Cir.1990). However, the court

will be reluctant to dismiss for failure to join if doing so deprives the plaintiff of "his choice of federal forum." *Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 499 n. 2 (7th Cir.1980). Deciding whether joinder is appropriate under Rule 19, the court must determine whether a party is a necessary party, *i.e.* one that should be joined. *United States ex rel. Hall v. Trival Dev. Corp.*, 100 F.3d 476, 478 (7th Cir.1996). If, however, the court cannot join the party because to do so would destroy jurisdiction or the party is not subject to service of process, the court must proceed to examine the four criteria described in Rule 19(b) to determine whether the action should go forward in the party's absence or whether the action must be dismissed. See 7 *Wright, Miller, Kane, Federal Practice and Procedure: Civil* § 1604. This question is commonly analyzed as whether this necessary party is "indispensable." *Durash v. Northern Trust Co.*, 1996 WL 99903, at *3 (N.D.Ill. Feb.29, 1996)(citing *Pasco*, 637 F.2d at 501 n. 13; *Krueger v. Cartwright*, 996 F.2d 928, 933 (7th Cir.1993)).

In deciding whether U.S. Buying Group is a necessary party under Rule 19, we must consider (1) whether complete relief can be accorded without joinder, (2) whether U.S. Buying Group's ability to protect his interest will be impaired, and (3) whether Sheffield will be subjected to a substantial risk of multiple or inconsistent obligations unless U.S. Buying Group is joined. *Thomas v. United States*, 189 F.3d 662, 666 (7th Cir.1999). It is unclear whether U.S. Buying Group, is a co-lessee or the only lessee. In either case it would have an interest in the subject matter of the litigation and any determination regarding the rights and obligations under the lease might very well affect it. A disposition of the matter may impair U.S. Buying Group's ability to protect its interest. Moreover, non-joinder may result in inconsistent judgments regarding the respective obligations and liabilities of Sheffield and U.S. Buying Group. Fed.R.Civ.P. Rule 19(a) (2).

*2 Defendant alleges that the U.S. Buying Group is the sole contracting party to the contract because the signatory on the contracts, Cathy F. Casson, and the contact person, Denise Sibley, are employees of U.S. Buying Group, not Sheffield, and neither are authorized to contract on behalf of Sheffield. In the same way, defendant argues that the equipment that is the subject of the contract was for the sole use of U.S. Buying Group. The allegations as stated by the defendant, if proven true, could lead the court to dismiss the action against the defendant. Plaintiff may then look to U.S. Buying Group as

the sole obligor. Obviously, the relief contemplated in this case will have a substantial impact on the defendant and U.S. Buying Group. For this reason, we find that U.S. Buying Group is a necessary party under Rule 9(a).

However, joinder of U.S. Buying Group is precluded due to its petition in bankruptcy. 11 U.S.C. § 362(a). The court must therefore now consider the four factors set forth in Rule 19(b) to determine whether in "equity and good conscience" this case should be dismissed.

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the person being thus regarded as indispensable. The factors to be considered by the court 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.

Fed.R.Civ.P. 19(b)

These four factors overlap, to a large extent, the considerations required under Rule 19(a), but Rule 19(b) requires a pragmatic weighing of these four factors. See *Burger King Corp. v. Amer. Nat'l Bank and Trust Co. of Chicago*, 119 F.R.D. 672, 679 (N.D.Ill.1988). No single factor is necessarily determinative, nor is the list inclusive. See *Freeman v. Liu*, 112 F.R.D. 35, 40 (N.D.Ill.1986). It appears clear that the plaintiff will not have an adequate remedy if the action is dismissed for nonjoinder as this will leave it without any remedy. It will not be able to pursue either of the two parties it alleges were bound by the terms of the contract plaintiff claims has been breached. Further, Sheffield systems is not prejudiced by a failure to join U.S. Buying Group. Sheffield's defense, as stated to us in open

court-that it is not a party to the contract, can be fully and completely litigated without joining U.S. buying group as a party. Sheffield, after all, does not have the burden of proving that U.S. Buying Group is the party that contracted with plaintiff. All Sheffield must do is to establish that it is not a party to the contract, or more precisely, make sure that plaintiff fails to prove that it, Sheffield, is a party to the contract. This, if true, Sheffield can accomplish without making U.S. Buying Group a party. If Sheffield prevails it will have obtained complete relief without joinder. If plaintiff prevails it also can obtain complete relief without joinder as under the terms of the contract both parties, are liable together and separately for any breach.

CONCLUSION

*3 For the reasons set forth above, Defendant's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(7) is hereby denied (Docket # 18-1).

SO ORDERED:

All Citations

Not Reported in F.Supp.2d, 2002 WL 1759823

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EXHIBIT 8

Grace Bros. v. UniHolding Corp.

Court of Chancery of Delaware, New Castle
June 13, 2000, Submitted ; July 12, 2000, Decided
Civil Action No. 17612

Reporter

2000 Del. Ch. LEXIS 101

GRACE BROTHERS, LTD. and BANC OF AMERICA SECURITIES, LLC, Plaintiffs, v. UNIHOLDING CORPORATION, UNILABS GROUP LIMITED, UNILABS HOLDINGS SA, EDGARD ZWIRN, ENRICO GHERARDI, ALESSANDRA VAN GEMERDEN, TOBIAS FENSTER, DANIEL REGOLATTI, PIERRE-ALAIN BLUM, and BRUNO ADAM, Defendants.

Subsequent History: [*1] Released for Publication by the Court July 20, 2000.

Disposition: Motion to dismiss DENIED, except that the plaintiffs' claim for monetary relief against the defendant-directors other than Zwirn, Gherardi, and van Gemerden based on their breaches of duty of care DISMISSED.

Core Terms

Swap, subsidiary, shares, stock, minority stockholder, defendant-directors, van, Holdings, wholly-owned, affiliates, merger, company's, challenged transaction, allegations, shareholders, announced, Registrant, common stock, transactions, disclosures, purposes, reasonable doubt, corporations, impartially, benefits, breach of fiduciary duty, board of directors, motion to dismiss, duty of loyalty, defendants'

Case Summary

Procedural Posture

Defendant directors of a corporation moved to dismiss plaintiff minority shareholders' action against defendants for breach of fiduciary duties.

Overview

Plaintiffs were institutional investors who owned stock in a corporation. Plaintiffs filed suit against the defendant

directors and the corporation's largest stockholder. Plaintiffs alleged that defendants breached their fiduciary duties to plaintiffs by allowing the corporation's largest stockholder's wholly-owned subsidiary to assume control over the corporation's primary asset, a clinical laboratory operating in Europe. The court denied defendants' motion to dismiss. The court concluded that plaintiffs pled particularized facts creating a reasonable doubt about the impartiality of defendant directors. Specifically, by alleging that defendant directors effected a scheme whereby controlling shareholders were able to gain the benefits of a squeeze-out merger without having to ensure that the merger was fair to minority shareholders, plaintiffs' complaint adequately stated a claim for breach of the fiduciary duty of loyalty. The Delaware court had personal jurisdiction over the defendants in the action.

Outcome

The motion to dismiss was denied. Plaintiffs complaint adequately stated a cause of action against defendant directors for breach of fiduciary duties.

LexisNexis® Headnotes

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > ... > Class Actions > Derivative Actions > General Overview

HN1 In a shareholder derivative suit, under the Aronson test a plaintiff must to plead particularized facts that create a reasonable doubt as to whether: (1) a majority of the corporation's directors are disinterested and independent; or (2) the challenged transactions are valid exercises of business judgment by the corporation's board of directors.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Remedies > Damages > Monetary Damages

Governments > Fiduciaries

Torts > ... > Defenses > Exculpatory Clauses > General Overview

HN2 Where a shareholders' suit seeks relief in the form of monetary damages and the corporation's certificate of incorporation contains an exculpatory charter provision pursuant to *Del. Code Ann. tit. 8, § 102(b)(7)*, plaintiffs may survive a motion to dismiss only if the complaint states a cognizable claim for breach of fiduciary duty not immunized by the exculpatory charter provision. Put simply, the complaint must state a claim for the breach of the duty of loyalty.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Governments > Fiduciaries

HN3 It is by no means a novel concept of corporate law that a wholly-owned subsidiary functions to benefit its parent. To the extent that members of the parent board are on the subsidiary board or have knowledge of proposed action at the subsidiary level that is detrimental to the parent, they have a fiduciary duty, as part of their management responsibilities, to act in the best interests of the parent and its stockholders.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Governments > Fiduciaries

HN4 There is no safe harbor in Delaware corporate law for fiduciaries who purposely permit a wholly-owned subsidiary to effect a transaction that is unfair to the parent company on whose board they serve.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

HN5 It is settled that inequitable action is not insulated from review simply because that action is accomplished in compliance with the statutory and contractual provisions governing the corporation.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN6 See Del. Chancery Ct. R. 19(b).

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Governments > Fiduciaries

HN7 Delaware has an interest in holding accountable those responsible for the operation of a Delaware corporation.

Counsel: Richard S. Cobb, Esquire, of KLETT, ROONEY, LIEBER & SCHORLING, Wilmington, Delaware; OF COUNSEL: Michael B. Fisco, Esquire, Jerome A. Miranowski, Esquire, James M. Jorissen, Esquire, of OPPENHEIMER WOLFF & DONNELLY, Minneapolis, Minnesota, Attorneys for Plaintiffs.

Peter J. Walsh, Jr., Esquire, Kevin R. Shannon, Esquire, of POTTER ANDERSON & CORROON, Wilmington, Delaware; OF COUNSEL: C. William Phillips, Esquire, Lisa M. Farabee, Esquire, of COVINGTON & BURLING, New York, New York, Attorneys for Defendants.

Judges: STRINE, Vice Chancellor.

Opinion by: STRINE

Opinion

MEMORANDUM OPINION

STRINE, Vice Chancellor

Plaintiffs Grace Brothers, Ltd. and Banc of America Securities, LLC are institutional investors who own stock in UniHolding Corporation ("UniHolding"). They have filed suit against, among others, the directors of UniHolding (the "defendant-directors") and UniHolding's largest stockholder, Unilabs Holdings, SA ("Unilabs"). [¶2] The plaintiffs allege that the defendants breached their fiduciary duties to UniHolding's non-controlling stockholders (the "Minority Stockholders") by allowing UniHolding's wholly-owned subsidiary, Unilabs Group Limited ("UGL"), to assume control over UniHolding's primary asset, its 54% stake in Unilabs, SA ("ULSA"), which is a clinical laboratory services company operating in Europe.

The defendants are alleged to have effected this scheme by causing UGL to issue to Unilabs and other Unilabs affiliates a controlling block of UGL stock in exchange for their UniHolding shares. This swap transformed UGL's parent, UniHolding, into its powerless child and, together with other transactions, left UniHolding with no assets other than its now-minority interest in UGL.

By virtue of these actions, the plaintiffs allege, the defendant-directors have served Unilabs' and their own personal interests in controlling ULSA through UGL, a British Virgin Islands ("BVI") corporation whose shares are not listed on any stock exchange. Because UGL would afford the Minority Stockholders with no liquidity and substantially reduced informational rights, the defendants allegedly knew that the Minority Stockholders [*3] would have little interest in holding UGL shares. Not only that, after the swap the defendant-directors allowed UniHolding to default on its federal securities law disclosures, leading to the company's delisting. These actions, the plaintiffs say, caused UniHolding stockholders to find themselves with delisted stock that is valued at one-sixth of its worth in 1997, even though its former controlled subsidiary, ULSA, is prospering.

The defendant-directors¹ have moved to dismiss the complaint for, among other reasons, failure to make a demand on the UniHolding board and for failure to state a claim for breach of fiduciary duty.

In this opinion, I conclude that: (1) demand is excused because a majority of the UniHolding board was either interested in the transactions challenged in the complaint or beholden to other directors who were; and (2) the complaint states [*4] a claim that the UniHolding directors purposely effected transactions to benefit Unilabs and its affiliate stockholders at the expense of UniHolding's Minority Stockholders. In the latter respect, I conclude that the complaint states a claim for breach of fiduciary duty irrespective of whether the UniHolding board decided to implement the challenged transactions in major part through actions by its wholly-owned subsidiary, UGL. Directors of a parent board can breach their duty of loyalty if they purposely cause--or knowingly fail to make efforts to stop--action by a wholly-owned subsidiary that is adverse to the interests of the parent corporation and its stockholders. As a result, I deny the

defendants' motion to dismiss, except as to plaintiffs' duty of care claims, which are barred by the exculpatory provision of UniHolding's certificate of incorporation.

I. Factual Background

A. The Plaintiffs

Plaintiffs Grace Brothers and Banc of America control, respectively, 457,187 and 232,494 shares of nominal defendant UniHolding Corporation.

B. The Corporate Defendants

Nominal defendant UniHolding Corporation is a Delaware corporation.

Defendant UGL is a BVI corporation [*5] that was formerly a wholly-owned subsidiary of UniHolding.

Defendant Unilabs is Panamanian corporation that was the largest stockholder of UniHolding and is now the largest stockholder of UGL. Panama Holdings is wholly-owned by Swiss Holdings, a Swiss Corporation. For simplicity's sake, I generally refer to both Swiss Holdings and Unilabs as "Unilabs" in this opinion.

C. The Ownership Structure Of UniHolding Before The Challenged Transactions

Resolution of this motion requires an understanding of the profound difference between UniHolding's status as of the time the plaintiffs became stockholders in January 1997 and its status after the transactions challenged in the complaint (the "Challenged Transactions").

In January 1997, the plaintiffs and certain other institutional investors became common stockholders of UniHolding. At that time, UniHolding stock traded on the NASDAQ Small Cap Market. UniHolding's business consisted of providing clinical laboratory testing services to physicians, managed care organizations, hospitals, and other health care providers. UniHolding itself had no operations but conducted all of its business through subsidiaries. Its clinical laboratory business [*6] was operated by ULSA, a Swiss corporation that had laboratories throughout continental Europe.

UniHolding controlled ULSA through its ownership of 54% of ULSA's stock. The rest of ULSA's stock was

¹ Throughout this opinion I refer at times to the moving defendant-directors simply as "defendants" where their status as directors is irrelevant.

publicly traded. Although UniHolding's interest in ULSA was its most important asset, UniHolding also owned a wholly-owned subsidiary, Global Unilabs Clinical Trials, Ltd. ("GUCT"), which performed testing for the pharmaceutical industry.

In the beginning of 1997, UniHolding was, for all practical purposes, controlled by Unilabs and stockholders who had affiliations with it. Before the Challenged Transactions were undertaken, Unilabs owned 41.6% of UniHolding's outstanding shares, and the Chairman of the board of Unilabs, defendant Edgar Zwirn, was also Chairman of UniHolding's board of directors. When the UniHolding shares Zwirn controlled through Unilabs are aggregated with those of the other defendant-directors, the UniHolding directors controlled over 50% of the company's issued and outstanding voting common stock.

D. The UniHolding Board Of Directors

The plaintiffs contend that a majority of the UniHolding board of directors is bound together by their ties to the company's Chairman, [*7] defendant Zwirn. Those ties, plaintiffs say, contributed to what the plaintiffs argue was a course of conduct designed to benefit Zwirn personally to the detriment of the Minority Stockholders of UniHolding.

The alleged ties depend to a large extent on Zwirn's own multiple roles at corporations affiliated with UniHolding. At all relevant times, Zwirn served as the Chairman of the Board of Unilabs and of its parent, Swiss Holdings. Through Unilabs, Swiss Holdings owned 41.6% of UniHolding's voting stock. Zwirn and his family own 23.3% of Swiss Holdings.

Zwirn's managerial authority extended down to all of UniHolding's subsidiaries. Thus he was the Chairman of the boards of UGL, GUCT, and ULSA as well as of other direct or indirect UniHolding subsidiaries.

Defendant Enrico Gherardi was director and secretary of UniHolding. He owned nearly 250,000 UniHolding shares, or approximately 4.6% of the company's stock. In addition, Gherardi served as a director of ULSA, and the plaintiffs believe that he (and/or defendant van Gernerden) also served on the UGL board. The complaint also alleges that a company affiliated with Gherardi received over \$ 1.6 million in unspecified

consulting fees [*8] from ULSA during the years 1997 to 1999 and that GUCT also paid a Gherardi-affiliated company \$ 300,000 in fees annually during that period.

Defendant Alessandra van Gernerden was a director of UniHolding and GUCT as well as of two other UniHolding subsidiaries. She owned over 490,000 UniHolding shares, or approximately 8.2% of the company's stock. Van Gernerden is defendant Gherardi's niece and is affiliated with the same businesses that received over \$ 2.5 million in unspecified consulting fees from ULSA and GUCT during years 1997 to 1999.²

Defendant Tobias Fenster was at all relevant times a director of UniHolding and GUCT as well as of two other UniHolding subsidiaries. Most important for present purposes is the fact that Fenster is Zwirn's brother-in-law and serves as the Chief Executive Officer of United Laboratories Espana, SA ("ULSP"), ULSA's Spanish subsidiary.

Finally, defendants Daniel Regolatti and [*9] Pierre-Alain Blum were at all relevant times directors of UniHolding and ULSA.

According to the plaintiffs, none of the defendant-directors would have held their directorships and offices or received other related benefits but for the beneficence of Zwirn. Thus the plaintiffs argue that none of the defendant-directors was capable of exercising a business judgment adverse to Zwirn's personal interests and that all of them lacked independence as a consequence.

E. ULSA Is Listed On The Swiss Stock Exchange

In April 1997, ULSA's stock became listed on the Swiss Exchange. According to the plaintiffs, this event is important because it led the defendant-directors, particularly Zwirn, to question UniHolding's continued utility to them. As a Swiss corporation, Swiss Holdings may have seen little need to continue to hold its Unilabs control block in ULSA through a publicly traded U.S. corporation, UniHolding, when ULSA shares were now freely tradable on a European exchange.

F. UniHolding Announces Its Intent To Merge Into UGL

In August of 1997, UniHolding announced that its board of directors had approved the concept of merging the

² I infer this from the fact that the amounts, timing, and sources of the payments are identical.

company into its UGL subsidiary. The stated purpose [*10] of the merger was to streamline the corporate structure of UniHolding and its subsidiaries.

G. The UniHolding Board Abandons The Merger And Sits By While Its Wholly-Owned Subsidiary Turns Itself Into UniHolding's Parent Corporation

The plaintiffs allege that the defendant directors in effect decided to implement a strategy that would provide Unilabs with the benefits of the proposed merger but relieve it from shouldering the burden of fair treatment of the Minority Stockholders that would be demanded in a merger. That alleged strategy had several components, which I now describe.

1. GUCT Is Spun-Off To The UniHolding Stockholders

In January 1998, UniHolding's board approved a spin-off of GUCT to UniHolding's stockholders (the "Spin-Off"). In the Spin-Off, UniHolding shareholders received a *pro rata* share of 7.9 million shares of GUCT common stock. But UniHolding retained non-voting GUCT preferred stock valued at \$ 20 million on a historical cost basis, which it then transferred to its wholly-owned UGL subsidiary. UniHolding recorded a net loss of \$ 2.8 million on the transaction.

Because GUCT stock had not been traded publicly prior to the Spin-Off, the UniHolding [*11] board assured its stockholders that GUCT would file a registration statement with the Securities and Exchange Commission after the Spin-Off and thereafter issue public disclosures in accordance with federal law. To date, GUCT has not done so, and its stock is not listed or traded on any public exchange.

2. The Child Takes Over The Parent: UGL Assumes Control Of UniHolding

The most important transaction the plaintiffs attack was the culmination of a year's worth of effort. In April of 1998, UniHolding announced that its 100% child had--supposedly without the involvement of UniHolding's board--become UniHolding's 60% percent parent:

On April 24, 1998 the Registrant's subsidiary, Unilabs Group Limited ("UGL") issued 3,156,700

new shares of its common stock in exchange for the same number of shares of common stock of the Registrant [UniHolding]. *The newly-issued UGL shares were issued to Unilabs Holdings SA and its affiliates* and certain European institutional investors in exchange for shares of Registrant on a one-for-one basis. As a result of these transactions, UGL now directly holds approximately 3.9 million shares (60%) of the Registrant.³

In another [*12] disclosure, UGL described the purpose for the stock swap (the Initial Swap") the following way:

[Unilabs] Holdings and its affiliates and certain European institutional investors transferred their shares of the Issuer for the same number of UGL Shares because they preferred holding their investments through a British Virgin Islands entity (such as UGL) rather than a Delaware corporation (such as the Issuer). While the undersigned reporting persons have not solicited nor made any offer for additional transfers, they at present do not intend to oppose any effort by other shareholders of the Issuer to transfer their shares in consideration for UGL Shares of the same one-for-one basis.

UGL also plans to investigate the quoting or listing of the UGL Shares on various markets. Depending upon the progress with respect to such markets, there could be further developments and transactions involving UGL and the Issuer.⁴

[*13] Defendants Zwirn, Gherardi, and van Gernerden exchanged the UniHolding shares they controlled for UGL shares in the Initial Swap. The Initial Swap left UniHolding's remaining stockholders as the owners of a publicly traded Delaware subsidiary of a non-publicly traded BVI corporation, the majority owner of which was Unilabs.

This situation did not persist, however, because the Initial Swap was rescinded. Then, on October 29, 1998, UniHolding once again announced its ongoing evaluation of a possible merger with UGL:

On August 8, 1997, the Company announced its intention to merge UniHolding into its wholly-owned subsidiary, UGL, with a view toward streamlining

³ Second Amended Complaint P43, at 8 (hereinafter "Complaint") (*quoting* Form 8-K dated April 24, 1998) (brackets in original; emphasis added).

⁴ Compl. P45, at 9 (*quoting* Amended Schedule 13-D dated Apr. 24, 1998) (emphasis added; quotations omitted).

the corporate structure. The proposed merger was and is subject to shareholder and regulatory approvals. In the fourth quarter of fiscal 1998, a major shareholder, Unilabs Holdings SA, a Panama corporation ("Holdings") reported the contribution to UGL of approximately 3.1 million shares of UniHolding common stock in exchange for the same number of shares of UGL common stock. However, this was rescinded. Accordingly, at present UGL remains a wholly-owned subsidiary of UniHolding. The Company is now continuing to examine [*14] the feasibility of the proposed merger with UGL.⁵

Yet approximately five months later, UniHolding announced that, rather than merging with its wholly-owned subsidiary UGL, UniHolding had once again been acquired by its corporate child. Specifically, UniHolding announced that Unilabs and certain other members of a "controlling group" had swapped their UniHolding shares to UGL in exchange for UGL shares (the "Swap"). The disclosure issued by UniHolding warrants careful consideration in view of its emphasis on the fact that the Swap was performed to benefit "a controlling group" and the fact that UniHolding--UGL's parent corporation--was supposedly informed of the Swap after it had already occurred:

*Unilabs' European founders had until recently held their controlling stake through a holding company, Unilabs Group Limited, itself owned by UniHolding Corporation, a US, Nasdaq-listed, corporation. With a view to simplify the group's shareholding structure and avoid any subsequent [*15] confusion with this US corporation's activities, the founders of Swiss-based [ULSA] now hold their majority stake directly through Unilabs Group Limited.*

As summarized in the above [ULSA] press release, the Board of Directors of UniHolding was informed by its subsidiary Unilabs Group Limited (a British Virgin Islands corporation, "UGL"), that UGL has reached a definitive agreement with Unilabs Holdings SA (a Panama corporation, "Holdings") on [Unilabs'] own behalf and on behalf of affiliates of [Unilabs]. Under such agreement, UGL has agreed to issue to [Unilabs] approximately 2.8 million newly-issued shares of UGL common stock for a consideration consisting of approximately 2.8 million

shares of UniHolding common stock. Prior to the transaction, [Unilabs] was the single largest shareholder of UniHolding. *According to UGL, the purpose of the transaction was to enable the controlling group, which includes the group founders, to simplify the structure of their holdings without necessarily proceeding with a more massive restructuring entailing for example the liquidation of UniHolding; a restructuring which might not have been in the best interest of the [*16] companies and all their shareholders, while, according to UGL the described transaction was made with a view to preserve the interests of the minority shareholders.*⁶

UniHolding's public disclosures further explained:

On February 25, 1999, the Registrant's subsidiary, Unilabs Group Limited ("UGL") issued approximately 2.8 million new shares of its common stock in exchange for the same number of shares of common stock of the Registrant. The newly-issued UGL shares were issued to Unilabs Holdings SA and its affiliates in exchange for shares of the Registrant on a one-for-one basis. As a result of these transactions, UGL now directly holds approximately 4.7 million shares (60%) of the Registrant. The Registrant continues to hold 2.5 million shares of UGL, the initial amount of UGL shares issued and outstanding when the Registrant owned 100% of UGL.⁷

[*17] Thus as a result of the Swap, UniHolding became a subsidiary of UGL--which now controlled 73.4% of UniHolding's stock--but retained a 43% interest in UGL. In turn, Unilabs--whose Chairman Zwirn was Chairman of both UniHolding and UGL--became UGL's majority stockholder. Gherardi and van Gernerden also participated in the Swap, and it is plausible to infer for purposes of this motion that they were an integral part of the "controlling group" of "Unilabs and its affiliates" referred to in UniHolding's public disclosures. Therefore, I hereinafter refer to Unilabs, Zwirn, Gherardi, and van Gernerden collectively as the "Controlling Group."

Given their participation as part of the Controlling Group in the Initial Swap and the ultimate Swap, the plaintiffs

⁵ Compl. P50, at 10.

⁶ Compl. P52, at 10-11 (*quoting* Press release dated March 2, 1999) (emphases added).

⁷ Compl. P54, at 11 (*quoting* Form 8-K dated March 12, 1999) (emphasis added).

allege that Zwirn, Gherardi, and van Gernerden (and the other members of the UniHolding board) were deeply involved in planning and implementing the Swap. Despite the involvement of UniHolding's board, the plaintiffs aver, UniHolding never disclosed any information that the Swap was being considered until after the Swap had already transpired. Moreover, the plaintiffs contend that the defendant-directors, as the board members of UGL's 100% [*18] owner, clearly had the authority to stop the Swap from occurring but did not do so.

3. UniHolding Exchanges A Block Of Its UGL Shares For UniHolding Shares Held By UGL

After the Swap was announced, UniHolding received complaints about the Swap from several of the Minority Stockholders, who included the plaintiffs and the Mutual European Fund (through its agent, Franklin Mutual Advisers, Inc.), as well as accompanying demands for books and records pursuant to *8 Del. C. § 220*. Before its complaint could be resolved, Mutual European Fund sold its UniHolding shares for \$ 2.00 each. The plaintiffs suspect that members of the Controlling Group or their affiliates purchased the Mutual European shares but cannot verify this suspicion because the buyer did not file the required Schedule 13-D after acquiring the shares.

After the demands were received, the UniHolding board convened a June 16, 1999 board meeting. The minutes of the meeting, which are attached to the complaint, have a surreal quality. They indicate that Zwirn explained to his fellow UniHolding directors (two others of whom had participated directly in the Swap) why the UGL board had engaged in a transaction whereby [*19] UGL became its owner's parent. In particular, Zwirn referred the board to a June 7, 1999 UGL memorandum (the "UGL Memo"), described in greater detail below, which discusses the Swap and the reasons behind it. Although redacted in large part, the minutes reflect the board's awareness of the Minority Stockholders' unhappiness with the Swap.

In September of 1999, the UniHolding board approved a proposal made in the UGL Memo. The UGL Memo

indicated that the UGL and UniHolding boards had reached an "agreement in principle" about this proposal before the June 16, 1999 board meeting.⁸ The proposal was designed to dampen the ire of UniHolding's Minority Stockholders through an exchange of shares that would eliminate UGL as a stockholder of UniHolding (the "Exchange"). In exchange for 430,000 shares of UGL stock, UniHolding was to receive all of the over 5.85 million UniHolding shares owned by UGL. After the Exchange, UniHolding was expected to cancel the shares rather than keep them as treasury stock.

[*20] The defendants allege that the purpose of the Exchange was to protect UniHolding's remaining stockholders from having their attributed interest in ULSA diluted as a result of the Swap. The Exchange did so by reducing UGL's ownership in UniHolding from 73.4% to zero, thus restoring the indirect proportionate interest of UniHolding's remaining stockholders in ULSA approximately to the level that existed before the Swap. The Exchange also had the effect of slightly reducing UniHolding's position in UGL from 43% to 37%. In the end, the plaintiffs, along with another Minority Stockholder, Morgan Stanley, became the owners of over 52% of UniHolding.⁹

[*21] 4. The UGL Memo Explaining the "Restructuring"

The plaintiffs attached to the complaint a copy of the June 1999 UGL Memo regarding the Swap and the Exchange. According to the UGL Memo, the Swap was inspired by the European UniHolding stockholders' desire to get rid of the undue cost associated with holding their indirect investment in ULSA through a publicly listed and traded American corporation. More specifically, the UGL Memo indicates that UniHolding had failed to develop a good market for its stock, despite the company's efforts to obtain get analysts to follow the stock and appreciate the strong performance of the ULSA subsidiary. Indeed, the UGL Memo asserts that analysts themselves had complained about UniHolding's unwieldy structure, blaming this corporate structure for the failure of UniHolding's stock price to thrive.

⁸ Compl. Ex. C at U0045.

⁹ According to defendants, this means that demand should be required because plaintiffs, if they act concertedly with Morgan Stanley, can elect a new board. But the UniHolding certificate provides for a classified board so that such a change can only occur over a two year period; moreover, I decline to adopt the innovation that stockholders who wish to bring a derivative suit must take steps to unseat the board as opposed to simply satisfying the traditional tests that measure demand futility.

Thus Unilabs "and certain other non-US stockholders of UniHolding" decided "to hold their shares at the UGL rather than UniHolding, level." ¹⁰ The UGL Memo asserts that these stockholders offered the plaintiffs and other American institutional holders the opportunity to do the same but that those stockholders had declined to do so. Nevertheless, the [*22] UGL Memo stated, UniHolding was "free to maintain" its status as a publicly listed and traded corporation "at its own expenses [sic] if its board and shareholders determine that it is in their best interests." ¹¹

H. UniHolding Is Delisted For Failure To Comply With Its Securities Law Responsibilities And Is Forced To Hock Its Assets To UGL

During 1998 and 1999, the UniHolding board repeatedly ignored SEC filing deadlines. As a final consequence of these failures, the SEC delisted UniHolding on September 17, 1999.

The delisting was accompanied by UniHolding's inability to fund its limited operations. After the Spin-Off and the Swap, UniHolding's only assets were its stock in UGL and certain non-trading assets that UniHolding later sold to UGL for \$ 10,000. The sale of the non-trading assets in June of 1999 was based on a five-year-old book value.

Consistent with the UGL Memo, UniHolding board minutes from June 1999 reflect Zwirn's view that UniHolding would have [*23] to meet all of its obligations itself. Even though UGL was at that time UniHolding's majority stockholder, Zwirn told his fellow UniHolding directors at the June 16, 1999 board meeting that "in view of the new relationship between UGL and [UniHolding], he felt that, contrary to what happened previously, UGL would no longer make financial resources available to [UniHolding], and it was necessary to arrange for bridge financing" ¹²

As a result, the UniHolding board entered into a loan agreement with its former wholly-owned subsidiary,

whereby UniHolding would pledge 320,000 of its 430,000 UGL shares in exchange for a \$ 500,000 loan. This loan was procured in part to help UniHolding defend against the § 220 actions brought by the plaintiffs.

I. The Stock Price Of UniHolding Plummetts

From the time the plaintiffs acquired their UniHolding shares in January 1997 until its shares were delisted in September 1999, UniHolding's stock price fell from \$ 12 per share to \$ 2.00 per [*24] share. During the time the plaintiffs have been stockholders, UniHolding has never paid a dividend. UniHolding stock currently has no market price and does not, for all practical purposes, trade.

By contrast, ULSA has apparently done extremely well during the same period and has paid substantial dividends to its stockholders. Yet, according to the complaint, none of these dividends have been upstreamed to UniHolding's stockholders through that company by way of UGL.

II. Legal Analysis

The defendants argue that the complaint must be dismissed for several reasons. I turn to the defendants' first two arguments now, applying the familiar standards that must be used under Court of Chancery Rules 23.1 ¹³ and 12(b)(6). ¹⁴

[*25] A. Must The Complaint Be Dismissed For Failure To Plead Facts Excusing Demand On The UniHolding Board?

The defendants contend that the claims raised by the plaintiffs are solely derivative in nature. As a result, defendants assert, the complaint must be dismissed unless the plaintiffs have satisfied the *Aronson v. Lewis*

¹⁰ *Id.* at U0008.

¹¹ *Id.*

¹² *Id.* at U0004.

¹³ In considering the defendants' motion to dismiss under Rule 23.1, the well-pleaded allegations of the derivative complaint must be accepted as true, but conclusory allegations will not be. *Grobow v. Perot*, Del. Supr., 539 A.2d 180, 187 (1988).

¹⁴ On a motion to dismiss, the well-pleaded allegations of the complaint will be accepted as true, but mere conclusory allegations will not be. *E.g., In re Tri-Star Pictures Litig., Inc.*, Del. Supr., 634 A.2d 319, 326 (1993). If, after doing so and drawing all reasonable inferences in favor of the plaintiffs, the court is convinced that there is no basis for a recovery by the plaintiffs, the court must grant the motion to dismiss. *Id.*

¹⁵ test for demand excusal. That test requires *HN1* a derivative plaintiff to plead particularized facts that create a reasonable doubt as to whether: (1) a majority of the UniHolding directors are disinterested and independent; or (2) the Challenged Transactions were valid exercises of business judgment by the UniHolding board of directors. ¹⁶ The defendants argue that the complaint fails to satisfy either prong of *Aronson* and therefore must be dismissed. I now turn to the first prong of *Aronson*.

The defendants assert that the UniHolding board is comprised [*26] of wholly disinterested and independent directors. According to the defendants, none of the UniHolding directors had a financial interest in effecting a reorganization of UniHolding that would prefer the interests of the Controlling Group affiliates over the interests of the Minority Stockholders. Nor, defendants assert, does the complaint plead facts from which one can infer that any of the other UniHolding directors could not exercise their business judgment independently of defendant Zwirn. By contrast, the plaintiffs argue that every member of the UniHolding board either was interested in the challenged transactions or was so beholden to Zwirn as to lack independence.

After carefully examining the allegations of the complaint, I conclude that the plaintiffs have pled particularized facts that create a reasonable doubt about the impartiality of four of the six UniHolding directors: Zwirn, Gherardi, van Gemerden, and Fenster. As a result, demand is excused.

As to defendant Zwirn, the complaint alleges facts that support the inference that Zwirn is the dominant player

in Unilabs, which controlled 41.6% of UniHolding's stock at the inception of the Challenged Transactions. ¹⁷ In [*27] view of Zwirn's position as Chairman of UniHolding, UGL, and USLA, it is also reasonable to infer that Unilabs had effectively used its position in UniHolding to ensure that its leader, Zwirn, would be the key executive at all the downstream businesses. Moreover, the attachments to the complaint support this and suggest that Unilabs was the driving force behind the creation and operation of ULSA from the beginning. Moreover, Unilabs appears to have only relinquished equity to the extent necessary to raise capital and to have taken great care to ensure that it would not give up effective control over ULSA.

[*28] The complaint also alleges that Zwirn orchestrated the Challenged Transactions and directed the other UniHolding board members to assent. ¹⁸ These allegations are buttressed by pled facts and documents incorporated into the complaint indicating Zwirn's central role in the Challenged Transactions. ¹⁹

[*29] Taken together, these facts create a reasonable doubt about Zwirn's disinterest. Underlying this doubt is the fact that UniHolding had the option of restructuring through a merger in which it would have had to ensure that the Minority Stockholders received fair consideration or through a distribution of its controlling interest in ULSA directly to its stockholders on a *pro rata* basis. Instead, UniHolding chose to effect a transaction that enabled the Controlling Group to continue to use the Minority Stockholders' equity to help them exercise firm majority control over ULSA while decreasing the Minority Shareholders' liquidity and informational rights. It is thus implausible that Zwirn—who indirectly owns over 23% of Unilabs—had no financial interest in the

¹⁵ *Aronson v. Lewis*, Del. Supr., 473 A.2d 805 (1984).

¹⁶ *Id.*, 473 A.2d at 814-15.

¹⁷ *Friedman v. Beningson*, Del. Ch., C.A. No. 12232, 1995 Del. Ch. LEXIS 154, at *13, Allen, C. (Dec. 4, 1995) (where director controlled 36% of the company's stock and served as its highest ranking officer, the "confluence of voting control with directoral and official decision making authority . . . is . . . quite consistent with control of the board") (internal citation omitted), *appeal denied*, *Del. Supr.*, 676 A.2d 900 (1996), reported in full, 1996 Del. LEXIS 11 (Jan. 10, 1996).

¹⁸ Compl. P56 ("Defendant Zwirn orchestrated the February 25, 1999 Stock Swap and, upon information and belief, other members of the UniHolding Board of Directors were intimately involved in the formulation and implementation of the 'two-step' restructuring of UniHolding and its formerly wholly-owned subsidiary, UGL.); Compl. P127 ("Defendant Zwirn directed the Director Defendants to endorse the February 25, 1999 Stock Swap, to consent to the September 3, 1999 stock exchange as the final step to the restructuring of UniHolding and UGL, and to engage in the related Corporate Transactions at issue.").

¹⁹ See *Heineman v. Data Point Corp.*, Del. Supr., 611 A.2d 950, 955 (1992) (to raise a doubt about a board's ability to act independently of a controlling stockholder, a plaintiff must advance particularized allegations from which it can be inferred that the board members who approved the transaction are acting at the direction of the allegedly dominating individual or entity).

Challenged Transactions. As a result, the plaintiffs have established a reasonable doubt as to his ability to give impartial consideration to a demand.

The complaint also pleads particularized facts that create reasonable doubt about the ability of defendants Gherardi and van Gernerden to impartially consider a demand. Gherardi is van Gernerden's uncle. Between the two of them, they owned nearly 13% of UniHolding before the [*30] Challenged Transactions. They subsequently converted their UniHolding shares into UGL stock in the Swap. In addition, Gherardi serves on the ULSA board, and van Gernerden served on the boards of two other UniHolding subsidiaries.²⁰ According to the documents quoted above that were attached to the complaint, the Swap was effected at the instance of the "controlling group" of Unilabs "and its affiliates." As stated previously, it is reasonable to infer at this pleading stage that Gherardi and van Gernerden were part of this "controlling group" of "affiliates" of Unilabs.

The basis for this inference is strengthened by the fact that, according to UniHolding public disclosures, a company affiliated with Gherardi and van Gernerden received "unspecified consulting fees" from GUCT and ULSA of over \$ 2.5 million during the period 1997 to 1999.²¹ Although the defendants [*31] fault the plaintiffs for not detailing the nature of these fees or Gherardi's and van Gernerden's precise affiliations with the

company receiving these fees, it seems to me reasonable to infer that UniHolding (whose approach to disclosure compliance allegedly is otherwise less than exemplary) would not have disclosed these substantial fees if Gherardi's and van Gernerden's affiliation to the recipient company was immaterial to them. Thus I conclude that Gherardi and van Gernerden were "interested" in the Challenged Transactions.

The fact that Gherardi's and van Gernerden's involvement in the Unilabs' family of companies was so extensive and apparently lucrative also creates a reasonable doubt about their ability to act adversely to Zwirn's interests. Zwirn is clearly positioned to exert substantial influence over decisions regarding Gherardi's and van Gernerden's roles at and remuneration from Unilabs-affiliated companies.²²

[*32] Likewise, the complaint also raises a reasonable doubt about the ability of defendant Fenster to impartially consider a demand adverse to Zwirn's interest. Fenster is Zwirn's brother-in-law.²³ [*33] Any suggestion that Fenster's family bond to Zwirn is strained would seem to be contradicted by Fenster's service as CEO of ULSA's Spanish subsidiary, ULSP, and as a director of UniHolding and other Unilabs-related companies.²⁴ It is reasonable to infer that Fenster does not serve as CEO of ULSP as a matter of charity rather than for

²⁰ The complaint suggests that one or both also served on the UGL board, but whether that is true or not would not change the outcome of this motion.

²¹ Compl. PP81, 86.

²² *Rales v. Blasband*, Del. Supr., 634 A.2d 927, 937 (1993) (where controlling stockholder-directors were positioned to exert substantial influence over a director's continued employment, that director could not objectively consider a demand adverse to their interests); *Friedman v. Beningson*, 1995 Del. Ch. LEXIS 154, at *15 (where 36% stockholder/director/CEO could exercise influence over director's receipt of \$ 48,000 a year in consulting fees, that director's ability to consider a demand detrimental to the CEO was sufficiently doubtful as to excuse demand); *Mizel v. Connelly*, C.A. No. No. 16638, mem. op., 1999 Del. Ch. LEXIS 157, at *8 n.1, Strine, V.C. (July 22, 1999, corr. Aug. 2, 1999) (where chairman and CEO held 32.7% of the company's stock, "the pragmatic, realist approach dictated by *Rales* required [the court] to accord great weight to the practical power wielded by a stockholder controlling such a block and to the impression of power likely to be harbored by the stockholder's fellow directors").

²³ *Harbor Finance Partners v. Huizenga*, Del. Ch., 751 A.2d 879, 886-89 (1999) (director who was brother-in-law of CEO and who was involved in various businesses with the CEO could not impartially consider a demand adverse to the CEO's interest); see also *Grimes v. Donald*, Del. Supr., 673 A.2d 1207, 1217 (1996) (a "material financial or familial interest" can disable a director from considering a demand); *Mizel v. Connelly*, 1999 Del. Ch. LEXIS 157, at *11-*12 (grandson could not objectively consider demand adverse to interests of his grandfather); cf. *Chaffin v. GNI Group, Inc.*, Del. Ch., C.A. No. 16211, mem. op., 1999 Del. Ch. LEXIS 182, at *17-*20, Jacobs, V.C. (Sept. 3, 1999) (where a transaction benefited his son financially, the father was "interested" in transaction for purposes of the business judgment rule).

²⁴ *Huizenga*, 751 A.2d at 889.

material compensation.²⁵ In view of Fenster's close familial and business relationships with Zwirn and Zwirn's influence over Fenster's employment at ULSP, Fenster's ability to consider a demand impartially is doubtful.

Because four of the six UniHolding directors cannot impartially consider a demand, I need not examine [*34] the impartiality of defendants Regolatti and Blum. Similarly, having found that the plaintiffs' complaint meets the first prong of *Aronson*, I will not consider the second prong of that test. Nor will I engage in the metaphysical exercise of determining whether the plaintiffs have stated individual--as opposed to exclusively derivative--claims. Such an analysis can be undertaken later in the litigation, if necessary to determine a remedy or address other issues.

B. Does The Complaint State A Claim Against The Director-Defendants For Breach Of The Fiduciary Duty Of Loyalty?

HN2 Because the complaint seeks relief in the form of monetary damages and because the UniHolding certificate of incorporation contains an exculpatory charter provision pursuant to *8 Del. C. § 102(b)(7)*, the plaintiffs may survive this motion to dismiss only if the complaint states a cognizable claim for breach of fiduciary duty not immunized by the exculpatory charter provision.²⁶ [*35] Put simply, the complaint must state a claim for the breach of the duty of loyalty.²⁷

In arguing that the complaint does not do so, the defendants advance two somewhat contradictory arguments. Relying on the plaintiffs' claim that the

defendants unlawfully divested the Minority Stockholders of appraisal rights by accomplishing their reorganization of UniHolding and UGL through the Swap, the defendants first argue that they are protected by the doctrine of independent legal [*36] significance.²⁸ The defendants next contend that the complaint fails to state a claim against them in relation to the Swap, because the Swap was effected without the involvement of the UniHolding board. As a consequence, the defendants claim, the UniHolding directors are not proper defendants to an action challenging that transaction.

For the following reasons, however, I reject the defendants' arguments and find that the complaint states a claim for breach of the fiduciary duty of loyalty.

Read as a whole, the complaint alleges that Zwirn, Gherardi, and van Gernerden, with the active support of their fellow directors, effected a scheme whereby the Controlling Group was able to gain the benefits of a squeeze-out merger without having to ensure that the merger was fair to UniHolding's Minority Stockholders. The members of the Controlling Group made clear their desire to rid themselves of the [*37] expense of being stockholders in a publicly listed and regulated corporation that provides its minority stockholders with important benefits such as regular financial disclosures, access to books and records, and a liquid market for their securities. These benefits were critical to the Minority Stockholders but not nearly as important to the Controlling Group. After all, the Controlling Group could obtain liquidity whenever it desired by selling UniHolding's control block in ULSA, could most likely dictate dividend flow to themselves through their control

²⁵ *Cf. Kahn v. Tremont Corp.*, Del. Ch., C.A. No. 12339, mem. op., 1994 Del. Ch. LEXIS 41, at *8-*9, Allen, C. (Apr. 21, 1994, rev. Apr. 22, 1994) (where directors might jeopardize their employment as executives by granting a demand contrary to interests of the director who indirectly controlled the corporation, a reasonable doubt existed as to their impartiality); *Mizel v. Connelly*, 1999 Del. Ch. LEXIS 157, at *8-*9 (where director-officers would have to consider a demand harmful to the interests of a director who was their management superior, reasonable doubt as their independence was created); *Steiner v. Meyerson*, Del. Ch., C.A. No. 13139, mem. op., 1995 Del. Ch. LEXIS 95, at *27-*30, Allen, C. (July 18, 1995) (a director who was the company's president and chief operating officer could not objectively evaluate a demand adverse to a director who was chairman and CEO and therefore his boss).

²⁶ *In re General Motors Class H Shareholders Litig.*, Del. Ch., 734 A.2d 611, 619 n.7 (1999).

²⁷ *McMillan v. Intercargo Corp.*, Del. Ch., C.A. No. 16963, mem. op., 2000 Del. Ch. LEXIS 70, at *25-*26 & *25 n.41, Strine, V.C. (Apr. 20, 2000). The pertinent exceptions in § 102(b)(7) relating to unlawful actions and actions taken in bad faith are quite obvious examples of disloyal acts. Arguably, the improper personal benefits provision of § 102(b)(7)(iv) could be seen as preventing a director from benefiting from his own gross negligence in the context of a self-dealing transaction, but this, too, can properly be seen as raising loyalty concerns, given that it involves a fiduciary who has personally benefited from his own lack of care at the expense of the beneficiaries of his service.

²⁸ Defs.' Br. at 29 (citing *Orzeck v. Englehart*, Del. Supr., 41 Del. Ch. 361, 195 A.2d 375 (1963)).

of the UGL and ULSA boards, and would have day-to-day access to corporate information through their multiple corporate offices.

The defendants initially announced to the market that they were considering a merger that would have streamlined UniHolding's structure but that would have required the defendants to take steps to guarantee the fairness of the consideration received in the merger.²⁹ After making this announcement, the Controlling Group consummated the Initial Swap at the UGL level, which had the effect of placing UniHolding's wholly-owned subsidiary in control of UniHolding. Defendant Zwirn was UGL's Chairman and the facts [*38] in the complaint amply support the inference that he instigated the Initial Swap. Defendants van Gernerden and Gherardi each participated in that swap. And by the time the Initial Swap was rescinded, it is clear that the entire UniHolding board knew that UGL's board was prepared to engage in a transaction that would place UGL in control of UniHolding and leave UniHolding's Minority Stockholders in a potentially compromised position.

Furthermore, it is reasonable to infer that the entire UniHolding board was aware of the Initial Swap at the planning stages. Because UniHolding had already announced the possibility of a merger so as to streamline the UniHolding/UGL/ULSA holding structure [*39] and because several of the defendants were involved in the Initial Swap, the plaintiffs are entitled to the inference that the UniHolding board considered that swap as an alternative means of accomplishing the streamlining that would advantage the Controlling Group. This inference is made even stronger by the fact that the Initial Swap was rescinded and that the UniHolding board then announced that a merger was still a real possibility. And by the time the final Swap took place, it seems implausible that the UniHolding board was uninvolved in determining which option to pursue. At the very least, the complaint pleads facts that, if true, make clear that the UniHolding board was not only fully aware of the possibility of the final Swap before it occurred but stood by and did nothing to stop it.

In this same regard, it is counterintuitive that those directors of UGL who were not affiliated with UniHolding³⁰ decided independently that it was important for UGL to take action to respond to the desires of the Controlling Group of UniHolding stockholders--*who were not UGL stockholders*--without consulting with the UniHolding board. While events may in fact have transpired in this rather [*40] unusual manner, on a dismissal motion the plaintiffs are entitled to the inference that the Controlling Group also dominated UGL and impelled UGL to do what it did. After all, Zwirn was UGL's Chairman.

In this context, the UniHolding board's supine reaction supports a claim for breach of the duty of loyalty. *HN3* It is by no means a novel concept of corporate law that a wholly-owned subsidiary functions to benefit its parent.³¹ To the extent that members of the parent board are on the subsidiary board or have knowledge of proposed action at the subsidiary level that is detrimental to the parent, they have a fiduciary duty, as part of their management responsibilities, to act in the best interests of the parent and its stockholders.

[*41] Here the pled facts support the inference that certain members of the UniHolding board--Zwirn, van Gernerden, and Gherardi--actively initiated and participated in the Swap at the UGL level to the benefit of their personal interests and at the expense of UniHolding and its Minority Stockholders. The other members of the board permitted them to do so. Although the defendants--directors would have me find that they were powerless to control the actions of UniHolding's wholly-owned subsidiary, they have not supported that implausible assertion with legal authority, and I hesitate to adopt an "uncontrollable child" theory of parent-subsidiary relations. More reasonable is the inference that the UniHolding directors decided that the best way to accomplish the goals desired by the Controlling Group was to effect a transaction at the UGL level and to allow that transaction to take place, even though UniHolding had the practical power to stop it.

HN4 There is no safe harbor in our corporate law for fiduciaries who purposely permit a wholly-owned subsidiary to effect a transaction that is unfair to the

²⁹ That is, the defendants would have had to show, in the absence of procedural protections such as an effective special committee with real clout, that the straight exchange of liquid shares in a publicly listed and SEC-regulated company for identical securities in a non-listed, non-SEC regulated corporation was a fair transaction.

³⁰ This group's identity is not revealed in the record.

³¹ *E.g., Sternberg v. O'Neil*, Del. Supr., 550 A.2d 1105, 1124 (1988); *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, Del. Supr., 545 A.2d 1171, 1174 (1988).

parent company on whose board they serve. Nor do I find convincing the defendants' attempt to [*42] compartmentalize Zwirn's role in the Swap. In their papers and at oral argument, the defendants would have me pretend that the Zwirn who served as Chairman of UniHolding had no responsibility to control or know about the actions of the Zwirn who served as Chairman of UGL, even though "they" were in fact one person.

This argument rests on the premise that the members of a parent board who also serve on the board of a subsidiary board may take action at the subsidiary level that is disloyal to the parent without bearing any fiduciary responsibility to the parent to help it exercise its power to stop the disloyal action.³² [*43] Put more simply, the plaintiffs argue that a director of a parent board such as Zwirn has no duty to stop himself from injuring the parent while wearing his subsidiary hat.³³ The policy implications of accepting this premise are, to put it mildly, unappealing. I decline to endorse an approach that so obviously invites abuse and that would gut the duty of loyalty owed by Delaware directors to their stockholders.

This conclusion finds strong support in Vice Chancellor Jacobs's post-trial decision in the analogous case of *Technicorp International II, Inc. v. Johnston* ("*TCI II v. Johnston*").³⁴ In that case, the defendants argued that they were not subject to service of process in Delaware under *10 Del. C. § 3114* for their actions in pillaging the wholly-owned California subsidiary of a Delaware corporation on whose board they served, even though that subsidiary was the parent's "only operating asset and source of income."³⁵ Like UniHolding, the parent in that case held all of its key operations at the [*44]

subsidiary level, making oversight of subsidiaries a crucial aspect of the parent board's function.

Vice Chancellor Jacobs rejected the directors' suggestion they could escape responsibility at the parent level, stating:

In *Hoover Industries, Inc. v. Chase*, a director and officer of a corporation and its subsidiary was charged with wrongfully diverting assets of both the parent and the subsidiary. The director claimed jurisdiction under *§ 3114* was unavailable because the challenged transactions were performed in his capacity as an "officer" rather than as a director. Rejecting that contention, former Chancellor Allen stated that "the duty of loyalty of a director is . . . a special obligation upon a director in *any* of his relationships with the corporation." The Chancellor also observed that it well may be that "a director [*45] *qua* director owes a duty to the corporation to so conduct himself in all of his capacities so as not to inflict an intentional, wrongful injury upon the corporation," but the Court found it unnecessary to explore the soundness of that proposition in that particular case. In this case, I conclude that that proposition is axiomatic and subsumed within the director's broader duty of loyalty. Thus, Johnston and Spillane had a duty as directors "in any of their relationships" with [the parent corporation] not to injure that corporation or its assets, including its wholly-owned subsidiary . . . This Court, therefore, has personal jurisdiction over the defendants under *§ 3114* with respect to [the parent corporation's]

³² See *Hoover Industries, Inc. v. Chase*, Del. Ch., C.A. No. 9276, mem. op., 1988 Del. Ch. LEXIS 98, at *4-*8, Allen, C. (July 13, 1998) (rejecting defendant's argument that because he performed his challenged actions solely as an officer, he was not susceptible to substituted service under *10 Del. C. § 3114*, strongly implying that such an approach would reduce the protective function of the duty of loyalty, and noting that it would also "encourage a jurisprudence of distinctions of metaphysical subtlety"); cf. *Manchester v. Narragansett Capital, Inc.*, Del. Ch., C.A. No. 10822, mem. op., 1989 Del. Ch. LEXIS 141, at *23-*24, Chandler, V.C. (Oct. 18, 1989) ("given the fact that the individual defendants are all employees, shareholders, officers, and directors of the corporation, it would be artificial to distinguish their actions as having been taken in different guises when, as directors, they control the corporation").

³³ See *Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, Del. Ch., C.A. No. 13950, mem. op., 1996 Del. Ch. LEXIS 130, at *10 n.7, Allen, C. (Oct. 17, 1996) ("culpable inaction by directors is a sufficient ground for a breach of fiduciary duty claim permitting service of process under *Section 3114*") (citing *Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, Del. Ch. C.A. No. 13950, amended order at 3, Allen, C. (Dec. 19, 1995)) (subsequent history omitted).

³⁴ *Technicorp Int'l II, Inc. v. Johnston* ("*TCI II v. Johnston*"), 2000 Del. Ch. LEXIS 81, Del. Ch., C.A. No. 15084, mem. op., Jacobs, V.C. (May 31, 2000).

³⁵ *TCI II v. Johnston*, 2000 Del. Ch. LEXIS 81, *14.

claim for wrongfully diverting assets of [the subsidiary].³⁶

[*46] Equally ineffective is the defendants' reliance on the doctrine of independent legal significance. *HN5* It was long ago settled that inequitable action is not insulated from review simply because that action was accomplished in compliance with the statutory and contractual provisions governing the corporation.³⁷ The defendants are on firmer ground in arguing that the transactions complained of by the plaintiffs did not give rise to rights under *8 Del. C. § 262*.³⁸ Nonetheless, if the plaintiffs later prove that the defendants took inequitable action designed to have the same effect on the plaintiffs as a squeeze-out merger, an award of quasi-appraisal damages would be within the realm of possibilities as a remedy.

Finally, [*47] the fact that the defendants belatedly undertook the Exchange cannot save them at this stage of the litigation. Although the Exchange reduced the dilutive effect of the Swap,³⁹ UniHolding's Minority Stockholders were still left as the owners of stock in a delisted corporation, the only valuable asset of which was a non-revenue-generating minority block of an unlisted BVI corporation dominated by the Controlling Group. At this stage, therefore, one cannot rule out the possibility that this transformation caused the Minority Stockholders real harm. Nor can one rule out the possibility that the defendants knew that the Swap would be likely to induce some or all of the Minority Stockholders to cash out for a pittance, much as Franklin

had done, thereby enabling the Controlling Group to absorb the minority's stake at an unfair price.

[*48] In this respect, it is again noteworthy that the defendants apparently never considered the option of distributing ULSA shares to the Minority Stockholders proportionate to their interests in UniHolding. That option would have given the Minority Stockholders stock in a listed corporation and therefore much more liquidity and value, although it also would have cut into the Controlling Group's voting power at ULSA. Furthermore, the defendants' failure to consider this option contributes to the inference at this point that they wanted to retain as much control of ULSA as possible for themselves and put as much pressure as possible on the Minority Stockholders to sell out their stakes cheaply.

That inference is not undercut for the purposes of this motion by the fact that the Controlling Group allegedly gave the Minority Stockholders the opportunity to trade their Nasdaq-listed shares in UniHolding for illiquid securities in an unlisted BVI corporation. It may turn out that evidence introduced later in the litigation will bear out the defendants' assertion that the Swap and Exchange were in fact a fair way to balance the divergent interests of the Controlling Group and the Minority Stockholders. [*49] But for now, it is impossible to conclude that the defendants did not realize that the chance to hold a minority block in a corporation such as ULG was an offer that institutional investors who want liquidity and reliable corporate disclosures would undoubtedly refuse (in part because of their own fiduciary obligations).

³⁶ *TCI II v. Johnston*, 2000 Del. Ch. LEXIS 81, *15-16 (quoting *Hoover Industries*, mem. op. at 4-5) (emphasis added in *TCI II v. Johnston*). *Pauley Petroleum Inc. v. Continental Oil Co.* does not hold to the contrary. *Del. Supr.*, 43 Del. Ch. 516, 239 A.2d 629 (1968). In that case, the Supreme Court affirmed the Chancellor's decision not to order an American parent company to take whatever action it could to force its Mexican subsidiary to terminate litigation against one of the plaintiff's subsidiaries. The case did not involve an allegation by a stockholder of the parent that the parent board was breaching its fiduciary duties, to oversee the company's operations, even at the subsidiary level. Rather, it involved allegations by a business whose interests were adverse to the aligned interests of the parent and its subsidiary. Thus the Supreme Court upheld the application of the traditional veil piercing analysis but expressly noted that the separate identities of a parent and subsidiary may be disregarded "in the interest of justice, when such matters as fraud . . . are involved" or "where equitable consideration[s] among members of the corporation require it . . ." *Id.*, 239 A.2d at 633 (citations omitted). See also *Carlton Investments* 1996 Del. Ch. LEXIS 130, at *13-*14 (if separate subsidiaries are used to divert assets to an interested director, the court will ignore the separate existences of a parent and subsidiary because to do otherwise "would simply advance a wrong").

³⁷ See, e.g., *Schnell v. Chris-Craft Industries, Inc.*, Del. Supr., 285 A.2d 437, 439 (1971).

³⁸ Indeed, the proposed merger most likely could have been accomplished without triggering statutory appraisal rights. See, e.g., *8 Del. C. §§ 253, 262(b)(2)(a)*.

³⁹ Because the Exchange took place after the Minority Stockholders complained about the Swap, it is inferable that the Exchange was ginned up to make the Swap look fair. It is also conceivable that the Exchange was performed later so as to allow the UniHolding board to argue that it was uninvolved in the Swap, a claim that would have been even less plausible had the Swap and Exchange been effected contemporaneously.

In sum, the complaint pleads facts that, if true, state a claim that the defendants breached their duty of loyalty.

C. Are The Defendant-Directors Subject To Personal Jurisdiction Under 10 Del. C. § 3114

The defendants also argue that they are not subject to this court's jurisdiction because the Swap did not involve actions they took as directors of UniHolding. As the reader might anticipate from the discussion above, I believe this argument lacks merit.

The complaint pleads that the UniHolding board actively participated in a scheme to benefit the Controlling Group to the detriment of UniHolding as an entity and its Minority Stockholders. To that end, the complaint alleges, members of the UniHolding board instigated action at the UGL level, and other members of the UniHolding board permitted that action, even though UniHolding was UGL's 100% owner and [*50] can be presumed to have had the power to prevent UGL, UniHolding's own creation, from turning on its parent.

Thus the complaint states a claim for breach of fiduciary duty against the UniHolding board members in their capacity as UniHolding directors. This suffices to invoke this court's jurisdiction over them.⁴⁰

D. Whether The Complaint Must Be Dismissed Because Indispensable Parties Are Allegedly Not Before The Court

The defendant-directors also contend that dismissal is warranted because the [*51] plaintiffs will most likely be unable to obtain jurisdiction over UGL and Unilabs.

Because the Swap is the central transaction challenged and because UGL and Unilabs were the major parties to that transaction, the defendant-directors assert that those companies are indispensable parties and that a proper balancing analysis under by Court of Chancery Rule 19(b) dictates dismissal in their absence.⁴¹

[*52] For purposes of this motion, I will assume that the plaintiffs will have difficulty obtaining personal jurisdiction over UGL and Unilabs in Delaware. Although the plaintiffs are in the process of effecting service on these foreign corporations pursuant to the relevant international treaties, the complaint fails to allege acts that transpired in Delaware. Thus, even if it can be shown that any of the defendant-directors acted as agents for UGL and/or Unilabs, jurisdiction over UGL and Unilabs is doubtful.⁴²

[*53] Nonetheless, I conclude that this action should proceed even if UGL and Unilabs cannot be required to participate as defendants. To use the words of Rule 19(b), it would ill serve "equity and good conscience" to permit defendants who have allegedly committed breaches of fiduciary duty against stockholders of Delaware corporations to escape jurisdiction here merely because the breaches they allegedly committed to benefit non-Delaware holding entities took place outside Delaware. If this were the rule, controlling stockholders would have an incentive to create non-Delaware holding entities simply to thwart the ability of minority stockholders to obtain a reliable forum to redress fiduciary breaches.

Similarly, dismissing this case because UGL is a British Virgin Islands corporation could incentivize Delaware

⁴⁰ *TCI II v. Johnston*, 2000 Del. Ch. LEXIS 81, *13-16 (discussed *supra*); *Hoover Industries*, 1988 Del. Ch. LEXIS 98, at *5-*7 (discussed *supra*); *Carlton* 1996 Del. Ch. LEXIS 130 at *12 (if plaintiff makes a prima facie showing that a director of a Delaware corporation knew that the corporation's French subsidiary was being used to effect self-dealing transaction to the detriment of its corporate parent and "took no action as director to correct the alleged abuses," jurisdiction under 10 Del. C. § 3114 could be asserted).

⁴¹ *HN6* See Ct. Ch. R. 19(b) ("If [an indispensable party] cannot be made a party, the Court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable. The factors to be considered by the Court 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.").

⁴² *HMG/Courtland Properties, Inc. v. Gray*, Del. Ch., 729 A.2d 300, 305 (1999) (jurisdiction over a co-conspirator in a breach of fiduciary duty action cannot be predicated on 10 Del. C. § 3114 but must be based instead on an application of § 3104, which, according to the alter ego theory of personal jurisdiction, turns in part on "the existence of acts in Delaware which can be fairly imputed to the out-of-state defendant and which satisfy the long-arm statute [and] federal due process requirements").

boards of directors to set up or use non-Delaware subsidiaries as vehicles for self-dealing transactions on the hope that Delaware's lack of jurisdiction over the subsidiaries will allow the parent board to escape accountability here. Perhaps in view of the obvious concerns raised by a contrary approach, it is not uncommon for this court to hear claims that directors of Delaware [*54] corporations have committed breaches of fiduciary duty at the behest of a majority or controlling stockholder who is not before the court. Proceeding in such a manner has never been thought unduly prejudicial, and I perceive no case-specific prejudice here.

Here, if this case gets to that point, the court can fashion an award of monetary damages that holds the defendant-directors accountable for any *and only* the harm that their breaches of fiduciary duty may have caused the plaintiffs. If the defendant-directors believe that Unilabs or UGL should shoulder a portion of their liability, the defendant-directors may file separate actions for contribution or indemnification against UGL and Unilabs in the domiciles of those entities. Moreover, given that director Zwirn has a considerable amount of influence over Unilabs and that Unilabs controls UGL, Zwirn has more than a slight say in whether those entities choose to participate in this action.

Nor will the defendant-directors face evidentiary prejudice because Unilabs and UGL might be absent. Zwirn was the primary mover on behalf of these entities participating in the Swap and that he therefore possesses sufficient knowledge to ensure [*55] that there is no evidentiary unfairness to the

defendant-directors in proceeding without Unilabs and UGL. Furthermore, Zwirn likely possesses the practical authority to ensure that UGL and Unilabs provide him and the other defendant-directors with any additional evidence they need to defend this suit, and this court can aid the defendant-directors (through the issuance of appropriate process to their domicile nations under international conventions) if he is unable to convince those corporations to do so.

The absence of prejudice to the defendant-directors is compounded by the quandary in which dismissal would put the plaintiffs. In Delaware, the plaintiffs can obtain jurisdiction over the entire UniHolding board. It is unclear whether jurisdiction over the whole board can be had elsewhere, and even if it could be had in, for example, the British Virgin Islands, there is no just reason why the plaintiffs should be forced to litigate against the directors of a Delaware corporation in another forum.⁴³

[*56] For all these reasons, I conclude that the relevant interests at stake weigh in favor of denying the defendant-directors' motion to dismiss pursuant to Court of Chancery Rule 19.

III. Conclusion

Based on the foregoing, the motion to dismiss is DENIED, except that the plaintiffs' claim for monetary relief against the defendant-directors other than Zwirn, Gherardi, and van Gernerden based on their breaches of duty of care is HEREBY DISMISSED. IT IS SO ORDERED.

⁴³ *Sternberg v. O'Neill*, 550 A.2d at 1123 **HN7** ("Delaware has an interest in holding accountable those responsible for the operation of a Delaware corporation"); *Carlton Investments*, 1996 Del. Ch. LEXIS 130, at *17 ("As has been noted in the past, actions involving claims that a director has breached his fiduciary duties to a Delaware corporation are of special concern to this Court. Section 3114 recognizes the strong interest that this Court has in assuring the effective administration of the law governing corporations organized in Delaware and, therefore, in hearing cases regarding internal corporate governance issues.") (internal citation omitted).

EXHIBIT 9

Highlands Ins. Co. v. Celotex Corp.

United States District Court for the District of Columbia

December 21, 1989, Decided; December 22, 1989, Filed

Civil Action No. 89-2258

Reporter

1989 U.S. Dist. LEXIS 15349

HIGHLANDS INSURANCE COMPANY, et al., Plaintiffs,
v. THE CELOTEX CORPORATION, et al., Defendants

Core Terms

carriers, defendants', unnamed, indispensable, parties, motion to dismiss, good conscience, excess carrier, reconsideration, plaintiffs', decisions, layer, weigh, seal

Opinion by: [*1] PRATT

Opinion

ORDER

JOHN H. PRATT, UNITED STATES DISTRICT JUDGE

The Court has considered the motion of defendants Celotex and Carey Canada for reconsideration or, alternatively, an amendment to allow an appeal, plaintiffs' opposition thereto, and defendants' reply. The Court also has considered the unopposed motion of these defendants for leave to file under seal two (2) ADR decisions. We grant the second motion, but for the reasons stated below, deny the first.

We denied defendants' motion to dismiss or, alternatively, to stay because we concluded that the five unnamed insurance carriers who are parties to the Oklahoma state court action were not "necessary" parties to the action in our Court. See Fed. R. Civ. P. 19(a). This conclusion was based on the fact that the Oklahoma action is not comprehensive, there being additional carriers who were not, and perhaps could not, be joined there, and that defendants failed to demonstrate how a decision as to liability in this Court would preclude them from obtaining relief from the five unnamed carriers in Oklahoma.

Moreover, even if the unnamed carriers were "necessary," they are not "indispensable" under the

more stringent test of Federal [*2] Rule 19(b). While defendants cite *American Insurance Co. v. Bradley Mining Co.*, 57 F. Supp. 545 (N.D. Cal. 1944), for the proposition that the unnamed carriers are indispensable, *Bradley* has never been cited by another court for this proposition, and the reference to "indispensable" in revised Rule 19, "was not intended to codify the pre-1966 body of precedent in which particular parties were categorized as indispensable." C. Wright, A. Miller, & M. Kane, 7 *Federal Practice and Procedure* § 1607, at 85 (2d ed. 1986). Rather, a court is to evaluate all relevant considerations presented by the case, and decide whether "in equity and good conscience" the case should proceed. *Id.*; see Fed. R. Civ. P. 19(b).

One factor that weighs heavily against dismissal is defendants' blatant attempt to avoid further litigation in this Court. Immediately after our June 1989 decision against them in a protracted lawsuit they brought against certain "lower layer" excess carriers, defendants turned to Oklahoma state court for precisely the same type of declaratory relief against "upper layer" excess carriers. Under these circumstances, and considering our extensive experience with [*3] the nature of this litigation, "equity and good conscience" weigh in favor of retaining jurisdiction.

Our consideration of the factors enumerated in Rule 19(b) does not indicate a contrary result. Those already parties will not be prejudiced by nonjoinder of the five unnamed carriers. Defendants cannot seriously claim that an unfavorable decision in this Court is the type of prejudice to which Rule 19(b) refers. Our decision will not be binding on the unnamed carriers, and defendants will remain free to seek relief against them in the Oklahoma action. *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*, 682 F.2d 12, 16 n.1 (1st Cir. 1982), cert. denied, 460 U.S. 1028, 103 S. Ct. 1279, 75 L. Ed. 2d 500 (1983). Nor can defendants claim that this litigation will provide them with inadequate relief. While the Oklahoma action may be necessary to resolve

1989 U.S. Dist. LEerce

defendants' dispute with the five unnamed carriers, these carriers are no more indispensable for this reason than are the carriers who are either parties to the Wellington Agreement or presently insolvent.

Because we are convinced that the Oklahoma action is not comprehensive, that we have a useful six years of experience [*4] with related litigation, and that defendants' forum shopping should not be condoned, we decline to exercise our discretionary power to stay this action pending resolution of the proceedings in Oklahoma. We also deny defendants' request for an amendment to allow an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1988). Because our Order denying defendants' motion to dismiss was based on alternative grounds, we are not "of the opinion that such order involves a controlling question of law as to which there

is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Moreover, because plaintiffs' motion for summary judgment is ripe for decision, we are not "of the opinion . . . that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.*

Accordingly, it is by the Court this 21st day of December, 1989,

ORDERED that defendants' motion for reconsideration or, alternatively, an amendment to allow an appeal is denied; and it is

FURTHER ORDERED that defendants' motion for leave to file under seal two (2) ADR decisions is granted.

EXHIBIT 10



Positive

As of: October 19, 2015 8:32 PM EDT

In re Silver Leaf, L.L.C.

Court of Chancery of Delaware, New Castle

April 20, 2004, Submitted kuloujk. ; June 29, 2004, Decided

C.A. No. 20611

Reporter

2004 Del. Ch. LEXIS 93; 2004 WL 1517127

IN RE: SILVER LEAF, L.L.C., a Delaware Limited Liability Company

Subsequent History: Later proceeding at *In re Silver Leaf, L.L.C.*, 2005 Del. Ch. LEXIS 119 (Del. Ch., Aug. 18, 2005)

Disposition: [*1] Lavi's motion to dismiss DENIED.

Core Terms

counterclaims, motion to dismiss, machines, parties, lack of personal jurisdiction, contacts, disputes, estoppel, license

Case Summary

Procedural Posture

Counterclaim-defendant sole corporate stockholder filed a motion to dismiss the counterclaim brought by defendants, a manager and two members of a limited liability company (LLC), due to lack of personal jurisdiction. The action brought by plaintiff corporation sought judicial dissolution of the LLC, and the counterclaim alleged breach of contract, breach of fiduciary duty, and tortious interference against both defendants.

Overview

The two LLC member plaintiffs and the corporate defendant formed an LLC to market and sell French fry vending machines. Litigation was commenced in New Jersey when the LLC lost its license. Thereafter, the corporate defendant filed for judicial dissolution in Delaware. Both defendants then sought dismissal of the New Jersey action so that the entire dispute could be resolved in one forum. The New Jersey action was dismissed and plaintiffs brought a counterclaim in

Delaware, asserting the same claims that they had raised in the New Jersey action. The stockholder sought dismissal of the counterclaim against him, alleging that the Delaware court lacked personal jurisdiction. However, the court found that the stockholder's conduct in securing the dismissal of the New Jersey action judicially estopped him from asserting a lack of jurisdiction in Delaware. Further, the exercise of personal jurisdiction over him was found to be consistent with due process notions of justice and fair play. The New Jersey action was dismissed based on the stockholder's assertion that Delaware could litigate the full dispute, and accordingly, the principles of due process were not offended.

Outcome

The motion to dismiss the counterclaim, brought by the stockholder, was denied.

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Evidence > Burdens of Proof > General Overview

HN1 In a motion to dismiss challenging personal jurisdiction pursuant to Del. Ch. Ct. R. 12(b)(2), the party asserting jurisdiction bears the burden of showing a basis for the court's exercise of jurisdiction over the nonresident party. In general, the court will conduct a

two-step analysis: first determining whether service of process on the nonresident is authorized by statute; and, second, deciding whether the exercise of jurisdiction is consistent with due process.

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN2 Judicial estoppel prevents a litigant from advancing an argument that contradicts a position previously taken by that same litigant, and that a court was persuaded to accept as the basis for its ruling. Judicial estoppel is an equitable doctrine designed to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN3 Although additional considerations may inform the doctrine of judicial estoppel's application in specific factual contexts, several factors typically inform the decision whether to apply the doctrine of judicial estoppel in a particular case: whether a party's later position is "clearly inconsistent" with its earlier position, whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled, and whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN4 A state court may exercise personal jurisdiction over a nonresident defendant so long as there are "minimum contacts" between the defendant and the forum. The minimum contacts analysis protects a defendant against the burden of litigating in a distant forum, and guarantees that the states through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system. It is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN5 A court considers the conduct of a defendant and the connections among the defendant, the forum and the litigation in determining whether the nonresident defendant has "minimum contacts" with the forum state.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN6 The "purposeful availment" requirement for jurisdictional purposes ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or the "unilateral activity of another party or a third person."

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN7 Jurisdiction is proper where a party's contacts proximately result from actions by the defendant himself that create a "substantial connection" with the forum state.

Business & Corporate Law > Limited Liability Companies > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HNB Delaware has a strong interest in resolving disputes regarding the internal affairs of limited liability companies formed under its laws.

Counsel: Bruce E. Jameson, Esquire, J. Clayton Athey, Esquire, PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware, for Petitioner/Counterclaim Defendant, USIS International Capital Corporation and Counterclaim Defendant, Mark Lavi.

Charles J. Brown, III, Esquire, ELZUFON AUSTIN REARDON TARLOFF & MONDELL, P.A., Wilmington, Delaware; John Fialcowitz, Esquire, Rita M. Jennings, Esquire, LOWENSTEIN SANDLER PC, Roseland, New Jersey, for Respondents/Counterclaim Plaintiffs, Syndi Romanoff, David Romanoff, Yehuda Segal and Silver Leaf, LLC.

Judges: LAMB, Vice Chancellor.

Opinion by: LAMB

Opinion

MEMORANDUM OPINION

LAMB, Vice Chancellor.

I.

This action arises out of a dispute between the three members of an LLC formed for the purpose of entering into a license to market and sell french fry vending machines. The LLC eventually lost its license and as a result the members are engaged in litigation. The manager of the LLC and two of its members filed suit in the Superior Court of New Jersey against the third member, a Delaware corporation and its sole stockholder asserting claims for breach of contract, breach of fiduciary duty and tortious interference.

[*2] In response, the corporate defendant in the New Jersey action filed in this court a petition for judicial dissolution of the LLC. It then joined its sole stockholder in asking the New Jersey Superior Court to dismiss the action without prejudice so that the entire dispute could be resolved in Delaware. The motion to dismiss the New Jersey action was granted. The defendants in this

action then answered the petition and counterclaimed, raising, in essence, the same claims previously alleged in New Jersey. In order to bring before this court all of the claims that had been asserted in New Jersey, the counterclaims name the sole stockholder of the corporate member as an additional counterclaim defendant.

That individual responded to the counterclaims with a motion to dismiss asserting a lack of personal jurisdiction, a defense not raised by him in the New Jersey action. The question presented is whether this court should entertain that defense or, instead, find that the individual's conduct in securing a dismissal of the New Jersey Superior Court action estops him from asserting a lack of personal jurisdiction here.

II.

In April 2001, Syndi Romanoff, Yehuda Segal and USIS formed [*3] Silver Leaf, LLC, a Delaware limited liability company. USIS, an Illinois corporation engaged in day trading corporate securities, owns a 50% equity interest in Silver Leaf. USIS is wholly owned by Mark Lavi, who also serves as its sole director and president. Syndi Romanoff and Yehuda Segal own the remaining interest in Silver Leaf, 30% and 20% respectively. David Romanoff is the manager of Silver Leaf.

In February 2002, Silver Leaf entered into an agreement with Tasty Fries, Inc. for the exclusive license to sell, market, sublicense and distribute Tasty Fries' patented french fry vending machines. Silver Leaf later ordered ten thousand Tasty Fries machines and arranged to pay for the machines in installments. Over the next few months, the relationship between Silver Leaf and Tasty Fries deteriorated as Tasty Fries prematurely demanded payment for the machines or assurances from Silver Leaf as to its financial condition.

As relations between Tasty Fries and Silver Leaf deteriorated, Lavi represented to Tasty Fries and other third parties that he was the manager of Silver Leaf and, over the objections of the other Silver Leaf members and its manager, conducted business in that capacity.

[*4] ¹ No machines were ever delivered, and Tasty Fries eventually terminated its agreement with Silver Leaf. The parties dispute the reason for the termination of the license agreement.

¹ Lavi sent letters in April 2002 to third parties declaring himself the manager of Silver Leaf. See Aff. of David Romanoff Related to Ans. Br. of Resp'ts/Countercl. Pls. In Opp'n to Countercl. Def. Mark Lavi's Mot. to Dismiss, at Ex. F (Memorandum

Silver Leaf, Syndi Romanoff, David Romanoff and Yehuda Segal began litigation in the New Jersey Superior Court relating to the management of Silver Leaf and the events leading up to the termination of its contract with Tasty Fries. In August 2003, Silver Leaf, Syndi Romanoff, David Romanoff and Yehuda Segal filed an action in the New Jersey Superior Court against Lavi and USIS alleging that Lavi conspired with Edward Kelly, Tasty [*5] Fries' president and CEO, to terminate Silver Leaf's agreement with Tasty Fries and to misappropriate Silver Leaf's exclusive license with Tasty Fries.²

On October 17, 2003, USIS filed this petition for judicial dissolution of Silver Leaf pursuant to 6 Del. C. § 18-802. USIS and Lavi moved to dismiss the New Jersey action arguing that the entire dispute could be and should be resolved in Delaware. Lavi obtained dismissal of the New Jersey action because he represented that the Delaware Court of Chancery had exclusive jurisdiction over disputes between the members and that Delaware was [*6] an available forum to hear all of the claims then pending in New Jersey. Lavi argued that "New Jersey's judicial resources should not be wasted on several complicated matters when, in one case in Delaware, all issues can, and hopefully will be resolved."³ Based on Lavi's representation that the Delaware Court of Chancery was the appropriate forum to resolve all of the disputes among the members of Silver Leaf, the New Jersey court dismissed the action pending before it.⁴

[*7] Silver Leaf, Syndi Romanoff, Yehuda Segal and David Romanoff, filed a response to the petition for dissolution on November 24, 2003, asserting counterclaims against both USIS and Lavi.⁵ On December 19, 2003, USIS answered the counterclaims and Lavi filed a motion to dismiss for lack of personal jurisdiction. The court heard argument on counterclaim-defendant Lavi's motion to dismiss on April 20, 2004.

III.

HN1 In a motion to dismiss challenging personal jurisdiction pursuant to Court of Chancery Rule 12(b)(2), the party asserting jurisdiction bears the burden of showing a basis for the court's exercise [*8] of jurisdiction over the nonresident party.⁶ In general, the court will conduct a two-step analysis: first determining whether service of process on the nonresident is authorized by statute; and, second, deciding whether the exercise of jurisdiction is consistent with due process.⁷

The court need not address the merits of the motion to dismiss because, as a threshold matter, the doctrine of judicial estoppel bars Lavi's assertion that this court lacks personal jurisdiction. **HN2** "Judicial estoppel prevents a litigant from advancing an argument that contradicts a position previously taken by that same litigant, and that [a court] was persuaded to accept as

from Mark Lavi to Fred Zemel (April 10, 2002)); Ex. G (Letters to the Ashwood Group, LLC, SA1 Marketing, the DMG Group and Tasty Fries (April 15, 2002)).

² Silver Leaf also filed suit in New Jersey Superior Court against Tasty Fries for breach of contract and tortious interference. Silver Leaf's action against Tasty Fries was removed to the United States District Court for the District of New Jersey. In July 2003, the federal district court action was stayed pending resolution of whether Silver Leaf has authority to bring suit against Tasty Fries.

³ Letter to the Honorable Miriam Span in Reply to Pls.' Opp'n to Defs.' Mot. to Dismiss in *Romanoff, et al. v. Lavi, et al.*, Docket No. C-115-03 (Nov. 3, 2003), *in* Cert. of John Fialcowitz Related to Ans. Br. of Resp'ts/Countercl. Pls. In Opp'n to Countercl. Def. Mark Lavi's Mot. to Dismiss ("Fialcowitz Cert."), at Ex. A.

⁴ In granting the motion to dismiss, Judge Miriam Span of the New Jersey Superior Court stated: "Well, I agree there should be one jurisdiction. In this case, I agree it should be Delaware . . . So the instant matter should be litigated as a whole in the Delaware Chancery Court." Tr. of Lavi's Mot. to Dismiss on November 7, 2003, *in* Fialcowitz Cert., at Ex. B.

⁵ Respondents counterclaim that Lavi and USIS breached the operating agreement of Silver Leaf in several respects, breached their fiduciary duties and usurped a corporate opportunity, and tortiously interfered in Silver Leaf's contract with Tasty Fries. Respondents further counterclaim that Lavi should be personally responsible for USIS's liabilities. They also plead demand futility in their counterclaim.

⁶ See *Steinman v. Levine*, 2002 Del. Ch. LEXIS 132, 2002 WL 31761252 at *8 (Del. Ch. Nov. 27, 2002), *aff'd*, **822 A.2d 397 (Del. 2003)**.

⁷ *Id.*

the basis for its ruling."⁸ Judicial estoppel is an equitable doctrine designed to protect the integrity of the judicial process by "prohibiting parties from deliberately changing positions according [*9] to the exigencies of the moment."⁹ The court concludes that Lavi should be judicially estopped from arguing before this court that it lacks personal jurisdiction over him when the New Jersey court accepted and relied upon Lavi's representation that the full dispute would be litigated in this court.

[*10] Moreover, the exercise of personal jurisdiction over Lavi is consistent with due process in the circumstances presented. **HN4** A state court may exercise personal jurisdiction over a nonresident defendant so long as there are "minimum contacts" between the defendant and the forum.¹⁰ The minimum contacts analysis protects a defendant against the burden of litigating in a distant forum, and guarantees that "the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."¹¹ [*11] "It is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."¹²

Exercising jurisdiction over Lavi would not offend traditional notions of fairness¹³ [*12] and Lavi could reasonably anticipate being haled into court in Delaware since Lavi himself is responsible for the connection with Delaware.¹⁴ First, Lavi undoubtedly authorized and directed the filing in Delaware of USIS's petition for dissolution of Silver Leaf.¹⁵ He then successfully argued before the New Jersey Superior Court that Delaware is the most appropriate forum to fully resolve the claims then pending in the New Jersey litigation, including claims against him personally. Thus, it is his own conduct that makes it necessary and appropriate to exercise jurisdiction over him in this forum, and not some fortuitous or attenuated contact with this State.¹⁶

Furthermore, since the counterclaims focus on Lavi's actions in holding himself out to be the manager of Silver Leaf, Delaware is the appropriate forum to resolve the counterclaims. **HN8** Delaware "has a strong interest in resolving disputes regarding the internal affairs of

⁸ *Siegman v. Palomar Med. Techs.*, 1998 Del. Ch. LEXIS 115, 1998 WL 409352 at *3 (Del. Ch. July 13, 1998).

⁹ *New Hampshire v. Maine*, 532 U.S. 742, 743, 149 L. Ed. 2d 968, 121 S. Ct. 1808 (2001). See 28 AM. JUR. 2D *Estoppel and Waiver* § 74 (2003) **HN3** "Although additional considerations may inform the doctrine's application in specific factual contexts, several factors typically inform the decision whether to apply the doctrine of judicial estoppel in a particular case: whether the party's later position is 'clearly inconsistent' with its earlier position, whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled, and whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Donald J. Wolfe, Jr. and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 11-1[c] (2003) (listing similar factors).

¹⁰ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945). **HN5** The court considers the conduct of the defendant and the connections among the defendant, the forum and the litigation in determining whether the nonresident defendant has "minimum contacts" with the forum state. *Id.*

¹¹ *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980).

¹² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985) **HN6** (This "purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or the 'unilateral activity of another party or a third person'" (citations omitted)).

¹³ *Int'l Shoe Co.*, 326 U.S. at 316.

¹⁴ See *Burger King*, 471 U.S. at 472 **HN7** ("Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum state.") (citation omitted).

¹⁵ *Mobil Oil Corp. v. Advanced Envtl. Recycling Techs., Inc.*, 833 F. Supp 437, 446 (D. Del. 1993).

¹⁶ See *id.*

LLCs formed under its laws." ¹⁷ [*13] By declaring himself to be the manager of Silver Leaf, he impliedly consented to "adjudicate disputes so inherently intertwined with that fiduciary position." ¹⁸ Therefore, jurisdiction over Lavi is consistent with the due process requirements of fairness and justice. ¹⁹

For the foregoing reasons, Lavi's motion to dismiss is DENIED. IT IS SO ORDERED.

¹⁷ *Cornerstone Techs. LLC v. Conrad*, 2003 Del. Ch. LEXIS 46, 2003 WL 1787959 at *13 (Del. Ch. Mar. 31, 2003). See *Assist Stock Mgmt. v. Rosheim*, 753 A.2d 974, 981 (Del. Ch. 2000) ("Delaware has a strong interest in providing a forum for disputes relating to the ability of managers of an LLC formed under its law to properly discharge their respective managerial functions.").

¹⁸ *Assist Stock Mgmt.*, 753 A.2d at 981.

¹⁹ Service of process is not at issue since counsel for Lavi stated at oral argument that, if the court determined that jurisdiction was appropriate, he would waive any technical difficulties in service of process.

EXHIBIT 11

KeyCite Yellow Flag - Negative Treatment

Distinguished by NuVasive, Inc. v. Lanx, Inc., Del.Ch., July 11, 2012

1994 WL 114867

Only the Westlaw citation is currently available.

**UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.**

Court of Chancery of Delaware, New Castle County.

MILES INC., Plaintiff,

v.

COOKSON AMERICA, INC., and
Cookson Pigments, Inc., Defendants.

Civ. A. No. 12,310. | Submitted Jan.
26, 1994. | Decided March 3, 1994.

Attorneys and Law Firms

Paul E. Crawford, Stanley C. Macel, III, Connolly, Bove,
Lodge & Hutz, Wilmington, of counsel: Joseph C. Gil, Miles
Inc., Pittsburgh, PA, for plaintiff.

Josy W. Ingersoll, Young, Conaway, Stargatt & Taylor,
Wilmington, of counsel: Edward J. Handler, III, James
Galbraith, Walter E. Hanley, Jr., Joseph Kirk, Kenyon &
Kenyon, New York City, for defendants.

MEMORANDUM OPINION

**ON DEFENDANTS' MOTION TO
DISMISS FOR FAILURE TO JOIN
INDISPENSABLE PARTIES: DENIED**

HARTNETT, Vice Chancellor.

*1 Notwithstanding a March 15, 1994 trial date, on January 5, 1994, defendants moved to dismiss this two-and-a-half year old action for failure to join indispensable parties. Defendants have failed to demonstrate that plaintiff's former employees are necessary parties to this action. Even assuming, arguendo, that the employees are necessary parties, this Court, in its discretion, would find that they are not indispensable parties. The motion to dismiss must, therefore, be denied. A Rule 11 sanction, however, will not be imposed upon defendants.

THE FACTUAL BACKGROUND

I

In this suit, plaintiff, Miles Inc., ("Miles") alleges that defendants, Cookson America, Inc. and Cookson Pigments, Inc. (collectively, "Cookson") misappropriated trade secrets that Miles employs in its production of high performance organic pigments. Cookson allegedly hired six former employees of Miles (the "Former Employees") and used their confidential knowledge of Miles' secret processes to manufacture and sell certain specific high performance pigments. Cookson now maintains that the Former Employees are indispensable parties to this action. All the Former Employees, except Mr. Smerak, are still employed by Cookson.

In this suit Miles is seeking: (1) an order enjoining Cookson from using or disclosing the secret processes of Miles; (2) an order enjoining Cookson from further inducing the Former Employees to breach their obligations owed to Miles by disclosing or using Miles' secret processes; (3) damages caused by the alleged misappropriation; and (4) an order requiring Cookson to deliver to Miles, or to destroy, any information relating to Miles' secret processes. (First Amended Complaint, Prayer for Relief).

THE APPLICABLE LAW

II

Chancery Rule 12(h)(2) permits the defense of failure to join an indispensable party to be made "in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." As will be discussed, the lateness of defendants' motion is regrettable but it appears to be timely.

III

Chancery Rule 19 controls the determination of whether a person is an indispensable party to a particular action. Chancery Rule 19(a) sets forth the criteria for the required joinder (if feasible) of a person:

A person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

*2 If a person falls within either of these criteria, but joinder is not feasible, the Court must then consider “whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.” Ch.Ct.R. 19(b). Chancery Rule 19(b) sets forth four factors to aid in this determination:

First, to what extent a judgment rendered in the person's absence might be prejudicial to him 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.

RULE 19(a) (NECESSARY PARTY) ANALYSIS

IV

Cookson does not argue (nor could it) that complete relief cannot be accorded among those already parties if the Former

Employees are not joined. Ch.Ct.R. 19(a)(1). The relief requested by Miles relates only to Cookson. Although Miles requests an order enjoining Cookson from inducing the Former Employees to further breach their obligations owed to Miles, such an order may be entered without requiring the non-party Former Employees to be joined as parties to this action.

Instead, Cookson relies upon Rule 19(a)(2)(i) in arguing that the Former Employees have legal interests relating to the subject of this action and that their ability to protect those interests will be impaired or impeded by their absence from this litigation. Cookson contends that if it is found liable, the Former Employees will be “branded as thieves, their personal and professional reputations will be damaged, and they will no doubt be unemployable in their current professions.” (Defendants' Opening Brief, p. 10). Cookson even goes so far as to state that “an injunction against defendants could force dismissal of the Former Employees and inhibit their employability by others.” (Defendants Reply Brief, p. 5).

In *Wylain, Inc. v. Kidde Consumer Durables Corp.*, D.Del., 74 F.R.D. 434 (1977), the defendant argued that the wrongful conduct alleged in the complaint actually was committed by two other corporations not named as parties to the action. The Court interpreted the complaint as alleging that the absentees were defendant's agents and then stated: “Whenever a judgment is entered against a principal on account of its agent's conduct, some adverse consequences to the agent may reasonably be expected, but it is clear, as a general matter, that the agent is not a necessary party under Rule 19(a)(2)(i).” *Id.* at 436. *See also Pasco Intern. (London) LTD. v. Stenograph Corp.*, 7th Cir., 637 F.2d 496, 502 (1980) (fact that an agent will suffer harm to his business reputation when his principal is held vicariously liable on account of the agent's conduct is not a sufficient interest for finding the agent an indispensable party under Rule 19); *Pyramid Securities LTD. v. IB Resolution, Inc.*, D.C.Cir., 924 F.2d 1114, 1121 (1991), *cert. denied*, 112 S.Ct. 85 (1991) (“the notion that parties must be joined merely because of the risk to their reputation is staggering”).

*3 Similarly, speculation about the occurrence of a future event (here, potential lost employment opportunities or the potential dismissal by Cookson of the Former Employees in the event of an adverse judgment against Cookson) has been deemed insufficient to render all the parties potentially affected by the future event to be considered as necessary

or indispensable parties under Rule 19. *Northrop Corp. v. McDonnell Douglas Corp.*, 9th Cir., 705 F.2d 1030, 1046 (1983), cert. denied, 464 U.S. 849 (1983). Indeed, it is difficult to understand Cookson's argument that it, as the alleged misappropriator of Miles' trade secrets, might be forced to dismiss the Former Employees as a result of an injunction against it in this suit. This argument seems to imply that the only reason the Former Employees have jobs at Cookson is because of a misappropriation.

Cookson's reliance upon Rule 19(a)(2)(i) is, therefore, misplaced. The claimed interests of the Former Employees' as to diminished reputations or loss of future employment opportunities are insufficient to qualify the employees as necessary parties under Chancery Rule 19(a).

V

Next to be considered is the effect of Chancery Rule 19(a)(2)(ii). Cookson does not argue that the disposition of this action in the absence of the Former Employees will leave any of the parties subject to a substantial risk of incurring multiple or otherwise inconsistent obligations by reason of the claimed interests of the Former Employees, and this Court perceives no such risk.

VI

Cookson relies heavily upon *Torrington Co. v. Yost*, D.S.C., 139 F.R.D. 91 (1991). Plaintiff-employer sued its former employee alleging breach of an agreement not to divulge secret or confidential information. Plaintiff sought an injunction limiting the defendant's employment at INA, his current employer, for eighteen months. The *Torrington* court found that INA was a necessary and indispensable party to the proceeding.

Torrington is readily distinguishable from the present case. First, the contractual rights of the Former Employees here are not implicated by the relief sought by Miles to the same extent as the contractual rights of INA were implicated by the relief sought by the *Torrington* Company. Miles does not seek to bar Cookson from employing the Former Employees—Miles simply seeks an order enjoining Cookson from further inducing the Former Employees to disclose Miles' trade secrets. Such an order would not prevent Cookson from employing the Former Employees. And they

could be employed even in their current positions unless the current positions rely entirely upon the misappropriation of Miles' trade secrets.

Second, the *Torrington* court found that a judgment against the defendant employee would not be adequate because INA, a non-party, could not be prevented from using the alleged misappropriated information. Here, a judgment enjoining Cookson, the alleged beneficiary of misappropriated information, from using Miles' trade secrets would be adequate to prevent future misappropriation even if the Former Employees are not bound by such a judgment.

*4 Third, the *Torrington* court believed that INA would be too limited in the ways it could use the defendant employee if the relief requested by the plaintiff was granted. Here, a judgment rendered against Cookson would only prevent Cookson from using the Former Employees to misappropriate Miles' secret information. Otherwise, the Former Employees would be free to work for Cookson in any capacity.

Finally, the *Torrington* court found that the defendant, if found liable, might be exposed to inconsistent obligations because in order to obey a court order enjoining him from working for INA, the defendant might have to breach his contract with INA. Here, there appears to be no such risk of inconsistent obligations for Cookson. Cookson, if found liable, will not be enjoined from employing the Former Employees. Cookson will simply be enjoined from using misappropriated information gleaned from the Former Employees. Thus, a suit by the Former Employees against Cookson would appear to be unlikely.

The contractual interests of the absentee party and the defendant at stake in *Torrington* were considerably greater than the interests of the absentee parties claimed to be at stake in the present litigation (reputation and future employment opportunities). Cookson's reliance upon *Torrington* is, therefore, misplaced.

RULE 19(b) (INDISPENSABLE PARTY) ANALYSIS

VII

Even assuming, arguendo, that the Former Employees could be considered as being necessary parties whose joinder is not feasible, an analysis of the four Rule 19(b) factors

shows that the Former Employees should not be found to be indispensable parties.

The weight to be given each factor of Rule 19(b) must be determined by this Court in light of the controlling equity and good conscience test and in terms of the facts and circumstances of each particular case. Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 1608 (1986); *Council of Civic Organizations of Brandywine v. New Castle County, et al*, Del.Ch., C.A. 12048-NC, Hartnett, V.C. (Sept. 21, 1993) *aff'd*, Del.Supr., No. 336, 1992, Moore, J. (Dec. 29, 1993) (ORDER).

THE FIRST RULE 19(b) FACTOR

VIII

Assuming, arguendo, that the Former Employees were found to be necessary parties, the indispensable party inquiry would begin with the first factor of Chancery Rule 19(b) relating to the extent a judgment rendered in the absence of the necessary parties might be prejudicial to them or those already parties. A Court must look to the "practical likelihood of prejudice and subsequent litigation, rather than the theoretical possibility that they may occur." Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1608 (1986).

Defendants contend that in the event of an adverse judgment against them, the prejudice inuring to the absentee Former Employees would be the injury both to their personal and professional reputations and to their future ability to make a living with defendants or with another employer. This argument was found to be insufficient in the Rule 19(a) analysis above and these speculative grounds of prejudice are also insufficient to serve as the basis for a finding of indispensability under the first factor of Chancery Rule 19(b). *Pasco*, 637 F.2d at 502 (injury to non-party agent's business reputation not a sufficient interest to serve as the basis for a cognizable claim of prejudice to the absent person under Rule 19(b)).

*5 Nor could any judgment against Cookson be enforced against the non-party Former Employees. *Nixon v. Blackwell*, Del.Supr., 626 A.2d 1366, 1374 n. 4 (1993). In sum, Cookson has failed to show that any prejudice could inure to the Former Employees as a result of a judgment rendered in their absence.

THE SECOND RULE 19(b) FACTOR

IX

The second factor in the Chancery Rule 19(b) indispensability analysis, assuming, arguendo, that such an analysis is required, mandates an examination of the extent to which any prejudice could be lessened "by protective provisions in the judgment, by the shaping of relief, or other measures." The ability to intervene in an action, although not determinative, may be viewed as a factor that lessens any potential prejudice resulting from a future judgment. See 3A James W. Moore et al, *Federal Practice* ¶ 19.01{5}, at 19-13 (2d ed. 1992); *Travelers Indem. Co. v. Dingwell*, 1st Cir., 884 F.2d 629 (1989); *The Council of Civic Organizations of Brandywine Hundred, Inc. v. New Castle County*, Del.Ch., C.A. No. 12048-NC, Hartnett, V.C. (Sept. 21, 1993), *aff'd*, Del.Supr., No. 336, 1992 Moore, J. (January 18, 1994) (ORDER).

The Former Employees have not sought to intervene in this action to protect their alleged interests, however. Cookson, in addressing the second Rule 19(b) factor, argues that a judgment adverse to Cookson would, "if it restricted the rights of Cookson fully to use the talents and abilities of the Former Employees," make the Former Employees unemployable. (Defendants' Opening Brief, p. 13). Cookson makes no attempt to relate this statement to the second Rule 19(b) factor, however, and its argument is without merit.

Miles seeks an order prohibiting Cookson from further misappropriation of Miles' alleged trade secrets. This Court could enter an order prohibiting Cookson from using the Former Employees' knowledge of Miles' trade secrets. To the extent that Cookson argues that such an order would be improper, Cookson is mistaken.

A review of the second factor of Rule 19(b) leads to the conclusion that the Former Employees would not be indispensable parties under this factor, even if they were necessary parties.

THE THIRD RULE 19(b) FACTOR

X

The third factor in the Chancery Rule 19(b) indispensability analysis, assuming, arguendo, that such an analysis is required, is “whether a judgment rendered in the person's absence will be adequate.” Considerations of judicial economy and the public interest in complete and consistent settlement of controversies impact on the analysis of this factor. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968); Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 1608 (1986). The prospect of later litigation, however, would not in itself be sufficient to make the Former Employees indispensable parties, even if they were necessary parties. *Pasco*, 637 F.2d at 505.

*6 Neither party addressed the third Rule 19(b) factor in depth, but it appears unlikely that a judgment rendered in the present case would lead to subsequent litigation. If Miles obtains its requested relief, it would likely have no need to sue the Former Employees in their individual capacities. And, it is unlikely that Cookson, in the event of an adverse judgment against it, would attempt to sue the Former Employees who are now its employees.

It therefore appears that a judgment rendered in the absence of the Former Employees would be adequate.

THE FOURTH RULE 19(b) FACTOR

XI

The fourth factor to be considered by this Court in its Chancery Rule 19(b) indispensability analysis, assuming, arguendo, that such an analysis is necessary, is whether Miles would have an adequate remedy if this action were to be dismissed because of its failure to name the Former Employees as parties.

Cookson argues that Miles could simply file suit in New Jersey if the instant action is dismissed because both Cookson Pigments and Cookson America could be sued in New Jersey, as could the Former Employees. Miles responds that Cookson America could not be joined as a party in a New Jersey action because its only nexus with New Jersey is its status as the parent of Cookson Pigments. Although it is impossible to determine that issue definitively from the present record, there is a substantial question whether Cookson can be sued in New Jersey.

Even assuming, arguendo, that the Former Employees are necessary parties and that an action against Cookson Pigments, Cookson America, and the Former Employees could be brought in New Jersey, this Court would not necessarily have to find that the Former Employees are indispensable parties and dismiss this suit. The weight to be given each Rule 19(b) factor is discretionary. Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 1608 (1986). And, the fact that there exists an alternative forum (favoring dismissal) is not as significant in a Rule 19(b)

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RULE 11 SANCTIONS

XII

Chancery Rule 11 provides that sanctions shall be imposed upon an attorney or party (or both) if a motion has been submitted for “any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”

Miles argues that Rule 11 sanctions should be imposed against Cookson because the motion to dismiss for failure to join indispensable parties was submitted for the improper purpose of circumventing this Court's December 31, 1993, denial of Cookson America's motion for summary judgment and defendants' motion to modify the protective order. *Miles Inc. v. Cookson America, Inc., et al*, Del.Ch., C.A. No. 12310-NC, Hartnett, V.C. (December 30, 1993). Miles also contends that the present motion was submitted as “part of an overall scheme to harass, delay and needlessly increase the cost of this litigation.” (Plaintiff's Brief at 21).

*7 This suit was filed on October 10, 1991, but defendants did not file their motion to dismiss for failure to join an indispensable party until January 5, 1994. By that time a draft of a Pre-Trial Order had been submitted and a trial date had been set. Originally trial had been set to commence on November 16, 1993 but due to other commitments of the Court, it was rescheduled to January 18, 1994, and then to March 15, 1994. Unfortunately, there was no mention in the Pre-Trial Order of any Motion To Dismiss nor any limitation on the filing of pre-trial motions.

While the filing of this motion, almost on the eve of trial, is most regrettable, it does not rise to the level of conduct that

would justify the imposition of Rule 11 sanctions. It has not been shown that the pending motion to dismiss for failure to join indispensable parties was submitted for an improper purpose.

Upon consideration of all the circumstances, this Court concludes that imposition of a Rule 11 sanction would not be appropriate.

In conclusion, the Former Employees are not necessary parties under Rule 19(a) because they lack sufficient interests relating to the subject of this action. Even if they were necessary parties, they would not be indispensable parties under Rule 19(b) for the reasons stated. Cookson's motion to dismiss for failure to join indispensable parties must therefore be dismissed.

IT IS SO ORDERED.

XIII

All Citations

Not Reported in A.2d, 1994 WL 114867

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EXHIBIT 12

NuVasive, Inc. v. Lanx, Inc.

Court of Chancery of Delaware

July 3, 2012, Submitted; July 11, 2012, Decided; July 11, 2012, EFiled

Civil Action No. 7266-VCG

Reporter

2012 Del. Ch. LEXIS 150; 2012 WL 2866004

NUVASIVE, INC., a Delaware corporation, Plaintiff, v. LANX, INC., a Delaware corporation, Defendant.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Subsequent History: Motion granted by *NuVasive, Inc. v. Lanx, Inc.*, 2012 Del. Ch. LEXIS 247 (Del. Ch., Oct. 12, 2012)

Core Terms

employees, trade secret, former employee, necessary party, absent party, injunction, parties, misappropriation, injunctive relief, indispensable party, aiding and abetting, contractual, damages, rights, breach of fiduciary duty, obligations, breached, no necessity, post-employment, indispensable, personnel's, factors, argues, joined

Case Summary

Procedural Posture

Plaintiff corporation sued defendant company alleging unfair competition, tortious interference with contractual relations, tortious interference with prospective contractual relations (contract-based claims), aiding and abetting breach of fiduciary duty, civil conspiracy, and misappropriation of trade secrets. The company moved to dismiss under Del. Ch. Ct. R. and 12(b)(7) and 19(b) for failure to join the corporation's former employees (FEs).

Overview

The trial court held that a resolution of the contract-based claims (CBC) would impair the FEs' rights, and that their interests were not fully represented by the company. The FEs were necessary parties on

the CBC, but not indispensable parties. Requiring separate suits in jurisdictions where each FE was subject to jurisdiction would encourage piecemeal litigation. The corporation was judicially estopped from arguing that a judgment here had a res judicata or collateral estoppel effect on other claims against the FEs. The FEs' interests were not adequately protected by the company. While a judgment in their absence could be prejudicial, the court could craft a remedy that would protect them. A monetary award against the company would not prejudice the FEs. The FEs were not necessary parties on the aiding and abetting breach of fiduciary duty claim since the corporation was estopped from arguing res judicata or collateral estoppel against them in other litigation. The FEs were not necessary parties on the *Del. Code Ann. tit. 6, § 2001* claim as a decision would only affect their employment prospects with the company if their positions relied on the misappropriation of trade secrets.

Outcome

The motion to dismiss or stay was denied.

LexisNexis® Headnotes

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN1 Under Del. Ch. Ct. R. 19(a), the court must determine whether an absent person is a necessary party to the litigation. In particular, Rule 19(a)(2) provides that a party should be joined, if feasible, if the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. Rule 19(a).

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN2 If an absent party is deemed necessary and cannot be joined, the court must then determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. Del. Ch. Ct. R. 19(b) provides four factors for the court to consider in determining if a necessary party is indispensable to the action: 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. Rule 19(b).

Civil Procedure > Parties > Joinder of Parties > General Overview

HN3 An action may continue without an absent party if that party's interest is fully represented therein.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

HN4 The four Del. Ch. Ct. R. 19(b) factors are interdependent and must be considered in relation to each other as well as to the facts of each case.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

HN5 Del. Ch. Ct. R. 19(b) directs the court to determine whether a judgment rendered without the absent person will be adequate. Rule 19(b). Considerations of judicial economy and the public interest in complete and consistent settlement of controversies impact on the analysis of this factor. In other words, will this suit, if permitted, encourage piecemeal litigation, or otherwise be undesirable.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

HN6 Del. Ch. Ct. R. 19(b) directs the court to consider whether a plaintiff will have a remedy if the suit is dismissed.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN7 Del. Ch. Ct. R. 19(b) directs the court to address to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties. Rule 19(b). The considerations under this Rule 19(b) factor are similar to those used to determine whether the absent parties are necessary parties to the litigation.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

HN8 The fourth factor of the Del. Ch. Ct. R. 19(b) analysis is 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. Rule 19(b).

Civil Procedure > Preliminary Considerations > Equity > Relief

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN9 The Delaware Court of Chancery has broad discretion to fashion equitable relief. The Court of Chancery has broad discretion in granting or denying a preliminary injunction.

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Improper Means

HN10 To bring a trade secret misappropriation claim, the acquirer of the trade secret must know or have reason to know that the trade secret was acquired by improper means or derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use. *Del. Code Ann. tit. 6, § 2001.*

Counsel: [*1] John L. Reed and Scott B. Czerwonka, of DLA PIPER LLP, Wilmington, Delaware; OF COUNSEL: Noah Katsell and John E. Fitzsimmons, of DLA PIPER LLP, San Diego, California, Attorneys for Plaintiff.

Jon E. Abramczyk, Kevin M. Coen, and Adam M. Kress of MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; OF COUNSEL: William Leone and Matthew Spohn, of FULBRIGHT & JAWORSKI, L.L.P., Denver, Colorado; Tricia Wisenbaker Macaluso, of FULBRIGHT & JAWORSKI, L.L.P., Dallas Texas, Attorneys for Defendant.

Judges: GLASSCOCK, Vice Chancellor.

Opinion by: GLASSCOCK

Opinion

MEMORANDUM OPINION

GLASSCOCK, Vice Chancellor

This is my decision on the Defendant's motion to dismiss for failure to join indispensable parties. The Plaintiff has chosen to sue the Defendant in Delaware for claims involving the Defendant's involvement in alleged breaches of contract by the Plaintiff's former employees, now employees of the Defendant. The Plaintiff and the Defendant are Delaware corporations, but none of the acts complained of took place here. Jurisdiction over the Plaintiff's former employees is unavailable in Delaware. The Plaintiff seeks injunctive relief, as well as damages. Because that injunctive relief may affect interests of the Plaintiff's [*2] former employees, they are necessary parties to this litigation. Because in equity I may take the Plaintiff's former employees' interests into account when considering whether to grant injunctive relief as well as the scope of any such relief, I find that the Plaintiff's former employees are not indispensable to this litigation, and the Defendant's motion to dismiss or stay is, accordingly, denied.

I. FACTS

This matter involves two Delaware medical corporations, NuVasive, Inc., ("NuVasive") and Lanx,

Inc. ("Lanx"). NuVasive alleges that Lanx improperly persuaded NuVasive employees and a NuVasive consultant, Dr. Andrew Cappuccino (collectively, the "former NuVasive Employees"), to leave NuVasive and work for Lanx instead. NuVasive argues that Lanx induced the employees to breach various agreements that the employees had with NuVasive and to misappropriate NuVasive's trade secrets and other proprietary information. NuVasive also asserts that Lanx aided and abetted breaches of fiduciary duty by the former NuVasive employees. NuVasive contends that Lanx took these actions as a short cut to avoid having to develop its own business. Accordingly, NuVasive has brought claims for unfair competition, [*3] tortious interference with contractual relations, tortious interference with prospective contractual relations, aiding and abetting breach of fiduciary duty, civil conspiracy, and misappropriation of trade secrets.

While NuVasive seeks monetary damages and an injunction preventing the "Defendants [sic] from engaging in the actionable behavior alleged,"¹ NuVasive has brought suit against Lanx only. Lanx contends that the former NuVasive employees are necessary and indispensable parties to this action because NuVasive's claims are predicated upon their acts. Lanx has moved to dismiss pursuant to Court of Chancery Rule 12(b)(7), which allows a defendant to move for dismissal because of a failure to join an indispensable party under Rule 19.²

II. ANALYSIS

A. Standard of Review

HN1 Under Rule 19(a), the court must determine whether an absent person is a necessary party to the litigation. In particular, Rule 19(a)(2) provides [*4] that a party should be joined, if feasible, if

the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of

¹ Am. Compl. ¶ 111.

² Ch. Ct. R. 12(b)(7). In the alternative, Lanx requests a stay of this action pending disposition of related litigation in Texas and California. Since I find that the former NuVasive employees are not indispensable to the litigation, I find no grounds for a stay.

incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.³

HN2 If an absent party is deemed necessary and cannot be joined, the court must then "determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable."⁴ Rule 19(b) provides four factors for the court to consider in determining if a necessary party is indispensable to the action:

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 [*5] will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.⁵

Neither party has asserted that the absent parties are subject to personal jurisdiction in Delaware or could otherwise be joined. Accordingly, the issues are whether the absent parties are necessary and, if so, whether the absent parties are indispensable to this litigation.

The unfair competition, tortious interference with contractual relations, tortious interference with prospective contractual relations, and civil conspiracy claims (the "Contract-Based Claims") are premised, at least in some part, upon whether the former NuVasive employees breached their non-competition agreements, non-solicitation agreements, or other contractual agreements with NuVasive (the "Agreements").⁶ For the reasons that I explain below, I find that while the former NuVasive employees are necessary parties to the litigation concerning the Contract-Based Claims, they are not indispensable parties because, to the extent necessary to protect the rights of the absent parties, I may deny NuVasive injunctive relief.

Additionally, the former NuVasive employees are not necessary parties for the claims based on aiding and abetting a breach of fiduciary duty and trade secret misappropriation.

B. The Contract-Based Claims

1. Necessary Parties

In determining whether the former NuVasive employees are necessary parties, I look to Rule 19(a)(2) to determine whether going forward in the former NuVasive employees' absence will impair their interests or leave them subject to inconsistent obligations. While NuVasive asserts that the former NuVasive employees are not necessary parties to this litigation for numerous reasons, I find that a resolution of the Contract-Based Claims will impair the former NuVasive employees' rights. This prejudice arises from NuVasive's request to enjoin Lanx from employing the absent parties in a way that breaches the Agreements.

The Contract-Based Claims depend, in part, on a finding that the former NuVasive employees breached the Agreements. NuVasive contends that the former NuVasive employees have entered employment agreements with Lanx in which each employee has agreed to honor all post-employment obligations owed to NuVasive under the Agreements.⁷ NuVasive alleges [*7] that a decision in the former NuVasive employees' absence will not impair or alter their rights because NuVasive "would have no cause of action against Lanx or the former NuVasive personnel if those parties adhered to the language in the former NuVasive personnel's agreements with Lanx which specifically state they will comply with their post-employment obligations to NuVasive."⁸ NuVasive argues, therefore, that injunctive relief in this case would only hold the former NuVasive employees to the terms of their contracts with Lanx and that this relief would have no detrimental effect on their continued employment with Lanx. This analysis begs the question of the scope of the limitation imposed on the former NuVasive

³ Ch. Ct. R. 19(a).

⁴ Ch. Ct. R. 19(b).

⁵ *Id.*

⁶ See generally Am. Compl. ¶¶ 71, 76, 79, [*6] 80, 86, 101.

⁷ An. Br. Pl. NuVasive, Inc. Opp'n Lanx, Inc.'s Mot. Dismiss Stay 9. [hereinafter "NuVasive's An. Br. ____"].

⁸ *Id.* at 9.

employees by the Agreements. That issue will necessarily be before this Court in the Contract-Based Claims, and it is in my determination of the breadth of the restrictions on their employment with Lanx that the former NuVasive employees have an interest. To protect their current and future employment, these employees have an interest in ensuring that the Agreements are narrowly read. If I broadly read the Agreements, and in doing so find that the former NuVasive employees [*8] breached the Agreements, these employees could lose their ability to work in certain areas or their jobs could be otherwise affected.

This Court's decision in *Miles, Inc. v. Cookson America, Inc.*, is distinguishable.⁹ In *Miles*, the plaintiff alleged that the defendants hired six of the plaintiff's former employees and that these former employees misappropriated the plaintiff's trade secrets.¹⁰ The plaintiff sought:

- (1) an order enjoining [the defendants] from using or disclosing the secret processes of [the plaintiff];
- (2) an order enjoining [the defendants] from further inducing the Former Employees to breach their obligations owed to [the plaintiff] by disclosing or using [the plaintiff's] secret processes; (3) damages caused by the alleged misappropriation; and (4) an order requiring [the defendants] to deliver to [the plaintiff], or to destroy, any information relating to [the plaintiff's] secret processes.¹¹

The *Miles* defendants argued that the former employees were necessary [*9] parties to the litigation. The defendants asserted that if the court found them liable, "an injunction against defendants could force dismissal of the former employees and inhibit their employability by others."¹² The court noted that: "[I]t is difficult to understand [the defendants'] argument that it, as the alleged misappropriator of [the plaintiff's] trade secrets,

might be forced to dismiss the [plaintiff's former employees] as a result of an injunction against it in this suit. This argument seems to imply that the only reason the [plaintiff's former employees] have jobs at [the defendant] is because of a misappropriation."¹³ In other words, the court rejected the argument that there was a direct nexus between the injunctive relief sought and the legitimate employment interests of the absent parties. Accordingly, the court held that the former employees were not necessary parties.¹⁴

With respect to the Contract-Based Claims, the value added by the former NuVasive employees to Lanx is not necessarily dependent upon NuVasive's intellectual property or trade secrets. NuVasive contends that it spends considerable time and money developing and training its [*10] employees.¹⁵ The former NuVasive employees' value to Lanx could be based on the training and expertise funded by NuVasive that does not inevitably flow from NuVasive's proprietary information; however, the quid pro quo for receiving this investment from NuVasive was that the former NuVasive employees agreed, via the Agreements, to limit their future employment possibilities with third parties. As I stated above, the question of what it means for the former NuVasive employees to comply with their post-employment obligations to NuVasive, as set forth in the Agreements, is at issue here; therefore, the *Miles* rationale is not dispositive here.

NuVasive argues that Lanx can litigate in the former NuVasive employees' interest. **HN3** "An action may continue without an absent party if that party's interest is fully represented therein,"¹⁶ but the former NuVasive employees' interests are not necessarily fully represented by Lanx. Lanx certainly has an interest in retaining its employees and protecting itself from liability; however, if Lanx views the former NuVasive employees as more-or-less fungible, Lanx's interest in litigating this

⁹ *Miles, Inc. v. Cookson Am., Inc.*, 1994 Del. Ch. LEXIS 27, 1994 WL 114867 (Del. Ch. Mar. 3, 1994).

¹⁰ 1994 Del. Ch. LEXIS 27, [WL] at *1.

¹¹ *Id.*

¹² 1994 Del. Ch. LEXIS 27, [WL] at *2.

¹³ 1994 Del. Ch. LEXIS 27, [WL] at *3.

¹⁴ *Id.*

¹⁵ Am. Compl. ¶¶ 6, 16.

¹⁶ *RJ Assocs., Inc. v. Health Payors' Org. Ltd. P'ship, HPA, Inc.*, 1999 Del. Ch. LEXIS 161, 1999 WL 550350, at *7 (Del. Ch. July 16, 1999).

action and ensuring that the Agreements [*11] are narrowly interpreted could be less than the former NuVasive employees' interest. In regard to the Contract-Based Claims, I find, therefore, that the former NuVasive employees' interest in the subject matter is not fully represented by Lanx.

2. Indispensable Parties

A ruling from this Court imposing the injunctive relief sought by NuVasive could affect the former NuVasive employees' livelihood and future employment prospects; therefore, they are necessary parties to this litigation.

Having found that the former NuVasive employees are necessary parties, I must now determine whether they are indispensable parties to the litigation under the four factors of Rule 19(b). *HN4* These four factors "are interdependent and must be considered in relation to each other as well as to the facts of each case."¹⁷ As explained below, I find that the former NuVasive employees are not indispensable parties because of my ability to craft a remedy which protects the rights of the absent parties.

a. [*12] Will a Judgment Here be Adequate, and is an Adequate Remedy Available Elsewhere?

First, I dispense with two of the Rule 19(b) factors, finding that they are of little import here. *HN5* Rule 19(b) directs me to determine whether a judgment rendered without the absent person will be adequate.¹⁸ "Considerations of judicial economy and the public interest in complete and consistent settlement of controversies impact on the analysis of this factor."¹⁹ "In other words, will this suit, if permitted, encourage piecemeal litigation, or otherwise be undesirable."²⁰

The issues underlying the claims before this Court are already being actively litigated in federal court in California and federal and state courts in Texas. Requiring separate suits in jurisdictions where each

former NuVasive employee is subject to jurisdiction would encourage, not limit, piecemeal litigation. There is no perfect venue in which all the necessary parties are subject to jurisdiction.

Similarly, *HN6* Rule 19(b) directs me to consider whether NuVasive will have a remedy if this suit [*13] is dismissed. Depending on the claim, NuVasive may have a remedy in some other jurisdiction against Lanx; however, this fact is not certain. What is certain is that NuVasive and Lanx are both Delaware corporations and subject to Delaware jurisdiction.

b. Potential Prejudice

HN7 Rule 19(b) directs me to address "to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties."²¹

The considerations under this Rule 19(b) factor are similar to those used to determine whether the former NuVasive employees are necessary parties to the litigation. NuVasive maintains that a judgment in NuVasive's favor will not prejudice the former NuVasive employees because:

[1. it] will not affect the former NuVasive personnel's stated job duties as the terms of their employment require them to comply with their post-employment obligations to NuVasive; [2.] a judgment against Lanx will not have a *res judicata* or collateral estoppel effect on claims against the former NuVasive personnel; and [3.] Lanx is adequately representing the former NuVasive personnel's rights in this case.²²

NuVasive has stated numerous times that [*14] a judgment here will not have a preclusive effect on any future litigation against the former NuVasive

¹⁷ *Council of Civic Orgs. of Brandywine Hundred, Inc. v. New Castle Cnty.*, 1993 Del. Ch. LEXIS 219, 1993 WL 390543, at *1, *3 (Del. Ch. Sept. 21, 1993).

¹⁸ Ch. Ct. R. 19(b).

¹⁹ *Brandywine Hundred*, 1993 Del. Ch. LEXIS 219, 1993 WL 390543, at *6.

²⁰ *Makitka v. New Castle Cnty. Council*, 2011 Del. Ch. LEXIS 198, 2011 WL 6880676, at *6 (Del. Ch. Dec. 23, 2011).

²¹ Ch. Ct. R. 19(b).

²² NuVasive's An. Br. 14.

employees.²³ I find, therefore, that NuVasive would be judicially estopped from arguing that any judgment in this case has a *res judicata* or collateral estoppel effect on claims against the former NuVasive employees in other litigation.

On the other hand, I find that the former NuVasive employees would still be prejudiced by the relief sought by NuVasive. As noted above, while the former NuVasive employees' job duties require them to comply with their post-employment obligations to NuVasive, the terms of this compliance and what effect it will have on their future employment may depend on how I interpret the Agreements. Furthermore, as I also mentioned above, while Lanx's interest may align with the former NuVasive employees' interests, this alignment is not perfect and the former NuVasive employees may have a greater interest than Lanx in maintaining the status quo.

Accordingly, I find that the former NuVasive employees' interests are not adequately protected by Lanx and that a judgment in their absence, leading to the injunctive relief NuVasive seeks, [*15] could be prejudicial.

c. Can Prejudice be Avoided?

HN8 The remaining factor of the Rule 19(b) analysis is "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."²⁴

NuVasive asserts that this Court can shape relief which lessens or avoids prejudice to the former NuVasive employees because NuVasive has altered its litigation strategy from seeking a *preliminary* injunction to one in which its primary focus is on collecting monetary damages from Lanx. NuVasive points out that a damages award paid by Lanx would not affect the former NuVasive employees, and argues that even though NuVasive continues to seek a permanent injunction, this Court could craft an injunctive remedy which simply prevents the former NuVasive employees from committing acts which would violate their contractual commitments to NuVasive.

Though NuVasive is no longer seeking a *preliminary* injunction, it is still seeking a *permanent* injunction. An injunction that prevents the former NuVasive employees from simply not committing acts which violate their contractual agreements could not be done without an interpretation [*16] of the Agreements. Moreover, this injunction could alter the employment relationship that currently exists between the former NuVasive employees and Lanx.

On the other hand, I could craft a remedy which would protect the interests of the absent parties. I have broad discretion to fashion an injunction which will protect the rights of those parties.²⁵ I could protect the rights of the absent parties by declining to enter injunctive relief or by crafting an injunction more limited in scope than that sought by NuVasive.²⁶ Moreover, an award against Lanx for monetary damages alone would not prejudice the former NuVasive employees. An award for monetary damages would not bar the former NuVasive employees from working for Lanx or prevent them from working in certain geographic regions or trade fields. In other words, NuVasive has chosen this forum knowing that its former employees were unavailable here. NuVasive may go forward here without the absent parties knowing that I may not fully grant the injunctive relief that it seeks, based on the equitable considerations mentioned above.

After weighing all the Rule 19(b) factors, I find that the former NuVasive employees are not indispensable parties to the litigation for the Contract-Based Claims because I am able to deny NuVasive the ability to obtain unduly prejudicial injunctive relief. Cognizant of this caveat, NuVasive may press forward with the Contract-Based Claims as it sees fit.

C. The Non-Contract-Based Claims

1. Aiding and Abetting Breach of Fiduciary Duty

NuVasive's next claim against Lanx is for aiding and abetting breach of fiduciary duty. NuVasive alleges that

²³ See generally *id.* at 10, 14.

²⁴ Ch. Ct. R. 19(b).

²⁵ *Reserves Dev. LLC v. Severn Sav. Bank*, 961 A.2d 521, 525 (Del. 2008) **HN9** ("The Court of Chancery has broad discretion [*17] to fashion equitable relief."); *Concord Steel, Inc. v. Wilmington Steel Processing Co., Inc.*, 2008 Del. Ch. LEXIS 44, 2008 WL 902406, at *3 (Del. Ch. Apr. 3, 2008) (The Court of Chancery has "broad discretion in granting or denying a preliminary injunction.").

²⁶ See generally *Russell v. Morris*, 1990 Del. Ch. LEXIS 39, 1990 WL 15618, at *7 (Del. Ch. Feb. 14, 1990).

the former NuVasive employees owed it a fiduciary duty, that the former NuVasive employees breached this duty, and that Lanx aided and abetted this breach. I cannot easily ascertain the prejudice that would result to the former NuVasive employees if I found that they breached their fiduciary duties to NuVasive. A finding by this Court [*18] would not limit what employment the former NuVasive employees could take and would not alter their relationship with Lanx. As stated above, based on representations relied on here, NuVasive is estopped from arguing *res judicata* or collateral estoppel against the absent parties in subsequent litigation. A possible harm that could arise is reputational damage to the former NuVasive employees, but this harm is not sufficient to render the former NuVasive employees necessary parties.²⁷

Accordingly, the former NuVasive employees are not necessary parties pursuant to Rule 19(a) for the aiding and abetting breach of fiduciary duty claim.

2. Trade Secret Misappropriation

HN10 To bring a trade secret misappropriation claim, the acquirer of the trade secret must know or have reason to know "that the trade secret was acquired by improper means . . . [or d]erived from or through a

person who owed a duty to the person seeking relief to maintain its secrecy or limit its use."²⁸ Lanx argues that the former NuVasive employees are necessary parties to the litigation because "[a]s with every other allegation in the Complaint, Lanx can only be liable for trade secret misappropriation [*19] if the Court concludes that Dr. Cappuccino and/or the former NuVasive employees first improperly acquired or disclosed those trade secrets to Lanx."²⁹

Even though I would have to first decide whether the former NuVasive employees improperly acquired or disclosed trade secrets, as discussed above, *Miles* addressed this precise argument and the rationale behind that decision is directly applicable to the situation before me. My decision would only affect the former NuVasive employees' employment prospects with Lanx to the extent that their employment actually does rely on the misappropriation of trade secrets. Accordingly, the former NuVasive employees are not necessary parties for the trade secret misappropriation claim.

III. CONCLUSION

For the reasons above, Lanx's Motion to Dismiss is Denied. An appropriate Order shall be filed implementing this Opinion.

²⁷ *Miles*, 1994 Del. Ch. LEXIS 27, 1994 WL 114867, at *1-*3.

²⁸ 6 Del. C. § 2001.

²⁹ Lanx's Mot. Dismiss 18.

EXHIBIT 13

1998 WL 110129

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Delaware.

PFIZER INC.

v.

ADVANCED MONOBLOC CORP.

No. 97C-04-037. | Jan. 23, 1998.

Letter Opinion and Order on Defendant's Motion to Dismiss for Improper Venue, Forum Non Conveniens, and Failure to Join an Indispensable Party-Motion Denied.

Attorneys and Law Firms

M. Duncan Grant, Esquire, Daniel V. Folt, Esquire, Pepper Hamilton & Scheetz, Wilmington.

B. Wilson Redfearn, Esquire, Brenda G. Houck, Esquire, Tybout Redfearn & Pell, Wilmington.

Opinion

QUILLEN, J.

*1 Dear Counsel:

Pending before the Court is Defendant's Motion to Dismiss, based on improper venue, *forum non conveniens*, and failure to join an indispensable party. For the reasons that follow, the Motion is DENIED.¹

FACTS

This is a breach of contract action involving the sale of allegedly defective aluminum cans by Defendant Advanced Monobloc ("Advanced Monobloc"), a Delaware corporation, to Plaintiff Pfizer Inc. ("Pfizer"), also a Delaware corporation. In the aerosol industry, three component companies are necessary for the production of a finished aerosol product: (1) a marketer; (2) a canner; and (3) a filler. Def.'s Op. Br., Ex. A.² Pfizer produced and marketed an aerosol product known as Pure Silk Shave Gel. Pfizer was the marketer of the product. Advanced Monobloc is an aluminum

aerosol can manufacturer, or canner, for the packaging of aerosol products. The third actor in this process, the filler, receives aluminum cans from the canner on behalf of the marketer, inspects them, and fills them with the marketer's product. In this case the filler was Piedmont Industries, Inc. ("Piedmont"). Piedmont is not as yet a party in this action. Advanced Monobloc asserts that, as the filler, it is Piedmont's responsibility to inspect and test the cans, including the linings, to ensure that the cans are of the quality required by the marketer.³

Advanced Monobloc and Pfizer have had an ongoing business relationship for a number of years. In the summer of 1994, Advanced Monobloc's sales personnel met with representatives of Pfizer's packaging development department in New York and gave a product presentation. Following the presentation there was a series of exchanges involving the production of a can for the Pure Silk Shave Gel, including the exchange of specifications and price quotations. The parties disagree as to whether an oral contract was formed at this point.

Advanced Monobloc provided Pfizer with product specifications for an aluminum can lined with epoxy phenolic material.⁴ Advanced Monobloc specified that its cans were to have an epoxy phenolic inside lining. Advanced Monobloc also provided Pfizer with 3,000 sample aluminum cans for testing purposes ("test cans"). The 3,000 test cans were fully and uniformly lined with epoxy phenolic coating. Additionally, Advanced Monobloc sent Pfizer an additional 20,000 sample aluminum cans for distribution to its sales network (the "sales samples"). The 20,000 sales samples were also fully and uniformly lined with epoxy phenolic coating.

Beginning in the summer of 1995 and through the spring of 1996, Pfizer, whose office is located in New Jersey, ordered several million cans from Advanced Monobloc, whose factory is located in Pennsylvania. All of Pfizer's purchase orders contained language specifying that "[t]his purchase order expressly limits acceptance to the terms set for [sic] herein."⁵ The Pfizer purchase orders did not specify a forum for litigation between the parties. Advanced Monobloc issued invoices to Pfizer containing a number of terms that were different from the terms set forth in the Pfizer purchase orders, including a forum selection clause which purports to bind the parties to Pennsylvania law and a Pennsylvania forum.⁶ Each Advanced Monobloc invoice also contained language stating that "Seller's acceptance of this sale is

expressly conditioned on Buyer's consent to the following exclusive terms and conditions, which shall be deemed made unless expressly rejected by Buyer in writing received within ten (10) days.”

*2 During 1995 and 1996, Advanced Monobloc supplied Pfizer with more than 4,000,000 of the aluminum cans designated in the purchase orders. Pfizer alleges in this lawsuit that the aluminum cans supplied by Advanced Monobloc were not fully lined with the necessary epoxy phenolic coating.

In May 1996, Pfizer discovered that a can of Pure Silk Shave Gel held by it for testing had ruptured at its test facilities in New Jersey. Subsequently, a number of other cans also ruptured. Pfizer alleges that the cans ruptured because they were not fully lined throughout their interior surfaces with epoxy phenolic coating. Pfizer took the product entirely off the market in the United States in June 1996. On July 2, 1996, Pfizer and the United States Consumer Products Safety Commission jointly announced a recall of all cans of Pure Silk Shave Gel at the consumer level in the United States. Pfizer filed this suit against Advanced Monobloc on April 4, 1997, alleging breach of contract, breach of express warranty, breach of implied warranty of fitness for a particular purpose, and breach of implied warranty of merchantability. *See* Complaint (Dkt. No. 1). Advanced Monobloc filed its Motion to Dismiss on May 21, 1997, for improper venue, *forum non conveniens*, and failure to join an indispensable party. *See* Def.'s Op. Br. (Dkt. No. 19).

DISCUSSION

1. Improper Venue

Advanced Monobloc argues that this case should be dismissed and litigated in Pennsylvania due to the forum selection clause that was included in Advanced Monobloc's invoice. Pfizer argues that the case should not be dismissed because the addition of Advanced Monobloc's forum selection clause materially alters the parties' contract and should not be included.

The parties agree that this conflict regarding the exchange of forms between merchants is governed by the Uniform Commercial Code Section 2-207.⁷ Pfizer argues that because Advanced Monobloc's invoice states that Seller's acceptance of this sale is expressly conditioned on Buyer's consent to the included exclusive terms and conditions, there was

not a reasonable expression of acceptance and thus no contract was formed pursuant to Section 2-207(1). Advanced Monobloc responds by asserting that Section 2-207(1) deals both with forms which represent an acceptance evidencing a contract and forms which represent a confirmation of a pre-existing oral agreement. But Advanced Monobloc contends that only acceptances under Section 2-207(1) can be expressly conditional and thus Advanced Monobloc's invoice conditioning acceptance on Pfizer's consent is inoperable since the invoice is a confirmation of a pre-existing oral agreement between the parties. In order for this Court to accept Advanced Monobloc's argument this Court would have to engage in the factual resolution of the issue of whether there existed a prior oral agreement between the parties. The Court will not resolve this factual dispute in determining Advanced Monobloc's Motion to Dismiss.

*3 Although it is premature to determine as a matter of law that the parties had a pre-existing contract pursuant to Section 2-207(1), the Court will assume, for sake of argument, that there pre-existed a contract and look to Section 2-207(2) for the additional terms of the contract. Under Section 2-207(2), additional terms become part of the contract unless any one of three conditions apply. In this case, two of those conditions apply. First, even assuming that there existed a prior oral agreement by the parties, Advanced Monobloc's forum selection clause would not be included pursuant to Section 2-207(2)(a) because Pfizer's purchase order expressly limited acceptance to the terms of the offer. Further, pursuant to Section 2-207(2)(b), the forum selection clause materially alters the contract. *General Instrument Corp. v. Tie Mfg., Inc.*, S.D.N.Y., 517 F.Supp. 1231, 1234 (1981) (finding that selection of a New York forum materially alters contract for Connecticut corporation); PLI Commercial Law & Practice Course Handbook Series Order No. A4-4297 1990 (“[i]t is generally recognized that a ‘forum selection’ clause ‘materially alters’ a contract within the meaning of § 2-207”).

Advanced Monobloc contends that the purchase orders sent by Pfizer were not offers. It argues that the offer by Pfizer came prior to the exchange of forms and thus Section 2-207(2) (a) does not apply. The Court notes that Advanced Monobloc is placing it in a position to resolve the factual dispute of whether Pfizer's purchase order should be considered an offer or whether there existed between the parties a prior oral offer and acceptance which culminated in a continuing pre-existing contract. This Court will not resolve this factual dispute in this Motion to Dismiss.

Even if the Court finds that Pfizer's purchase order was not an offer, Advanced Monobloc's forum selection clause is not established as a contract term under Section 2-207(2)(b). The test to find whether a term materially alters a contract is if that term would result in surprise or undue hardship to the party opposing the term. *Miller v. Newsweek, Inc.*, D. Del., 660 F.Supp. 952 (1987). Advanced Monobloc argues that because the parties have been doing business over the course of many years and, during those years, Pfizer's purchase orders and Advanced Monobloc's invoices have been exchanged, there is no surprise or hardship. The Third Circuit in *Altronics of Bethlehem, Inc. v. Repco, Inc.*, 957 F.2d 1102, 1108 (1992) found that Plaintiffs' continued performance with constructive or actual knowledge of disclaimers of consequential damages did not demonstrate their acceptance of new terms in the contract. The Court in *Altronics*, relying on precedent in *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 3d Cir., 939 F.2d 91 (1991), held that "the repeated sending of a writing which contains certain standard terms, without any action with respect to those terms, cannot constitute a course of dealing which would incorporate a term of the writing otherwise excluded under § 2-207." *Id.*

*4 The purpose of Section 2-207(2)(b) is to establish guidelines for the finding of a contract in the routine exchange of divergent forms between buyers and sellers in a commercial setting. See *Falcon Tankers, Inc. v. Litton Sys.*, Del.Super., 355 A.2d 898 (1976). It protects against the imposition of harsh conditions upon a party merely as a result of the party accepting a price quotation or purchase order form. *Id.* This Court finds that, because boilerplate language in a confirmatory memo may not be read by the other party, and the parties did not bargain for the clause, such a provision in Advanced Monobloc's invoice can work surprise and hardship on Pfizer. *KIC Chemicals, Inc. v. Adco Chemical Co.*, S.D.N.Y., No. 95 CIV 6321 (Mar. 20, 1996). In so doing, it would be a material alteration. Accordingly, the Court declines to dismiss the case for improper venue.

2. Forum Non Conveniens

The grant or denial of a Motion to Dismiss based upon the doctrine of *forum non conveniens* lies within the sound discretion of the Court. *Monsanto Co. v. Aetna Casualty & Surety Co.*, Del.Super., 559 A.2d 1301, 1304 (1988). This Court may decline jurisdiction when "considerations of convenience, expense and the interests of justice dictate that litigation in the forum selected by the plaintiff would be

unduly inconvenient, expensive or otherwise inappropriate." *Id.*

A Defendant bears a heavy burden of proving inconvenience under the doctrine of *forum non conveniens* in order to override a Plaintiff's choice of forum. See *Moore Golf, Inc. v. Ewing*, Del.Super., 269 A.2d 51, 52 (1970). The Supreme Court has stated that:

The dismissal of an action on the basis of the doctrine [*forum non conveniens*], and the ultimate defeat of plaintiff's choice of forum, may occur only in the rare case in which the combination and weight of the factors to be considered balance overwhelmingly in favor of the defendant.

Kolber v. Holyoke Shares, Inc., Del.Super., 213 A.2d 444, 447 (1965).

The Supreme Court of Delaware has established a test for evaluating motions to dismiss based on *forum non conveniens*. See *Miller v. Phillips Petroleum Co. Norway*, Del.Super., 537 A.2d 190 (1988); *Chrysler First Business Credit Corp. v. 1500 Locust Ltd. Partnership*, Del.Super., 669 A.2d 104 (1995). There are six factors this Court must consider when presented with such a Motion: (1) whether Delaware law applies; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the possibility of viewing the premises; (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and (6) all other practical considerations which would make the trial easy, expeditious and inexpensive. *Miller*, 537 A.2d at 202. See also *Taylor v. LSI Logic Corp.*, Del.Super., 689 A.2d 1196, 1198-99 (1997). It is not enough for a Defendant to show that the first five factors weigh in its favor. Instead it must demonstrate that in analyzing the five factors, there exists true inconvenience and hardship. *Chrysler First*, 669 A.2d at 105.⁸ In analyzing the five factors, the Court concludes that these factors do not carry the day against finding Delaware to be an appropriate forum.

*5 *Whether Delaware Law Applies.* Delaware follows the "most significant relationship" test of the Restatement (Second) of Conflicts with respect to actions based on contract. See Restatement (Second) of Conflicts § 188; *Travelers Indem. Co. v. Lake*, Del.Super., 594 A.2d 38, 41 (1991). Rather than address the specifics of the "most

significant relationship” test, the Court will simply note that it is relatively clear from the nature of this cause of action that Delaware does not have the “most significant relationship,” that the law of some other jurisdiction, most likely Pennsylvania, will have. The only connection between Delaware and the contract in issue is that the parties are incorporated in Delaware.

Relative Ease of Access to Proof. None of the evidence relevant to this case is located in Delaware. Delaware is not home to any known material witnesses, documents, or other items of relevant proof. Any documents held by either party apparently are located at their principle places of business in Pennsylvania and New Jersey. There is nothing to suggest, however, that production of such documents could not be made were the trial held here.

Availability of Compulsory Process for Witnesses. No known or currently-expected witnesses reside in this State. At least as to witnesses from Piedmont, it appears that compulsory process may not be locally available. However, those witnesses employed by the parties presumably will be made available for trial, and the testimony of any witnesses who are unavailable could be taken by way of deposition.

Possibility of Viewing the Premises. For obvious reasons, it is not necessary to consider this factor seriously in the present cause of action. Exhibits can be produced in Delaware and the desirability of a view seems unlikely.

Pendency or Nonpendency of a Similar Action or Actions in Another Jurisdiction. When there is no prior similar action pending elsewhere, a Motion to Dismiss for *forum non conveniens* should be granted only if Defendant establishes “with particularity” that it will suffer “overwhelming hardship and inconvenience if required to litigate in Delaware.” *Taylor*, 689 A.2d at 1197. No similar action is pending in another jurisdiction.⁹

All Other Practical Considerations. Defendants did not specifically discuss this element, but it bears mention here. First, Courts generally try to respect a Plaintiff's choice of forum, although foreign Plaintiffs are routinely accorded less deference in their choice of forum than are citizens or residents of the State. See *Lony v. E.I. DuPont de Nemours & Co.*, 3d Cir., 886 F.2d 628, 634 (1989) (stating “the reason for giving a foreign Plaintiff's choice less deference is not xenophobia, but merely a reluctance to assume that the choice is a convenient one”). Second, there is no evidence that the

application of either New York, Pennsylvania or New Jersey law would pose a substantial burden on the prompt resolution of this litigation. Cf. *Nash v. McDonald's Corp.*, Del.Super., C.A. No. 96C-09-045-WTQ, Quillen, J. (Feb. 27, 1997), Letter Op. at 4; *Rudisill v. Sheraton Copenhagen Corp.*, D. Del., 817 F.Supp. 443, 448 (1993). Third, there is no great public policy in favor of litigating the case here in Delaware. This factor favors Advanced Monobloc. There is no “local interest in having localized controversies decided at home.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 234, 241 n. 6 (1981). Aside from incorporation, this case has no connection with this forum. But this forum seems a favorable one for the impartial adjudication of the dispute without any significant inconvenience to the parties. In fact, if one looks at the spectrum of choice, Delaware appears to be a convenient forum.

***6 Summation.** After reviewing all of the factors, the Court finds that Advanced Monobloc has not sustained its burden of showing inconvenience and hardship sufficient to justify granting the Motion. In Advanced Monobloc's favor, Delaware law is not involved in the present dispute, Advanced Monobloc's witnesses and documents are located in Pennsylvania, compulsory process may not be locally available for witnesses from Piedmont, and there is no great public policy reason for litigating the case here in Delaware. In Pfizer's favor, no prior suit was or is pending, its witnesses and documents are located in New Jersey, depositions could be taken of witnesses from Piedmont, and this Court would have no difficulty applying the law of another State. To be certain, there is a paucity of Delaware connections to this litigation, but it seems that Defendant is unhappy less about the fact that the action is in Delaware than that it is not in Pennsylvania. Plaintiff is not obligated to choose the forum most favored by the Defendant. This litigation, wherever it is held, is going to involve documents and witnesses located in several different States and will involve some modest inconvenience for either or both of the parties. But Delaware appears as centrally located as any forum. Accordingly, the Court declines to dismiss the case for *forum non conveniens*.

3. Failure to Join an Indispensable Party

The joinder of persons needed for just adjudication is analyzed under Superior Court Civil Rule 19.¹⁰ Advanced Monobloc asserts that Piedmont is an indispensable party and failure to join it requires dismissal by this Court. I note that Pfizer has since filed a First Amended Complaint which does include Piedmont, perhaps demonstrating the

benefit of judicial delay. *See* Dkt. No. 26. It is, however, my understanding that there might be some question of ability to obtain jurisdiction over Piedmont and, since Piedmont has not as yet appeared, I will discuss the indispensable party argument, recognizing that the discussion may prove to be unnecessary. *See* Mr. Grant's letter dated November 25, 1997 and Mr. Redfearn's response dated November 26, 1997.

In order for this Court to dismiss this action for failure to join an indispensable party, it must first determine whether Piedmont is a party that must be joined under Superior Court Civil Rule Rule 19(a)(1). A joinder of Piedmont is clearly preferable, but the threshold issue in Rule 19(a)(1) is whether complete relief can be granted to Advanced Monobloc or Pfizer in the absence of the unjoined party, Piedmont. The effect of the decision on the absent party is immaterial. *See* 3A James W. Moore et al., *Moore's Federal Practice* ¶ 19.0-1[2], at 19-128 (2d ed.1979). Pfizer seeks compensatory damages against Advanced Monobloc based on breach of contract, breach of express warranty, breach of implied warranty of fitness for a particular purpose, and breach of implied warranty of merchantability. This Court can fully grant such relief to Pfizer against Advanced Monobloc. Further, if Advanced Monobloc prevails, complete relief can be had.

*7 Advanced Monobloc argues that Piedmont failed to properly inspect the cans and thus is the intervening

cause of Pfizer's damages. This argument, however, goes towards Advanced Monobloc's defense to liability for Pfizer's damages. In essence, the contention is that Advanced Monobloc's defense would be tactically served as a practical matter if Piedmont were a party. Advanced Monobloc's contention of Piedmont's role in its liability defense against Pfizer fails to establish that complete relief cannot be accorded between Pfizer and Advanced Monobloc. To the contrary, every defense claim remains available to Advanced Monobloc and there is no risk of multiple recovery on Pfizer's claims. Having concluded that Advanced Monobloc does not meet the requirement of Rule 19(a)(1), it is unnecessary to proceed to an application of Rule 19(b).¹¹ *See Hammond v. Clayton*, 7th Cir., 83 F.3d 191 (1996). Accordingly, the Court declines to dismiss the case for failure to join an indispensable party.

CONCLUSION

For all of the foregoing reasons, Defendant Advanced Monobloc's Motion to Dismiss is DENIED. IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 1998 WL 110129

Footnotes

- 1 The Court apologizes for the delay in producing this opinion. For some reason, the case got lost on my desk. Under normal standards, this opinion should have been out not later than December 1997.
- 2 "Def.'s Op. Br." refers to Defendant Advanced Monobloc Corporation's Opening Brief in Support of Motion Pursuant to Rule 12(B)(3) and 12(B)(7) (Dkt. No. 19).
- 3 Advanced Monobloc presents affidavit testimony of Montfort A. Johnson, who states that in the aerosol industry it is customary for a marketer to delegate its responsibility to accept incoming shipments of cans to the filler. It is the filler's responsibility to inspect and test the cans, including the linings, to ensure that they are of the quality required by the marketer. Should a filler discover a defect in the can, it is the filler's responsibility to notify the marketer and the canner of the problem so that production can be stopped to determine the cause of the problem. Advanced Monobloc asserts that Pfizer delegated to Piedmont the responsibility to inspect and accept incoming cans. Upon receipt, Piedmont's Quality Assurance team did, in fact, inspect a random sample of Advanced Monobloc's cans. During those inspections, Piedmont specifically performed tests to check for the completeness of the lining inside of the cans. Advanced Monobloc further asserts that during bottom thickness testing, Piedmont opened random cans in which any lack of inside lining could be readily observed.
- 4 The purpose of epoxy phenolic lining is to prevent the interior surfaces of the cans from coming into contact with the shave gel. Contact between the shave gel and the interior surfaces of the can would corrode and thereby weaken the walls of the can.
- 5 Pfizer's purchase orders specifically state:
REVISION: This purchase order expressly limits acceptance to the terms set for [sic] herein. No terms stated by Seller in accepting or acknowledging this order shall be binding upon Buyer if inconsistent with or in addition to the terms stated

herein unless accepted in writing by Buyer. If, however, a written contract is already in existence between Buyer and Seller covering the purchase of the articles, work, or services covered hereby, the terms and conditions of said contract shall prevail to the extent that the same may be inconsistent with the terms and conditions hereof.

6 Advanced Monobloc's invoice states:

14. This agreement shall be governed and construed in accordance with the laws of the Commonwealth of Pennsylvania. The Buyer and Seller agree that the courts of the Commonwealth of Pennsylvania shall have sole jurisdiction of dispute arising under this agreement. Buyer submits to personal jurisdiction of the courts of Pennsylvania. (Def.Op.Br., Ex. I).

7 6 *Del. C.* § 2-207(1996) provides:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under this subtitle.

8 One must wonder in this day and age whether this particular list of factors is as helpful as heretofore. Sometimes review under our standard seems more artificial than real. *Chrysler First*, 669 A.2d at 107. The world has changed since *General Motors Corp. v. Cryo-Maid, Inc.*, Del.Supr., 198 A.2d 681, 684 (1964).

9 It is interesting to note that Advanced Monobloc has not initiated a defensive suit in any other jurisdiction especially since it claims the absence of an indispensable party. The Court understands from Mr. Redfearn's letter dated November 26, 1997 that Pfizer may have filed an action against Piedmont in New Jersey.

10 Super. Ct. Civ. R. 19. Rule 19 states in part:

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

11 Super. Ct. Civ. R. 19(b) states:

(b) *Determination by Court whenever joinder not feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the Court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the Court 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.

EXHIBIT 14

RJ Assocs. v. Health Payors' Org. Ltd. Pshp.

Court of Chancery of Delaware, New Castle

March 15, 1999, Date Submitted ; July 16, 1999, Date Decided

C.A. No. 16873

Reporter

1999 Del. Ch. LEXIS 161

RJ ASSOCIATES, INC., Plaintiff, v. HEALTH PAYORS' ORGANIZATION LIMITED PARTNERSHIP, HPA, INC., and MIDWEST MEDICAL PREFERRED PROVIDES, INC., Defendants.

Subsequent History: [*1] Released for Publication by the Court August 27, 1999.

Disposition: Defendants' motions to dismiss denied, except that their Rule 12(b)(6) motion granted with respect to RJA's claim that this Court compel the production of HPA, MMPP, and the Partnership's books and records.

Core Terms

Partnership, partnership agreement, distributions, network, provider, alleges, personal jurisdiction, expenses, parties, general partner, limited partnership, limited partner, fiduciary duty, accounting, marketing, deductions, contacts, obligations, cash receipts, records, entity, join, motion to dismiss, contractual, contracts, breached, partner, breach of fiduciary duty, plaintiff's claim, managing partner

Case Summary

Procedural Posture

Defendants, a limited and general partner of a limited partnership, moved to dismiss plaintiff's complaint against them alleging breach of contract, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, accounting, and civil conspiracy. Defendants claimed court did not have jurisdiction, plaintiff failed to join an indispensable party, and plaintiff was not be entitled to relief under any set of facts.

Overview

Plaintiff, member of a limited partnership, alleged defendant, other limited partner, controlled defendant general partner and that they acted together to breach contractual and fiduciary duties to plaintiff. Defendants moved to dismiss. Court denied defendants' Del. Chancery Ct. R. 12(b)(2) motion, concluding it had jurisdiction. Defendant general partner, by accepting its position, consented to court's jurisdiction and plaintiff's claims related directly to its actions as general partner. In addition, jurisdiction existed over defendant limited partner under Delaware long arm statute, Del. Code Ann. tit. 10 § 31004(c), where plaintiff alleged this defendant transacted business in Delaware from which its claims arose. Motion to dismiss under Rule 19 was denied because party that defendants claimed was necessary and indispensable did not fall within definition, and even if it had, its interests would have been adequately protected. Lastly, when viewed in light of the well-pleaded facts, all of plaintiff's claims would entitle it to relief, except its request for access to partnership books and records. With that one exception, defendants' Rule 12(b)(6) motion denied.

Outcome

Motion to dismiss plaintiff's complaint granted only on limited issue of plaintiff's request for access to partnership books and records; in all other respects it was denied. Court had jurisdiction over both defendants and party that defendants claimed to be necessary and indispensable did not meet Del. Chancery Ct. R. 19 definition. In addition, in light of the well-pleaded facts, plaintiff's claims would entitle it to relief.

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

HN1 To overcome a challenge to personal jurisdiction, the plaintiff must establish, prima facie, that a court has personal jurisdiction over the objecting defendant.

Business & Corporate Law > Limited Partnerships > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN2 By accepting the position of general partner, a corporation consents to be subjected to a Delaware court's jurisdiction if the limited partnership has chosen to incorporate under Delaware law a matter of law.

Business & Corporate Law > Limited Partnerships > General Overview

Business & Corporate Law > Limited Partnerships > Management Duties & Liabilities

Civil Procedure > ... > Pleadings > Service of Process > General Overview

HN4 The Delaware Revised Uniform Limited Partnership Act, *Del. Code Ann. tit. 6 § 17-109(a)*, states that a general partner of a limited partnership may be served with process in the manner prescribed in this section in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited partnership or a violation by the general partner of a duty to the limited partnership, or any partner of the limited partnership, whether or not the general partner is a general partner at the time the suit is commenced.

Civil Procedure > ... > Pleadings > Service of Process > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > Service on Agents

HN3 A general partner is properly served with process, if, under the Delaware Revised Uniform Limited Partnership Act, *Del. Code Ann. tit. 6 § 17-109(b)*, service of process is effected by serving the registered agent.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Long Arm Jurisdiction

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN5 Delaware's general long arm statute, *Del. Code Ann. tit. 10 § 3104*, requires a two-part analysis: (i) whether *§ 3104* applies in the specific circumstances; and (ii) if so, whether a Delaware court's exercise of jurisdiction over the defendant satisfies constitutional due process requirements.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

HN6 Where in personam jurisdiction is challenged on a motion to dismiss, the record is construed most strongly against the moving party.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN7 *Del. Code Ann. tit. 10 § 3104(c)(1)* authorizes the exercise of jurisdiction over a nonresident who in person or through an agent transacts any business or performs any character of work or service in Delaware.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN8 Under the Delaware long arm statute, *Del. Code Ann. tit. 10 § 3104*, the plaintiff's cause of action must have a nexus with the forum-related contact; that is the claim must arise from at least one act that legally constitutes the transacting of business in Delaware.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

HN9 Before a court may assert jurisdiction over a non-domiciliary defendant based upon implied consent, the defendant must have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN10 A defendant has created continuing obligations between itself and Delaware if it could reasonably expect to be haled before a Delaware court.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN11 Del Chancery Ct. R. 19(a) pertinently states that it is "necessary" for a person to be joined where (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims and interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN12 Under Del. Chancery Ct. R. 19(a), to qualify as "necessary," a party should have not only an interest in some part of the controversy but the interest must be such that a final decree cannot be made which will neither touch upon that party's interest nor leave the controversy in such a state that the final determination would be inconsistent with equity and good conscience.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN13 Del. Chancery Ct. R. 19(a) requires that if a necessary party cannot feasibly be joined, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN14 In making a determination that an action should be dismissed because of infeasibility of joining a necessary party under Del. Chancery Ct. R. 19(a), a court must consider four factors: (i) the extent of

prejudice to absent and existing parties, (ii) the possibility of shaping a judgment as to mitigate such prejudice, (iii) whether the remedy given without the party will be adequate or will instead create more lawsuits by parties involved in the same transaction or occurrence, and (iv) whether the plaintiff has available an alternative forum to hear and adjudicate the claim. These pragmatic considerations, are to be governed by practicality and flexibility rather than by idealistic and mechanical standards bottomed upon allegedly inseparable substantive rights.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN15 When deciding a motion under Del. Chancery Ct. R. 12(b)(6), a court must consider as true the well-pleaded facts in the complaint, and must view all inferences in the light most favorable to the plaintiff.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN16 A complaint will be dismissed under Del. Chancery Ct. R. 12(b)(6) only where it appears with reasonable certainty that the plaintiff would not be entitled to relief under any set of facts.

Business & Corporate Law > Limited Partnerships > General Overview

Business & Corporate Compliance > ... > Business & Corporate Law > Limited Partnerships > Formation

Contracts Law > Types of Contracts > Partnership Agreements

HN17 A Delaware court may properly adjudicate a claim that a distribution payment methodology currently utilized by defendants is improper under the partnership agreement and is causing ongoing financial harm to plaintiff and in that context, declare the rights and obligations of parties to a Delaware limited partnership agreement.

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > Partnership Liabilities

Business & Corporate Law > Limited Partnerships > General Overview

Contracts Law > Breach > General Overview

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Contracts Law > Types of Contracts > Covenants

Contracts Law > Types of Contracts > Partnership Agreements

HN18 A complaint's allegations that the defendants failed to adhere in good faith to the contractual obligations set forth in a partnership agreement, and failed to deal fairly with plaintiff, are sufficient to state a claim for breach of the implied covenant of good faith and fair dealing.

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > Derivative Actions

Business & Corporate Law > Limited Partnerships > General Overview

Contracts Law > Breach > General Overview

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Governments > Fiduciaries

HN19 Conduct by an entity that occupies a fiduciary position may form the basis of both a contract and a breach of fiduciary duty claim.

Business & Corporate Law > Limited Partnerships > General Overview

HN20 In any case not provided for in this chapter the Delaware Uniform Partnership Law and the rules of law and equity shall govern. The Delaware Revised Uniform Limited Partnership Act, *Del. Code Ann. tit. 6 § 17-1105*.

Business & Corporate Law > Limited Partnerships > General Overview

Business & Corporate Law > Limited Partnerships > Management Duties & Liabilities

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN21 Because the Delaware Revised Uniform Limited Partnership Act contains no provision governing the accountability of limited partners for breaches of fiduciary duty, Delaware courts must look to the Delaware Uniform Partnership Law to determine what fiduciary duties are owed by and to the limited partners in a limited partnership.

Business & Corporate Law > General Partnerships > General Overview

Business & Corporate Law > Limited Partnerships > General Overview

Contracts Law > Types of Contracts > Partnership Agreements

Governments > Fiduciaries

HN22 The Delaware Uniform Partnership Law, Del. Code Ann. tit. 6 § 1521(a), provides that every partner must account to the partnership for any benefit, and hold as trustee for it any profits, derived by him without the consent of the other partners from any transaction connected with the conduct of the partnership or from any use by him of its property.

Business & Corporate Law > General Partnerships > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Rights of Partners > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Rights of Partners > Partnership Property

Business & Corporate Law > Limited Partnerships > General Overview

HN23 The Delaware Uniform Partnership Act, Del. Code Ann. tit. 6 §§ 1522(1) and 1522(3), provide that any partner shall have the right to a formal account as to partnership affairs if he is wrongfully excluded from the partnership business of possession of its property by his copartners or as provided by 1521 of this title.

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > Breach of Fiduciary Duty

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > General Overview

Business & Corporate Law > Limited Partnerships > General Overview

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN24 The Delaware Uniform Partnership Act, Del. Code Ann. tit. 6 § 1521, states that every partner is accountable as a fiduciary to the other partners and must account to the partnership for any benefit.

Business & Corporate Law > Limited Partnerships > General Overview

HN25 Under *Del. Code Ann. tit. 6 § 17-305*, a limited partner seeking access to partnership records must

make a written demand on the general partner to inspect the information requested and the purpose for the demand.

Counsel: Anne C. Foster and Thad J. Bracegirdle, Esquires, of RICHARDS, LAYTON & FINGER, Wilmington, Delaware; and J. Stephen McAuliffe, III, Esquire, of MILES & STOCKBRIDGE, PC, Rockville, Maryland; and Matthew S. Sturtz, Esquire, of MILES & STOCKBRIDGE, PC, Baltimore, Maryland; and Lisa C. Wood, Esquire, of NUTTER, McCLENNEN & FISH, LLP, Boston, Massachusetts; Attorneys for Plaintiff.

Stephen E. Jenkins and Richard D. Heins, Esquires, of ASHBY & GEDDES, Wilmington, Delaware; and Paul J. Jackson, Esquire, of ROETZEL & ANDRESS, Akron, Ohio; Attorneys for Defendants.

Judges: JACOBS, VICE CHANCELLOR.

Opinion by: JACOBS

Opinion

MEMORANDUM OPINION

JACOBS, VICE CHANCELLOR

Pending are motions to dismiss the complaint in this action brought by a limited partner of a Delaware limited partnership. The defendants are the limited partnership's only other limited partner and its General Partner. The plaintiff charges that the other limited partner controls the General Partner, and that both defendants, acting together, breached their contractual and fiduciary [*2] duties to the plaintiff by causing the Partnership to make improper deductions for certain expenses from the plaintiff's partnership distributions.

The defendants have moved to dismiss the complaint: (i) for lack of personal jurisdiction over the defendants under Rule 12(b)(2); (ii) for failure to join persons needed for just adjudication under Rule 19; and (iii) for failure to state a claim upon which relief can be granted under Rule 12(b)(6). For the reasons that follow, the Court concludes that with one exception, these motions must be denied.

I. BACKGROUND

The following facts appear from the allegations of the complaint.

A. The Parties

The plaintiff, RJA Associates, Inc. ("RJA"), is a Delaware corporation with its principal place of business in Bethesda, Maryland.

Co-defendant Midwest Medical Preferred Providers, Inc. ("MMPP") is an Ohio corporation with its principal place of business in Ohio. In April 1994, MMPP and RJA (each as 50% owners) formed co-defendant HPA, Inc. ("HPA"), which also is an Ohio corporation with its principal place of business in Ohio, to create a national network of health care providers. To further that purpose, in April 1994, HPA, MMPP, and [*3] RJA then formed defendant Health Payor's Organization L.P. (the "Partnership"), a Delaware limited partnership with its principal place of business in Ohio. HPA became the General Partner, and MMPP and RJA became the two limited partners, of the Partnership.

B. The Three Agreements

Three agreements are relevant to this case: (a) the "Close Corporation and Shareholders Agreement" ("Shareholders Agreement"); (b) the Health Payors' Organization Limited Partnership Agreement ("Partnership Agreement"); and (c) the "Master Agreement." These agreements are now described.

1. The Shareholders Agreement

The Shareholders Agreement, which RJA and MMPP entered into when they incorporated HPA, entitles MMPP to designate a majority (four) of HPA's Board of Directors, including its Chairman. That Agreement also entitles RJA to name the remaining three directors, and further provides that RJA representatives would be named permanent managing partners for provider network development and client marketing. The Shareholders Agreement expressly provides that it is to be governed by Ohio law.

2. The Partnership Agreement

The Partnership Agreement is intended to govern the Partnership's affairs [*4] and the relations between HPA (as the General Partner) and MMPP and RJA (as the limited partners). That Agreement entitles each partner to receive, at least quarterly, a "Cash Flow" distribution to compensate them for their time and expenses devoted to the Partnership. "Cash Flow" is defined in the Partnership Agreement as:

the gross cash receipts of the Partnership from all sources reduced by the following: (a) all principal and interest payments and other sums paid on or with respect to any indebtedness of the Partnership; and (b) all cash expenditures incurred incident to the operation of the Partnership's business, including all payments to RJA pursuant to Section 4.1 of the Master Agreement."

The Partnership Agreement requires Cash Flow to be distributed as follows: HPA (1%), RJA (49.5%), and MMPP (49.5%).

3. The Master Agreement

The parties to the Master Agreement were the Partnership, RJA, and Primary Health Services, Inc. ("PHS"), an Ohio corporation and affiliate of MMPP. Under the Master Agreement, those parties agreed to give the Partnership's payor clients access to PHS's and RJA's respective provider network contracts without cost to the Partnership. PHS [*5] and RJA also agreed to contract with additional providers, on the Partnership's behalf, to join the Partnership's network. RJA alleges in its complaint that (i) under the Master Agreement RJA, PHS, and HPA were to jointly market the Partnership's provider network to their various payor clients, and that (ii) each of these parties would be responsible for its own costs and expenses in connection with its development and marketing efforts, and would be compensated only by Cash Flow distributions. For that reason, RJA claims, HPA was not entitled to deduct from Cash Flow distributions to partners any amounts that RJA or PHS incurred for marketing and development expenses.

C. The Alleged Unlawful and Fraudulent Actions

Between Fall 1994 and September 1998, the Partnership made distributions of gross cash receipts to all partners, including RJA, on a twice-monthly basis. From those distributions RJA paid its operating costs and expenses associated with the performance of its obligations under the Partnership Agreement and the Master Agreement.

In September 1998, MMPP and HPA offered to purchase RJA's interest in the Partnership. RJA declined that offer. Shortly thereafter, Mr. Arthur [*6] Chandler, the Chairman of the HPA Board and the owner of MMPP and PHS, told RJA that the method of Cash Flow distributions prescribed by the Partnership Agreement would be altered. Specifically, distributions would be changed from a bi-monthly to a quarterly distribution of *net cash* receipts.¹ Mr. Chandler also informed RJA that RJA would no longer function as the managing partner for provider network development or as the managing partner for client marketing for the Partnership. RJA claims that this change of status constituted a breach of the Shareholders Agreement.²

[*7] RJA immediately objected to those actions. In response, HPA noticed a board meeting to be held in Cleveland, Ohio on October 27, 1998. The proposed changes to the distribution schedule were not discussed at that meeting. Instead, MMPP and HPA again offered to buy out RJA, and then recessed the meeting to permit RJA an opportunity to consider the offer, which RJA later rejected.

On the morning of November 2, 1998, after it learned that RJA had rejected its second offer, HPA sent notice by fax that it was reconvening the October 27 meeting later that same day. Because of the shortness of notice, no RJA representatives could be present. At that meeting MMPP's designees to the HPA Board announced that they were unilaterally voting to amend the Partnership Agreement so that the funds to be distributed from gross cash receipts would now be equal to "net revenue." As a result of that change, RJA has been unable to remain current in its monthly expenses of approximately \$ 20,000 to \$ 25,000.

Thereafter, without notice or explanation, HPA deducted approximately \$ 138,000 from distributions that (RJA claims) were otherwise due to RJA. HPA then paid that \$ 138,000 to PHS, despite provisions [*8] in the Master Agreement mandating that the Partnership would have free access to the PHS network.

Although the Partnership Agreement provided that each limited partner would be responsible for its own costs

¹ This new Cash Flow structure would reduce the distributions, because "net cash receipts" involved additional deductions from gross cash receipts, that (plaintiffs claim) are not proper under the definition of "Cash Flow." Historically, distributions made by the Partnership were not reduced by "network development" expenses because RJA and PHS (not the Partnership) were financially responsible for the costs of developing of the network.

² Shareholders Agreement, at 3 ("Individuals designated as directors by RJA must include those individuals designated as the Managing Partner for Provider Network Development and the Managing Partner for Client Marketing for the Partnership? until such time as MMPP requests from RJA a change in Managing Partners for the Partnership.").

and expenses in developing and marketing the Partnership provider network, HPA and MMPP unilaterally decided that (i) those functions would be exercised solely by them and (ii) the Partnership would deduct arbitrary percentages from gross revenue for accounting, claim repricing, and network development and similar functions. In its complaint, the plaintiff claims that this new methodology for calculating these deductions was not disclosed, and that those deducted percentages bore no relation to the actual costs and expenses of carrying out those functions.

The plaintiff further alleges that in late 1995 or early 1996, MMPP established a new provider network known as Direct Care America ("DCA") as a vehicle to divert to DCA and its affiliated entities -- including MMPP -- business and revenues from the Partnership and RJA. Moreover, in 1995 MMPP allegedly began giving PHS and its clients free access to the Partnership network without any contract that would permit such access.

[*9] Finally, the plaintiff claims that PHS, in violation of the Master Agreement, began charging the Partnership a fee for providing Partnership clients access to PHS's provider network, and did not disclose that those fees were ultimately paid to RJA.

D. RJA Commences Two Actions

Thereafter, two lawsuits were filed. RJA filed this Delaware action on December 30, 1998, and served the Partnership and HPA (as general partner) with process through the Partnership's registered agent under 6 Del. C. §§ 17-105 and 17-109, respectively. MMPP was served with process through the Secretary of State of the State of Delaware under 10 Del. C. § 3104.

On January 25, 1999 -- one month after the plaintiff initiated this Delaware action -- HPA, MMPP, and PHS commenced a lawsuit in the Court of Common Pleas of Summit County, Ohio (the "Ohio action"), for a judgment declaring that MMPP, HPA, and PHS had fulfilled all contractual duties owed to RJA Associates under the Partnership, Shareholders, and Master Agreements. In March 1999, RJA removed the Ohio action to the United States District Court for the Northern District of Ohio

Eastern Division. One month later, the District Court dismissed [*10] the action for lack of subject matter jurisdiction.³

II. THE CONTENTIONS

The defendants first argue that the complaint should be dismissed because under Rule 12(b)(2), because this Court lacks personal jurisdiction over MMPP and HPA, which are Ohio corporations that do not have sufficient Delaware contacts to support jurisdiction; the plaintiffs did not properly serve HPA; and the Delaware forum is inconvenient. Second, the defendants contend that the action must be dismissed under Rule 19, because the plaintiff's failed to join PHS, which is a necessary and indispensable party. Finally, the defendants urge that the complaint should be dismissed under Rule 12(b)(6), because none of its allegations states a claim upon which relief could be granted.

These contentions are now addressed.

III. ANALYSIS

A. The Personal Jurisdiction Motion

The defendants challenge this Court's personal jurisdiction [*11] over them under Court of Chancery Rule 12(b)(2). **HN1** To overcome a challenge to personal jurisdiction, the plaintiff must establish, *prima facie*, that this Court has personal jurisdiction over the objecting defendant.⁴

1. As to HPA

The defendants first argue that the Court lacks personal jurisdiction over HPA because it was not properly served with process. Alternatively, they contend that at most, this Court has personal jurisdiction over HPA only as to claims that relate to the "business of the limited partnership," which does not include any claims based upon the Master Agreement or Shareholders Agreement. I disagree, [*12] and conclude that HPA is subject to personal jurisdiction in Delaware.

HN2 By accepting the position of General Partner, HPA consented to be subjected to this Court's jurisdiction as

³ *Midwest Medical Preferred Providers, Inc. v. R.J. Associates, Inc.*, Case No. 5:99CV478 (D. Ohio E.D. 1999).

⁴ *Newspan, Inc. v. Hearthstone Funding Corp.*, 1994 Del. Ch. LEXIS 52, *11, Del. Ch., C.A. No. 13304, Allen, C. (May 10, 1994). The plaintiff bears the burden of showing that a fact finder could determine that the factual basis for personal jurisdiction has been established. 1994 Del. Ch. LEXIS 52, *3 (citing *Hart Holding Co. v. Drexel Burnham Lambert, Inc.*, Del. Ch., 593 A.2d 535, 539 (1991)).

a matter of law.⁵ [*13] Moreover, and contrary to the defendants' position, the plaintiff's claims against HPA relate directly to HPA's actions as general partner and to "the business of the limited partnership." **HN3** HPA was also properly served with process, because under the Partnership Act "service of process shall be effected by serving the registered agent."⁶ HPA served the Partnership's registered agent on December 30, 1998.

2. As to MMPP

The plaintiff claims that this Court has in, *personam* jurisdiction over MMPP by virtue of **HN5** Delaware's general long arm statute, *10 Del. C. § 3104*. That claim requires a two-part analysis: (i) whether *§ 3104* applies in these specific circumstances; and (ii) if so, whether this Court's exercise of jurisdiction over MMPP satisfies constitutional due process requirements.⁷ **HN6** Where *in personam* jurisdiction is challenged on a motion to dismiss, the record is construed most strongly against the moving party (here, the defendants).⁸

a) Jurisdiction under *10 Del. C. § 3104(c)(1)*

RJA claims that personal jurisdiction over MMPP exists [*14] under *10 Del. C. § 3104(c)(1)*, which is a "single act statute" that enables the Court to exercise jurisdiction over nonresidents "on the basis of a single act done or transaction engaged in by the nonresident within the State."⁹ **HN7** *Section 3104(c)(1)* authorizes the exercise of jurisdiction over a nonresident "who in

person or through an agent... transacts any business or performs any character of work or service" in Delaware. **HN8** Under that Section, however, the plaintiff's cause of action must have a nexus with the forum-related contact; that is the claim must arise from at least one act that legally constitutes the transacting of business in Delaware.¹⁰

[*15] RJA points to three contacts that, when taken together, establish that MMPP was "transacting business" in Delaware: (i) MMPP participated in the formation of the Partnership in 1994, (ii) MMPP indirectly participated in the Partnership's management by "controlling" HPA, and (iii) MMPP caused the Partnership Agreement to be amended to alter the method of distributions to the partners. RJA claims that its claims against MMPP arise from one or more of these Delaware contacts.

MMPP responds that those contacts are insufficient to establish personal jurisdiction both as a matter of fact and law. MMPP contends that RJA's claims that MMPP managed the Partnership through its "control" of HPA and that MMPP caused the Partnership Agreement to be "amended," are not alleged in the complaint and therefore cannot be considered. That is not correct. These disputed allegations do appear in the complaint.¹¹

[*16] The defendants' legal argument appears to assume that MMPP's only Delaware contact was its

⁵ **6 HN4** *Del. C. 17-109(a)* (the Delaware Revised Uniform Limited Partnership Act ("DRULPA")) states: "A general partner... of a limited partnership may be served with process in the manner prescribed in this section in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited partnership or a violation by the general partner... of a duty to the limited partnership, or any partner of the limited partnership, whether or not the general partner? is a general partner? at the time the suit is commenced."

⁶ *6 Del. C. § 17-109(b)*.

⁷ *Hercules Inc. v. Leu Trust and Banking (Bahamas), Ltd.*, Del. Supr., 611 A.2d 476, 480-81 (1992).

⁸ *Leach v. Solar Bldg. Sys., Inc.*, 1998 Del. Ch. LEXIS 16, *4 Del. Ch., C.A. No. 15673, Jacobs, V.C. (Feb. 13, 1998).

⁹ *Eudaily v. Harmon*, Del. Supr., 420 A.2d 1175, 1180 (1980).

¹⁰ *Haisfield v. Cruver*, 1994 Del. Ch. LEXIS 155, *14, Del. Ch., C.A. No. 12430, Steele, V.C., (Aug. 25, 1994); *Arnold v. Society for Savings Bancorp*, 1993 Del. Ch. LEXIS 275, *8, Del. Ch., C.A. No. 12883, Chandler, V.C. (Dec. 17, 1993), *aff'd in part, rev'd in part on other grounds*, Del. Supr., 650 A.2d 1270 (1994).

¹¹ The plaintiff alleges that none of the three RJA representatives on the HPA Board was present at the meeting where the HPA Board "amended" the Partnership Agreement, creating the inference that only the four MMPP representatives on the HPA Board made that decision. Although MMPP and RJA are equal HPA Shareholders, MMPP has control of HPA's board by virtue of the Shareholders Agreement, which authorizes MMPP to nominate 4 of the 7 directors. See Complaint Ex. A. P 3, at 3. Thus, I conclude for purposes of this motion — where the record must be construed most strongly against the defendants — that the complaint's allegations are sufficient to show that MMPP controlled HPA (at least indirectly), especially in relation to the HPA Board decisions that gave rise to this lawsuit.

participation in forming the Partnership as a Delaware entity. Proceeding from that assumption, MMPP then concludes that the mere participation in the formation of a Delaware entity is not sufficient to confer jurisdiction under § 3104(c)(1), because where the formation of a Delaware entity is the defendant's only Delaware contact, the entity formation must be an integral part of the alleged wrongdoing.¹²

In the abstract, MMPP's statement of the law appears to be correct; that is, RJA's claim must arise from (*inter alia*) the formation of the Partnership. But that principle is misapplied in this case, because MMPP's assumption is incorrect: RJA alleges more than the mere formation of the Partnership as the basis for asserting in [*17] *personam* jurisdiction over MMPP. RJA also alleges that MMPP, although a limited partner, was more than just a passive investor, and indeed had at least indirect control over the Partnership's general partner, HPA. The plaintiff further claims that MMPP unilaterally caused the Partnership Agreement to be amended to alter the Cash Flow distributions to the plaintiff's detriment.¹³ In the aggregate these allegations are sufficient to establish (for personal jurisdiction purposes) that MMPP transacted business in Delaware and that RJA's claims against MMPP arise from these alleged transactions.

b) The Constitutional Minimum Contacts Issue

Having determined that § 3104 applies to MMPP, I must next consider whether subjecting MMPP [*18] to in

personam jurisdiction in Delaware is consistent with due process. I am satisfied that MMPP has sufficient contacts with Delaware to satisfy the due process standards of *International Shoe Co. v. Washington*¹⁴ and its progeny.

International Shoe holds that *HN9* before a court may assert jurisdiction over a non-domiciliary defendant based upon implied consent, the defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" ¹⁵ [*19] The specific inquiry here is *HN10* whether MMPP has created continuing obligations between itself and Delaware such that it could reasonably expect to be haled before a Delaware court.¹⁶ That question must be answered in the affirmative.

The record shows that MMPP has several Delaware contacts. To be specific, (a) it took an active role in establishing the Delaware Partnership;¹⁷ (b) MMPP owns a 50 percent interest in HPA, the Partnership's General Partner, and appoints four of HPA's seven Board members; (c) MMPP receives 49.5% of the Cash Flow distributions from the Partnership, and it benefits directly from Delaware law through the operation of the Partnership's provider network; (d) MMPP (allegedly) controls HPA and, thereby controls the Partnership's management; (e) [*20] MMPP allegedly caused the Partnership Agreement to be amended under Delaware law to change the agreed-upon Cash Flow distribution payments to the limited partners; and (g) MMPP agreed

Second, the plaintiff alleges that at the November 2, 1998 meeting, "the MMPP representatives on the [HPA] Board announced that they were *unilaterally amending* the Partnership Agreement so as no longer to distribute gross cash receipts." Although the plaintiff does not allege that the MMPP representatives on the HPA Board literally amended the Partnership Agreement document, it may be inferred that the directors who voted upon the amendment intended and agreed to do so.

¹² See *Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Productions, Inc.*, Del. Ch., C.A. No. 12306, 1991 Del. Ch. LEXIS 113, Allen, C. (July 10, 1991).

¹³ See e.g., *Hart Holding Co. v. Drexel Burnham Lambert, Inc.*, Del. Ch., 593 A.2d 535, 541-42 (1991) (filing certificate of merger and amendment of charter in furtherance of unlawful conspiracy constituted business in Delaware for long-arm jurisdiction purposes).

¹⁴ 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

¹⁵ 326 U.S. at 316; accord, *Sternberg v. O'Neil*, Del. Supr., 550 A.2d 1105, 1118 (1998).

¹⁶ *Shaffer*, 433 U.S. 186, 216, 97 S. Ct. 2569, 53 L. Ed. 2d 683; *Sternberg*, 550 A.2d at 1120 (recognizing that minimum contacts are established when a defendant has deliberately created a continuing obligation between itself and Delaware); *In re USA Cafes, L.P. Litig.*, Del. Ch., 600 A.2d 43, 50-51 (1991) (asking "whether its should have been reasonably anticipated by [defendant] 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.").

¹⁷ See *USA Cafes*, 600 A.2d at 51 ("The creation of a legal entity creates a forum state public interest in the governance of that entity.").

to a Delaware choice of law provision in the Partnership Agreement.¹⁸ These contacts are sufficient, in my view, to establish that MMPP should reasonably have anticipated being haled into a Delaware court.¹⁹

[*21] Subjecting MMPP to personal jurisdiction in Delaware is also "reasonable" because it comports with "traditional notions of fair play." The burden imposed upon MMPP to litigate in Delaware (particularly, for example, its travel costs and the cost of hiring local counsel) would not be significantly greater than they would be if MMPP litigated elsewhere.²⁰ Because the *International Shoe* criteria are satisfied, this Court is constitutionally empowered to exercise personal jurisdiction over MMPP in this case.²¹

[*22] B. The Rule 19 Joinder Motion

The defendants next argue that this action should be dismissed under Court of Chancery Rule 19 because

the plaintiff failed to join PHS, which is a necessary and indispensable party. I disagree. PHS does not fall within the definition of a "necessary" party under Rule 19(a). Moreover, even if PHS had an interest in this litigation sufficient to make it a necessary party, this action could proceed without PHS, because that interest would be adequately protected by the parties already joined.

RJA's claims all arise directly from HPA and MMPP's management and control of the Partnership's affairs. PHS is not alleged to be a partner in the Partnership or to have been involved in any of the Partnership's affairs, management, or operations.

Rule 19(a) "categorizes those persons whose joinder should be required to accord complete adjudication of

¹⁸ See *Haisfield*, 1994 Del. Ch. LEXIS 155, *15 ("A choice of law clause, although insufficient standing alone to confer personal jurisdiction, 'reinforces [the defendant's] deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there.'") (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 482, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)).

¹⁹ See *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980) (finding that defendant should have reasonably "anticipated being haled in to court" in the forum state).

²⁰ 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95.

²¹ The defendants also argue that this action should be dismissed on the basis of *forum non conveniens*. In considering a motion to dismiss on *forum non conveniens* grounds, this Court must weigh the six factors enumerated in *General Foods Corp. v. Cryo-Maid, Inc.* ("*Cryo-Maid*"), Del. Supr., 41 Del. Ch. 474, 198 A.2d 681 (1964), *overruled in part on other grounds sub nom. PepsiCo, Inc. v. Pepsi-Cola Bottling Co.*, Del. Supr., 261 A.2d 520 (1969). The key issue is, "whether any or all of the *Cryo-Maid* factors establish that defendant will suffer overwhelming hardship and inconvenience if forced to litigate in Delaware. Absent such a showing, plaintiff's choice of forum must be respected." *Chrysler First Business Credit Corp. v. 1500 Locust Ltd. Partnership*, Del. Supr., 669 A.2d 104 (1995).

The defendants have failed to establish that they would be subjected to overwhelming hardship and inconvenience if required to litigate in Delaware. A bare claim of inconvenience is an insufficient basis for dismissal absent a particularized showing of hardship. *Taylor v. LSI Logic*, Del. Supr., 689 A.2d 1196, 1199 (1997); *In re Will of Mansfield*, 1990 Del. Ch. LEXIS 175, *22, Del. Ch. C.A. No. 11340, Chandler, V.C. (Oct. 12, 1990). An analysis of the *Cryo-Maid* factors also confirms that dismissal is not appropriate. First, Delaware law is applicable to this case. Section 11.4 of the Partnership Agreement expressly and unequivocally provides that the agreement and the rights of the parties thereunder are governed by Delaware law; moreover, the plaintiff's breach of fiduciary duty claims arise from the defendants' actions in their capacity as partners in a Delaware limited partnership and, thus, are governed by Delaware law. See *Hurst v. General Dynamics Corp.*, Del. Ch., 583 A.2d 1334, 1339 (1990).

Second, although none of the potential witnesses or relevant documents is located in Delaware, that is not dispositive because no showing is made that transporting witnesses or documents to Delaware would subject defendants or any potential witnesses to overwhelming hardship or inconvenience. Given the relative speed and efficiency of modern travel, Wilmington is easily accessible from either Ohio or Washington D.C., the locations from which the relevant witnesses would be traveling. Third, although some potential witnesses reside in Ohio, several of them are under the control of either HPA or the Partnership and could be compelled to testify in whatever forum where the disputes were litigated. Fourth, viewing the premises is irrelevant in these circumstances. Fifth, the dismissal of the Ohio lawsuit is a factor that favors the Delaware forum. Sixth, the argument that this Court lacks personal jurisdiction over HPA or MMPP has been rejected. For these reasons, the facts here fall far short of the Delaware standard for dismissal on *forum non conveniens* grounds.

claims at issue."²² **HN11** That Rule pertinently states that it is "necessary" for a person to be joined where:

(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition
 [*23] of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

HN12 To qualify as "necessary," a party:

should have not only an interest in some part of the controversy but the interest must be such that a final decree cannot be made which will neither touch upon that party's interest nor leave the controversy in such a state that the final determination would be inconsistent with equity and good conscience.²³

[*24] PHS is not a necessary party under this definition. The plaintiff's claims do not prejudice or implicate the rights of PHS, because they arise from HPA's and MMPP's alleged breach of the Partnership and Master Agreements, specifically, their failure to distribute funds to RJA under those agreements. To the extent RJA's claims a wrongful distribution by defendants of funds to PHS, the interests of PHS are only tangentially implicated, and would not be adversely affected by a favorable decision for RJA on that claim, because RJA does not seek rescission of any payments made to PHS

or of any arrangement between PHS and the defendants. Moreover, any risk of inconsistent judgments or duplicate litigation has been greatly reduced by the dismissal of the Ohio action, which implicated no rights or interests of PHS.²⁴

[*25] But even if (*arguendo*) PHS were a necessary party, it is not "indispensable" under Court of Chancery Rule 19(b). **HN13** That Rule requires that if a necessary party cannot feasibly be joined, "the Court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." **HN14** In making that determination, the Court must consider four factors: (i) the extent of prejudice to absent and existing parties, (ii) the possibility of shaping a judgment as to mitigate such prejudice, (iii) whether the remedy given without the party will be adequate or will instead create more lawsuits by parties involved in the same transaction or occurrence, and (iv) whether the plaintiff has available an alternative forum to hear and adjudicate the claim.²⁵ These "pragmatic considerations," are to be "governed by practicality and flexibility rather than by idealistic and mechanical standards bottomed upon allegedly inseparable substantive rights."²⁶

[*26] It is settled law that an action may continue without an absent party if that party's interest is fully represented therein.²⁷ Here, PHS's interests will be adequately and fully protected by MMPP, of which PHS is an affiliate. MMPP has an economic interest in protecting any rights that PHS may have to any funds or opportunities that were (allegedly) wrongfully diverted to PHS by MMPP and HPA. MMPP thus has an undeniable stake in advancing the interests of PHS to

²² *Hughes Tool Co. v. Fawcett Publications, Inc.*, Del. Supr., 350 A.2d 341, 344 (1975).

²³ *Joseph v. Shell Oil Co.*, Del. Ch., 498 A.2d 1117, 1125 (1985) (citing *Elster v. American Airlines*, Del. Ch., 34 Del. Ch. 500, 106 A.2d 202, 203-04 (1954) (quoting *Shields v. Barrow*, 58 U.S. (17 How.) 130, 15 L. Ed. 158 (1854))).

²⁴ Although PHS was named as a plaintiff in the Ohio action, the complaint sought only a declaratory judgment that the actions of HPA and MMPP were correct and appropriate under the Partnership Agreement -- an agreement to which PHS was not a party. The Ohio action did not seek any adjudication that PHS was entitled to the payments it had received from HPA, or any relief that would be adverse to PHS. See *Midwest Medical Preferred Providers*, *supra* note 3, at 4 ("PHS has failed to state a claim against RJA in the Ohio Complaint....PHS's involvement in the case *sub judice* is insignificant and does not impact the Court's analysis.").

²⁵ of Chancer Rule 19(b).

²⁶ *National Educ. Corp. v. Bell & Howell Co.*, 1983 Del. Ch. LEXIS 562, *8, Del. Ch., C.A. No. 7278, Brown, C. (Dec. 13, 1983).

²⁷ *Joyce v. Cuccia*, 1997 Del. Ch. LEXIS 71, Del. Ch., C.A. No. 14953, 24-26, Jacobs, V.C. (May 14, 1997); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, Del. Super., 565 A.2d 268, 271 (1989) (citing *Moran v. Household Int'l, Inc.*, Del. Ch., 490 A.2d 1059, *aff'd*, Del. Supr., 500 A.2d 1346 (1985)).

the extent they may be implicated by this lawsuit. Any risk of inconsistent judgments has been minimized (if not eliminated) by the dismissal of the Ohio action in RJA's favor. For these reasons, this action may and should proceed in the absence of PHS.

[*27] C. The Rule 12(b)(6) Motion to Dismiss

Lastly, the defendants seek dismissal of the complaint under Court of Chancery Rule 12(b)(6). The complaint sets forth five separate claims against HPA and MMPP, namely: (a) breach of contract, (b) breach of the implied covenant of good faith and fair dealing, (c) breach of fiduciary duty, (d) an accounting, and (e) civil conspiracy. The requested relief includes a declaration of each party's rights under the Partnership Agreement.

HN15 When deciding a motion under Rule 12(b)(6), the Court must consider as true the well-pleaded facts in the complaint, and must view all inferences in the light most favorable to the plaintiff.²⁸ **[*28]** **HN16** A complaint will be dismissed only where it appears with reasonable certainty that the plaintiff would not be entitled to relief under any set of facts.²⁹ The Court now addresses RJA's claims within the framework of these well-established principles.

1. The Pivotal Underlying Allegations

RJA alleges that the Partnership Agreement expressly required distributions of Cash Flow "no less frequently than quarterly," and that historically HPA had distributed Cash Flow on a twice-monthly basis. The Partnership Agreement defined Cash Flow to mean gross cash receipts of the Partnership, reduced by (among other things) "all cash expenditures incurred incident to the operation of the Partnership's business..." RJA claims

that deductions from Cash Flow for "cash expenditures" should not have included any expenses for marketing or development of the Partnership network performed by RJA or PHS, because in the Master Agreement those parties themselves contracted to absorb those costs.³⁰

[*29] RJA also alleges that in September 1998, MMPP and HPA offered to purchase RJA's interest in the Partnership. In October 1998, shortly after RJA declined that offer, Arthur Chandler (the owner of MMPP, PHS, and HPA's Chairman of the Board), together with MMPP's representatives on the HPA Board, altered the distribution schedule and formula, allegedly in violation of express language in the Partnership Agreement. Specifically, RJA claims that (a) the distributions were reduced from twice-monthly payments to quarterly payments; and (b) the gross cash receipts were reduced by expenses relating to network marketing and development, which PHS and RJA had contractually agreed to assume.³¹ RJA also claims that at all relevant times MMPP exercised control over HPA's actions taken as general partner, because (i) MMPP nominated a majority of the representatives to the HPA Board, and (ii) Mr. Chandler manipulated the dates on which the HPA Board met to vote on the alterations to the distribution schedule and formula, so that no RJA representatives to the HPA Board would be present and only MMPP representatives would make those decisions.

[*30] These allegations form the basis for the claims for relief, the legal sufficiency of which is next considered.

2. The Claims for Relief

a. Declaratory Judgment

²⁸ *In re Tri-Star Pictures, Inc. Litig.*, Del. Supr., 634 A.2d 319, 326 (1993); *Delaware State Troopers Lodge No. 6 v. O'Rourke*, Del. Ch., 403 A.2d 1109, 1110 (1979); *Penn Mart Realty Co. v. Becker*, Del. Ch., 298 A.2d 349, 351 (1972).

²⁹ *Tri-Star*, 634 A.2d at 326; *O'Rourke*, 403 A.2d at 1110, *Penn Mart*, 298 A.2d at 351.

³⁰ The Master Agreement requires RJA and PHS to provide, among other things, "existing contracts," "primary contracts," "physician contracts," and "secondary contracts." The only provision for the payment of expenses incurred in procuring those contracts is found in sections 3.1 and 4.1 of the Master Agreement, which authorize such payments only to RJA.

The Master Agreement also states that RJA, HPA, and PHS (not the Partnership) were responsible for marketing the network. The Master Agreement provides that "all travel, entertainment, and related expenses incurred in implementing the Marketing Plan shall be paid by RJA, PHS, and HPA for their respective agents and employees (emphasis added)." RJA alleges that all of the obligations, including the related expenses, for developing and implementing the marketing plan for the Partnership's network fell to RJA, PHS, and HPA. Therefore, RJA claims, distributions paid by the Partnership should not have been reduced to pay such expenses.

³¹ Specifically, these expenses related to "claims repricing," "network development," and "accounting."

RJA contends that this Court is the proper forum to declare the validity of HPA and MMPP's actions involving Partnership Cash Flow distributions under the Partnership Agreement. I concur. The claims that the distribution payment methodology currently utilized by HPA (and dictated by MMPP) is improper under the Partnership Agreement and is causing ongoing financial harm to RJA. **HN17** This Court may properly adjudicate that claim and in that context, declare the rights and obligations of parties to a Delaware limited partnership agreement. ³² Accordingly, the complaint states a claim upon which declaratory relief could be granted against HPA and MMPP.

b. Breach of Contract

Next, RJA claims that HPA -- which is a party to both the Partnership Agreement and the Master Agreement [*31] -- breached both by failing to properly distribute Cash Flow to RJA. RJA also contends that MMPP -- which allegedly controls HPA -- breached section 6.2 of the Partnership Agreement, which precludes MMPP from "participating in the operation, management, or control of the Partnership's business." ³³

In support of its dismissal motion HPA argues that the complaint fails to state a claim against HPA upon which relief can be granted, because (a) under the definition of "Cash Flow," HPA was entitled to deduct marketing and network expenses from Cash Flow distributions, such as expenses paid to PHS for its various network marketing and development efforts; (b) HPA was not contractually required to cause the Partnership to make two distribution payments per month; and (c) PHS was not obligated under the Master Agreement to provide the Partnership [*32] with free marketing or development services. MMPP argues that RJA's breach of contract claim should be dismissed because MMPP is not a party to the Master Agreement and because MMPP is not obligated under the Partnership Agreement to "ensure distribution of funds" to RJA. I find that RJA has alleged a cognizable claim for breach of contract against both defendants.

RJA alleges that under the Master Agreement, RJA and PHS were required to absorb their respective costs for

network development, and that those costs could not be deducted from Cash Flow distributions. HPA's October 1998 decision to alter the methodology by which distributions were made, sufficiently states a claim for violations of the Partnership and the Master Agreements.

As for MMPP, RJA alleges that because MMPP sought to be the purchaser of RJA's interest and controls HPA's board, MMPP caused HPA to engage in conduct that (RJA claims) constituted a breach of § 6.1 of the Partnership Agreement. Those allegations are sufficient to state a claim against MMPP for breach of the Partnership Agreement.

RJA's claim of breach of the implied duty to act in good faith and fair dealing against HPA and MMPP, properly falls [*33] within the scope of RJA's breach of contract claim. ³⁴ **HN18** The complaint's allegations that the defendants failed to adhere in good faith to the contractual obligations set forth in the Partnership Agreement, and failed to deal fairly with RJA, are sufficient to state a claim for breach of the implied covenant of good faith and fair dealing.

c. Breach of Fiduciary Duty

The defendants also seek dismissal of RJA's claims that HPA and MMPP breached their fiduciary duties to RJA. The Partnership Agreement expressly states that HPA "shall be under a fiduciary duty to conduct and manage the affairs for the Partnership in a prudent, businesslike and lawful manner." That broad contractual undertaking incorporates and encompasses traditional fiduciary duties recognized under [*34] Delaware law ³⁵ which, RJA contends, HPA breached by failing to adhere to the express contractual undertakings to RJA contained in the Partnership and Master Agreements.

HPA contends that these claims are insufficient because RJA is "bootstrapping" what are really breach of contract claims into fiduciary duty claims, and also because the claims are derivative. I find these arguments unpersuasive. **HN19** Conduct by an entity that occupies

³² See Court of Chancery Rule 57; 10 Del. C. § 6501.

³³ Because RJA's breach of contract claim against MMPP does not involve the Master Agreement, the complaint does not state a claim against MMPP for breach of that Agreement.

³⁴ See e.g., *Gilbert v. El Paso Co.*, Del. Ch., 490 A.2d 1050, 1054-55 (1984), *aff'd*, Del. Supr., 575 A.2d 1131 (1990) ("An implied covenant of good faith and fair dealings is grafted upon every contract.")

³⁵ See *USA Cafes*, 600 A.2d at 48-49.

a fiduciary position (here, HPA) may form the basis of both a contract and a breach of fiduciary duty claim.³⁶ Moreover, RJA's breach of fiduciary duty claims (wrongfully amending the Partnership Agreement formula for calculating distributions at an unfairly noticed directors meeting) are direct in nature. HPA has cited no authority that establishes that these are derivative claims for waste. RJA has stated a claim for breach of fiduciary duty against HPA.

[*35] With respect to MMPP, the situation is somewhat more complex, because MMPP is a limited, not a general, partner. The DRULPA expressly states that "**HN20** in any case not provided for in this chapter the Delaware Uniform Partnership Law [DUPL]...and the rules of law and equity...shall govern."³⁷ **HN21** Because the DRULPA contains no provision governing the accountability of limited partners for breaches of fiduciary duty, the Court must look to the DUPL to determine what fiduciary duties are owed by and to the limited partners in a limited partnership. **HN22** Section 1521(a) of the DUPL provides that:

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits, derived by him without the consent of the other partners from any transaction connected with the...conduct...of the partnership or from any use by him of its property.

Unless expressly modified by the Partnership Agreement, the fiduciary duties set forth in § 1521 apply to MMPP.³⁸ [*36]

The Partnership Agreement at issue here does not modify or preempt the fiduciary duties owed by the

limited partners to a limited partnership. RJA alleges that MMPP, through its control of HPA, (a) unilaterally and improperly amended the Partnership Agreement formula so as no longer to distribute gross cash receipts as the Partnership Agreement prescribed; (b) paid excessive and unwarranted access fees to its affiliate, PHS; (c) permitted PHS's customers to have access to the Partnership's network without compensating the Partnership; and (d) established a competitive business that improperly solicited the Partnership's medical providers. [*37]³⁹ Each of these acts is claimed to have resulted in the diversion from the Partnership of revenue, at least a portion of which rightfully belonged to RJA. Individually or collectively, they would constitute an actionable breach of MMPP's fiduciary duty to RJA.

[*38]

d. Civil Conspiracy

RJA has also alleged facts that establish the elements of a claim of civil conspiracy cause of action, under Ohio law, against MMPP and HPA.

Drawing all inferences from the pleadings in favor of RJA, the complaint can fairly be read to allege that (a) MMPP participated in, and stood to benefit greatly from, the decisions made to alter the distributions from the Partnership to RJA; (b) MMPP had the power to elect, and has elected, four of the seven HPA Board members; (c) MMPP sought to purchase RJA's 49% interest in the Partnership in September 1998 and, after RJA rebuffed MMPP's offer, undertook (along with HPA) a course of conduct to place RJA in financial peril; (d) this course of conduct was implemented through hastily called HPA board meetings at which only MMPP representatives

³⁶ See *Cantor Fitzgerald, L.P. v. Cantor*, Del. Ch., 724 A.2d 571 (1998); *Universal Studios, Inc. v. Viacom, Inc.*, Del. Ch., 705 A.2d 579 (1997). Indeed, the fact that HPA may have allegedly breached its fiduciary duty to RJA would actually constitute a breach of section 5.1 of the Partnership Agreement.

³⁷ Del. C. 17-1105.

³⁸ See *James River-Pennington, Inc. v. CRSS Capital, Inc.*, 1995 Del. Ch. LEXIS 22, *10, Del. Ch., C.A. No. 13870, Steele, V.C. (Mar. 6, 1995); *Sonet v. Plum Creek Timber Co. ("Sonet I")*, Del. Ch., 722 A.2d 319, 322 (1998) ("Principles of contract preempt fiduciary principles where the parties to a limited partnership have made their intentions to do so plain.").

³⁹ MMPP's reliance on § 5.4 of the Partnership Agreement to justify its creation of a competitive network is, at least this stage of the proceedings, misplaced. The language of § 5.4 does permit MMPP to own an interest in, among other things, a competitive business. Its language does not, however, permit MMPP to utilize information gained from its control over the Partnership to begin soliciting the Partnership's customers to join MMPP's newly created competitive network. Given the fact that MMPP's owner and two employees are directly involved in the governance and operation of the Partnership, and would have access to information including the Partnership's customer lists and pricing information, discovery is needed to determine the full extent to which the Partnership's proprietary information was used by MMPP to further its competitive business objectives.

could be present and vote; (e) the actions taken at those meetings resulted in substantial monies being paid to PHS (MMPP's affiliate), caused a corresponding reduction in the distribution that RJA would have received, and resulted in the elimination of the twice-monthly distributions that historically had been made since the Partnership began.

RJA is entitled to the reasonable [*39] inference that this course of action -- undertaken by HPA after September 1998 immediately following RJA's rejection of MMPP's offer to purchase RJA's interest in the Partnership -- was orchestrated by (and for the benefit of) MMPP and PHS. These allegations are sufficient to state a claim for civil conspiracy.⁴⁰

e. Claim for Accounting and Access to Books and Records

Lastly, RJA seeks an accounting and access to the financial records of the Partnership, HPA, and MMPP. The defendants contend that RJA is not entitled to that relief [*40] as a matter of law.

RJA's claim of entitlement to an accounting from the Partnership rests upon Article 7 of the Partnership Agreement and 6 Del. C. § 1522. Article 7 expressly provides for a full accounting of the Partnership and access to the Partnership's financial records. The Partnership Agreement is silent, however, as to HPA's and MMPP's obligations (if any) in that regard. Thus, the Court must look to the DRULPA and DUPA to determine whether RJA also has a statutory right to a full accounting from HPA and/or MMPP.

The DRULPA also contains no provision that addresses whether there can be an accounting between limited partners where wrongful usurpation of partnership

assets is alleged. **HN23** Section 1522 of the DUPA provides, however, that "any partner shall have the right to a formal account as to partnership affairs...if he is wrongfully excluded from the partnership business of possession of its property by his copartners" or "as provided by 1521 of this title."⁴¹ **HN24** Section 1521 states that every partner is accountable as a fiduciary to the other partners and "must account to the partnership for any benefit..." Those two DUPA provisions, RJA argues, entitle RJA to an accounting [*41] from HPA and MMPP for breaching their fiduciary duties to RJA. I concur.

Because I have found that RJA has stated claims against both HPA and MMPP for breach of their fiduciary duties, it follows that RJA has also stated a claim for an accounting against the defendants.

RJA is not, however, presently entitled to access to Partnership books and records. **HN25** Under 6 Del. C. § 17-305, a limited partner seeking access to Partnership records must make a written demand on the General Partner to inspect the information requested and the purpose for the demand.⁴² RJA's request to compel access to Partnership books and records must fail, because the complaint does not allege that RJA made a written demand for books and records upon either of the defendants.

IV. CONCLUSION

[*42] For the foregoing reasons, the defendants' motions to dismiss are denied, except that their Rule 12(b)(6) motion is granted with respect to RJA's claim that this Court compel the production of HPA, MMPP, and the Partnership's books and records. IT IS SO ORDERED.

⁴⁰ Under Ohio law, the element of "malice" required to establish a civil conspiracy is defined as, "that state of mind under which a person does a wrongful act properly, without a reasonable lawful excuse, to the injury of another." *Williams v. Aetna Fin. Co.*, 83 Ohio St. 3d 464, 700 N.E.2d 859, 868 (1998). Whether or not the defendants in fact possessed the requisite *mens rea* is a question that must be resolved by the finder of fact at a later stage.

⁴¹ 6 Del. C. § 1522(1)&(3).

⁴² 6 Del. C. § 17-305(d).

EXHIBIT 15

Roberts v. Delmarva Power & Light Co.

Superior Court of Delaware, Kent

June 1, 2007, Submitted; August 6, 2007, Decided

CONSOLIDATED CASE, C.A. No: 05C-09-015 (RBY)

Reporter

2007 Del. Super. LEXIS 234

LISA ROBERTS, Plaintiff, v. DELMARVA POWER & LIGHT COMPANY, d/b/a/ Connectiv Power Delivery, BENJAMIN CLENDANIEL, CHESWOLD AIRPORT, DELAWARE RIVER AND BAY AUTHORITY and JAMES JOHNSON, Defendants. BARBARA L. AUBREY, Individually and Executor of the Estate of James R. Aubrey, Deceased, and JENNIFER L. AUBREY, Plaintiffs, v. DELAWARE RIVER AND BAY AUTHORITY and DELAWARE AIRPARK and PEPCO HOLDINGS, INC. and DELMARVA POWER & LIGHT f/k/a CONNECTIV POWER DELIVERY and DIAMOND AVIATION INC., and HARLAN DURHAM, Defendants.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Subsequent History: Motion denied by *Roberts v. Delmarva Power & Light Co.*, 2007 Del. Super. LEXIS 232 (Del. Super. Ct., Aug. 6, 2007)

Prior History: [*1] Upon Consideration of Defendant Delmarva Power and Light's Rule 12(b)(7) Motion to Dismiss.

Disposition: DENIED.

Core Terms

parties, joinder, join, feasible, joint tort feasor, no necessity, equitable power

Case Summary

Procedural Posture

Two wrongful death actions, filed by different plaintiffs, against various defendants, including a power company, were consolidated. The second set of plaintiffs also sought redress in the Pennsylvania Court of Common

Pleas, Philadelphia County, and the New York Supreme Court, New York County, against separate defendants. Intervenor, defendants in the Pennsylvania suit (Pennsylvania defendants) intervened in the Delaware suit.

Overview

The power company moved to dismiss. The power company argued that the trial court's equitable powers should be used to order dismissal under Del. Super. Ct. R. Civ. P. 19(b) or joinder under Rule 19(a). The trial court held that the only equitable powers were those found in Rule 19(b). Those equitable powers could not be used unless the indispensability issue under Rule 19(b) could be reached. Joint tortfeasors were not necessary parties whose joinder was mandatory. The Pennsylvania defendants were not necessary parties under Rule 19(a) as they were arguably tortfeasors. Thus, the Rule 19(b) issue could not be reached and the equitable powers were inaccessible. The Pennsylvania defendants were not necessary parties under Rule 19(a), and it did not need to be determined whether they were indispensable parties under Rule 19(b).

Outcome

The power company's motion to dismiss was denied.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN1 Del. Super. Ct. R. Civ. P. 12(b)(7) provides that a trial court may dismiss a plaintiff's claim for failing to join a party pursuant to Del. Super. Ct. R. Civ. P. 19. In order

to determine whether a plaintiff has failed to join a party pursuant to Rule 19, the trial court undertakes a two-pronged inquiry. First, the trial court inquires whether the party is a necessary party under Rule 19(a). A party is necessary if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Governments > Courts > Rule Application & Interpretation

HN3 Construction of federal rules is generally persuasive in the construction of the Delaware Superior Court Civil Rules.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN4 The present version of Del. Super. Ct. R. Civ. P. 19 does not use the word "necessary." It refers to parties who should be joined if feasible. The term "necessary" in referring to a Rule 19(a) analysis harks back to an earlier version of Rule 19.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN5 Del. Super. Ct. R. Civ. P. 19 tracks Fed. R. Civ. P. 19(a) word for word.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN2 If the party is necessary, it must be joined if feasible to do so. It is not feasible to join a party when the party is not subject to service of process and joining the party would deprive the trial court of subject matter jurisdiction. Del. Super. Ct. R. Civ. P. 19(a). If the party is necessary and joinder is feasible, then the trial court shall order that the person be made a party. Rule 19(a). If the person should join the action as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. Rule 19(a). Del. Super. Ct. R. Civ. P. 12(b)(7) does not provide for dismissal at this stage.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN6 If a party is "necessary" under Del. Super. Ct. R. Civ. P. 19(a), but joinder is not feasible, then the trial court must determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable. Rule 19(b). In making this assessment, the trial court is to consider the following factors: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) 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; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether a plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Rule 19(b).

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Parties > Joinder of Parties > General Overview

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Burden Shifting

HN7 When presented with a Del. Super. Ct. R. Civ. P. 12(b)(7) motion, the trial court places an initial burden on the party raising the defense to show that the person who was not joined is needed for a just adjudication. However, when an initial appraisal of the facts reveals the possibility that an unjoined party whose joinder is required under Del. Super. Ct. R. Civ. P. 19 exists, the burden devolves on the party whose interests are adverse to the unjoined party to negate this conclusion and a failure to meet that burden will result in the joinder of the party or dismissal of the action. When presented with such a motion, the trial court will consider all well-pleaded facts in the complaint and accept them as true. In viewing the facts, the trial court must draw all reasonable inferences in favor of the non-movant. The trial court may consider documents that are integral to a plaintiff's claim and incorporated in the complaint in deciding a motion to dismiss.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

HN8 It is well settled law that joint tortfeasors are not necessary parties whose joinder is mandatory, but are merely permissive parties. Furthermore, the Advisory Committee has made it clear that Fed. R. Civ. P. 19 is not at variance with the settled authorities holding that a tortfeasor with the usual "joint-and-several" liability is merely a permissive party to an action against another with like liability. Joinder of these tortfeasors continues to be regulated by Fed. R. Civ. P. 20.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

HN9 The trial court cannot access the equitable powers in Del. Super. Ct. R. Civ. P. 19(b) unless it can reach the Rule 19(b) issue: indispensability.

Counsel: John Grady, Esq., Grady & Hampton, Dover, Delaware for Plaintiff Lisa Roberts.

Gary W. Aber, Esq., Aber, Goldlust, Baker & Over, Wilmington, Delaware for Plaintiff Jennifer Aubrey.

David K. Sheppard, Esq., Blank, Rome, LLP, Wilmington, Delaware for Plaintiff Barbara Aubrey.

Lisa C. McLaughlin, Esq., Phillips, Goldman & Spence, P. A., Wilmington, Delaware for Defendant Delmarva Power & Light Co.

Stephen P. Casarino, Esq., Casarino, Christman & Shalk, Wilmington, Delaware for Defendants James Johnson, Benjamin Clendaniel, Cheswold Airport and Delaware River & Bay Authority.

Christian J. Singewald, White and Williams, LLP, Wilmington, Delaware for Defendant Precision Airmotive, LLC.

Todd L. Goodman, Esq., Pepco Holdings, Inc., Wilmington, Delaware for Defendants Pepco and Delmarva Power & Light Company.

Thomas G. Whalen, Esq., Stevens & Lee, Wilmington, Delaware for Defendant Harlan Durham.

Judges: Robert B. Young, J.

Opinion by: Robert B. Young

Opinion

OPINION AND ORDER

Young, J.

The Defendant, Delmarva Power and Light, has filed a Motion to Dismiss this entire action pursuant to Superior Court Civil Rules 12(b)(7) and 19. For [*2] the following reasons, the Defendant's Motion is **DENIED**.

FACTS

On October 12, 2003, James Aubrey, a certified pilot, and his daughter, Jennifer Aubrey, took off from the Delaware Airpark in his single-engine, Piper Cherokee 180. The Aubreys left the airport in Cheswold, Delaware and proceeded to Hazleton, Pennsylvania. Shortly before sunset, the Aubreys left the Hazleton Municipal Airport to return to Delaware. When they arrived in Cheswold it was dark. On final approach, the aircraft struck a utility pole. The right wing separated from the fuselage, which crashed into the ground. As a result of the impact, both of the Aubreys sustained personal injuries; James Aubrey ultimately died from his injuries.

This incident resulted in the filing of two separate actions in Delaware stemming from the alleged wrongful death of James Aubrey. In the first, Lisa Roberts, another daughter of James Aubrey, sought to recover for her father's wrongful death in a lawsuit filed in Kent County. In the second, Barbara Aubrey, the widow and executor of the Estate of James Aubrey, and Jennifer Aubrey (collectively "the Aubrey Plaintiffs") filed a wrongful death action in New Castle County. In this same action [*3] Jennifer Aubrey also made claims for the personal injuries she sustained in the crash.

Ms. Roberts seeks damages from Defendants, Delmarva Power and Light Company, Benjamin McDaniel a/k/a Benjamin Clendaniel ("Clendaniel"), Delaware Airpark, James Johnson, Delaware River and Bay Authority. The Aubrey Plaintiffs seek damages from Defendants Delmarva Power and Light Company, Pepco Holdings, Inc., Delaware Airpark, Delaware River and Bay Authority, Diamond Aviation, Inc., and Harlan Durham. On April 7, 2006, this Court ordered that the New Castle County action be consolidated into the Kent County action.

In addition to filing a lawsuit in Delaware, the Aubrey Plaintiffs seek redress in the Pennsylvania Court of

Common Pleas, Philadelphia County, and the New York Supreme Court, New York County, against separate defendants who purportedly are not subject to personal jurisdiction in Delaware.¹ In the Pennsylvania action, the Complaint states that the Aubrey Plaintiffs are suing Avco Corp. and its Textron Lycoming Reciprocating Engine Division², Superior Air Parts, Inc.³, Precision Airmotive, LLC, Precision Airmotive Corp., Precision Aerospace Corp., Precision Aerospace Services, LLC, Precision [*4] Aviation Products Corp., Precision Products, LLC⁴, and Mark IV Industries⁵ under the theories of strict liability, breach of warranty, negligence and failure to warn. In the New York action, the Aubrey Plaintiffs are suing Penn Yaro Aero Service, Inc. and Penn Yaro Aero Leasing Corp. alleging strict liability, breach of warranty and negligence. The damages sought by the Aubrey Plaintiffs as to James Aubrey in these actions are those damages that are recoverable for his wrongful death.

A group consisting of all of the defendants in the Pennsylvania action⁶ ("the Intervenor"), [*5] filed a Motion to Intervene pursuant to Superior Court Civil Rule 24(b)(2). On March 13, 2007, the Court granted intervention. The Court's decision did not make the Intervenor parties to the action in the traditional sense. Instead, it provided the means for the Intervenor to bring claims against the existing parties or for the existing parties to bring claims against the Intervenor.

Following the decision, the Court held a scheduling conference. At the conference it was agreed that the parties had until May 1, 2007 to add or amend the Complaint, and that the parties had until May 15, 2007 to bring any third party claims. Neither of those actions has occurred. Rather, Defendant Delmarva Power and Light has filed this Motion to Dismiss pursuant to Superior Court Civil Rules 12(b)(7) and 19. Defendants Diamond Aviation, Inc. and Harlan Durham and Defendants Delaware River and Bay Authority and Delaware Airparks urge the Court to grant Defendant Delaware Power and Light's Motion.

STANDARD [*6] OF REVIEW

Recently, in *Fedirko v. G&G Construction, Inc.*⁷, the Superior Court set out the standard of review for a Motion to Dismiss pursuant to Superior Court Civil Rule 19. For purposes of this Motion, the Court adopts that standard, set out in *Fedirko* as follows:

HN1 Superior Court Civil Rule 12(b)(7) provides that a Court may dismiss a plaintiff's claim for failing to join a party pursuant to Superior Court Civil Rule 19.⁸ In order to determine whether a plaintiff has failed to join a party pursuant to Rule 19,⁹ the Court undertakes a two pronged inquiry.¹⁰ First, the Court inquires whether the party is a necessary party under Rule 19(a).¹¹ A party is necessary if:

¹ However, the Court notes that the complaints filed in these other states indicate that some of these defendants are, in fact, Delaware corporations.

² The Aubrey Plaintiffs aver, in the Pennsylvania Complaint, that the Avco defendants are a Delaware corporation.

³ The Aubrey Plaintiffs aver, in the Pennsylvania Complaint, that Superior is a Texas corporation.

⁴ The Aubrey Plaintiffs aver, in the Pennsylvania Complaint, that all of the Precision defendants are organized under the laws of the State of Washington.

⁵ The Aubrey Plaintiffs aver, in the Pennsylvania Complaint, that Mark IV Industries is a Delaware corporation.

⁶ The Court can say this because, according to the representations of Counsel for the Proposed Intervenor, the Aubrey Plaintiffs have executed a stipulation of dismissal as to Superior Air Parts, Inc.

⁷ 2007 Del. Super. LEXIS 172, 2007 WL 1784184 (Del. Super.)

⁸ *Graham v. State Farm Mut. Ins. Co.*, 2006 Del. Super. LEXIS 247, 2006 WL 1600949, at *1 (Del. Super.).

⁹ To the extent Delaware Courts have not addressed the mechanics of Rule 19, the Court refers to federal sources. See *Wolhar v. General Motors Corp.*, 712 A.2d 464, 469 (Del. Super. 1997) (**HN3** "Construction of federal rules is generally persuasive in the construction of Superior Court Civil Rules.").

¹⁰ *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 404 (3d Cir. 1993).

¹¹ *Id.* (**HN4** "The present version of Rule 19 does not use the word "necessary." It refers to parties who should be joined if *feasible*. The term *necessary* [*8] in referring to a Rule 19(a) analysis harks back to an earlier version of Rule 19. It survives in case law at the price of some confusion.").

"(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason [*7] of the claimed interest."¹²

HN2 If the party is necessary, it must be joined if feasible to do so.¹³ It is not feasible to join a party when the party is not subject to service of process and joining the party would deprive the Court of subject matter jurisdiction.¹⁴ If the party is necessary and joinder is feasible, then the Court shall order that the person be made a party.¹⁵ If the person should join the action as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.¹⁶ The Rule does not provide for dismissal at this stage.¹⁷

Second, **HN6** if the party is "necessary" under Rule 19(a), but joinder is not feasible, then the Court must determine¹⁸ whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable."¹⁹ In making this assessment, the Court is to consider the following factors:

(1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) 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; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the [*9] action is dismissed for nonjoinder.²⁰

HN7 When presented with a Rule 12(b)(7) motion, the Court places an initial burden on the party raising the defense to show that the person who was not joined is needed for a just adjudication.²¹ "However, when an initial appraisal of the facts reveals the possibility that an unjoined party whose joinder is required under Rule 19 exists, the burden devolves on the party whose interests are adverse to the unjoined party to negate this conclusion and a failure to meet that burden will result in the joinder of the party or dismissal of the action."²²

When presented with such a motion, the Court "will consider all well-pleaded facts in the complaint and accept them as true."²³ In viewing the facts, the Court must draw "all reasonable inferences in favor of the non-movant."²⁴ The Court may consider documents that are "integral [*10] to the plaintiff's claim and incorporated in the complaint" in deciding a motion to dismiss.

¹² *Id.* (quoting **HN5** Federal Rule of Civil Procedure 19(a), which Delaware Superior Court Civil Rule 19(a) tracts word for word.).

¹³ *Id.*

¹⁴ Delaware Superior Court Civil Rule 19(a).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *John Hancock Property & Cas. Co. v. Hanover Ins. Co.*, 859 F.Supp. 165, 168 (E.D. Pa. 1994).

¹⁸ *Janney Montgomery Scott, Inc.*, 11 F.3d at 404.

¹⁹ Delaware Superior Court Civil Rule 19(b).

²⁰ *Id.* See also, *Graham*, 2006 Del. Super. LEXIS 247, 2006 WL 1600949, at *1.

²¹ *John Hancock Property & Cas. Co.*, 859 F.Supp. at 168.

²² 7 *Federal Practice and Procedure Civ. 3d* § 1609. See also, *Boles v. Greeneville Housing Authority*, 468 F.2d 476, 478 (6th Cir. 1972).

²³ *AT&T Corp. v. Clarendon America Ins.*, 2006 WL 2685081, at *3 (Del. Super. 2006).

²⁴ *Id.*

DISCUSSION

The Defendant argues for the dismissal of the entire case based on Rule 19(b) because the Plaintiffs, Lisa Roberts, Barbara Aubrey and Jennifer Aubrey, have failed to join indispensable parties, the Intervenor. Alternatively, the Defendant argues that the Intervenor is a necessary party under Rule 19(a). The Court will address the Defendant's second argument first, for, as stated above, the Court cannot address Rule 19(b) unless it has first found the Intervenor necessary and their joinder not feasible.

As the Plaintiffs point out, **HN8** it is well settled law that joint tortfeasors are not necessary parties whose joinder is mandatory, but are merely permissive parties.²⁵ Furthermore, the Advisory Committee made it clear that Federal Rule 19 was "not at variance with the settled authorities holding that a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability. Joinder of these tortfeasors continues to be regulated by Rule 20; [*11] compare Rule 14 on third-party practice."²⁶

The Defendant urges the Court to use its equitable powers to order dismissal under Rule 19(b) or joinder under Rule 19(a). However, the only equitable powers the Defendant cites are those found in Rule 19(b). **HN9** The Court cannot access those equitable powers unless it can reach the Rule 19(b) issue: indispensability. Here, the general rule that tortfeasors are not necessary parties under Rule 19(a) [*12] prevents the Court from

even reaching the Rule 19(b) issue and accessing the equitable power in Rule 19(b).²⁷ While a few courts have found exceptions to the general rule, and thereby found joint tortfeasors to be necessary parties, these cases are rare, and the actions of these courts are universally distinguished and disfavored by subsequent courts.²⁸

Thus, the Court can find no legally persuasive case law that alters the general rule that joint tortfeasors are not necessary parties whose joinder is mandatory. Certainly, the best course of action here is to combine in one action [*13] all the claims and parties arising out of a single incident. However, the Court will not ignore established case law and its own rules of civil procedure to do so.

Here, the Intervenor is, arguably, a joint tortfeasor. Thus, pursuant to the common law and the intent underlying our rules of civil procedure, they are not necessary parties under Rule 19(a). As stated previously, this Court need not determine whether the Intervenor is an indispensable party under Rule 19(b). Therefore, the Defendant's Motion to Dismiss pursuant to Rule 19 should be **DENIED**.

SO ORDERED.

/s/ Robert B. Young

J.

²⁵ See *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7-8, 111 S. Ct. 315, 112 L. Ed. 2d 263 (1990) (Where the Court stated, "It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." The Court then held that the potential joint tortfeasors were not necessary parties under Rule 19(a), but were permissive parties under Rule 20.); *Hurwitch v. Adams*, 52 Del. 247, 155 A.2d 591, 595, 2 Storey 247 (Del. 1959) (Where the Court held, "Rule 19 of the Superior Court requires that parties having a joint interest must be joined, while Rule 20 permits the joinder of parties against whom claims are asserted which arise out of the same occurrence. The claims asserted in No. 45, 1959 are in tort and, as such, they are several.")

²⁶ Federal Rule of Civil Procedure 19.

²⁷ Even if the Court were to hold the Intervenor were a necessary party, the Court would not have to reach the Rule 19(b) issue because joinder would be feasible since there would be no service of process issue or subject matter jurisdiction issue. Thus, the Court could not access the equitable power of Rule 19(b).

²⁸ See *Whyham v. Piper Aircraft Corp.*, 96 F.R.D. 557 (M.D. Pa. 1982); *Leick v. Schnellpressenfabrik Ag Heidelberg*, 128 F.R.D. 106 (S.D. Iowa 1989); *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525 (S.D. Tex. 1994); *Bailey ex rel. Bailey v. Toyota Motor Corp.*, 2003 WL 23142185, at *1 (S.D. Ind. 2003).

EXHIBIT 16

Tooley v. Donaldson, Lufkin & Jenrette

Court of Chancery of Delaware, New Castle

December 2, 2002, Submitted ; January 21, 2003, Decided

CONSOLIDATED C.A. No. 18414-NC

Reporter

2003 Del. Ch. LEXIS 10

PATRICK TOOLEY and KEVIN LEWIS, Plaintiffs, v. DONALDSON, LUFKIN & JENRETTE, INC., JOHN STEELE CHALSTY, HENRI DE CASTRIES, MICHAEL HEGARTY, EDWARD D. MILLER, STANLEY B. TULIN, DENIS DUVERNE, HENRI G. HOTTINGUER, W. EDWIN JARMAIN, JOE L. ROBY, HAMILTON E. JAMES, ANTHONY F. DADDINO, DAVID F. DELUCIA, STUART M. ROBBINS, HAMILTON E. JAMES, FRANCIS JUNGERS, W.J. SANDERS III, LOUIS HARRIS, JANE MACK GOULD and JOHN C. WEST, Defendants.

Subsequent History: Affirmed in part and reversed in part by, *Remanded by Tooley v. Donaldson, 2004 Del. LEXIS 161 (Del., Apr. 2, 2004)*

Disposition: [*1] Defendants' motion to dismiss complaint for lack of standing GRANTED. Order entered.

Core Terms

shareholders, tender offer, shares, merger agreement, special injury, merger, tendered, cashed, standing to bring, plaintiffs', contractual right, derivative action, lack of standing, non-tendering, days

Case Summary

Procedural Posture

Plaintiffs, stockholders, filed a class action suit to enjoin a delay in the closing of a tender offer in a proposed merger. The merger was consummated, and the stockholders continued to seek damages for the lost time value of the money they received for their shares that was occasioned by the postponed closing. Defendants, a company and its officers, moved to dismiss the complaint for lack of standing.

Overview

A letter agreement amended various terms of the merger agreement and extended the tender offer until a date 22 days later than the first extension date. The tender offer closed on that date, and the public minority shareholders were cashed out for \$ 90 per share. The shareholders alleged that the second extension was not authorized by the merger agreement, lacked consideration, and was wrongfully approved solely to accommodate administrative needs. The stockholders contended they were injured, as they lost the time value of the cash paid for their shares. Defendants argued that, even if there was a breach of fiduciary duty, the complaint alleged, at most, a derivative claim, and that the stockholders lost standing to pursue the claim pursuant to Del. Ch. Ct. R. 23.1 when their shares were cashed out. The court held that the stockholder had no separate contractual right to bring a direct claim. The court further held that the stockholders' claim for lost time value did not constitute a special injury, as the delay in closing affected all stockholders equally. The action was at most a derivative action, and, accordingly, the stockholders had no standing to bring the suit.

Outcome

Defendants' motion to dismiss the complaint for lack of standing was granted.

LexisNexis® Headnotes

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > General Overview

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > Enforcement of Corporate Rights

Civil Procedure > ... > Class Actions > Derivative Actions > General Overview

HN1 Del. Ch. Ct. R. 23.1 governs derivative actions and generally requires a plaintiff to be a shareholder of a corporation in order to bring suit on behalf of the corporation.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > Enforcement of Corporate Rights

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > Direct Actions

Civil Procedure > ... > Class Actions > Derivative Actions > General Overview

HN2 A direct action seeks compensation for a special injury different from injury to the corporation or other shareholders. A derivative action seeks compensation for injury to the corporation.

Business & Corporate Law > ... > Corporate Governance > Shareholders > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > ... > Class Actions > Derivative Actions > General Overview

Civil Procedure > ... > Class Actions > Derivative Actions > Voluntary Dismissals

HN3 According to Del. Ch. Ct. R. 23.1, derivative actions may only be maintained by shareholders of a corporation. Thus, standing to bring a derivative action is extinguished when a shareholder sells its shares in the corporation, even if the shareholder initially had standing to bring the suit. In such situations, the derivative suit can no longer be maintained by the shareholder, and the suit is traditionally dismissed.

Business & Corporate Law > ... > Corporate Governance > Shareholders > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > Direct Actions

Business & Corporate Law > ... > Shareholders > Meetings & Voting > General Overview

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Controlling Shareholders > General Overview

HN4 In order to bring a direct claim, a plaintiff must have experienced some special injury. A special injury is a wrong that is separate and distinct from that suffered by other shareholders, or a wrong involving a contractual right of a shareholder, such as the right to vote, or to assert majority control, which exists independently of any right of the corporation. Suits alleging special injuries may be maintained as a direct action, even though the same wrong injures the corporation as well. Additionally, shareholders do not lose standing to bring suit to recover for special injuries when their shares in the corporation are sold.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

HN5 The court will independently examine the nature of the wrong alleged and any potential relief to make its own determination of a suit's classification as direct or derivative. This determination is for the court to make based upon the body of the complaint. A plaintiff's designation of the suit is not binding.

Counsel: Joseph A. Rosenthal and Herbert W. Mondros, of ROSENTHAL, MONHAIT, GROSS & GODDESS, P.A., Wilmington, Delaware; OF COUNSEL: ABBEY GARDY, LLP, New York, New York, and SCHIFFRIN & BARROWAY, LLP, Bala Cynwyd, Pennsylvania, for Plaintiffs.

David C. McBride and John J. Paschetto, of YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; OF COUNSEL: Alan S. Goudiss, of SHEARMAN & STERLING, New York, New York, for Defendant Donaldson, Lufkin & Jenrette, Inc.

Robert K. Payson and Donald J. Wolfe, Jr., of POTTER ANDERSON & CORROON, Wilmington, Delaware; OF COUNSEL: Paul K. Rowe, of WACHTELL, LIPTON, ROSEN & KATZ, New York, New York, for Individual Defendants.

Judges: William B. Chandler III, Chancellor.

Opinion by: William B. Chandler III

Opinion

MEMORANDUM OPINION

Plaintiff stockholders originally brought this class action suit to enjoin a delay in the closing of a tender offer in the proposed merger between Donaldson, Lufkin & Jenrette, Inc. ("DLJ") and Credit Suisse Group. They planned to tender their shares and alleged that the DLJ board members breached [*2] their fiduciary duties by wrongfully agreeing to a 22-day delay in the closing. Plaintiffs further alleged that they were harmed by this delay because of the lost time value of the consideration paid for their shares at the close of the tender offer.

The tender offer closed and plaintiffs' shares were cashed out on November 2, 2000. The merger has been consummated and plaintiffs continue to seek damages for the lost time value of their \$ 90 per share that was occasioned by the postponed closing. Defendants have now moved to dismiss the complaint for lack of standing.

I. STATEMENT OF FACTS ¹

Plaintiffs are former stockholders of DLJ, a Delaware corporation that provides various investment and banking services to institutional, governmental and individual clients. Before its acquisition by Credit Suisse Group, DLJ's largest stockholder was AXA Financial, Inc., owning approximately 71% of DLJ. AXA [*3] Financial, in turn, is majority-owned (approximately 60%) by its parent, AXA. All the individual defendants are former directors of DLJ.

On August 30, 2000, AXA Financial announced that Credit Suisse Group and DLJ had entered into a \$ 13.4 billion merger agreement. The merger agreement was between Credit Suisse Group, Diamond Acquisition Corporation, ² and DLJ, and expressly disavowed any third-party beneficiaries to the contract. According to this agreement, DLJ's public minority would receive \$ 90 cash per DLJ share in a first-step tender offer to the DLJ public stockholders, and AXA Financial would subsequently receive the cash and stock combination equivalent of \$ 90 per share. The first-step tender offer was intended to expire 20 days after its commencement, unless the offer was extended.

The merger [*4] agreement provided for two main types of extensions for the tender offer period. The first, a five-day extension, could be invoked without DLJ's consent if payment obligations were not satisfied, or as required by the SEC, or if more than 10% but less than 20% of all outstanding DLJ shares were tendered. The second type of extension allowed Credit Suisse Group to extend the offer under various enumerated conditions, one of which included an agreement between DLJ and Credit Suisse Group to postpone acceptance of DLJ stock for payment. Credit Suisse Group used both of these options to extend its tender offer.

Credit Suisse Group began its Tender Offer on September 8, 2000. This offer was set to expire on October 5, 2000. Credit Suisse then invoked a five-day extension of the offer, announced on October 6, 2000. At the end of this first extension, the parties agreed upon a second extension of the offer in a letter agreement. This letter agreement amended various terms of the merger agreement and extended the tender offer until November 2, 2000, a date 22 days later than the first extension date. In the letter agreement, Credit Suisse Group also removed several contingencies set forth [*5] in the merger agreement, such as material adverse changes and representations and warranties, by deeming them satisfied by DLJ. The tender offer closed on November 2, 2002, and the public minority shareholders were cashed out for \$ 90 per share.

Plaintiffs filed this class action complaint, alleging that the second extension was not authorized by the merger agreement, lacked consideration, and was wrongfully approved "solely to accommodate the administrative needs of AXA Financial." Plaintiffs contend this was a breach of the DLJ board members' fiduciary duties, namely a breach of their duty of loyalty, because the board had a duty to proceed with the tender offer so that the DLJ shareholders would receive cash for their shares as soon as possible. Instead, the closing of the tender offer was delayed by 22 days. Plaintiffs contend they were injured because they lost the time value of the cash paid for their shares. In essence, plaintiffs' entire

¹ All facts are taken as alleged in the Class Action Complaint and the documents upon which the Complaint relies.

² Diamond Acquisition Corporation was a wholly owned subsidiary of Credit Suisse Group, formed to effect the merger. For purposes of this opinion, I treat Diamond Acquisition the same as Credit Suisse Group.

complaint³ rests upon the assertion not that the merger consideration was unfair, but that it was received 22 days later than initially agreed because of a wrongfully granted extension.

[*6] II. DIRECT OR DERIVATIVE NATURE OF THE CLAIM

Defendants move to dismiss the complaint for lack of standing. They argue that, even if there was a breach of fiduciary duty by the board members, the complaint alleges, at most, a derivative claim. Therefore, plaintiffs lost standing to pursue the claim, pursuant to Chancery Court Rule 23.1, when their shares were cashed out.⁴ Once DLJ shareholders were cashed out, they would lose standing to sue on behalf of the corporation. Additionally, defendants assert that plaintiffs suffered no special injury resulting from the 22-day delay because this delay fell equally upon all shareholders and did not injure any contractual right of the shareholder separate from the corporation. Thus, because defendants contend that the complaint fails to allege a direct claim, they assert that plaintiffs' standing to bring this suit was extinguished when plaintiffs were cashed out. Thus, the complaint (they argue) should be dismissed.

[*7] Plaintiffs disagree and assert that the complaint alleges special injury, because only the tendered minority shares were subject to the 22-day delay in the closing of the tender offer. Plaintiffs reason that although the extension had a direct adverse economic impact on the class, the extension of the tender offer actually benefited AXA Financial, the majority shareholder, by accommodating its administrative needs. Thus, plaintiffs conclude, they have alleged the requisite special injury required to bring a direct suit, and the complaint cannot be dismissed for lack of standing.

Because plaintiffs are no longer DLJ stockholders, their standing to bring this suit depends upon whether it is

direct or derivative in nature. **HN2** A direct action seeks compensation for a special injury different from injury to the corporation or other shareholders. A derivative action seeks compensation for injury to the corporation.

HN3 According to Rule 23.1, derivative actions may only be maintained by shareholders of a corporation. Thus, standing to bring a derivative action is extinguished when a shareholder sells its shares in the corporation, even if the shareholder initially had standing to bring the suit. **[*8]** In such situations, the derivative suit can no longer be maintained by the shareholder, and the suit is traditionally dismissed.

HN4 In order to bring a *direct* claim, a plaintiff must have experienced some "special injury."⁵ A special injury is a wrong that "is separate and distinct from that suffered by other shareholders, ... or a wrong involving a contractual right of a shareholder, such as the right to vote, or to assert majority control, which exists independently of any right of the corporation."⁶ Suits alleging special injuries may be maintained as a direct action, even though the same wrong injures the corporation as well.⁷ Additionally, shareholders do not lose standing to bring suit to recover for special injuries when their shares in the corporation are sold.

[*9] **HN5** The Court will independently examine the nature of the wrong alleged and any potential relief to make its own determination of the suit's classification.⁸ This determination is for the Court to make based upon the body of the complaint; plaintiffs' designation of the suit is not binding.⁹

Here, it is clear that plaintiffs have no separate contractual right to bring a direct claim, and they do not assert contractual rights under the merger agreement. First, the merger agreement specifically disclaims any persons as being third party beneficiaries to the contract. Second, any contractual shareholder right to payment

³ Plaintiffs additionally alleged harm based upon the failure of the board to declare a quarterly dividend and for corporate waste, but both these claims were abandoned in plaintiffs' Opposition Brief.

⁴ **HN1** Rule 23.1 governs derivative actions and generally requires a plaintiff to be a shareholder of a corporation in order to bring suit on behalf of the corporation.

⁵ *Lipton v. News Int'l.*, 514 A.2d 1075, 1079 (Del. 1986).

⁶ *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1070 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1986).

⁷ *Id.* at 1079.

⁸ *Kramer v. Western Pacific Indus., Inc.*, 546 A.2d 348, 352 (Del. 1988).

⁹ *Id.*

of the merger consideration did not ripen until the conditions of the agreement were met. The agreement stated that Credit Suisse Group was not required to accept any shares for tender, or could extend the offer, under certain conditions--one condition of which included an extension or termination [*10] by agreement between Credit Suisse Group and DLJ. Because Credit Suisse Group and DLJ *did* in fact agree to extend the tender offer period, any right to payment plaintiffs could have did not ripen until this newly negotiated period was over. The merger agreement only became binding and mutually enforceable at the time the tendered shares ultimately were accepted for payment by Credit Suisse Group.¹⁰ It is at that moment in time, November 3, 2000, that the company became bound to purchase the tendered shares, making the contract mutually enforceable. [*11] DLJ stockholders had no individual contractual right to payment until November 3, 2000, when their tendered shares were accepted for payment. Thus, they have no contractual basis to challenge a delay in the closing of the tender offer up until November 3.¹¹ Because this is the date the tendered shares were accepted for payment, the contract was not breached and plaintiffs do not have a contractual basis to bring a direct suit.

The only other type of special injury that would provide the stockholder plaintiffs with a basis to bring a direct claim is one that is separate and distinct from the injury suffered by the other shareholders or the corporation. Here, plaintiffs, as a class, allege that their injury is the lost time value of their \$ 90 per share caused by the 22-day extension. They allege that this injury is different from both the non-tendering [*12] shareholders and the majority DLJ shareholder (*i.e.*, AXA Financial). As the argument goes, the injury is different from the non-tendering shareholders for the simple reason that the non-tendering shareholders did not tender their shares in the offer, so any delay in its closing was irrelevant to them. Similarly, the majority stockowner, AXA Financial, allegedly did not lose the time value of its money when the tender offer was extended because

it was not subject to the tender offer either. Further, they allege, AXA Financial actually benefited from this extension because it was agreed upon solely to accommodate its administrative needs.

This argument is logically flawed, however. A delay in one step of the merger must logically lead to a delay in the subsequent steps of the staged merger because of the domino effect of the steps leading up to its closing. Although neither the non-tendering stockholders nor AXA Financial tendered their shares in the tender offer, it is not plausible that they did not suffer a similar delay in receiving the consideration paid for their shares. Neither the non-tendering stockholders nor AXA Financial could be cashed out until the tendering shareholders [*13] were cashed out. Thus, any 22-day delay occasioned by an extension of the tender offer would also result in a similar delay for the second step of the merger--the step that included both the minority stockholders and AXA Financial. Because this delay affected all DLJ shareholders equally, plaintiffs' injury was not a special injury, and this action is, thus, a derivative action at most. Accordingly, plaintiffs no longer have standing to bring this suit and it must be dismissed.

III. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss the complaint for lack of standing is GRANTED. An Order has been entered in accordance with this Memorandum Opinion.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

PATRICK TOOLEY and KEVIN LEWIS, Plaintiffs, v. DONALDSON, LUFKIN & JENRETTE, INC., JOHN STEELE CHALSTY, HENRI DE CASTRIES, MICHAEL HEGARTY, EDWARD D. MILLER, STANLEY B. TULIN, DENIS DUVERNE, HENRI G. HOTTINGUER, W. EDWIN JARMAIN, JOE L. ROBY, HAMILTON E. JAMES, ANTHONY F. DADDINO, DAVID F. DELUCIA,

¹⁰ *Johnson v. Shapiro*, 2002 Del. Ch. LEXIS 122, 2002 WL 31438477 at *5 (Del. Ch.) (finding that tender offer was mutually binding when the tendered shares were *accepted* while the fiduciary relationship extended until the time the payment was actually made for those shares).

¹¹ Aside from this, it is notable that the merger agreement contained a much later termination date of March 31, 2001. This is the date on which the merger agreement would expire by its own terms, if the merger had not yet been consummated. The agreement anticipated various contingencies that could lead to delays in the consummation of the merger. Thus, it should not have surprised plaintiffs that a delay could have occurred, as it did here. Further, as compared to the final March 31, 2001, termination date contained in the merger agreement--a date over four months after the tender offer period actually closed--a delay of only 22 days hardly seems unexpected or unreasonable.

2003 Del. Ch. Lierce

STUART M. ROBBINS, HAMILTON E. JAMES,
FRANCIS JUNGERS, W.J. SANDERS III, LOUIS
HARRIS, JANE MACK GOULD and JOHN C. WEST,
Defendants.

ORDERED that the complaint in these consolidated
proceedings is dismissed because the plaintiffs lack
standing to bring the claims asserted therein.

CONSOLIDATED [*14] C.A. No. 18414-NC

William B. Chandler III

ORDER

Chancellor

For the reasons assigned in this Court's Memorandum
Opinion entered in this case on this date, it is

Dated: January 21, 2003

EXHIBIT 17

Tyco Fire & Sec. v. Alcocer

United States District Court for the Southern District of Florida, Miami Division

September 23, 2008, Decided; September 23, 2008, Entered

CASE NO. 04-23127-CIV-COOKE/BANDSTRA

Reporter

2008 U.S. Dist. LEXIS 71997; 2008 WL 4371854

TYCO FIRE & SECURITY, et al., Plaintiffs, v. JESUS HERNANDEZ ALCOCER, et al., Defendants.

Craig A. Lawrence, Marcel C. Notzon, III, Notzon Law Firm, Laredo, TX; Joshua Michael Entin, Rosen Switkes & Entin P.L., Miami Beach, FL.

Subsequent History: Motion granted by *Tyco Fire & Sec. v. Alcocer*, 2009 U.S. Dist. LEXIS 27720 (S.D. Fla., Mar. 23, 2009)

Judges: MARICA G. COOKE, United State District Judge.

Prior History: *Tyco Fire & Sec., LLC v. Hernandez Alcocer*, 218 Fed. Appx. 860, 2007 U.S. App. LEXIS 3853 (11th Cir. Fla., 2007)

Opinion by: MARICA G. COOKE

Core Terms

Opinion

forum non conveniens, alternative forum, motion to dismiss, factors, adequate alternative, inconvenience, reinstate, lawsuit, motions, weigh, lack of personal jurisdiction, public and private, private interest, plaintiffs', equipoise, default, vacate

ORDER ON MONTIEL VILCHIS'S AND QUESADA SUAREZ'S MOTIONS TO DISMISS BASED ON FORUM NON CONVENIENS

This matter is before me on Defendants Luis Montiel Vilchis and Gonzalo Quesada Suarez's motions to dismiss based on *forum non conveniens*. See D.E. 93, 94. I am denying the motions [*2] as neither Defendant has demonstrated the existence of an adequate alternative forum, that the public and private factors weigh in favor of dismissal, or that Plaintiffs can reinstate their lawsuit in the alternative forum without undue inconvenience or prejudice.

Counsel: [*1] For Tyco Fire & Security, LLC, Phillip McVey, George Azze, Plaintiffs: Antonio Carmelo Castro, Stephen N. Zack, LEAD ATTORNEYS, Boies Schiller & Flexner, Miami, FL; Stuart Harold Singer, LEAD ATTORNEY, Boies Schiller & Flexner, Fort Lauderdale, FL.

A. BACKGROUND

For Jesus Hernandez Alcocer, Defendant: Mark Alan Journey, LEAD ATTORNEY, Coffey Burlington Wright Crockett et al, Miami, FL; Joshua Michael Entin, Rosen Switkes & Entin P.L., Miami Beach, FL.

On December 15, 2004, Plaintiffs filed a complaint against Defendants, alleging causes of action for violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, civil conspiracy, and defamation. After service was effectuated, Defendant Alert 24 failed to answer or otherwise respond to the complaint. On March 17, 2005, a clerk's default was entered against Alert 24. On April 8, 2005, Alert 24 moved to quash service of process, to vacate the clerk's entry of default, to dismiss for lack of personal jurisdiction, to dismiss for improper venue, and to dismiss for *forum non conveniens*. I granted the motion to dismiss based on *forum non conveniens* and denied all other relief. Plaintiffs

Gonzalo Quesada Suarez, Defendant, Pro se, Estado de Mexico, Mexico.

Luis Montiel Vilchis, Defendant, Pro se, Huixquilucan Edo De, Mexico.

For Alert 24, LLC, a Texas limited liability company, Defendant: Mark Alan Journey, LEAD ATTORNEY, Coffey Burlington Wright Crockett et al, Miami, FL;

appealed and, on March 23, 2007, the Eleventh Circuit issued its mandate vacating my dismissal and remanding the case. Now that the case is again pending before me, Montiel Vilchis and Quesada Suarez [*3] have moved to dismiss the complaint based on *forum non conveniens*.

B. DISCUSSION

To prevail on a motion to dismiss based on *forum non conveniens*, the movant has the burden of demonstrating that (1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) plaintiff can reinstate the lawsuit in the alternative forum without undue inconvenience or prejudice. *Tyco Fire & Sec., LLC v. Hernandez Alcocer*, 218 F. App'x 860, 864 (11th Cir. 2007).

The first step is to determine "whether an adequate alternative forum exists which possesses jurisdiction over the whole case." *Id. at 864-65* (citing *C.A. La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983)). To succeed on this point, the defendant must show that the proposed alternative forum is both available and adequate. *Id. at 865* (citing *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001)). A defendant can demonstrate that the alternative forum is available by either showing that it is amenable to service of process in that forum, or alternatively, by consenting to the jurisdiction of the alternative forum. *Id.* To show that an alternative forum will be adequate, [*4] the defendant must establish that the forum "could provide some relief for the plaintiffs' claims, even if 'the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum.'" *Id.* (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)).

After the adequacy and the availability of the alternative forum have been established, the court "must consider all relevant factors of private interest, weighing in the balance a strong presumption against disturbing

plaintiffs' initial forum choice." *Id.* (citing *La Seguridad*, 707 F.2d at 1307). If the balance of private interests are in equipoise or near equipoise, the court must then determine whether or not factors of public interest tip the balance in favor of a trial in a foreign forum. *Id.* "[I]f the court determines that the balance of interests favors the alternative forum, then it must 'ensure that plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice.'" *Id.* (citing *La Seguridad*, 707 F.2d at 1307).

Montiel Vilchis and Quesada Suarez have not satisfied their burden in moving to dismiss this case based on *forum non conveniens*. [*5] Their respective two-page motions fail to address all the considerations outlined above. The two motions are identical and merely state that the case should be litigated in Mexico because all of the acts Plaintiffs allege occurred there. Montiel Vilchis and Quesada Suarez also assert that they do not have the economic resources to come to the United States to appear in the case and have no connection with this country. Lastly, they assert that I do not have jurisdiction over them. Montiel Vilchis and Quesada Suarez's allegations are insufficient for me to dismiss this case on the basis of *forum non conveniens*. If they wish to challenge my jurisdiction to entertain a lawsuit against them, they may file a motion to dismiss based on lack of personal jurisdiction.

C. CONCLUSION

For the foregoing reasons, I am denying Gonzalo Quesada Suarez' Motion to Dismiss for Forum Non Conveniens [D.E. 93] and Luis Montiel Vilchis' Motion to Dismiss for Forum Non Conveniens [D.E. 94].

DONE AND ORDERED in Miami, Florida, this 23rd day of September 2008.

/s/ Marica G. Cooke

MARICA G. COOKE

United State District Judge

EXHIBIT 18

Winitz v. Vivonex Corp.

Court of Chancery of Delaware, New Castle

January 30, 1974, Decided ; January 30, 1974, Filed

3408 C. A. 1970

Reporter

1974 Del. Ch. LEXIS 115

Winitz v. Vivonex Corporation, et al.

Core Terms

stock, indispensable, inventions, joined, judgment rendered, requires, parties

Case Summary

Procedural Posture

Defendant corporation filed a motion to dismiss plaintiff complainant's lawsuit against it, on the ground that defendant stockholder was an indispensable party, and that the case could not proceed without him or, alternatively, on the ground that the stockholder was a necessary party, and that the court in its discretion should not have proceeded without him.

Overview

The complainant's original lawsuit against defendants was dismissed with prejudice as to the stockholder. The complainant had requested that the stockholder set aside, transfer, and deliver to him such number of shares of the corporation's common stock as the stockholder had received, and that the corporation set aside, transfer, and deliver to the complainant such number of shares as the stockholder might have been unable to deliver. Applying the language of Del. Ch. Ct. R. 19(a)(2), the court determined that the stockholder's absence would have as a practical matter impaired or impeded his ability to protect his interest in the corporation. Moreover, the stockholder's absence would have left the corporation subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the stockholder's claimed interest. The court could not envision any judgment it might have fashioned whereby the complainant would have gotten what he sought, which was stock in the

corporation, without substantial prejudice to the corporation, the stockholder, or the corporation's other shareholders. The court found that the stockholder was an indispensable party.

Outcome

The court granted the corporation's motion for dismissal of the complainant's lawsuit under Delaware Chancery Rule 19.

LexisNexis® Headnotes

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN1 Del. Ch. Ct. R. 19, which was amended to follow its federal counterpart, Fed. R. Civ. P. 19 (as amended 1966), requires the court to condition any finding of indispensability on pragmatic considerations of a particular case rather than abstract analysis and generalization.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN2 Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule, which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. While such generalizations are still valid today, and they are consistent with the requirements of Del. Ch. Ct. R. 19, they are not a substitute for the analysis required by that rule. Following the procedure set forth in Rule 19, the

Court must view all the circumstances and determine, which interests weigh most heavily.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

Governments > Courts > Rule Application & Interpretation

HN3 Concern for the circumstances of the particular case does not preclude the court from looking for guidance to other decisions involving Del. Ch. Ct. R. 19.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN4 The decision whether to dismiss, that is, the decision whether the person missing is "indispensable," must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN5 Del. Ch. Ct. R. 19(a) categorizes those persons whose joinder is desirable from the standpoint of complete adjudication and elimination of relitigation. If there are no procedural or jurisdictional bars to joining such a party, Rule 19 requires that he be joined.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

Governments > Courts > Rule Application & Interpretation

HN6 Del. Ch. Ct. R. 19(b) suggests four "interests" that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled. First, to what extent a judgment rendered in the person's absence might be prejudicial to him 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. The distilled essence of these "criteria" of subdivision (b) is the attempt to balance the rights of all concerned.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

Governments > Courts > Rule Application & Interpretation

HN7 There remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. The court reads Del. Ch. Ct. R. 19's third criterion, whether the judgment issued in the absence of the nonjoined person will be "adequate," to refer to the public stake in settling disputes by wholes, whenever possible.

Civil Procedure > Judgments > Entry of Judgments > Nonparties Affected by Judgment

HN8 Where an outsider is not before the court, he cannot be bound by the judgment rendered.

Counsel: [*1] Clyde M. England, Jr., Esquire, 801 Market Tower, P. O. Box 148, Wilmington, Delaware 19899.

Edmund N. Carpenter, II, Esquire, Wendell Fenton, Esquire, 4072 DuPont Building, Wilmington, Delaware 19899.

Judges: QUILLEN

Opinion by: WILLIAM T. QUILLEN

Opinion

Letter Opinion and Order on Defendants' Motion to Dismiss the Complaint

The plaintiff originally sued two defendants, S. Allan Kline and Vivonex Corporation. On July 14, 1972, Chancellor Duffy entered an order granting the defendant Kline's motion to quash, vacate and dismiss the alias order and writ of sequestration which had been entered on May 17, 1971. On April 16, 1973, Chancellor Duffy dismissed with prejudice the case as to the defendant Kline. The result of these two orders is that, insofar as jurisdiction over Kline depended upon sequestration, it failed and, insofar as jurisdiction over Kline depended on the application of 10 *Del. C.* # 365, the action against the defendant Kline was dismissed, evidently because the plaintiff failed to press the claim. See letter of Stephen J. Rothschild, Esquire, dated February 2, 1973, which appears as Docket No. 80 and which indicates that the plaintiff did not press his motion for a default [*2] judgment.

In light of the removal of the defendant Kline from the case, the defendant Vivonex Corporation has filed a motion to dismiss the complaint on the ground that Kline is an indispensable party and the case cannot proceed without him or, alternatively, on the ground that Kline is a necessary party and the Court in its discretion should not proceed without him.

Although the circumstances surrounding Kline's elimination from the case are somewhat unusual, and although the legal significance of the dismissal with prejudice may be challenged in some other jurisdiction, there seems to be no reason why the Court should not look at the present situation in the same manner as it normally would in a motion based on Rule 19. It would appear that Kline's absence from this lawsuit is either because the means were not available to subject him to the jurisdiction of the State of Delaware and this Court, or the plaintiff was so negligent in pressing the claim against Kline that a dismissal resulted. Neither factual alternative would appear to present any special considerations in considering a motion under Rule 19.

The plaintiff assigned by assignment dated August 2, 1967 to Kline 80% of [*3] certain inventions of his which were developed prior to May 4, 1964. By a letter agreement also dated August 2, 1967 the assignment was to be void if the plaintiff did not receive a 2 1/2 equity in Vivonex Corporation which was to be formed. Vivonex was not a signer of or party to the assignment or the letter agreement.

By a sale of stock agreement dated October 1, 1967, the plaintiff and Kline transferred to Vivonex the inventions about which they had contracted in the assignment and letter agreement. In return, they received 142,857 shares of common stock of Vivonex.

In essence, the plaintiff alleges that he did not receive a 2 1/2% equity interest in Vivonex and that he is aggrieved thereby. He claims that the assignment is invalid for a failure of consideration and that Vivonex knew or should have known about the letter agreement between him and Kline. The complaint as filed requested that Kline set aside, transfer and deliver to the plaintiff such number of shares of common stock of Vivonex as Kline received for the transfer of inventions under the

sale of stock agreement and that Vivonex set aside, transfer and deliver to the plaintiff such number of shares as Kline might be [*4] unable to deliver. In addition, the plaintiff seeks an accounting from Vivonex for all of the profits received to date arising from its use of the inventions.

To support their respective positions on the indispensability of Kline, both the plaintiff and Vivonex rely almost exclusively on state and federal court decisions rendered before Rule 19 was amended effective January 1, 1968. This reliance, while not improper, was somewhat misplaced. *HN1* Rule 19, which was amended to follow its federal counterpart, 28 U.S.C.A. F.R. Civ. Pro. 19 (as amended 1966), requires the Court to condition any finding of indispensability on pragmatic considerations of the particular case rather than abstract analysis and generalization. *

[*5] This trend towards generalization was an outgrowth of *Shields v. Barrow*, where the United States Supreme Court attempted to define those categories of persons without whom litigation could ("necessary") or could not ("indispensable") proceed.

HN2 "Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties."

58 U.S. (17 How.) 130, 139, 15 L.Ed. 158, 160 (1854).

As Mr. Justice Harlan explained in *Provident Tradesmens Bank & Trust Co. v. Patterson*, while such "generalizations are still valid today, and they are consistent with the requirements of Rule 19, . . . they are not a substitute for the analysis required by that Rule." *390 U.S. 102, 124, 88 S. Ct. 733, [*6] 746, 19 L.Ed.2d 936, 953 (1968).* Therefore, although the Court's eventual conclusion must answer the question of Kline's indispensability to the present litigation, that conclusion

* For thorough discussion of the indispensability doctrine under present Federal Rule 19 and its predecessor, see Notes of the Advisory Committee on the Federal Rules of Civil Procedure, 28 U.S.C.A. F.R. Civ. Pro. 19 (as amended 1966), quoted at 3A *Moore's Federal Practice* P 19.01; Kaplan, Continuing work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356 (1967); *Schutten v. Shell Oil Company*, 421 F.2d 869 (5th Cir. 1970).

cannot be made quickly or abstractly. Following the procedure set forth in Rule 19, the Court must view all the circumstances and determine which interests weigh most heavily.

At the same time, it should be recognized that **HN3** concern for the circumstances of the particular case does not preclude the Court from looking for guidance to other decisions involving Rule 19. This practice would seem especially advisable where earlier litigation contains essential parallels to the case under consideration. Hence, in deciding the status of Kline, the Court will, from time to time, refer to *Haas v. Jefferson National Bank of Miami Beach*, 442 F.2d 394 (5th Cir. 1971). In that decision by Judge Aldisert (of the Third Circuit sitting by designation), the Court of Appeals affirmed dismissal of Haas' suit for a mandatory injunction directing the defendant bank to issue him certain shares of its stock. Before the District Court, Haas had alleged two agreements with a fellow Ohioan, Glueck, whereby they had jointly purchased [*7] shares of the bank's stock. Haas further alleged that, with the bank's knowledge, all the certificates for the purchased stock were placed solely in Glueck's name. He also contended that Glueck had subsequently presented the stock certificates for transfer to Haas' name, but the bank refused to make the assignment. The bank, however, based its refusal on the argument that Glueck was indebted to it; that, under the terms of a promissory note, Glueck was required to assign his property to the bank; and that, nevertheless, Glueck had pledged the stock certificates as collateral for a loan with a second bank. The District Court found Glueck to be an indispensable party within the terms of Federal Rule 19 and dismissed Haas' suit since Glueck's joinder would destroy federal diversity jurisdiction.

While this Court need not be concerned with questions of federal diversity jurisdiction, parallels between the application of Federal Rule 19 in Haas and this litigation involving Chancery Rule 19 are immediately evident and persuasive. Still it is not enough to substitute Winitz for Haas, Kline for Glueck, and Vivonex for the Jefferson National Bank of Miami Beach to reach a satisfactory conclusion. [*8] In keeping with the directions of Rule 19, the Court must examine and weigh merits of *this* particular case.

HN4 "The decision whether the dismiss (i.e., the decision whether the person missing is 'indispensable') must be based on factors varying with the different cases, some such factors being

substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests."

Provident Tradesmens Bank & Trust Co. v. Patterson, supra, 390 U.S. at 118, 119 88 S.Ct. at 743, 19 L.Ed.2d at 950.

Therefore, the starting point for the Court's analysis must be two questions: Is Kline a party "to be joined if feasible" under section (a) of Rule 19? If so, under section (b) of that rule, should the Court proceed without Kline or dismiss the action?

HN5 "Subdivision (a) of Rule 19 categorizes those persons whose joinder is desirable from the standpoint of complete adjudication and elimination of relitigation. If there are no procedural or jurisdictional bars to joining such a party, Rule 19 requires that he be joined."

Schutten v. Shell Oil Company, supra, 421 F.2d at 873.

It would seem fair to conclude that Kline falls within [*9] that category of persons who, under subdivision (a), should be "joined if feasible." Kline would be "more than a key witness whose testimony would be of inestimable value." *Haas v. Jefferson National Bank of Miami Beach*, 442 F.2d at 398. Kline's interest in Vivonex is directly under attack. The plaintiff claims that a 2 1/2% equity interest in Vivonex should be taken from Kline and given to him. Alternatively, the plaintiff wants Vivonex to give him a stock interest which Vivonex claims it has already properly given to Kline. Either way, under any definition, Kline is a "necessary" party to be "joined if feasible." To apply the language of Rule 19(a)(2), the Court believes that Kline's absence would "(i) as a practical matter impair or impede his ability to protect that interest [in Vivonex] or (ii) leave . . . [Vivonex] . . . subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [Kline's] claimed interest."

Since Kline's joinder is not now feasible, the Court must decide whether, in light of Rule 19(b), his absence is so vitally important as to mandate dismissal. **HN6** "Rule 19(b) suggests four 'interests' that must be [*10] examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled." *Provident Trademens Bank & Trust Co. v. Patterson*, supra, 390 U.S. at 109, 88 S. Ct. at 737, 738, 19 L.Ed.2d at 944, 945.

In the language of Rule 19, these four interests are:

"First, to what extent a judgment rendered in the person's absence might be prejudicial to him 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."

"The distilled essence of these 'criteria' of subdivision (b) is the attempt to balance the rights of all concerned." *Schutten v. Shell Oil Company, supra, 421 F.2d at 873.*

Looking to the first two interests, the Court cannot envision any judgment it might fashion whereby the plaintiff would get what he seeks--stock in Vivonex--without substantial prejudice to Vivonex, Kline, or other [*11] Vivonex shareholders. A judgment awarding Kline's shares to Winitz would directly deprive Kline of his property although he is not before the Court to protect that interest. Similarly, an order that Vivonex issue and deliver additional stock to the plaintiff would dilute all Vivonex stock, impair Kline's title to his stock, and, in all likelihood, subject both Vivonex and Kline to actions by other shareholders.

Furthermore, any such judgment would, of necessity, require a ruling on an important underlying question: "Who properly holds title to the inventions that were allegedly transferred from Winitz to Kline to Vivonex?" Proper disposition of this question necessitates the presence of the "middleman", Kline. Otherwise, the Court does not believe it can justly adjudicate the complex interrelated matter of rights to Vivonex stock and the underlying inventions. The questions are more complex, the risk of substantial prejudice to Kline and Vivonex even greater than in *Haas v. Jefferson National Bank of Miami Beach*, where Judge Aldisert wrote:

"It is difficult to conceptualize a form of relief or protective provisions which would not require as a preliminary matter the determination [*12] of the questions of title with all the resulting potential for prejudice."

442 F.2d at 399. The relief plaintiff seeks here is predicated on a preliminary finding that his assignment of the inventions was invalid for lack of consideration. The potential for prejudice to Kline of such a finding

cannot be disputed.

The third concern listed in Rule 19(b), adequacy of a judgment rendered in a necessary person's absence, was discussed by Mr. Justice Harlan in the following terms,

HN7 "There remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible, . . ."

Provident Tradesmens Bank & Trust Co. v. Patterson, supra, 390 U.S. at 111, 18 S. Ct. at 739, 19 L.Ed.2d at 946.

Although the long time this litigation has been in Delaware's courts is a matter of some concern to the Court, Kline's absence is of greater concern. It means that this Court, and this litigation, will be unable to settle the controversy which has [*13] arisen from the assignment and transfer of the underlying inventions for Vivonex stock. That controversy was and is primarily a dispute between the plaintiff and Kline, the person who is not here joined. **HN8** "Since the outsider is not before the court, he cannot be bound by the judgment rendered." *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. at 110, 88 S. Ct. at 738, 19 L.Ed.2d at 945.*

Since no judgment by this Court can bind Kline, no judgment here can adequately resolve the basic matters surrounding the dispute. An order for an accounting would mean a Vivonex suit against Kline for reimbursement. An order compelling the issuance of more Vivonex stock invites a derivative action. And, as in *Haas v. Jefferson National Bank of Miami Beach*, there is potential for later litigation over the "outsider's" claim to his stock.

"If Haas prevailed in this litigation in the absence of Glueck and were adjudicated owner of half of the stock, Glueck, not being bound by *res adjudicata*, could theoretically succeed in later litigation against the Bank in asserting ownership of the whole."

Supra, 442 F.2d at 398. "A judgment rendered at this time and without [*14] . . . [Kline] . . . would simply result in additional costly litigation no matter how such

judgment was formulated." *Schutten v. Shell Oil, supra*, 421 F.2d at 875. Neither the public's interest in an "adequate" judgment nor the interests of Winitz, Kline, and Vivonex can be completely or properly served by trial of this matter here.

With the unfortunate inadequacy of this forum in mind, the court must now turn to Rule 19's final question: "Is the plaintiff without an adequate remedy if Kline's absence requires dismissal?"

Counsel have indicated that both Winitz and Kline are California residents and that Vivonex qualified to do business in California. Furthermore, all the transactions complained of apparently took place in California. The Court knows of no reason why the courts of California

would not afford the plaintiff an opportunity to have his rights against both Kline and Vivonex adequately and completely adjudicated. If delay in the Delaware courts has now precluded action by the plaintiff in California, that delay was primarily attributable to plaintiff. The Court will not save him from the consequences of his own inaction.

For the reasons state above, the Court finds [*15] S. Allen Kline to be an indispensable party and grants the motion to defendant Vivonex for dismissal under Chancery Rule 19. IT IS SO ORDERED.

William T. Quillen

EXHIBIT 19

7 Fed. Prac. & Proc. Civ. § 1601 (3d ed.)

Federal Practice & Procedure
Federal Rules Of Civil Procedure
Database updated April 2015

The Late Charles Alan Wright ^{a75}, Arthur R. Miller ^{a76}, Mary Kay Kane ^{a77}, Richard L. Marcus ^{a78}, Adam N. Steinman ^{a79}

Federal Rules of Civil Procedure
Chapter 5. Parties
Mary Kay Kane ^{a409}

Rule 19. Required Joinder of Parties
A. Joinder Of Persons Needed For Just Adjudication—In General

[Link to Monthly Supplemental Service](#)

§ 1601 History of Rule 19

Primary Authority

Fed. R. Civ. P. 19

Forms

West's Federal Forms §§ 2 to 2910

From the promulgation of the federal rules in 1938 until 1966, the provisions for the compulsory joinder of parties in Rule 19 remained unchanged. In 1966, however, “a restructuring of major proportions” was undertaken “to eliminate formalistic labels that restricted many courts from an examination of the practical factors of individual cases.”¹ To emphasize the significance of the revision, the title of the rule was changed from “Necessary Joinder of Parties” to “Joinder of Persons Needed for Just Adjudication.”²

Prior to the federal rules, the idea that there were parties without whom a court could not proceed—those labeled indispensable—and parties whose presence was desirable and who should be joined if possible—those known as necessary—was well-established in federal practice.³ The source of Rule 19 itself, as pointed out by the Advisory Committee Note to the original rule, is found in Rules 25, 37, and 39 of the Federal Equity Rules of 1912.⁴ Moreover, the protection of the interests of unrepresented parties was the subject of federal legislation as early as 1839.⁵

Even though the terminology and practice relating to joinder developed from equity and equitable doctrines,⁶ similar terminology and practice were utilized on the law side of the federal courts long before the unification of law and equity in 1938.⁷ In addition, state decisions under New York's Field Code and comparable legislation in other jurisdictions during the second half of the nineteenth century provided part of the early background for Rule 19.⁸ During this period, many courts were greatly influenced by the “bible on equity practice,”⁹ Story's Commentaries on Equity Pleadings, the first edition of which appeared in 1838.

Much of the federal rule's language, both in its original and amended form, and many of the considerations that are significant in determining whether joinder is necessary, stem from the 1855 Supreme Court decision in *Shields v. Barrow*.¹⁰ In its opinion the Court attempted to develop general definitions of those persons without whom litigation could or could not proceed.

2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons

not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.¹¹

These definitions, although in themselves reasonable and expressive of earlier precedents, nevertheless were “painfully condensed,”¹² and subject to varying interpretations by lower courts. Words such as “separable” and “affecting” were particularly susceptible to improper application. The criterion of separability of rights led courts to place emphasis on classifying rights as “joint” or “common” or determining whether the absentee was “united in interest” with those parties present in the action. The result was judicial concentration on “an inward analysis of the nature of the rights asserted, rather than an outward assessment of the pros and cons of continuing with the particular case in the face of some incompleteness of *dramatis personae*.”¹³

Subdivision (a) of original Rule 19 did little to improve the situation. It stated that “subject to the provisions . . . of subdivision (b) . . . persons having a joint interest shall be made parties.” This clause might appear to suggest that indispensable parties were those having rights or obligations that would be classified as joint under traditional analysis. But as is mentioned in the Advisory Committee Note to the amended rule “persons holding an interest technically ‘joint’ are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically ‘joint’ may have this relation to an action.”¹⁴ Some federal courts concluded that “joint interest” referred to those parties defined as necessary or indispensable prior to the adoption of the rule.¹⁵ Other courts vaguely defined parties having a joint interest as those directly and legally affected by the judgment in the case.¹⁶ Thus, it was clear that the rule’s language was not useful in determining who must be present before an action might proceed.

Improper application of *Shields v. Barrow* and the original version of Rule 19 thus led to a somewhat rigid judicial approach to the rule, which the 1966 amendment was designed to eliminate. Professor John W. Reed, in an influential article advocating revision of the rule, called for an abandonment of the labels “necessary” and “indispensable.”¹⁷ He argued:

It is not simply that labels have determined the outcome of many cases. The trouble rather is the result of several factors operating concurrently; a ready reliance on labels for solutions of particular cases, a thoughtless reiteration—instead of a critical examination—of the basic principles of required joinder, and a conceptualistic view of “jurisdiction” and “rights” in relation to the joinder of parties.¹⁸

Since this view is reflected in the 1966 revision of Rule 19, courts now are obliged to reach decisions regarding compulsory joinder by balancing pragmatic considerations, an approach that is not inconsistent with the *Shields* definition quoted earlier,¹⁹ but rather focuses on the latter portion of it. Although it frequently has been said that Rule 19 is declaratory of the law as it existed prior to the adoption of the federal rules,²⁰ it must be emphasized that the rules as to joinder of parties are simpler, more flexible, and more liberal than the common-law or code provisions of most states and the former federal equity practice.²¹

The 1966 Advisory Committee Note to Rule 19 points out that the major failure of the original rule was that it “did not state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible.”²² Even so, the Committee did not point to any line of decisions with which it was unhappy. Instead it seems that the Committee, influenced by law-review articles and by the revision of several state procedures,²³ felt that the courts should be encouraged to identify the proper considerations in their decisions. What the rulemakers desired to change was not necessarily the results of previous cases, but rather the reasoning process by which the federal courts were deciding issues under Rule 19. Typical of the attitudes expressed in the literature that appeared prior to the 1966 amendment is the article by Professor Reed mentioned above, in which he commented:

Because of the sometimes unfortunate consequences of heavy reliance on *Shields v. Barrow*, both holding and method, the classification in that famous case should be abandoned in favor of an informal, rational balancing of competing interests case by case—interests relating to the helplessness

of plaintiff, double vexation of defendant, the possible effect on absent persons, the convenience of the court, and the “equity and good conscience”—in short, the justice—of the end result.²⁴

The factors now present in Rule 19 bear a strong resemblance to those suggested criteria. And it should be kept in mind that many cases decided under original Rule 19,²⁵ as well as cases decided prior to the adoption of the federal rules,²⁶ also applied the factors now embodied in Rule 19.

Because the actual results reached under the pre-1966 phrasing of the rule had not been unsatisfactory, some members of the bar criticized the Advisory Committee for going beyond rewriting its Note to the rule.²⁷ Although the practice of changing a Note without revising the rule has been used in the past, it seems that in this instance the Committee was wise to amend the rule, and thereby secure formal approval of its joinder philosophy from the Supreme Court and the Congress under the procedures set out in the Rules Enabling Act.²⁸ Thus, the pragmatic considerations relevant to a party-joinder question were written into the rule, rather than being inserted into the Committee's Note, which although worthy of great weight would serve only to suggest a practice to the federal courts.²⁹

As noted earlier, the new rule effects more of a change in method than a change in result.³⁰ Instead of being concerned only with whether past decisions indicate a particular person would be considered “necessary” or “indispensable,” Rule 19(a) and Rule 19(b) now require the court to consider several factors thought relevant to the initial decision whether an absentee should be joined in the action and to a determination of what consequences should follow if joinder of the absentee is not feasible. Pragmatic considerations are controlling;³¹ however, the list of factors now found in the rule is not intended to be exclusive.³²

In addition to the failure of many courts to articulate satisfactory bases of decision prior to 1966, the Advisory Committee referred to other defects in the original version of Rule 19.³³ Paramount among these was a problem of “jurisdiction” that arose in connection with the concept of indispensable parties. The Committee felt the rule's wording suggested that the absence of an indispensable party “itself deprived the court of the power to adjudicate as between the parties already joined.”³⁴ As is discussed in a later section, failure to join a party under Rule 19 is not really a jurisdictional matter inasmuch as the court does have subject-matter jurisdiction over the action before it; what is involved is a question of whether the court should decline to adjudicate the dispute because certain persons are absent.³⁵ The present language of Rule 19(a) and Rule 19(b) help eliminate this confusion.

Subdivision (c), which concerns the pleading of reasons for nonjoinder, corresponds to the content of subdivision (c) prior to 1966, although its text has been revised and the Advisory Committee Note now suggests that it might be desirable to advise persons who have not been joined of the action's existence.³⁶ Rule 19(d), which points up the exception to the rule's application when a class action is involved, was added in 1966. It repeats a comparable exception previously contained in the first clause of subdivision (a).³⁷

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Footnotes

a75 Charles Alan Wright Chair in Federal Courts, The University of Texas.

a76 University Professor, New York University. Formerly Bruce Bromley Professor of Law, Harvard University.

a77 John F. Digardi Distinguished Professor of Law, Chancellor and Dean Emeritus, University of California, Hastings College of the Law.

a78 Horace O. Coil ('57) Chair in Litigation, University of California, Hastings College of the Law.

a79 Professor of Law and Michael J. Zimmer Fellow Seton Hall Law School.

a409 John F. Digardi Distinguished Professor of Law, Chancellor and Dean Emeritus, University of California, Hastings College of the Law.

1

Elimination of labels

Cohn, *The New Federal Rules of Civil Procedure*, 1966, 54 Geo.L.J. 1204.

See also

Provident Tradesmens Bank & Trust Co. v. Patterson. 1968. 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 936.

League to Save Lake Tahoe v. Tahoe Regional Planning Agency. C.A.9th. 1977, 558 F.2d 914, 918, **quoting Wright & Miller.**

Morrison v. New Orleans Public Serv., Inc., C.A.5th, 1969, 415 F.2d 419.

Jamison v. Memphis Transit Management Co., C.A.6th, 1967, 381 F.2d 670, 674.

Prestenback v. Employers' Ins. Co., D.C.La.1969, 47 F.R.D. 163.

Snyder v. Epstein. D.C.Wis.1968, 290 F.Supp. 652, 656.

Rule 19 seeks to eliminate what might be described as a “push button” determination, requiring the judge instead to grapple with the elements of the case that weigh in favor of retention or dismissal. Rippey v. Denver U.S. Nat. Bank, D.C.Colo.1966, 260 F.Supp. 704.

Cooper v. Texas Gulf Indus., Inc., Tex.1974, 513 S.W.2d 200, 203, **citing Wright & Miller.**

Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 1967, 81 Harv.L.Rev. 356.

Note, Rule 19 and Indispensable Parties, 1967, 65 Mich.L.Rev. 968.

2

Change in caption

Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., C.A.3d. 1966, 365 F.2d 802, 822, reversed on other grounds sub nom. Provident Tradesmens Bank & Trust Co. v. Patterson. 1968, 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 936 (dissenting opinion).

Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 1967, 81 Harv.L.Rev. 356, 365.

3

Classification of parties

A third classification was that of “proper” party. Proper parties were those whose interest in the subject matter might be conveniently settled in the suit, but whose presence was not essential to the determination of the controversy between the immediate litigants. Dunham v. Robertson, C.A.10th, 1952, 198 F.2d 316, 319. Proper parties are the subject of Rule 20. See §§ 1651 to 1660.

4

Equity Rules 25, 37, and 39

The origin of Rule 19(c) can be traced to Equity Rule 25, which stated in part that a bill of complaint should contain: “Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.”

Equity Rule 37, from which parts of Rules 19(a) and (b) are derived, stated in part: “Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.”

Equity Rule 39 described persons whose joinder would not be required under revised Rule 19(a): “In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties, and in such cases the decree shall be without prejudice to the rights of the absent parties.”

5

Act of 1839

“That where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit, between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer; and the nonjoinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit.” 5 Stat. 321 (1839).

6

Equity practice

“We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground, that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.” Mallow v. Hinde. 1827, 12 Wheat. (25 U.S.) 193, 198, 6 L.Ed. 599.

Elmendorf v. Taylor. 1825. 10 Wheat. (23 U.S.) 152, 6 L.Ed. 289.

Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., C.A.3d. 1966, 365 F.2d 802, 817, reversed on other grounds sub nom. Provident Tradesmens Bank & Trust Co. v. Patterson. 1968. 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 936 (dissenting opinion).

The requirements of joinder originated in equity practice. *Kuchenig v. California Co.*, C.A.5th, 1965, 350 F.2d 551, 552, certiorari denied 86 S.Ct. 561, 382 U.S. 985, 15 L.Ed.2d 473.
Washington v. U.S., C.C.A.9th, 1936, 87 F.2d 421, 426.

7

Development at law

Barney v. Baltimore City, 1867, 6 Wall. (73 U.S.) 280, 18 L.Ed. 825.

“It is an elemental principle of the common law, that where a contract is joint and not several, all the joint obligees who are alive must be joined as plaintiffs, and that the defendant can object to a non-joinder of plaintiffs, not only by demurrer, but in arrest of judgment, under the plea of the general issue.” *Farni v. Tesson*, 1, 1 Black (66 U.S.) 309, 17 L.Ed. 67.

National City Bank of New York v. Harbin Elec. Joint-Stock Co., C.C.A.9th, 1928, 28 F.2d 468.

See also

Compulsory joinder at law depended on possession of joint interests, whereas joinder in equity was concerned with avoiding piecemeal litigation and multiplicity of suits. Obviously, suits in equity demanded joinder in many situations in which there was no joint interest. *Bank of California Nat. Ass'n v. Superior Court in & for the City & County of San Francisco*, 1940, 106 P.2d 879, 16 Cal.2d 516.

Proceedings, *Cleveland Institute on the Federal Rules*, 1938, p. 260.

Reed, *Compulsory Joinder of Parties in Civil Actions*, 1957, 55 Mich.L.Rev. 327, 331–332.

8

Historical background

The development of the concept of indispensable parties from the emergence of “modern equity” in the latter part of the seventeenth century to the reception of developed equity procedure by the American courts in the nineteenth century is discussed in Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 1961, 61 Col.L.Rev. 1254, 1287.

9

“Bible of equity practice”

Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 1961, 61 Col.L.Rev. 1254, 1286. In the same article, Professor Hazard argues that Justice Story's simplistic view of the indispensable-party rule was, because of Story's immense prestige and influence, primarily responsible for preventing a reexamination of the rule until recent years.

10

Shields case

1855, 17 How. (58 U.S.) 130, 15 L.Ed. 158.

11

Definitions

17 How. at 139 (per Curtis, J.).

12

“Painfully condensed”

Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 1967, 81 Harv.L.Rev. 356, 361.

13

Lack of clarity

Id. at 362.

See also

Reed, *Compulsory Joinder of Parties in Civil Actions*, 1957, 55 Mich.L.Rev. 327, 346–357.

Developments in the Law—Multiparty Litigation in the Federal Courts, 1958, 71 Harv.L.Rev. 874, 880.

14

Joint interest

The 1966 Advisory Committee Note to Rule 19 is set out in vol. 12A.

15

Prior classifications

“[Original Rule 19 was] not intended to and did not effect any alteration in the standards by which the existence of an indispensable party may be determined.” *Stumpf v. Fidelity Gas Co.*, C.A.9th, 1961, 294 F.2d 886, 890.

Chidester v. City of Newark, C.C.A.3d, 1947, 162 F.2d 598.

Shell Dev. Co. v. Universal Oil Prods. Co., C.C.A.3d, 1946, 157 F.2d 421.

Delno v. Market St. Ry., C.C.A.9th, 1942, 124 F.2d 965.

Joscar Co. v. Consolidated Sun Ray, Inc., D.C.N.Y. 1961, 28 F.R.D. 351.

Empire Ordnance Corp. v. U.S., Ct.Cl.1952, 108 F.Supp. 622.
Field v. True Comics, Inc., D.C.N.Y.1950, 89 F.Supp. 611.
Society of European Stage Authors & Composers v. WCAU Broadcasting Co., D.C.Pa.1940, 1 F.R.D. 264.

16

Directly affected

McArthur v. Rosenbaum Co., C.A.3d, 1950, 180 F.2d 617.
Samuel Goldwyn, Inc. v. United Artists Corp., C.C.A.3d, 1940, 113 F.2d 703.
Platte County v. New Amsterdam Cas. Co., D.C.Neb.1947, 6 F.R.D. 475.
Chidester v. City of Newark, D.C.N.J.1945, 58 F.Supp. 787, affirmed C.C.A.3d, 1947, 162 F.2d 598.

17

Revision advocated

Cohn, *The New Federal Rules of Civil Procedure*, 1966, 54 Geo.L.J. 1204, 1207–1208.
Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 1965, 74 Yale L.J. 403.
Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 1967, 81 Harv.L.Rev. 356, 366.

18

Abandonment of labels

Reed, *Compulsory Joinder of Parties in Civil Actions*, 1957, 55 Mich.L.Rev. 327, 328–329.

See also

Provident Tradesmens Bank & Trust Co. v. Patterson, 1968, 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 936.
In *Schutten v. Shell Oil Co.*, C.A.5th, 1970, 421 F.2d 869, 872, the court, commenting on the principles of *Shields v. Barrow*, said, “While this formulation, as an abstract proposition is consistent with the present Rule 19, any flexibility or pragmatism envisioned by the Supreme Court in *Shields* was soon eliminated by courts”
Calcote v. Texas Pac. Coal & Oil Co., C.C.A.5th, 1946, 157 F.2d 216, 223, certiorari denied 67 S.Ct. 205, 329 U.S. 782, 91 L.Ed. 671 (dissenting opinion).

1964 draft

It is interesting to note that the word “indispensable” did not appear in the 1964 draft of the amendment of Rule 19. Instead, the words “contingently necessary” were used. Preliminary Draft of Proposed Amendments, reprinted in 34 F.R.D. 325, 379. Apparently the Advisory Committee originally intended to follow Professor Reed's suggestion and do away with the indispensable-party label. However, the final revision of Rule 19 indicates a limited retreat; the word “indispensable” was reinserted into subdivision (b), albeit “only in a conclusory sense.” See Advisory Committee Note to the 1966 amendment to Rule 19, which is set out in vol. 12A.

19

New rule not inconsistent

Provident Tradesmens Bank & Trust Co. v. Patterson, 1968, 88 S.Ct. 733, 746, 390 U.S. 102, 124, 19 L.Ed.2d 936.

20

Rule declaratory of prior law

Kuchenig v. California Co., C.A.5th, 1965, 350 F.2d 551, certiorari denied 86 S.Ct. 561, 382 U.S. 985, 15 L.Ed.2d 473.
Stumpf v. Fidelity Gas Co., C.A.9th, 1961, 294 F.2d 886.
Turner v. Brookshear, C.A.10th, 1959, 271 F.2d 761.
McArthur v. Rosenbaum Co., C.A.3d, 1950, 180 F.2d 617.
Metropolis Theatre Co. v. Barkhausen, C.A.7th, 1948, 170 F.2d 481, certiorari denied 69 S.Ct. 812, 336 U.S. 945, 93 L.Ed. 1101.
“Rule 19 made no change in existing law relative to compulsory or dispensable joinder.” *Wesson v. Crain*, C.C.A.8th, 1948, 165 F.2d 6, 8.
“The enactment of Rule 19(a) was not intended to change the rules governing compulsory joinder as laid down by existing case law. *Shields v. Barrow* still furnishes the fundamental definition of indispensable party.” *Caldwell Mfg. Co. v. Unique Balance Co.*, D.C.N.Y.1955, 18 F.R.D. 258, 261.

See also

Proceedings, Atlanta Institute on the Federal Rules, 1938, p. 47.

21

Liberalize practice

Hoheb v. Muriel, C.A.3d, 1985, 753 F.2d 24, 26, citing **Wright & Miller**.

“The new rule was not intended to turn the clock backward but was meant to liberalize practice as to joinder to the fullest extent compatible with doing justice between the parties in interest.” *Greenleaf v. Safeway Trails, Inc.*, C.C.A.2d, 1944, 140 F.2d 889, certiorari denied 64 S.Ct. 1048, 322 U.S. 736, 88 L.Ed. 1569.

Shoop v. Paramount Productions, Inc., D.C.Pa.1979, 84 F.R.D. 90, 92, citing **Wright & Miller**.

See also

Louisiana Through Dept of Highways v. Lamar Advertising Co. of Louisiana, La.1973, 279 So.2d 671, 674 n. 3, citing **Wright & Miller**.

For an excellent comparison of common-law, code, and equity rules relating to joinder of parties, see Clark, *Code Pleading*, 2d ed. 1947, §§ 56–66.

22

Relevant factors

The 1966 Advisory Committee Note to Rule 19 is set out in vol. 12A.

23

Articles and state statutes

Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 1961, 61 Col.L.Rev. 1254.

Reed, *Compulsory Joinder of Parties in Civil Actions*, 1957, 55 Mich.L.Rev. 327, 329.

Developments in the Law—Multiparty Litigation in the Federal Courts, 1958, 71 Harv.L.Rev. 874.

Note, *Indispensable Parties in the Federal Courts*, 1952, 65 Harv.L.Rev. 1050.

Procedural changes in Michigan and New York also aided the Advisory Committee in deciding on the direction in which a revision should be undertaken. Mich.Gen.Ct.Rules 205 (effective Jan. 1, 1963); N.Y.C.P.L.R. 1001 (effective Sept. 1, 1963).

24

Balancing interests

Reed, *Compulsory Joinder of Parties in Civil Actions*, 1957, 55 Mich.L.Rev. 327, 356.

See also

Citing Reed's article, and Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 1961, 61 Col.L.Rev. 1254, the court in *Schutten v. Shell Oil Co.*, C.A.5th, 1970, 421 F.2d 869, said: “The reform of Rule 19 was preceded by more than a decade of scholarly inspection and debate.”

25

Pre-1966 practice

“Our former cases have established a policy under which indispensability of parties is determined on practical considerations.” *Shaughnessy v. Pedreiro*, 1955, 75 S.Ct. 591, 595, 349 U.S. 48, 54, 99 L.Ed. 868.

Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., C.A.3d, 1966, 365 F.2d 802, 817, reversed on other grounds sub nom. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 1968, 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 936 (dissenting opinion). *Stevens v. Loomis*, C.A.1st, 1964, 334 F.2d 775.

Britton v. Green, C.A.10th, 1963, 325 F.2d 377.

Gaw v. Higham, C.A.6th, 1959, 267 F.2d 355, 357, certiorari denied 79 S.Ct. 1453, 360 U.S. 933, 3 L.Ed.2d 1546.

In Kroese v. General Steel Castings Co., C.A.3d, 1950, 179 F.2d 760, certiorari denied 70 S.Ct. 1026, 339 U.S. 983, 94 L.Ed. 1386, the court denied a motion to dismiss for failure to join as indispensable parties a majority of the directors of a corporation because there was no forum in which plaintiff could join those persons.

Imperial Appliance Corp. v. Hamilton Mfg. Co., D.C.Wis.1967, 263 F.Supp. 1015.

Pennsalt Chem. Corp. v. Dravo Corp., D.C.Pa.1965, 240 F.Supp. 837, 840.

Stonybrook Tenants Ass'n, Inc. v. Alpert, D.C.Conn.1961, 194 F.Supp. 552.

Blizzard v. Penley, D.C.Colo.1960, 186 F.Supp. 746.

See also

“When courts do articulate the policies which underlie their decisions to treat particular parties as indispensable they consider three factors: (1) the unfairness to those present of proceedings without an absent party; (2) the effect on the absentees of a determination of the controversy before the court; and (3) the court's ability to determine finally the rights of the parties before it in a manner which cannot be aborted by action of an absent party.” *Developments in the Law—Multiparty Litigation in the Federal Courts*, 1958, 71 Harv.L.Rev. 874, 880.

26

Pre-rule practice

The fact that practice prior to the rule was similar is clearly demonstrated by the list of factors that the court in *Washington v. U.S.*, C.C.A.9th, 1936, 87 F.2d 421, 427, felt must be considered in determining the interest of an absent party. The court noted: “From these

authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?" The court cites numerous cases to support this proposition.

Roos v. Texas Co., C.C.A.2d, 1927, 23 F.2d 171, certiorari denied 48 S.Ct. 434, 277 U.S. 587, 72 L.Ed. 1001.

See also

In *Niles-Bement-Pond Co. v. Iron Moulders' Union*, 1920, 41 S.Ct. 39, 41, 254 U.S. 77, 80, 65 L.Ed. 145, the Court rejected a rigid classification of indispensability, saying: "There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party"

27

Criticism of amendment

In *Kaplan*, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 1967, 81 *Harv.L.Rev.* 356, 366, Professor Benjamin Kaplan, who was the reporter for the Advisory Committee when amended Rule 19 was drafted and promulgated, states that amended Rule 19 met "opposition as needlessly rocking the boat. The existing rule, it was said, though perhaps not the best conceivable, had not resulted in any spate of wrong or hurtful decisions. A new text was bound to be unsettling to bench and bar, and there was no assurance that it would generate better decisions than the old."

An article that was critical of the proposed amendment, including the balancing of factors it calls for, is *Fink*, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 1965, 74 *Yale L.J.* 403.

Bar opposition also was reflected in *Report of the Committee on Federal Rules of Civil Procedure: Judicial Conference—Ninth Circuit*, 1964, reprinted in 36 *F.R.D.* 209, 214–221; *Supplemental Report*, 1965, reprinted in 37 *F.R.D.* 71, 72–74; *Second Supplemental Report*, 1965, reprinted in 37 *F.R.D.* 499–500.

28

Rules Enabling Act

28 U.S.C.A. § 2072.

29

Weight given Committee Note

"The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or inconsistency. But in ascertaining their meaning the construction given to them by the Committee is of great weight." *Mississippi Pub. Corp. v. Murphree*, 1946, 66 S.Ct. 242, 246, 326 U.S. 438, 444, 90 L.Ed. 185.

In the *Introductory Statement to the 1938 Advisory Committee Notes*, which are set out in vol. 12A, the Committee itself said: "The Notes are not part of the rules, and the Supreme Court has not approved or otherwise assumed responsibility for them. They have no official sanction, and can have no controlling weight with the courts, when applying the rules in litigated cases." Nonetheless, the courts have given the Notes considerable weight. See vol. 4, § 1029.

30

No change in result

Provident Tradesmens Bank & Trust Co. v. Patterson, 1968, 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 936.

Jamison v. Memphis Transit Management Co., C.A.6th, 1967, 381 F.2d 670, 676.

Liberty Mut. Ins. Co. v. Price, D.C.Ohio 1969, 48 F.R.D. 1.

Imperial Appliance Corp. v. Hamilton Mfg. Co., D.C.Wis.1967, 263 F.Supp. 1015.

See also

Advisory Committee Note to the 1966 amendment to Rule 19, which is set out in vol. 12A.

31

Pragmatics control

Provident Tradesmens Bank & Trust Co. v. Patterson, 1968, 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 936.

Smith v. State Farm Fire & Cas. Co., C.A.5th, 1980, 633 F.2d 401, 405, quoting *Wright & Miller*.

Bio-Analytical Servs., Inc. v. Edgewater Hosp., Inc., C.A.7th, 1977, 565 F.2d 450, certiorari denied 99 S.Ct. 84, 439 U.S. 820, 58 L.Ed.2d 111.

Kaplan v. International Alliance of Theatrical & Stage Employees & Motion Picture Mach. Operators of the U.S. & Canada, C.A.9th, 1975, 525 F.2d 1354.

In deciding joinder motions, the courts emphasize pragmatic considerations rather than rigid formalism: the maximum effective relief with the minimum expenditure of judicial energy. *Gentry v. Smith*, C.A.5th, 1973, 487 F.2d 571.

Bennie v. Pastor, C.A.10th, 1968, 393 F.2d 1.

Jamison v. Memphis Transit Management Co., C.A.6th, 1967, 381 F.2d 670, 676.

Frazier v. City of Norfolk, D.C.Va.2006, 236 F.R.D. 273, 275, **citing Wright, Miller & Kane.**

All aspects of joinder problems arising under Rule 19 should be resolved through practical considerations, to the end of avoiding circuity of actions, thereby promoting judicial economy, and commonsense realistic appraisals should play a primary role in making the determination under the rule. Lopez v. Martin Luther King, Jr. Hosp., D.C.Cal.1983, 97 F.R.D. 24.

Prescott v. Plant Indus., Inc., D.C.N.Y.1980, 88 F.R.D. 257.

Johnson v. Chilkat Indian Village, D.C.Alaska 1978, 457 F.Supp. 384.

Singleton v. Airco, Inc., D.C.Ga.1978, 80 F.R.D. 467.

Kaye v. Pantone, Inc., D.C.N.Y.1978, 78 F.R.D. 657.

Occidental of Umm Al Qaywayn, Inc. v. Cities Serv. Oil Co., D.C.La.1975, 396 F.Supp. 461.

Republic Realty Mortgage Corp. v. Eagson Corp., D.C.Pa.1975, 68 F.R.D. 218, 220, **citing Wright & Miller.**

Bixby v. Bixby, D.C.Ill.1970, 50 F.R.D. 277.

Snyder v. Epstein, D.C.Wis.1968, 290 F.Supp. 652, 656.

See also

Sherrill v. Estate of Plumley, Civ.App.Tex.1974, 514 S.W.2d 286, 298, **quoting Wright & Miller.**

Lewis, Mandatory Joinder of Parties in Civil Proceedings: The Case for Analytical Pragmatism, 1974, 26 U.Fla.L.Rev. 381.

32

Factors not exclusive

The four factors listed by Rule 19 for determining whether an absent person is an indispensable party are not exclusive, and additional factors may be considered such as the right of plaintiff to control his own litigation and whether under state law plaintiff would have the right to maintain a separate action. Ramsey v. Bomin Testing, Inc., D.C.Okl.1975, 68 F.R.D. 335.

To make determinations under Rule 19(b), the court must examine all factors enumerated in the rule and other relevant considerations. Bixby v. Bixby, D.C.Ill.1970, 50 F.R.D. 277.

See also

“The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.” See the 1966 Advisory Committee Note to Rule 19, which is set out in vol. 12A.

Sherrill v. Estate of Plumley, Civ.App.Tex.1974, 514 S.W.2d 286, 298, **quoting Wright & Miller.**

Compare

In Liberty Mut. Ins. Co. v. Price, D.C.Ohio 1969, 48 F.R.D. 1, 4, the court recognized that it had discretion in determining indispensability under Rule 19(b), but it rejected defendant's argument that retaining the action might result in limiting defendant's discovery and right to examine witnesses. The court noted: “If these assertions qualified as grounds for dismissal, the Court, in ruling on each Rule 19(b) problem, would have to examine the procedural benefits and detriments of the particular state and federal rules. There is nothing in Rule 19(b) which suggests that such an approach is required or even appropriate.”

33

Other defects

The Advisory Committee's Note, which is set out in vol. 12A, recites the defects in the pre-1966 version of Rule 19 as follows:

Textual defects. (1) The expression ‘persons ... who ought to be parties if complete relief is to be accorded between those already parties,’ appearing in original subdivision (b), was apparently intended as a description of the persons whom it would be desirable to join in the action, all questions of feasibility of joinder being put to one side; but it was not adequately descriptive of those persons.

“(2) The word ‘indispensable,’ appearing in original subdivision (b), was apparently intended as an inclusive reference to the interested persons in whose absence it would be advisable, all factors having been considered, to dismiss the action. Yet the sentence implied that there might be interested persons, not ‘indispensable,’ in whose absence the action ought also to be dismissed. Further, it seemed at least superficially plausible to equate the word ‘indispensable’ with the expression ‘having a joint interest,’ appearing in subdivision (a). ... But persons holding an interest technically ‘joint’ are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically ‘joint’ may have this relation to an action.” ...

“(3) The use of ‘indispensable’ and ‘joint interest’ in the context of original Rule 19 directed attention to the technical or abstract character of the rights or obligations of the persons whose joinder was in question, and correspondingly distracted attention from the pragmatic considerations which should be controlling.”

“(4) The original rule, in dealing with the feasibility of joining a person as a party to the action, besides referring to whether the person was ‘subject to the jurisdiction of the court as to both service of process and venue,’ spoke of whether the person could be made a party ‘without depriving the court of jurisdiction of the parties before it.’ The second quoted expression used ‘jurisdiction’ in the sense of the competence of the court over the subject matter of the action, and in this sense the expression was apt. However, by a familiar confusion, the expression seems to have suggested to some that the absence from the lawsuit of a person who was ‘indispensable’ or ‘who ought to be [a] part[y]’ itself deprived the court of the power to adjudicate as between the parties already joined.” ...

Failure to point to correct basis of decision. The original rule did not state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible. In some instances courts did not undertake the relevant inquiry or were misled by the ‘jurisdiction’ fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions.

See also

Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (I), 1967, 81 Harv.L.Rev. 356.

34

Wording suggests power

See the 1966 Advisory Committee Note to Rule 19, which is set out in vol. 12A.

See also

Cooper v. Texas Gulf Indus., Inc., Tex.1974, 513 S.W.2d 200, 203, citing **Wright & Miller**.

35

Discussion elsewhere

See § 1611.

36

Rule 19(c)

See the discussion of Rule 19(c) in § 1625.

37

Rule 19(d)

See the discussion of Rule 19(d) in § 1626.

See also the 1966 Advisory Committee Note to Rule 19(d), which is set out in vol. 12A.

EXHIBIT 20

4-19 Moore's Federal Practice - Civil § 19.05

Moore's Federal Practice - Civil > Volume 4: Analysis: Civil Rules 17-22 > Volume 4 Analysis: Civil Rules 17-22 > Chapter 19 Required Joinder of Parties

Author

by Richard D. Freer *

§ 19.05 If Joinder of Necessary Party Is Not Feasible, Court Must Either Proceed or Dismiss Because Absentee Is “Indispensable”

[1] Indispensability Analysis Based on “Equity and Good Conscience”

[a] Analysis Guided by Four Factors

Once the court determines that an absentee is necessary or, in current Rule terms, is a “required party” (*see* § 19.03),¹ but that joinder of the absentee is not feasible (*see* § 19.04) the court has only two options: it may proceed with the pending litigation or it may dismiss the case.² There is no other option, and each choice poses risks. If the court proceeds, it invites the very harm that justified finding the absentee necessary in the first place—generally, either harm to the absentee’s interest or the threat of inconsistent obligations for the defendant. If the court dismisses, it robs the plaintiff of

* Richard D. Freer is the Robert Howell Hall Professor of Law at Emory University School of Law.

Professor Freer acknowledges the contribution of Paul Croushore, J.D., LL.M., in preparing the latest revisions to this chapter. Mr. Croushore is a member of the Ohio, Indiana, and Kentucky bars. Professor Freer also acknowledges the contribution of Roslyn K. Myers, member of the New York and Connecticut bars, in preparing this chapter. This chapter was originally written for MOORE’S FEDERAL PRACTICE by Professor James Wm. Moore.

¹ Fed. R. Civ. P. 19(a)(1).

² **Proceed or dismiss.** Fed. R. Civ. P. 19(b) (“If person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.”).

3d Circuit *Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 844 F.2d 1050, 1054 (3d Cir. 1988) (“Where joinder of a Rule 19(a) necessary party is not feasible, the court must decide whether the absent party is ‘indispensable,’ and hence that the action cannot go forward.”); *see also* *Huber v. Taylor*, 532 F.3d 237, 249 (3d Cir. 2008) (district court should not dismiss sua sponte without giving parties opportunity to be heard and address court’s concerns).

7th Circuit *Codest Eng’g v. Hyatt Int’l Corp.*, 1995 U.S. Dist. LEXIS 17276, at *6 (N.D. Ill. Nov. 15, 1995) (“If joinder is not feasible, the court must then determine under Rule 19(b) whether it can, in ‘equity and good conscience,’ permit the action to proceed in the individual’s absence or whether it must treat the absent individual as indispensable.”); *Balcor Real Estate Fin., Inc. v. Hall Fin. Group, Inc.*, 1991 U.S. Dist. LEXIS 1808, at *4 (N.D. Ill. Feb. 14, 1991) (“If jurisdiction would be destroyed, the court must examine the four considerations described in Rule 19(b) to determine whether the action may proceed in the person’s absence.”); *Burger King Corp. v. American Nat’l Bank & Trust Co. of Chicago*, 119 F.R.D. 672, 675 (N.D. Ill. 1988) (“Only if joinder is not possible ... does Rule 19(b) come into play.”).

8th Circuit *United States ex rel. Gulbranson v. D & J Enters.*, 1993 U.S. Dist. LEXIS 19843, at *12 (W.D. Wis. Dec. 23, 1993) (if joinder not feasible, court must determine “whether it should treat the absent party as indispensable and dismiss the action.”).

D.C. Circuit *Coalition on Sensible Transp. v. Dole*, 631 F. Supp. 1382, 1385 (D.C. Cir. 1986) (citing Moore’s, “Under Rule 19, a court first must consider whether an entity meets the requirements of Rule 19(a) and thus is a ‘necessary’ party. ... If so, and if that entity cannot be made a party to the case, the court must determine whether ‘in equity and good conscience the action should proceed among the parties before it, or should be dismissed’ ”); *cf. Park v. Didden*, 695 F.2d 626, 629 n.10 (D.C. Cir. 1982) (“[F]ailure to join a party, even one determined after practical analysis to be ‘indispensable,’ is not in itself ‘a jurisdictional defect: The court [has power to] decide the case before it even if it cannot decide the rest of the case that is not before it because [an] absentee has not been made a party.’ ” (quoting F. James & G. Hazard, *Civil Procedure* 9.21 at 444 (2d ed. 1977))).

its forum of choice, delaying or possibly denying vindication of plaintiff's rights (*see* § 19.02).³ If the court takes the latter course and dismisses the case for nonjoinder of the absentee, the absentee is then, retroactively, labeled "indispensable" (*see* § 19.05[7]).^{3.1}

The court is to make the decision of whether to proceed or dismiss based on "equity and good conscience."⁴ Indeed, this has always been the standard, even as stated by venerable Supreme Court precedent.⁵ The indispensability analysis under Rule 19(b) breaks tradition with the venerable precedent not so much in defining an indispensable absentee as in methodology. Rather than engage in the rigid label-driven exercise historically undertaken, the Rule requires an ad hoc, fact-based analysis (*see* § 19.02). As restyled in 2007, the Rule even omits labelling altogether. As restyled, the Rule simply calls for a decision as to whether the action may continue in the absence of a necessary or "required" party or whether there must be a dismissal. It completely omits the step of calling any party "indispensable," regardless of the decision made.^{5.1}

The Rule fosters such a pragmatic analysis by listing four factors to guide the court in assessing whether to proceed or dismiss.⁶ The factors are not arranged in a hierarchical order, and no factor is determinative or necessarily more important than another. The four factors are not exclusive.⁷ Again, the major focus is equity and good conscience, which permits the court to consider all

³ *See* Fed. R. Civ. P. 19.

^{3.1} **"Indispensable" party.** *See* B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 516 F.3d 18, 23 (1st Cir. 2008) (if, in equity and good conscience, action cannot proceed without party, party is retroactively labeled "indispensable"; citing Moore's).

⁴ **Equity and good conscience.** Fed. R. Civ. P. 19(b); *see* Republic of Philippines v. Pimentel, 553 U.S. 851, 128 S. Ct. 2180, 171 L. Ed. 2d 131, 143 (2008) ("The design of the Rule, then, indicates that the determination whether to proceed will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations.").

⁵ **Venerable precedent.** Shields v. Barrow, 58 U.S. (17 How.) 130, 139, 15 L. Ed. 158 (1854) (defining indispensable absentees as "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or having the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.").

^{5.1} Fed. R. Civ. P. 19, advisory committee note of 2007 ("Former Rule 19(b) described the conclusion that an action should be dismissed for the inability to join a Rule 19(a) party by carrying forward traditional terminology: 'the absent party being thus regarded as indispensable.' 'Indispensable' was used only to express a conclusion reached by applying the tests of Rule 19(b). It has been discarded as redundant.").

⁶ Fed. R. Civ. P. 19(b)(1)–(4); *see, e.g.,* Heineman v. Terra Enters., 817 F. Supp. 2d 1049, 1055 (E.D. Tenn. 2011) ("This analysis [of indispensability] ... requires consideration of four factors: (1) to what extent a judgment rendered in the person's absence might prejudice the person or those already parties; (2) the extent to which the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.").

⁷ **Factors not exclusive.** *See* Fed. R. Civ. P. 19, advisory committee note of 1966 (reproduced verbatim at § 19App.02[2]—factors "are not intended to exclude other considerations which may be applicable in particular situations."); *see* Republic of Philippines v. Pimentel, 553 U.S. 851, 128 S. Ct. 2180, 171 L. Ed. 2d 131, 144 (2008) (multiple factors must bear on decision whether to proceed without required person—decision must be based on factors varying with different cases, some factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests).

1st Circuit B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 516 F.3d 18, 23 (1st Cir. 2008) (no set weight afforded factors, nor do specified factors constitute exhaustive canvas).

2d Circuit Associated Dry Goods Corp., v. Towers Fin. Corp., 920 F.2d 1121, 1124 (2d Cir. 1990) (no set weight afforded factors).

9th Circuit Paiute-Shoshone Indians of the Bishop Cmty. v. City of Los Angeles, 637 F.3d 993, 1000 (9th Cir. 2011) ("The Supreme Court has interpreted Rule 19(b) as requiring us to consider at least four interests. ... That list is not exclusive of other considerations, however. At all events, Rule 19(b) requires us to undertake a 'practical examination of [the] circumstances' to determine whether an

circumstances bearing on the fairness or advisability of choosing one course over the other.^{7.1} The four factors clearly overlap with each other and, moreover, overlap with the factors addressed to determine whether the absentee was necessary in the first place.⁸ Overlap, however, should not be equated with redundancy. While the necessary party analysis under Rule 19(a) and the indispensability analysis under Rule 19(b) look at similar issues, each has a different thrust which reflects its different purpose. Under the former, the court is more or less concerned with whether nonjoinder *could* have one of the adverse effects addressed by that Rule. The basic possibility of such harm justifies joining the absentee.⁹ Under the indispensability analysis, the court is faced with an absentee whose joinder cannot be secured and must determine whether nonjoinder *actually will* result in the kind of prejudice hypothesized earlier.¹⁰ There is a difference in degrees.¹¹ The decision

action may proceed 'in equity and good conscience' without the absent party.").

11th Circuit *Molinos Valle del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1344 (11th Cir. 2011) (factors are not intended to exclude other considerations).

Fed. Circuit *In re Cambridge Biotech Corp.*, 186 F.3d 1356, 1369 (Fed. Cir. 1999) (other factors may be considered).

^{7.1} **Equity and good conscience standard.** See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 464 F.3d 885, 890–894 (9th Cir. 2006) (phrase “equity and good conscience” emphasizes flexibility that judge may find necessary in order to achieve fairness, and moral weighing that should attend judge’s choice).

⁸ **Rule 19(a) and (b) factors overlap.** Compare Fed. R. Civ. P. 19(a) with Fed. R. Civ. P. 19(b).

3d Circuit See also *Schulman v. J.P. Morgan Inv. Mgmt., Inc.*, 35 F.3d 799, 806 (3d Cir. 1994) (“The extent to which a judgment rendered in landlord’s absence might be prejudicial to it or to those already parties to this case must be considered under Rule 19(b) as well as 19(a)”).

5th Circuit See also *A.J. Kellos Constr. Co. v. Balboa Ins. Co.*, 495 F. Supp. 408, 414 (S.D. Ga. 1980), rev’d on other grounds, 661 F.2d 402 (5th Cir. 1981) (factor listed in Fed. R. Civ. P. 19(b)(1), concerning possible prejudice to existing parties, relates to “multiple liability” clause of Fed. R. Civ. P. 19(a)(1)(B)(ii)).

7th Circuit See also *Codest Eng’g v. Hyatt Int’l Corp.*, 1995 U.S. Dist. LEXIS 17276, at *11 (N.D. Ill. Nov. 15, 1995) (citing *Moore’s*, “The test as to whether an absent party’s interest may be impaired under [Fed. R. Civ. P. 19(a)(1)(B)(i)] is essentially the same as the ‘prejudice’ inquiry used to determine a party’s ‘indispensability’ under Rule 19(b).”; *Burger King v. American Nat’l Bank & Trust Co.*, 119 F.R.D. 672, 679 (N.D. Ill. 1988) (“The four factor analysis mandated by Rule 19(b) thus overlaps to a large extent with that required by Rule 19(a). However, unlike Rule 19(a), Rule 19(b) provides for a pragmatic weighing of the relevant factors.”).

9th Circuit See also *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991) (“The prejudice to the Quinault Nation if the plaintiffs are successful stems from the same legal interests that makes the Quinault Nation a necessary party to the action.”); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 n.15 (9th Cir. 1983) (impairment of the absent party’s ability to protect its interest under Fed. R. Civ. P. 19(a)(1)(B)(i) is similar to the prejudice to the absent party consideration under Fed. R. Civ. P. 19(b)(1); risk of leaving a defendant exposed to inconsistent obligations under Fed. R. Civ. P. 19(a)(1)(B)(ii) is also similar to the prejudice to the defendant factor under Fed. R. Civ. P. 19(b)(1); and whether complete relief can be accorded under Fed. R. Civ. P. 19(a)(1)(A) is similar to the adequacy of relief inquiry under Fed. R. Civ. P. 19(b)(3)); *but cf. Lopez v. Martin Luther King, Jr. Hosp.*, 97 F.R.D. 24, 29 (C.D. Cal. 1983) (“Subdivision (a) is designed to broadly define all those parties that have a bona fide interest in the subject of the litigation. Subdivision (b) is designed, and is better equipped, to make the subtle distinctions between those parties who are only conditionally necessary and those who are truly indispensable.”).

10th Circuit *Davis v. United States*, 343 F.3d 1282, 1291 (10th Cir. 2003) (Fed. R. Civ. P. 19(b)(1)’s prejudice test is essentially same as inquiry under Fed. R. Civ. P. 19(a)(1)(B)(i) concerning potential harm to absentee’s ability to protect its interest if litigation continues in its absence); *Enterprise Mgmt. Consultants v. United States ex rel. Hodel*, 883 F.2d 890, 894 n.4 (10th Cir. 1989) (citing *Moore’s*, Fed. R. Civ. P. 19(b)(1) prejudice test is essentially the same as the inquiry under Fed. R. Civ. P. 19(a)(1)(B)(i) into whether continuing the action without a person will, as a practical matter, impair that person’s ability to protect his interest relating to the subject of the lawsuit).

D.C. Circuit See *Kickapoo Tribe v. Babbit*, 43 F.3d 1491, 1497 n.9 (D.D.C. 1995) (Fed. R. Civ. P. 19(a)(1)(B)(i) inquiry same as Fed. R. Civ. P. 19(b)(1), (2) considerations).

⁹ See Fed. R. Civ. P. 19(a)(1).

¹⁰ See Fed. R. Civ. P. 19(b)(1).

of whether to proceed or dismiss the case requires a closer look at the real probability and severity of prejudice caused by nonjoinder versus prejudice caused by dismissal.

The first factor deals with the extent to which a judgment rendered without the absentee might be prejudicial.^{11.1} The second factor requires the court to consider the extent to which any prejudice could be lessened or avoided by either protective provisions in the judgment, shaping the relief, or other measures.^{11.2} The third factor is whether the judgment will be adequate without joinder of the absentee.^{11.3} The fourth factor requires the court to determine whether the plaintiff would have an adequate remedy should the case be dismissed.^{11.4} These four considerations reflect in varying degrees the relevant interests underlying compulsory party joinder doctrine: the interest of the plaintiff in having a forum, the interest of the defendant in avoiding multiple litigation and inconsistent judgments, the interest of the absentee in avoiding prejudicial impact of a judgment to which it cannot be made a party, and the public and judicial interest in complete, consistent, and efficient resolution of disputes.¹² In deciding whether to proceed or dismiss, the court must always be mindful of these interests.¹³

[b] Indispensability Analysis Requires Balancing Test

The indispensability analysis balances various interests based on the particular facts of each case (*see [a], above*).¹⁴ The inquiry is flexible¹⁵ and pragmatic.¹⁶

Some courts have voiced the opinion that they prefer not to dismiss for nonjoinder.¹⁷ Any such preference simply recognizes that dismissal is by nature a disruptive event that should not be ordered

¹¹ Compare Fed. R. Civ. P. 19(a) with Fed. R. Civ. P. 19(b).

^{11.1} Fed. R. Civ. P. 19(b)(1).

^{11.2} Fed. R. Civ. P. 19(b)(2).

^{11.3} Fed. R. Civ. P. 19(b)(3).

^{11.4} Fed. R. Civ. P. 19(b)(4).

¹² **Interests protected.** See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109–111, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) (when determining whether suit may proceed in absence of necessary party, court must consider: (1) whether party sought to be joined has interest in having forum and whether adequate alternate forum exists; (2) interest of party seeking joinder in avoiding multiple litigation, or inconsistent relief, or sole responsibility for a liability shared with another; (3) the interest of the outsider whom it would have been desirable to join; (4) the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.).

¹³ **Interests underlie decision.** See Fed. R. Civ. P. 19(b).

2d Circuit See also *Klockner Stadler Hurter, Ltd. v. Insurance Co. of Pa.*, 785 F. Supp. 1130, 1133 (S.D.N.Y. 1990) (discussing *Provident Tradesmens* analysis of Fed. R. Civ. P. 19(b) factors); *Ente Nazionale Idrocarburi v. Prudential Sec. Group*, 744 F. Supp. 450, 458–462 (S.D.N.Y. 1990) (same); *Circle Indus. v. City Fed. Sav. Bank*, 749 F. Supp. 447, 456 (E.D.N.Y. 1990) (finding absentee indispensable based on *Provident Tradesmens* factors).

9th Circuit *Paiute-Shoshone Indians v. City of Los Angeles*, 637 F.3d 993, 1000–1002 (9th Cir. 2011) (*Patterson* factors did not favor allowing case to proceed in absence of United States); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991) (applying four factors in Fed. R. Civ. P. 19(b) to determine whether Indian tribe, necessary party immune from suit, is indispensable party).

10th Circuit *Davis v. United States*, 343 F.3d 1282, 1290–1294 (10th Cir. 2003) (court applied four factors and addressed other equitable factors to determine that Indian tribe, which could not be joined because of sovereign immunity, was indispensable in case that concerned distribution of settlement funds to bands within tribe).

¹⁴ **Balancing interests.** *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) (“The decision whether to dismiss (i.e., the decision whether the person missing is ‘indispensable’) must be based on factors varying with

the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests.”).

2d Circuit *See also* Circle Indus. v. City Fed. Sav. Bank, 749 F. Supp. 447, 456 (E.D.N.Y. 1990) (Fed. R. Civ. P. 19(b) requires balancing of factors at court's discretion).

6th Circuit *See also* Professional Hockey Club Cent. Sports Club of the Army v. Detroit Red Wings, Inc., 787 F. Supp. 706, 713 (E.D. Mich. 1992) (“[T]he crisp question for analysis is whether, on balance, the [plaintiff's] interest in maintaining its cause before a federal court is greater than [absentee's] interest in being a named party in this lawsuit.”).

7th Circuit *See also* Burger King v. American Nat'l Bank & Trust Co., 119 F.R.D. 672, 679 (N.D. Ill. 1988) (“Rule 19(b) provides for a pragmatic weighing of the relevant factors.”).

9th Circuit *See also* Aguilar v. Los Angeles County, 751 F.2d 1089, 1094 (9th Cir. 1985) (Fed. R. Civ. P. 19(b) “represents an attempt to balance the rights of all those affected by the litigation.”); Lopez v. Martin Luther King, Jr. Hosp., 97 F.R.D. 24, 28 (C.D. Cal. 1983) (“the Court must balance the competing and at times seemingly inconsistent interests that are at stake in any Rule 19 problem.”).

10th Circuit *But cf.* Enterprise Mgmt. Consultants v. United States ex rel. Hodel, 883 F.2d 890, 894 (10th Cir. 1989) (“When ... a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves.”).

11th Circuit *See, e.g.*, Brackin Tie, Lumber & Chip Co., Inc. v. McLarty Farms, Inc., 704 F.2d 585, 587 (11th Cir. 1983) (citing **Moore's**, balance of factors weighed in favor of proceeding in absence of joint obligors).

D.C. Circuit *But cf.* Wichita & Affiliated Tribes of Okla. v. Hodel, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986) (citing **Moore's**, “[T]here is very little room for balancing [Fed. R. Civ. P. 19(b) factors]” when absentee is immune from suit).

¹⁵ **Flexible approach.** Swerhun v. General Motors Corp., 141 F.R.D. 342, 344 (M.D. Fla. 1992) (Fed. R. Civ. P. 19 requires “a flexible analysis of the facts pertaining to each case.”).

2d Circuit *See also* Jaser v. New York Prop. Ins. Underwriting Ass'n, 815 F.2d 240, 242 (2d Cir. 1987) (court “should take a flexible approach when deciding what parties need to be present for a just resolution of the suit.”); Pioneer Commercial Funding Corp. v. United Airlines, Inc., 122 B.R. 871, 879 (S.D.N.Y. 1991) (acknowledging Second Circuit's mandate that court approach determination under Fed. R. Civ. P. 19 flexibly).

10th Circuit *See also* Davis v. United States, 343 F.3d 1282, 1290–1294 (10th Cir. 2003) (court must weigh and balance Fed. R. Civ. P. 19(b) factors and other equitable considerations in making indispensability determination); Francis Oil & Gas, Inc. v. Exxon Corp., 661 F.2d 873, 878 (10th Cir. 1981) (Fed. R. Civ. P. 19 is not mechanical formula).

11th Circuit Swerhun v. General Motors Corp., 141 F.R.D. 342, 344 (M.D. Fla. 1992) (Fed. R. Civ. P. 19 requires “a flexible analysis of the facts pertaining to each case.”).

¹⁶ **Pragmatic approach.** *See* Fed. R. Civ. P. 19, advisory committee note of 1966 (“pragmatic considerations ... should be controlling.”).

1st Circuit B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 516 F.3d 18, 23 (1st Cir. 2008) (analysis involves balancing of competing interests and must be steeped in pragmatic considerations).

9th Circuit Paiute-Shoshone Indians v. City of Los Angeles, 637 F.3d 993, 1000 (9th Cir. 2011) (rule requires court to undertake practical examination of circumstances to determine whether action may proceed in equity and good conscience); Eldredge v. Carpenters, 662 F.2d 534, 537 (9th Cir. 1981) (court must examine practical effects of joinder or nonjoinder rather than rigid formula); Lopez v. Martin Luther King, Jr. Hosp., 97 F.R.D. 24, 28 (C.D. Cal. 1983) (citing **Moore's**, “Rule 19 matters should be governed by practical considerations. Indeed, the Rule was amended in 1966 in an attempt to forestall what was developing as a rigid, formalistic approach to compulsory joinder under the old version of the Rule.”).

11th Circuit Molinos Valle del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1344 (11th Cir. 2011) (pragmatic considerations play key role in Fed. R. Civ. P. 19 determinations).

D.C. Circuit *See also* Wichita & Affiliated Tribes of Okla. v. Hodel, 788 F.2d 765, 774 (D.C. Cir. 1986) (four factors set forth in Fed. R. Civ. P. 19(b) are “not rigid, technical tests, but rather guides to the overarching equity and good conscience determination.”); Kickapoo Tribe v. Babbit, 43 F.3d 1491, 1499 (D.D.C. 1995) (pragmatic considerations underlie determination of whether to proceed).

¹⁷ **Preference not to dismiss.** *See, e.g.*, Jaser v. New York Prop. Ins. Underwriting Ass'n, 815 F.2d 240, 242 (2d Cir. 1987) (preference for non-dismissal); Drankwater v. Miller, 830 F. Supp. 188, 191 (S.D.N.Y. 1993) (preference for non-dismissal).

routinely. Obviously, dismissal should be ordered if the court decides that equity and good conscience require it.¹⁸ The issue of whether to proceed or dismiss is vested in the sound discretion of the district judge,¹⁹ whose conclusion will be upheld unless it constitutes an abuse of discretion.²⁰

¹⁸ **Equity and good conscience.**

2d Circuit *See* Rose v. Simms, 1995 U.S. Dist. LEXIS 17686, at *8 (S.D.N.Y. Nov. 29, 1995) (“The phrase ‘good conscience,’ in 19(b), contemplates that very few cases should be terminated due to the absence of non-diverse parties unless there has been a reasoned determination that their nonjoinder makes just resolution of the action impossible.”).

D.C. Circuit Park v. Didden, 695 F.2d 626, 628–629 (D.C. Cir. 1982) (“Before dismissing an action under the aegis of Rule 19, the district court must be positioned to say, with the security afforded by careful exploration and evaluation of the facts and circumstances of the particular case: (1) one or more persons not joined as a party is indeed needed for just adjudication, (2) joinder of such person(s) is not feasible, and (3) dismissal is preferable to adjudication without the unjoined persons”).

¹⁹ **Court has discretion.** Swerhun v. General Motors Corp., 141 F.R.D. 342, 344 (M.D. Fla. 1992) (“The Court is vested with substantial discretion in making the determination [under Fed. R. Civ. P. 19].”).

2d Circuit Lipton v. The Nature Co., 781 F. Supp. 1032, 1034 (S.D.N.Y. 1992) (“the Rule 19 motion regarding indispensability of parties ... [is] addressed to the court’s equitable discretion.”); *see also* S. & S Mach. Corp. v. General Motors Corp., 1994 U.S. Dist. LEXIS 13677, at *7 (S.D.N.Y. Sept. 28, 1994) (“District Courts have broad discretion in Rule 19 application, due to the fact-based analysis of the effects of non-joinder.”).

3d Circuit *See also* Janney Montgomery Scott v. Shepard Niles, Inc., 11 F.3d 399, 405 (3d Cir. 1993) (“Rule 19(a) is a necessary predicate to a district court’s discretionary determination under Rule 19(b).”).

11th Circuit Swerhun v. General Motors Corp., 141 F.R.D. 342, 344 (M.D. Fla. 1992) (“The Court is vested with substantial discretion in making the determination [under Fed. R. Civ. P. 19].”).

D.C. Circuit *See also* Cloverleaf Standardbred Owners Ass’n, Inc. v. National Bank of Washington, 699 F.2d 1274, 1277 (D.C. Cir. 1983) (district courts have discretion to determine “which factors to weigh and how heavily to emphasize [Fed. R. Civ. P. 19(b)] considerations.”).

²⁰ **Abuse of discretion review.**

1st Circuit Picciotto v. Continental Cas. Co., 512 F.3d 9, 14 (1st Cir. 2008) (review is for abuse of discretion; deference is warranted because Fed. R. Civ. P. 19(b) determinations are not legal conclusions but involve balancing of competing interests and must be steered in pragmatic considerations).

2d Circuit Conntech Dev. Co. v. University of Conn., 102 F.3d 677, 682 (2d Cir. 1996) (because Fed. R. Civ. P. 19(b) requires factual determinations more than legal ones, district court’s failure to join party will be reversed only for abuse of discretion); *see also* MasterCard Int’l, Inc. v. Visa Int’l Serv. Ass’n, Inc., 471 F.3d 377, 385 (2d Cir. 2006) (district court abuses its discretion when its decision either (1) rests on error of law or clearly erroneous factual finding, or (2) when its decision cannot be located within range of permissible decisions).

3d Circuit Schulman v. J.P. Morgan Inv. Mgmt., Inc., 35 F.3d 799, 804 (3d Cir. 1994) (reviewing district court’s conclusion that absentee is not indispensable under Fed. R. Civ. P. 19(b) for abuse of discretion).

4th Circuit National Union Fire Ins. Co. v. Rite Aid, Inc., 210 F.3d 246, 250 n.7 (4th Cir. 2000) (abuse of discretion standard applies).

7th Circuit Extra Equipamentos e Exportacao Ltda. v. Case Corp., 361 F.3d 359, 361–362 (7th Cir. 2004) (appellate review of determination of indispensability is limited to deciding whether district court has committed abuse of discretion).

8th Circuit Deere & Co. v. Diamond Wood Farms, Inc., 152 F.R.D. 158, 161 (E.D. Ark. 1993) (“The standard of review for this determination by the trial court is abuse of discretion.”).

9th Circuit Bakia v. County of Los Angeles, 687 F.2d 299, 301 (9th Cir. 1982) (standard of review of district court’s decision is abuse of discretion); *see also* Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983) (district court abused its discretion in determining that government was necessary party); Walsh v. Centeio, 692 F.2d 1239, 1241 (9th Cir. 1982) (reviewing for abuse of discretion); *but cf.* Aguilar v. Los Angeles County, 751 F.2d 1089, 1092 (9th Cir. 1985) (“While Fed. R. Civ. P. 19 cases are generally reviewed under an abuse of discretion standard, to the extent that the determination of [the absent party’s] interest and its impairment under [Fed. R. Civ. P. 19(a)(1)(B)(i)] involved an interpretation of California collateral estoppel law, it is reviewed under a de novo standard.”).

10th Circuit Davis v. United States, 343 F.3d 1282, 1289 (10th Cir. 2003) (“A district court’s indispensability determination under Rule 19 will not be disturbed absent an abuse of discretion. Its underlying legal conclusions, however, are reviewed de novo. The court abuses its discretion in making an indispensability determination when it fails to consider a relevant factor, relies on an improper factor, or relies on grounds that do not reasonably support its conclusion” [citations omitted]); Sac & Fox Nation of Mo. v. Norton, 240 F.3d 1250, 1258 (10th Cir. 2001) (district court’s Fed. R. Civ. P. 19 determinations are reviewed under abuse of discretion).

The Sixth Circuit, however, applies a de novo standard to review of the Rule 19(b) determination, with the abuse of discretion standard reserved for Rule 19(a) determinations.^{20.1} A court that concludes the case should be dismissed for nonjoinder should take care to create a sufficient factual record to permit appellate review of the dismissal.²¹

[2] First Factor Addresses Prejudicial Effect of Judgment on Absentee or Party

[a] Court Must Assess Likelihood and Extent of Prejudice

The first factor of the indispensability analysis is “the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties.”²² This provision clearly overlaps with the considerations of whether an absentee is necessary under the “impair or impede” clause (which addresses the possible harm to the absentee) and the “multiple liability” clause (which addresses whether nonjoinder of the absentee might subject the defendant to risk of multiple liability

standard).

11th Circuit Winn Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1039 (11th Cir. 2014) (review of district court’s decision regarding the joinder of indispensable parties is based on abuse of discretion standard).

^{20.1} **6th Circuit applies de novo standard.** Glancy v. Taubman Ctrs., Inc., 373 F.3d 656, 665–666 (6th Cir. 2004) (“We review de novo the district court’s decision that a party is indispensable under Federal Rule of Civil Procedure 19(b) as well as the decision that the court lacks subject matter jurisdiction.”); Keweenaw Bay Indian Community v. Michigan, 11 F.3d 1341, 1346 (6th Cir. Mich. 1993) (“[W]e review a Rule 19(a) finding that a party is necessary to an action under an abuse of discretion standard, while we review a Rule 19(b) determination that a party is indispensable to an action de novo.”); accord Laethem Equip. Co. v. Deere & Co., 2012 U.S. App. LEXIS 12135, at **9 (6th Cir. June 13, 2012) (unpublished) (court reviews Fed. R. Civ. P. 19(b) determinations using de novo standard; whether a party is necessary under Fed. R. Civ. P. 19(a) is reviewed for abuse of discretion).

²¹ **Record on appeal.** Bakia v. County of Los Angeles, 687 F.2d 299, 302 (9th Cir. 1982) (record must reflect bases for dismissal). 3d Circuit See also Morgan Stanley Dean Witter Reynolds, Inc. v. Gekas, 309 F. Supp. 2d 652, 656 n.5 (M.D. Pa. 2004) (“we believe the issue of indispensability is difficult to decide based on the incomplete record before us, and therefore have chosen to decide the motions on other grounds”).

9th Circuit Bakia v. County of Los Angeles, 687 F.2d 299, 302 (9th Cir. 1982) (record must reflect bases for dismissal).

²² **Adverse impact.** See Fed. R. Civ. P. 19(b)(1); see also Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 124–125, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) (“One basis for dismissal is prejudice to the rights of an absent party that ‘cannot’ be avoided in issuance of a final decree.”).

2d Circuit Circle Indus. v. City Fed. Sav. Bank, 749 F. Supp. 447, 457 (E.D.N.Y. 1990) (when defendants were unlikely to protect absentee’s interest given their desire to insure that any finding of wrongdoing is established only as to absentee, absentee would be prejudiced if action went forward).

9th Circuit Paiute-Shoshone Indians v. City of Los Angeles, 637 F.3d 993, 1001 (9th Cir. 2011) (“Rule 19(b) tells us to consider the extent to which a judgment rendered in the United States’ absence might *prejudice* the existing parties. In *Patterson*, the Supreme Court interpreted that directive to mean that we must consider a defendant’s ‘interest’ in whether a case should proceed without a required party. ... As examples of interests a defendant might have, the Court observed that a defendant ‘may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another.’ ... We do not take that observation to mean that those are the only interests a defendant might have in not wanting to proceed with an action in the absence of a required party who could not be joined. ... Here, even if we agree with Plaintiff that the City does not face the possibility of multiple litigation, inconsistent relief, or responsibility for liability that it would share with the United States, the City still has a significant interest in not wanting to proceed with this case. To achieve the relief that Plaintiff seeks, Plaintiff must prove that agents of the United States violated the 1937 Act when they gave the Bishop Tribal Land to the City. The City cannot reasonably be expected to defend the actions of an entirely different entity over which the City had no control. Proceeding with this suit in the absence of the United States therefore would prejudice the City because the City by itself cannot defend effectively against the crux of Plaintiff’s allegations, even though those allegations may be untrue.”).

D.C. Circuit Adams v. Bell, 711 F.2d 161, 171 (D.C. Cir. 1983) (en banc) (“Under the first and second prongs of this test when the relief requested *must*, to satisfy plaintiffs’ claims, be in derogation of the rights of a person not before the court, that person is an indispensable party.”).

or inconsistent obligations) (*see* § 19.03[3], [4]).²³ This overlap on bases of inquiry should not mask the fact that the quality of the indispensability analysis is different.²⁴ Under the necessary party analysis, the court is concerned essentially with whether nonjoinder *could* have one of the adverse effects addressed by that Rule. The basic possibility of such harm justifies joining the absentee.²⁵ In contrast, the indispensability analysis takes place when the court is faced with an absentee whose joinder cannot be secured. The court is concerned with whether nonjoinder *actually will* result in the kind of prejudice hypothesized earlier and, if so, the severity of that harm.²⁶ It is a difference in degree, reflected in the Rule's direction to assess "the extent to which" prejudice will flow from proceeding without the absentee.

Obviously, failure to join the absentee will work some hardship either on the absentee or on a party. Were this not so, the absentee would not have been held necessary in the first place. Just as obviously, then, the fact that the absentee's interest will be affected by the outcome of the suit does not automatically dictate that the absentee is indispensable.²⁷ The absentee's interest may be protected by extant parties, or the absentee may be able to take action to lessen the prejudice (*see* § 19.05[2][b], [c].) The other factors enumerated in the Rule, and the interests they reflect, must be considered as well.²⁸ For example, it may be possible to fashion the judgment to avoid harm to the absentee.^{28.1}

Similarly, the fact that nonjoinder of the absentee may harm the defendant does not, in itself, require that the case be dismissed. With regard to the defendant, the focus is on the practical reality that subsequent litigation could subject it either to multiple liability or to inconsistent obligations. As with the absentee, the defendant may be able to protect itself from harm occasioned by nonjoinder, and the court should consider these options in determining whether to proceed or dismiss (*see* § 19.05[2][c]). The other factors in the indispensability analysis must be applied in a flexible, pragmatic way depending on the particular facts of the case (*see* [1], *above*) in assessing whether to proceed or dismiss.

²³ **Rule 19(a)(1)(B) overlaps Rule 19(b)(1).** *See* Fed. R. Civ. P. 19(a)(1)(B)(i) ("impair or impede" clause); Fed. R. Civ. P. 19(a)(1)(B)(ii) ("multiple liability" clause).

7th Circuit *See* Burger King v. American Nat'l Bank & Trust Co., 119 F.R.D. 672, 679 (N.D. Ill. 1988) (citing Moore's, "Having found that [absentee subtenant and franchisee] is a necessary party here, this court has already determined that the first Rule 19(b) factor—the counterpart to [Fed. R. Civ. P. 19(a)(1)(B)(i)]—weighs in favor of dismissing the case.").

D.C. Circuit *See* Kickapoo Tribe v. Babbit, 43 F.3d 1491, 1497 n.9 (D. D.C. 1995) (Fed. R. Civ. P. 19(a)(1)(B)(i) inquiry same as Fed. R. Civ. P. 19(b)(1), (2) considerations).

²⁴ *See* Fed. R. Civ. P. 19(b).

²⁵ *See* Fed. R. Civ. P. 19(a)(1).

²⁶ *See* Fed. R. Civ. P. 19(b)(1); *see also* Doré Energy Corp. v. Prospective Inv. & Trading Co., 570 F.3d 219, 232 (5th Cir. 2009) (factors under Fed. R. Civ. P. 19(b) are concerned with whether actual harm to anyone's interests will occur if case proceeds without absent parties; and in this case one existing party entered into agreement with absent parties to effect that absent parties would continue to receive same royalty payments regardless of outcome of suit, thus absent parties no longer had stake in outcome and there was no obstacle to continuing suit in their absence).

²⁷ **Impact on interest not necessarily dispositive.** Coalition on Sensible Transp. v. Dole, 631 F. Supp. 1382, 1386–1387 (D.C. Cir. 1986) (fact that absentee's interest would be affected by suit was not sufficient to warrant dismissal); *see also* Swomley v. Watt, 526 F. Supp. 1271, 1273 (D. D.C. 1981) (fact that absentee permit holder had interest in and was likely to be affected by litigation ruled not sufficient to make absentee indispensable).

²⁸ *See* Fed. R. Civ. P. 19(b)(2)–(4).

^{28.1} *See* Fed. R. Civ. P. 19(b)(2) (prejudice might be lessened by "protective provisions in the judgment" or by "shaping the relief").

While the rule refers to prejudice to the absent party or to the “existing parties” resulting from the judgment, the proper focus is on prejudice to the absent party or to the existing defendants. Prejudice to the plaintiff is usually not relevant as that is prejudice the plaintiff is willing to bear.^{28.2}

Frequently, nonjoinder of the absentee will inflict harm both on the absentee and the defendant.²⁹ Such dual prejudice is not required to warrant either a holding that the absentee is necessary or a dismissal for nonjoinder if the absentee cannot be joined. Both the necessary party analysis and the indispensability analysis speak in the alternative of harm either to the absentee or to the defendant. In fact, the court need not base its decision solely on prejudice.³⁰

[b] Prejudice to Absentee May Be Mitigated if Parties Represent Absentee's Interest

The court may properly consider whether the absentee's interest is fully represented by extant parties. Such representation could mitigate the potential harm to the absentee and avoid a finding of indispensability.³¹ Courts make this assessment cautiously. Mere similarity of interest is not sufficient to prevent prejudice; the interest of the party and the absentee must be identical.³²

^{28.2} **Prejudice to plaintiff not relevant.** *CP Solutions PTE, Ltd. v. General Elec. Co.*, 553 F.3d 156, 159 (2d Cir. 2009) (“Whatever prejudice to CP Solutions there might be, it is prejudice the plaintiff is willing to bear and therefore should not have troubled the district court.”).

²⁹ **Harm to defendant and absentee.** *See Martin v. Wilks*, 490 U.S. 755, 766–769, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989) (when black firefighters sue municipality alleging racial discrimination in promotions in city's fire department, and seek order moving them up on promotion list ahead of absentee white firefighters, absentees's interest could be impaired by judgment in favor of plaintiffs since judgment would lower their priority for promotion; moreover, nonjoinder of absentees could subject city to inconsistent obligations if plaintiffs won present case and absentees won subsequent case because city would be unable to comply with one judgment without violating the other).

³⁰ *Compare Fed. R. Civ. P. 19(a)(1)(B) with Fed. R. Civ. P. 19(b)*; *see also Fed. R. Civ. P. 19*, advisory committee note of 1966 (“It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined”).

³¹ **Prejudice mitigated.** *See Heckman v. United States*, 224 U.S. 413, 444–445, 32 S. Ct. 424, 56 L. Ed. 820 (1912) (Indian grantors of land were not indispensable in action to cancel land conveyances and restore land to Indian grantors because “[t]here [could] be no more complete representation than that on the part of the United States in acting on behalf of these dependents”).

1st Circuit *See also Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 636 (1st Cir. 1989) (absent party's interest was prejudiced because extant party would not be able to protect absentee's interests).

2d Circuit *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 134 (2d Cir. 2013) (potential prejudice to absent party is mitigated when remaining party could champion absentee's interest; prejudice was practically nonexistent when absentees and remaining parties were represented by same counsel and their interests were aligned in all respects); *cf. Circle Indus. v. City Fed. Sav. Bank*, 749 F. Supp. 447, 457 (E.D.N.Y. 1990) (absentee would be harmed if action proceeded because remaining defendants were unlikely to protect absentee's interest given their desire to insure that any finding of wrongdoing was established only as to absentee).

6th Circuit *See also Professional Hockey Club Cent. Sports Club of the Army v. Detroit Red Wings, Inc.*, 787 F. Supp. 706, 713 (E.D. Mich. 1992) (citing *Moore's*, “[T]he single most important consideration in determining whether [absentee's] absence will prejudice his interests is whether his interests are adequately protected by [defendant]. If they are, his absence will have little, if any, effect. If they are not, he will quite possibly be prejudiced by his absence.”).

7th Circuit *See Extra Equipamentos e Exportacao Ltda. v. Case Corp.*, 361 F.3d 359, 362–364 (7th Cir. 2004) (district court failed to consider fact that party that could not be joined was wholly owned subsidiary of existing party, which would be able to represent absent party's interest); *see also Burger King v. American Nat'l Bank & Trust Co.*, 119 F.R.D. 672, 678 (N.D. Ill. 1988) (“[T]he potentially prejudicial effect on an absent party will not of itself require his joinder” if parties adequately represent absentee's interests).

9th Circuit *See Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012) (Indian tribe was

[c] Absentee and Defendant May Be Able to Lessen Potential Prejudice

In deciding whether to proceed or dismiss, the court may properly consider the absentee's ability to protect itself from prejudice. Because the "impair or impede" test for necessary parties and the test for intervention of right overlap, a necessary absentee will usually have the right to protect its own interests by intervening (*see* §§ 19.02[4][c], 19.03[2], 19.07).³³ An absentee's refusal to intervene may be considered in calculating prejudice should the case proceed without the absentee.³⁴ Courts interpret a decision not to intervene as an indication that the absentee does not deem its interests

not even "necessary" party when it was adequately represented by tribal officials who were parties).

D.C. Circuit *Cf. Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 774–775 (D.C. Cir. 1986) ("In some cases the prejudice created by the relevant party's absence is mitigated, or even eliminated, by the presence of a party who will represent the absent party's interest. ... [W]hatever allegiance the government owes to the tribes as trustee, is necessarily split among the three competing tribes ... [creating] a conflict between the interests of the United States and the interests of Indians," thus representation of Native Americans by United States would be inadequate).

Fed. Circuit *Dainippon Screen Mfg. Co. v. CFMT, Inc.*, 142 F.3d 1266, 1272 (Fed. Cir. 1998) (subsidiary that held patent for parent company was not indispensable, and declaratory judgment action for patent infringement could proceed without it when, among other factors, subsidiary's interests were adequately protected by parent because subsidiary and parent shared common goal of protecting patent).

³² Identical interest.

1st Circuit *Bacardí Int'l Ltd. v. V. Suárez & Co.*, 719 F.3d 1 (1st Cir., 2013) (if parent and subsidiary have identical interest, subsidiary is not indispensable party).

5th Circuit *Cf. Escamilla v. M2 Tech., Inc.*, 2013 U.S. App. LEXIS 14385, at **10–**13 (5th Cir. July 16, 2013) (unpublished) (though licensee was sole shareholder of trademark owner, owner and licensee were legally distinct persons and sole shareholder's participation in lawsuit was not sufficient to avoid joinder of trademark owner as indispensable party).

6th Circuit *Professional Hockey Club Cent. Sports Club of the Army v. Detroit Red Wings, Inc.*, 787 F. Supp. 706, 713 (E.D. Mich. 1992) (citing *Moore's*, when interests of absentee and defendant were identical, "[s]pecifically, both would like to demonstrate that the contract between [absentee] and the [plaintiff] is invalid," interests of necessary absentee would not be significantly impaired by nonjoinder); *Envirotech Corp. v. Bethlehem Steel Corp.*, 729 F.2d 70, 73 (2d Cir. 1984) (identity of interests "obviate[s] any serious possibility of prejudice.").

7th Circuit *Burger King v. American Nat'l Bank & Trust Co.*, 119 F.R.D. 672, 678 (N.D. Ill. 1988) ("[M]ere similarity of interest will not do; there must be an identity of interest between the absent party and the one already a party to the action."); *see also Codest Eng'g v. Hyatt Int'l Corp.*, 1995 U.S. Dist. LEXIS 17276, at *12 (N.D. Ill. Nov. 15, 1995) (if absentee's interests are fully represented by parties, prejudice test does not weigh in favor of joinder).

10th Circuit *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 999–1000 (10th Cir. 2001) (in case involving apportionment of funds among Indian tribes, federal officials who were defendants could not adequately represent absent tribe's interests, because defendants' interest was in implementing national policy, while tribe had specific interest in receiving funds).

D.C. Circuit *Coalition on Sensible Transp. v. Dole*, 631 F. Supp. 1382, 1386 (D.C. Cir. 1986) (in determining indispensability of parties who against whom motion to dismiss was pending, parties' interests would be adequately protected by substantial identity of interests among defendants; all sought to defeat plaintiffs' claims and complete highway construction which was subject of suit).

³³ **Intervention protects interests.** Compare Fed. R. Civ. P. 19(a)(1)(B)(i) with *Fed. R. Civ. P. 24(a)(2)*; *see also* Fed. R. Civ. P. 19, advisory committee note of 1966 (drafters envisioned court informally informing absentee of its status as necessary and of its right to intervene).

³⁴ Intervention to protect absentee's interest.

7th Circuit *Burger King v. American Nat'l Bank & Trust Co.*, 119 F.R.D. 672, 678 (N.D. Ill. 1988) (citing *Moore's*, "[A]n absent person's decision to forego intervention indicates that he does not deem his own interests substantially threatened by the litigation."). 9th Circuit *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 820 n.5 (9th Cir. 1985) ("An absent party's opportunity to intervene may be considered in calculating the prejudicial effect to him.").

threatened by the litigation.³⁵ The absentee's refusal to intervene in such a circumstance may justify the court's decision to proceed rather than dismiss, unless, of course, other factors (such as harm to the defendant) dictate dismissal.

Intervention of right is less useful today than in the past, however, if joinder of the absentee is infeasible because it would destroy subject matter jurisdiction (*see* § 19.04[1]). In the past, joinder could be effected because intervention of right generally invoked supplemental jurisdiction. Now, however, under the supplemental jurisdiction statute, claims by absentees who seek to intervene as plaintiffs and against absentees who intervene as defendants, do not carry supplemental jurisdiction (*see* § 19.04[1][b]).³⁶

Moreover, courts are reluctant to require the absentee to protect its own interest if intervention would result in the absentee's waiving an immunity to suit.³⁷ In such a case, the court may well conclude that the action should be dismissed.³⁸ In determining whether a party is indispensable, a necessary party's immunity from suit is an important factor.³⁹

³⁵ **Failure to intervene.** *Burger King v. American Nat'l Bank & Trust Co.*, 119 F.R.D. 672, 678 (N.D. Ill. 1988) (citing *Moore's*, if absentee does not take opportunity to intervene, "the court should not, absent special circumstances, second-guess this decision.").

³⁶ 28 U.S.C. § 1367(b).

³⁷ **Immune absentee.**

9th Circuit *See Wilbur v. Locke*, 423 F.3d 1101, 1114 (9th Cir. 2005) (although Indian tribe has right to intervene, court may not require tribe to intervene to minimize potential prejudice, because intervention would require waiver of sovereign immunity); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991) ("We also reject appellants' theory that the [absentee] Quinault Nation could minimize the potential prejudice by intervening in the action and asserting its interests.").

D.C. Circuit *See Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986) ("Finally, we reject the notion that the [absentee tribe's] ability to intervene as defendants in the cross-claim, as the [other tribes] did vis-a-vis the original claim, mitigated the prejudice of proceeding in their absence. To intervene, the [absent tribe] would have had to waive their tribal immunity. It is wholly at odds with the policy of tribal immunity to put the tribe to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it.").

³⁸ **Indispensable absentee.**

7th Circuit *See Burger King v. American Nat'l Bank & Trust Co.*, 119 F.R.D. 672, 679 (N.D. Ill. 1988) ("The upshot of [Fed. R. Civ. P. 19, 24] is that an absent person who has a substantial interest in a lawsuit and who wishes to keep that lawsuit in federal court will refrain from seeking intervention, not because his interests in the suit are de minimis or are adequately represented by the parties to the lawsuit, but instead because he fears that demonstrating the degree of his interest in the lawsuit would ensure its dismissal."). 10th Circuit *See also Enterprise Mgmt. Consultants v. United States ex rel. Hodel*, 883 F.2d 890, 893 (10th Cir. 1989) ((1) tribe was immune from suit, and (2) tribe was indispensable party and, thus, action could not proceed against federal officials).

³⁹ **Immunity important factor.**

2d Circuit *See Seneca Nation of Indians v. New York*, 383 F.3d 45, 47-49 (2d Cir. 2004) (district court did not abuse its discretion when it dismissed action against State of New York, even though this left plaintiffs without remedy, because of importance of state's sovereign immunity to Fed. R. Civ. P. 19(b) analysis).

5th Circuit *See also A.J. Kellos Constr. Co. v. Balboa Ins. Co.*, 495 F. Supp. 408, 414 (S.D. Ga. 1980), rev'd on other grounds, 661 F.2d 402 (5th Cir. 1981) (plaintiffs' argument that they will be prejudiced by absence of state if ruling is favorable to defendant "presupposes a remedy [is available] against the state. ;... The sovereign immunity barrier moots the potential of prejudice to [plaintiff], and if a Rule 19(b) analysis were undertaken, would militate against finding the state an indispensable party.").

9th Circuit *See, e.g., Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991) ("Some courts have noted, however, that when the necessary party is immune from suit, there is very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor."); *see also Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975) (applying four-part test to determine whether absentee Indian tribes are indispensable parties).

10th Circuit *See also Enterprise Mgmt. Consultants v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) ("When, as

If the concern is harm caused to the defendant, the court may properly consider the defendant's options for avoiding prejudice. For example, if the defendant has a claim against the absentee for indemnity or contribution for all or part of plaintiff's claim in the pending case, it can implead the absentee (*see Ch. 14, Third-Party Practice*).⁴⁰ Moreover, an impleader claim by a defendant, unlike joinder of a necessary party, invokes supplemental jurisdiction (*see § 19.02[4][a]*). A defendant sued regarding ownership of a res can invoke defensive interpleader to join all claimants to the pending case (*see § 19.02[4][b]*; *see also Ch. 22, Interpleader*). A defendant's failure to use these avenues may justify the court's refusal to dismiss the pending case.⁴¹ As always, however, the court must assess all relevant factors in deciding whether to proceed or dismiss.

[d] Prejudice May Be Unavoidable if Absentee's and Party's Claims Mutually Exclusive

If the claims of a party and an absentee are mutually exclusive, prejudice from nonjoinder is virtually inescapable. If the court is convinced that the chance of prejudice is real and cannot be abated meaningfully, the absentee may well be found indispensable. For example, conflicting claims by beneficiaries to a common trust may result in severe prejudice to an absentee.⁴² The defendant can obviate possible harm to it by employing interpleader (*see § 19.04[4][b]*). Similarly, interrelated claims, such that a judgment on one would automatically affect the other, may augur toward a finding of indispensability.⁴³ For example, a decision affecting the conditions or validity of a lease effects a sublease such that all parties to the lease are indispensable.⁴⁴ If interests are divided on a percentage basis, relief often cannot be granted to one interest-holder without affecting the rights of

here, a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves.”).

⁴⁰ **Impleader.** *See* Fed. R. Civ. P. 14(a).

5th Circuit *Boone v. GMAC*, 682 F.2d 552, 553 (5th Cir. 1982) (defendants could protect their interest by joining third party).

7th Circuit *Pasco Int'l (London), Ltd. v. Stenograph Corp.* 637 F.2d 496, 500 (7th Cir. 1980) (refusing to find absentee indispensable when defendant could implead absentee).

9th Circuit *EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070, 1086–1087 (9th Cir. 2010) (“The courts of appeals that have addressed the question are unanimous in holding that if an absentee can be brought into an action by impleader under Rule 14(a), a dismissal under Rule 19(b) is inappropriate.”).

11th Circuit *Challenge Homes, Inc. v. Greater Naples Care Ctr., Inc.*, 669 F.2d 667, 671 (11th Cir. 1982) (defendant could protect itself against prejudice by impleading absentee under Fed. R. Civ. P. 14).

⁴¹ **Availability of interpleader.** *Kelly v. Commercial Union Ins. Co.*, 709 F.2d 973, 977–978 (5th Cir. 1983) (refusing to find absentees indispensable because defendant could interplead them).

⁴² **Conflicting claims to trust.** *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986) (“Conflicting claims by beneficiaries to a common trust present a textbook example of a case where one party may be severely prejudiced by a decision in his absence.”).

⁴³ **Interrelated interest.** *Deere & Co. v. Diamond Wood Farms, Inc.*, 152 F.R.D. 158, 161 (E.D. Ark. 1993) (when absentee claimed interest in surplus proceeds from sale of farm equipment, litigation might result in prejudice to absentee because plaintiff asserted that proceeds should be applied to other indebtedness owed by party defendants, thus absentee might lose its claim to proceeds).

⁴⁴ **Lease and sublease.** *See Burger King v. American Nat'l Bank & Trust Co.*, 119 F.R.D. 672, 680 (N.D. Ill. 1988) (citing *Moore's*, although court might shape remedy to mitigate harm to defendant property owner by awarding damages in lieu of default or rescission, prejudicial effect that ruling for defendant property owner on continued validity of lease would have on absent subtenant and franchisee's sublease could not be avoided; second factor of Fed. R. Civ. P. 19(b) weighs in favor of dismissal).

the others.⁴⁵ Again, it bears repeating that no fact pattern in itself automatically justifies the conclusion that the case should be dismissed. Rather, the court must consider all relevant factors in determining the proper course.

[e] Prejudice to Absentee Protected by Sovereign Immunity May Require Dismissal

In *Republic of Philippines v. Pimentel*, the U.S. Supreme Court addressed the effect of foreign sovereign immunity (*see generally* *Ch. 104, Specific Grants of Federal Question Jurisdiction*) on the Rule 19(b) analysis, and ruled that the district court erred by not giving the necessary weight to the assertion of immunity. This was an interpleader action to determine the ownership of property allegedly stolen by Ferdinand Marcos. The Republic of the Philippines and a Philippine Commission (created to recover property wrongfully taken by Marcos) were named in the suit, but were dismissed after they invoked sovereign immunity. The district court ruled that the action could proceed in the absence of the two entities.^{45.1}

The Supreme Court reversed, concluding that when sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered when there is a potential for injury to the interests of the absent sovereign. The Court emphasized the important comity interests that are served by giving full effect to sovereign immunity. If the claims of the absentee had been frivolous, the district court would have had leeway to proceed, because the absentee could not be prejudiced. What the court of appeals had done, though, in affirming the district court decision, was in essence to decide the claims of the absent entities against them and assume there would be no prejudice on that ground. This consideration of the merits was itself an infringement of sovereign immunity.^{45.2}

Proceeding with the case in the absence of the Republic and the Commission (even though they themselves had invoked immunity and sought to be dismissed) was error because it ignored the substantial prejudice the two entities were likely to incur should the interpleader proceed in their absence.^{45.3} The Court also discussed the three other Rule 19(b) factors briefly and concluded that the balance of equities required dismissal. The Court thus performed the traditional Rule 19(b) analysis in which a court must consider all relevant factors and determine whether “in equity and good conscience, the action should proceed among the existing parties or should be dismissed.”^{45.4} Nevertheless, as a concurring and dissenting opinion by Justice Stevens pointed out, the Court’s

⁴⁵ **Conflicting claims to defined amount.** *See* *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986) (“[W]hen, as in this case, the parties’ interest is in a specified percentage of the pie, and the combined requests of the parties exceed 100% of the pie, the court cannot afford one relief without affecting the rights of the others. In that instance, the claims are mutually exclusive, and the problem of indispensability of an absent party is accentuated.”).

^{45.1} **Supreme Court rules on effect of sovereign immunity of absent party.** *Republic of Philippines v. Pimentel*, 553 U.S. 851, 859–860, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008).

^{45.2} **Consideration of merits is infringement of sovereign immunity.** *Republic of Philippines v. Pimentel*, 553 U.S. 851, 864–869, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008).

^{45.3} **Prejudice to absent parties.** *Republic of Philippines v. Pimentel*, 553 U.S. 851, 868–869, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008).

^{45.4} **“Equity and good conscience.”** *See* Fed. R. Civ. P. 19(b); *Republic of Philippines v. Pimentel*, 553 U.S. 851, 870–872, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008).

analysis seems to give “near-dispositive effect” in the calculus to sovereign immunity.^{45.5} Rule 19 was amended in 1966 to allow for a more flexible and case-specific analysis—rather than pigeon-hole certain types of cases as more or less requiring the joinder of absent parties, the amendments were designed to allow the district court to balance *all* relevant factors and make a pragmatic determination based on the equities of the situation. The Court’s approach, which elevates sovereign immunity above other factors, protects the important interests underlying sovereign immunity, but to the detriment of a proper Rule 19 analysis.

The dissent, in conducting the Rule 19 balancing inquiry, would have given sovereign immunity somewhat less weight. First, the absentees would have to take steps in U.S. courts at some point if they wished to recover the assets. Thus, the sovereign interest implicated was not of the same magnitude as when a sovereign faces liability. Their interest in this case was in choosing the most convenient venue and time for the suit to proceed. Second, the Republic had participated in other proceedings involving Marcos’ assets in U.S. courts without interposing any objection. Accordingly, applying Rule 19 more flexibly, the dissent would have remanded for further proceedings, rather than require dismissal. On remand, the court could decide whether to dismiss the case, stay the proceedings, or require the absentees to choose between asserting sovereign immunity and defending on the merits. The dissent noted that there was a risk of unfairness in conducting proceedings without the participation of the absentees, but that they could avoid this risk by waiving their sovereign immunity. As a practical matter, it appeared from the record that they might well do so on remand if the case proceeded before a different judge.^{45.6}

[3] Second Factor Addresses Court’s Ability to Shape Relief to Avoid Harm

The second factor of the indispensability analysis is the “extent to which any prejudice could be lessened or avoided” by “protective provisions in the judgment,” “shaping the relief,” or by “other measures.”⁴⁶ This invitation to mold the decree calls for creativity. For example, when specific performance or rescission of a contract will harm an absentee, the court may lessen the prejudicial

^{45.5} **Stevens’ dissent.** See *Republic of Philippines v. Pimentel*, 553 U.S. 851, 875, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008) (concurring and dissenting opinion by Justice Stevens, joined by Justice Souter).

^{45.6} **Dissent would give less weight to sovereign immunity claim.** *Republic of Philippines v. Pimentel*, 553 U.S. 851, 875–879, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008) (concurring and dissenting opinion by Justice Stevens).

⁴⁶ **Prejudice lessened or avoided.** See Fed. R. Civ. P. 19(b)(2); see also *Provident Tradesmens Nat’l Bank v. Patterson*, 390 U.S. 102, 115, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) (in action involving prejudice to absentee through possible exhaustion of absentee’s insurance coverage to pay judgments in the pending litigation against insurer, Court noted that lower court could have “avoided all difficulties by proper phrasing of the decree. ... Payment could have been withheld pending the suits against [the absentee] and relitigation (if necessary) by him.”).

1st Circuit *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 547–548 (1st Cir. 2006) (when party would be indispensable only insofar as other parties sought specific enforcement of contract, district court could avoid finding of indispensability by limiting relief to other remedies).

2d Circuit *Jota v. Texaco, Inc.*, 157 F.3d 153, 161 (2d Cir. 1998) (among court’s options is to order pleading amended when by restructuring relief requested plaintiff is able to change status of indispensable party or prevent ill effects of nonjoinder).

7th Circuit See *Burger King v. American Nat’l Bank & Trust Co.*, 119 F.R.D. 672, 680 (N.D. Ill. 1988) (“The second factor requires the court to consider whether it could shape its ultimate ruling so as to mitigate its effect on the absent party.”).

9th Circuit See *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1046 (9th Cir. 1983) (“[I]f [plaintiff] eventually succeeds on any or all of its claims ... adequate relief could be shaped that would neither impair a significant Government [absentee] interest nor subject [defendant] to any greater inconsistent obligation than it freely assumed.”).

effect by awarding monetary relief to the successful plaintiff.⁴⁷ If the case involves distribution of a fund, the court may order that some amount sufficient to satisfy a subsequent claim by the absentee be left undistributed in the present action (or that security be posted for that amount).⁴⁸ Such action may protect both the absentee and the defendant from potential prejudice.

If litigation involves various interests, the court may be able to limit its judgment in such a way as not to affect the interests of the absentee, and must at least explore this option before dismissing the case.⁴⁹

In assessing whether relief can be shaped to mitigate prejudice, the court may consider protective measures that the absentee or the party might take to lessen or avoid prejudice. The absentee will often qualify to intervene as of right and thereby protect its interest from adverse impact (*see* [2][c], *above*).⁵⁰ Similarly, a defendant may be able to protect itself by using impleader⁵¹ or interpleader to join absentees (*see* [2][c], *above*; *see also* *Ch. 22, Interpleader*).

[4] Third Factor Addresses Adequacy of Judgment if Case Is Not Dismissed

The third factor in the indispensability analysis is “whether a judgment rendered in the person’s absence would be adequate.”⁵² Under this third factor, the court must examine the outcome if it decides to proceed rather than dismiss. In contrast, the fourth factor requires the court to consider the effect of dismissing (*see* [5], *below*). Both considerations thus reflect not only interest in protecting parties and absentees, but also “the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.”⁵³ The “adequate remedy” consideration echoes the “complete relief” clause of the Rule’s necessary party analysis (*see* § 19.03[2]).⁵⁴

⁴⁷ **Monetary relief.** *See, e.g., Campbell v. Triangle Corp.*, 56 F.R.D. 480, 482 (E.D. Pa. 1972) (“[A]ny ... prejudice to [the absentee’s] interests can be avoided by limiting relief to money damages should plaintiff prevail.”).

⁴⁸ **Retain funds.** *See Provident Trademans Bank & Trust Co. v. Patterson*, 390 U.S. 102, 115, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) (suggesting this possibility).

2d Circuit *County of Wyoming v. Erie Lacawanna Ry.*, 360 F. Supp. 1212, 1215 (W.D.N.Y. 1973) (court has inherent power to drop nondiverse parties and permit action to proceed without them).

⁴⁹ **Limited judgment.** *See Provident Trademans Bank & Trust Co. v. Patterson*, 390 U.S. 102, 115, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) (court has duty to consider molding decree before dismissing).

⁵⁰ *See Fed. R. Civ. P. 24(a)(2)*.

⁵¹ *Fed. R. Civ. P. 14*.

⁵² *See Fed. R. Civ. P. 19(b)(3)*.

⁵³ **Efficient resolution of controversies.** *Provident Trademans Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) (“[T]here remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule’s third criterion, whether the judgment issued in the absence of the nonjoined person will be ‘adequate,’ to refer to this public stake in settling disputes by wholes, whenever possible.”).

2d Circuit *See also Circle Indus. v. City Fed. Sav. Bank*, 749 F. Supp. 447, 457 (E.D.N.Y. 1990) (“the fourth Rule 19(b) factor of the Court’s and the public’s interest in efficient settlement of controversies supports a finding that [absentee] an indispensable party. Even without [the absentee] as a party to this action, the plaintiff’s discovery efforts and evidentiary proof will be directed at [the absentee]. A complete, consistent and efficient adjudication of plaintiff’s claims against the remaining defendants could only be achieved in an action where [absentee] is also a party.”).

8th Circuit *See also Deere & Co. v. Diamond Wood Farms, Inc.*, 152 F.R.D. 158, 161 (E.D. Ark. 1993) (“The third factor ... pertains to the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.”).

10th Circuit *Davis v. United States*, 343 F.3d 1282, 1293 (10th Cir. 2003) (concern underlying this factor is not adequacy of judgment from plaintiff’s viewpoint, but adequacy of “dispute resolution”—concern is public interest in complete, consistent, and efficient

Proceeding in litigation without the absentee—who, at this point, has been found necessary but cannot be joined—requires the court to enter a judgment that does not fully resolve a dispute between the extant parties. If the judgment is going to be essentially hollow, the court may well opt to dismiss rather than proceed. For example, if plaintiff seeks relief that will require an affirmative act by an absentee who cannot be joined it may make little sense to proceed.⁵⁵ Cases of this kind, which are rare, seem to involve the plaintiff's suing the wrong defendant, and might be dismissed for failure to state a claim on which relief could be granted.⁵⁶

The “adequacy of judgment” consideration may operate in conjunction with the other considerations enumerated in the Rule.⁵⁷ If the court finds that proceeding without the absentee would cause a serious risk of prejudice, the court may examine the possibility of shaping relief to lessen the harmful effect, and then consider the propriety of awarding relief that is less than complete.⁵⁸ More often, however, courts have stressed the relationship between the adequacy of judgment and adequacy of remedy considerations.⁵⁹ Thus, even if the court could accord some relief, dismissal may be the superior disposition if there is an alternative forum in which all interested persons (including the absentee) can be joined in a single case. It is appropriate to weigh the advantages of complete relief available in another forum against the concerns of duplicating effort in view of the time and resources already expended in the pending case.

[5] Fourth Factor Addresses Adequacy of Remedy if Case Is Dismissed

[a] Joinder May Be Possible in Alternative Forum

The fourth factor in the indispensability analysis is “whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.”⁶⁰ Under this provision, the court is directed to examine the ramifications of dismissing the pending case. This “adequacy of remedy” consideration complements the third factor—the adequacy of judgment which requires the court to consider the ramifications of proceeding in the pending litigation—and reflects the societal and judicial interest in resolving disputes completely, efficiently, and consistently (*see* [4], *above*).⁶¹

resolution of disputes).

⁵⁴ **Rule 19(b)(4) and Rule 19(a)(1)(A) overlap.** Compare Fed. R. Civ. P. 19(a)(1)(A) with Fed. R. Civ. P. 19(b)(3), (4); *see also* Burger King v. American Nat'l Bank & Trust Co., 19 F.R.D. 672, 679 (N.D. Ill. 1988) (Fed. R. Civ. P. 19(b)(3) implicates interests similar to those of Fed. R. Civ. P. 19(a)(1)(A)).

⁵⁵ **Act by absentee required.** *See, e.g., Kalinsky v. Long Island Lighting Co.*, 484 F. Supp. 176, 180 (E.D.N.Y. 1980) (in action by electricity user against power company for declaration that it was exempt from rate structure, case was dismissed for nonjoinder of Public Service Commission which set pricing rate).

⁵⁶ *See Fed. R. Civ. P. 12(b)(6).*

⁵⁷ *See Fed. R. Civ. P. 19(b)(1)–(4).*

⁵⁸ *See Fed. R. Civ. P. 19(b)(1), (2), (3).*

⁵⁹ *See Fed. R. Civ. P. 19(b)(3), (4).*

⁶⁰ Fed. R. Civ. P. 19(b)(4); *see also* Davis v. United States, 343 F.3d 1282, 1289–1294 (10th Cir. 2003) (fourth factor is perhaps most important factor).

⁶¹ *See Fed. R. Civ. P. 19(b)(3), (4).*

The decision to dismiss the pending case has its most direct impact on the plaintiff, who will have to take other steps to vindicate its rights. Under the “adequacy of remedy” consideration, the court must assess what those steps might be and how effective they may prove.⁶² The primary consideration in this instance is whether there is a satisfactory alternative forum in which the plaintiff can proceed.⁶³ An alternative forum will only be superior to the present federal forum if all interested persons—including the absentee—can be joined in a single case there. Otherwise, the alternative forum will be facing the same sort of problem the court faces in the pending case.^{63.1}

The urge to dismiss in favor of another court (usually a state court) in which comprehensive joinder is possible is a strong one not only for efficiency reasons, but because joinder will obviate the potential prejudice motivating most compulsory party joinder problems. It is thus understandable that the case law as a whole imparts a sense that the “adequacy of remedy” consideration may be the most influential of the four factors.⁶⁴ While no single factor is always determinative, the court’s focus on the fourth factor may result in getting the overall dispute before the one court that can resolve it.

In interpleader cases (*see generally Ch. 22, Interpleader*), it appears that it is the stakeholder who files the case, and not any actual claimant, who is considered to be the “plaintiff” for purposes of the Rule 19(b) analysis. The court must consider whether the stakeholder will have an adequate remedy if it is not allowed to proceed with the interpleader—that is, whether the stakeholder should be forced to risk inconsistent judgments as to how to disburse the property. While the interests of the claimants may be relevant to the Rule 19(b) equitable balance, these interests should be

⁶² See Fed. R. Civ. P. 19(b)(4).

⁶³ **Adequate forum.** See Fed. R. Civ. P. 19, advisory committee note of 1966 (“The fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible.”).

1st Circuit See Delgado v. Plaza Los Americas, Inc., 173 F.R.D. 30, 35–36 (D.P.R. 1997) (rape victim indispensable in case brought by victim’s father against shopping center where rape allegedly occurred, and dismissal was especially appropriate because plaintiff had adequate remedy in parallel state court action filed by other family members).

2d Circuit See also Circle Indus. v. City Fed. Sav. Bank, 749 F. Supp. 447, 457 (E.D.N.Y. 1990) (when plaintiff would not suffer prejudice by statute of limitations, unavailable witnesses or otherwise by exhausting its administrative remedies before proceeding in federal court, failure to join absentee mandated dismissal under Fed. R. Civ. P. 19(b)).

3d Circuit See, e.g., Angst v. Royal Maccabees Life Ins. Co., 77 F.3d 701, 706 (3d Cir. 1996) (applying fourth factor of Fed. R. Civ. P. 19(b), whether plaintiff will have adequate remedy if action is dismissed, court found that plaintiff would have adequate remedy in existing state court action which involved all parties plaintiff desired to join in federal action); Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel, 895 F.2d 116, 122–123 (3d Cir. 1990) (because federal courts have exclusive jurisdiction over admiralty action seeking title to vessel and salvage award, fact that plaintiff did not have alternative forum weighed in favor of retaining case).

5th Circuit Cf. Scoggins v. Fredrick, 629 F.2d 426, 427 (5th Cir. 1980) (Fed. R. Civ. P. 19(b) instructs court to consider whether “there is an adequate forum to determine the interests of the parties if the suit is dismissed from federal court.”).

7th Circuit See also Novacolor, Inc. v. American Film Techs., Inc., 1992 U.S. Dist. LEXIS 10315, at *12 (N.D. Ill. July 16, 1992) (quoting Moore’s, “The major consideration, however, in determining the adequacy of plaintiff’s remedy if the action is dismissed—the fourth factor of [Fed. R. Civ. P. 19(b)(4)—is ‘whether a satisfactory alternative forum exists.’”).

^{63.1} **Alternative forum is superior only if all interested persons can be joined there.** See, e.g., Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 134 (2d Cir. 2013) (“because Lisa and Neal are not amenable to personal jurisdiction in New York, and because Barbara and Susan—New York residents—are, as far as the record reveals, not amenable to personal jurisdiction in California, the Kirbys might well be able to thwart a declaratory judgment suit brought by Marvel in a forum in either state. ... In light of the nearly non-existent showing of prejudice to any of the parties involved here, we see no reason to permit the Kirbys to withhold consent to any suit in which the forum or litigation posture are not to their liking.”).

⁶⁴ See Fed. R. Civ. P. 19(b)(4).

considered under other factors—generally the first factor, which considers prejudice to the absent person and to existing parties (*see* [2], *above*).^{64.1}

[b] State (or Occasionally Foreign) Court May Provide Adequate Alternative Forum

If the absentee cannot be joined due to lack of personal jurisdiction, it is usually not appropriate to relegate the plaintiff to state court in the forum where the federal court sits because that court has no more power to exercise personal jurisdiction than the federal court had (*see* § 19.04[2]).⁶⁵ On the other hand, if all parties and the absentee could be subject to personal jurisdiction in another state, it may be possible to transfer the case to a federal district court in that state, rather than dismiss). If an absentee is joined under the compulsory party joinder rule but raises a valid objection to venue, it may also be possible to transfer the action to a federal district that meets venue restrictions (*see* § 19.04[3]). In most cases discussing the “adequacy of remedy” factor, joinder of the absentee is infeasible because it would deprive the court of subject matter jurisdiction (*see* § 19.04[1]).⁶⁶ In such a case, no federal court will be a better alternative because no federal court will have subject matter jurisdiction over the claims involving all parties and the absentee. If there is an alternative forum in which comprehensive joinder can be effected, it will usually be a state court. In such circumstances, many federal courts are willing to dismiss for nonjoinder of a necessary absentee when all interested persons, including the absentee, can be joined in state court.⁶⁷

Dismissing a federal case to allow complete resolution in state court serves the interest of justice by avoiding duplicative litigation and serves the interests of the absentee and defendant by permitting

^{64.1} **Interpleader.** *Republic of Philippines v. Pimentel*, 553 U.S. 851, 128 S. Ct. 2180, 171 L. Ed. 2d 131, 148–149 (2008) (dismissal of action when absentee could not be joined because of sovereign immunity provided at least some protection to stakeholder, as future suits asserting interest in property would be dismissed on same grounds if same persons continued to assert sovereign immunity; moreover, Court noted that while dismissal for sovereign immunity will mean, in some cases, that plaintiffs will be left without forum for resolution of their claims, this result is contemplated under doctrine of sovereign immunity).

⁶⁵ *See generally Fed. R. Civ. P. 4(k)(1)(A)* (territorial limits for service of process in federal courts match those in state courts).

⁶⁶ *See generally Fed. R. Civ. P. 19(a)(1)* (“A person ... whose joinder will not deprive the court of subject-matter jurisdiction must be joined if ...”).

⁶⁷ **State court provides adequate forum.** *See, e.g., Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 706–707 (3d Cir. 1996) (because receiver, non-diverse intervenor of right, was necessary and indispensable under Fed. R. Civ. P. 19(a) and plaintiff had adequate remedy in existing state court action, which involved all parties plaintiff desired to include in federal action, Fed. R. Civ. P. 19(b) required dismissal).

1st Circuit *See also Acton Co. v. Bachman Foods, Inc.*, 668 F.2d 76, 81 (1st Cir. 1982) (all parties and absentee could be joined in pending state court case).

2d Circuit *See, e.g., Circle Indus. v. City Fed. Sav. Bank*, 749 F. Supp. 447, 456 (E.D.N.Y. 1990) (when plaintiff would have alternative forum to litigate its claims against all named defendants after exhausting its administrative remedies for claims against receiver who represented some defendants, under Fed. R. Civ. P. 19(b), absentee was indispensable, mandating dismissal).

3d Circuit *See, e.g., Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 706–707 (3d Cir. 1996) (because receiver, non-diverse intervenor of right, was necessary and indispensable under Fed. R. Civ. P. 19(a) and plaintiff had adequate remedy in existing state court action, which involved all parties plaintiff desired to include in federal action, Fed. R. Civ. P. 19(b) required dismissal).

7th Circuit *See, e.g., Burger King v. American Nat'l Bank & Trust Co.*, 119 F.R.D. 672, 680 (N.D. Ill. 1988) (“When the case involves a dispute over real property, and all the parties, [plaintiff lessee-by-assignment, absent subtenant and absent franchisee], could be joined in state court, this factor actually mitigates in favor of dismissal.”).

9th Circuit *See, e.g., Aguilar v. Los Angeles County*, 751 F.2d 1089, 1094 (9th Cir. 1985) (state court offered alternative forum); *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 820 n.5 (9th Cir. 1985) (citing *Moore's*, in action by chiropractor and patient against patient's employer's insurer alleging underpayment of health claims and improper bases for determining claims allowances, nondiverse employer was indispensable and adequate alternative forum was provided by state court).

joinder to avoid the harm which threatened them. Importantly, it also recognizes and honors the plaintiff's right to seek redress. The effect, in practical terms, is to force the plaintiff to share the litigation with others and to litigate in state court. While some plaintiffs may prefer that their cases go forward only in federal court, most courts have rejected arguments that state court will be less hospitable to the plaintiff's claims.⁶⁸ The focus on an adequate alternative forum can thus funnel the overall dispute to the only court that can handle it as a single unit. Moreover, because these are diversity of citizenship cases, state substantive law will govern, which means that the Rule also funnels the case to the court most expert in the applicable law.⁶⁹

In assessing the adequacy of the alternative forum, the courts look to whether the plaintiff is entitled to an adequate remedy, and not necessarily to precisely the same remedy that it sought in federal court.⁷⁰

There is no guaranty that the plaintiff can proceed in a court in the United States. The preferred alternative forum may be in a foreign country.⁷¹

[c] Alternative Forum May Not Be Adequate if Statute of Limitations Has Run

In determining the adequacy of the remedy if the case is dismissed for nonjoinder, an important consideration is whether the statute of limitations has run. If so, dismissing the pending case may leave the plaintiff without a remedy.⁷² The fact that the statute of limitations has run does not automatically mean that dismissal will prevent refileing of the case in another forum. The timely commencement of the federal court action may have satisfied the statute of limitations by virtue of a savings or tolling statute; so that analysis of any savings or tolling statute is an essential part of

⁶⁸ **State hostility.**

5th Circuit *See, e.g., Doty v. St. Mary Parish Land Co.*, 598 F.2d 885, 888 (5th Cir. 1979) (rejecting as unfounded plaintiff's attack on state court as biased).

9th Circuit *See, e.g., Walsh v. Centeio*, 692 F.2d 1239, 1244 n.5 (9th Cir. 1982) (rejecting argument that state court would not be hospitable to non-citizen).

⁶⁹ **State law.**

4th Circuit *See, e.g., Ranger Fuel Corp. v. Youghioghney & Ohio Coal Co.*, 677 F.2d 378, 381 (4th Cir. 1982) (state court no less effective than federal court in case to compel arbitration, since state law enforced agreements to arbitrate).

9th Circuit *See, e.g., Walsh v. Centeio*, 692 F.2d 1239, 1243 (9th Cir. 1982) (state court superior for resolving issues of local trust law).

⁷⁰ **Adequate remedy does not mean same relief.** *See Kickapoo Tribe v. Babbit*, 43 F.3d 1491, 1499 (D.D.C. 1995) ("The fourth factor requires consideration of whether the plaintiff will have an adequate remedy if the action is dismissed which is different from whether the plaintiff can obtain precisely the same relief elsewhere.").

⁷¹ **Non-United States forum.**

2d Circuit *Rapoport v. Banco Mexicano Somex S.A.*, 668 F.2d 667, 669 (2d Cir. 1982) (in action against Mexican bank seeking return of deposits, court dismissed for failure to join other claimants-depositors who were citizens of Mexico and were not subject to personal jurisdiction in United States, noting that plaintiff's interests were adequately protected in interpleader-type proceeding in Mexican court).
3d Circuit *See also Japan Petroleum Co. (Nigeria), Ltd. v. Ashland Oil*, 456 F. Supp. 831, 847 (D. Del. 1978) (dismissal in favor of litigation in Nigeria).

7th Circuit *Extra Equipamentos e Exportacao Ltda. v. Case Corp.*, 361 F.3d 359, 362 (7th Cir. 2004) (existence of alternative forum in Brazil supported district court's decision to dismiss under *Fed. R. Civ. P. 19*).

⁷² *See Fed. R. Civ. P. 19(b)(4)*.

any court's analysis of statute of limitations issues and the availability of another forum.⁷³ Moreover, the defendant may be willing to waive a statute of limitations defense to secure dismissal of the federal action. The district court can make its dismissal conditional on such a waiver, as is frequently done in dismissals under the forum non conveniens doctrine. Of course, if the preferred alternative forum is another federal district court, transfer to that court will obviate the statute of limitations problem.

[d] Existence of Alternative Forum Not Automatically Dispositive

The fact that there is an alternative forum in which comprehensive joinder can be effected does not automatically warrant dismissal of the pending case.⁷⁴ As with all inquiries under Rule 19, the court must consider all the facts of the particular case. Other factors under the indispensability analysis may impel the court to keep the case.⁷⁵ Moreover, problems with the alternative forum may make it inadequate. For example, commencing litigation in the alternative forum may result in unacceptable delay.⁷⁶ On the other hand, the mere existence of a backlog in state court is not a compelling reason to retain the case in federal court.⁷⁷ Courts also consider whether proceeding in the alternative forum will impose substantially greater costs on the plaintiff.⁷⁸

⁷³ **Savings statute.** *See, e.g., Jenkins v. Reneau*, 697 F.2d 160, 163 (6th Cir. 1983) (although dismissed for lack of jurisdiction in federal court, right of plaintiff to sue in state court was preserved by Tennessee savings statute).

⁷⁴ **Availability of alternative forum not dispositive.** *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 844 F.2d 1050, 1055 (3d Cir. 1988) (citing *Moore's*, "That fact [that alternative forum exists] alone cannot transform [absentee] into an indispensable party.").

3d Circuit *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 844 F.2d 1050, 1055 (3d Cir. 1988) (citing *Moore's*, "That fact [that alternative forum exists] alone cannot transform [absentee] into an indispensable party.").

6th Circuit *See, e.g., Professional Hockey Club Cent. Sports Club of the Army v. Detroit Red Wings, Inc.*, 787 F. Supp. 706, 715 (E.D. Mich. 1992) (although plaintiff had alternative forum by waiving personal jurisdiction in state court and joining that action, court did not dismiss case for failure to join indispensable party based on other Fed. R. Civ. P. 19(b) factors).

D.C. Circuit *See also Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986) (quoting *Moore's*, "While a court should be extra cautious in dismissing a case for nonjoinder where the plaintiff 'will not have an adequate remedy elsewhere,' ... it is also important to realize that '[t]his does not mean that an action should proceed solely because the plaintiff otherwise would not have an adequate remedy, as this would be a misconstruction of the rule and would contravene the established doctrine of indispensability.'").

Fed. Circuit *Dainippon Screen Mfg. Co. v. CFMT, Inc.*, 142 F.3d 1266, 1273 (Fed. Cir. 1998) (court must consider all relevant factors and existence of alternative forum does not automatically warrant dismissal of case, citing *Moore's*).

⁷⁵ *See Fed. R. Civ. P. 19(b)(1)-(3).*

⁷⁶ **Delay is consideration.** *See, e.g., Coalition on Sensible Transp. v. Dole*, 631 F. Supp. 1382, 1386 (D.C. Cir. 1986) (although action could have been transferred to another federal court, delay caused by such transfer made that forum unsatisfactory since plaintiffs sought preliminary injunction); *see also Ilan-Gat Eng'rs, Ltd. v. Antigua Int'l Bank*, 659 F.2d 234, 241-242 (D.C. Cir. 1981) (plaintiff may be prejudiced by delay and cost arising from dismissal); *Mikulay Co. v. Urban Mass Transp. Admin.*, 90 F.R.D. 250, 252 (D.D.C. 1980) (delay could prejudice efforts to obtain preliminary relief).

⁷⁷ **Problem with alternative forum not dispositive.** *See, e.g., Lopez v. Martin Luther King, Jr. Hosp.*, 97 F.R.D. 24 (C.D. Cal. 1983) (citing *Moore's*, case dismissed despite reputed five-year backlog in state court).

⁷⁸ **Increased litigation costs.** *See, e.g., Coalition on Sensible Transp. v. Dole*, 631 F. Supp. 1382, 1386 (D.C. Cir. 1986) (court considered plaintiff's costs resulting from transfer to another district court in evaluating adequacy of remedy).

The absence of an alternative forum also is not necessarily dispositive. A court, after balancing the four factors, may determine that dismissal is required even though this leaves the parties without an adequate remedy.^{78.1}

[6] If Court Decides Not to Dismiss, Case Proceeds Among Existing Parties

If the court concludes in equity and good conscience that it should not dismiss the pending case, the litigation continues, obviously without joinder of the absentee. The judgment in the pending case generally will not bind the absentee (*see* § 19.03[d]). Even if the absentee eschewed a right to intervene,⁷⁹ it is not bound by the judgment.⁸⁰

[7] If Court Decides to Dismiss, Absentee Is Then Deemed “Indispensable”

If in equity and good conscience, the court decides to dismiss the pending case rather than proceed without the absentee, most courts and counsel have traditionally labelled the decision to dismiss by deeming the absentee indispensable.⁸¹ Thus, indispensable is a label attached to the absentee only *after* the court has determined that it will dismiss the action because it cannot effect joinder of the absentee (*see* § 19.02[2]).

Until its restyling in 2007, Rule 19(b) was clear on the point. It stated that, if the court determined to dismiss, the absentee was “thus regarded as indispensable.”⁸² Despite the clarity of the pre-2007 rule and of the intentions of the drafters on this point (*see* § 19.02), confusion over the terminology of compulsory party joinder has proved unavoidable. It is an oxymoron to speak, as many do, of “joining an indispensable party.” By definition, an indispensable party cannot be joined. Indispensability is a conclusory label that is applied *retroactively*. The label was appropriate, if ever, only after the court decided (1) the absentee was a necessary or “required” party; (2) the absentee’s joinder was not feasible; and (3) the case should be dismissed. Thus, “the labelling of a party as ‘indispensable’ is the

^{78.1} **Lack of alternative forum not dispositive.**

9th Circuit *Wilbur v. Locke*, 423 F.3d 1101, 1115 (9th Cir. 2005) (action was dismissed when Indian tribe was indispensable party, as Ninth Circuit has regularly held that tribal interest in sovereign immunity overcomes lack of alternative remedy or forum for plaintiffs); *In re Republic of Philippines*, 309 F.3d 1143, 1152–1153 (9th Cir. 2002) (foreign government defendants in interpleader action were indispensable parties even though it appeared that no other forum would be available to settle dispute).

10th Circuit *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1283–1284 (10th Cir. 2012) (“The parties do not dispute that dismissal of this action leaves the Northern Arapaho with no remedy at all, let alone an adequate one. But this fact, while unsatisfying, does not preclude dismissal” particularly when absent party, another Indian tribe, could not be joined because of sovereign immunity); *Davis v. United States*, 343 F.3d 1282, 1289–1294 (10th Cir. 2003) (in light of strong policy favoring dismissal when court cannot join Indian tribe because of sovereign immunity, absence of alternative forum did not weigh so heavily against dismissal that district court abused its discretion in deciding to dismiss).

⁷⁹ *Fed. R. Civ. P. 24(a)(2)*.

⁸⁰ **Absentee not bound.** *Martin v. Wilks*, 490 U.S. 755, 761, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989) (rejecting assertion that failure to intervene bound absentee to judgment; one is not bound by judgment unless joined as party or in privity with party).

⁸¹ *See Fed. R. Civ. P. 19*, advisory committee note of 2007 (using traditional terminology, when court decides to dismiss because of absence of necessary party, absent party is thus deemed “indispensable.”).

⁸² *See* § 19App.03[1] (text of Rule as it existed prior to December 2007 restyling); *see also Fed. R. Civ. P. 19*, advisory committee note of 1966 (reproduced at § 19App.02[2], explaining proper use of term “indispensable” by noting that rule used “the word ‘indispensable’ only in a conclusory sense, that is, a person is ‘regarded as indispensable’ when he cannot be made a party and, upon consideration of the factors mentioned above, it determined that in his absence it would be preferable to dismiss the action rather than retain it.”).

consequence, not the measure, of the evaluation” as to whether the action should proceed.⁸³ The concept of indispensability addresses the court’s ability to make an equitable adjudication in the absence of a particular person.⁸⁴

As part of the 2007 restyling of Rule 19, all mention of the term “indispensable” was eliminated from the text of the Rule.^{84.1} Instead, the Rule simply requires courts to determine whether an absentee is a necessary or “required” party, and if so, and if joinder of the necessary or required party is not feasible, to determine whether to proceed with the parties already before the court or to dismiss the action. If the court make the decision to dismiss, the Rule text ignores whether the absentee should thus be deemed “indispensable.”^{84.2} Of course, the one-word label, “indispensable” was and remains not only the traditional term for a decision to dismiss an action under the compulsory joinder rule, it is a handy, well-known, and compact term for summarizing the decision. Courts and counsel continue to use this term even after its elimination from Rule 19.^{84.3} Whether the elimination of the term from the text of the Rule will encourage diminished or only *correct* usage of the term ‘indispensable’ remains to be seen.

The courts of appeals generally apply an abuse of discretion standard to the determination as to whether a case should be dismissed under Rule 19(b), the same standard that is usually applied to determinations under Rule 19(a).⁸⁵ The Sixth Circuit, however, applies a de novo standard to review of the Rule 19(b) determinations, reserving the abuse of discretion standard for Rule 19(a)

⁸³ **Term “indispensable.”** *Inventive Music, Ltd. v. Cohen*, 564 F. Supp. 914, 921 (D.N.J. 1982) (discussing compulsory joinder rule); see *Provident Trademans Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) (“To say that a court ‘must’ dismiss in the absence of an indispensable party and that it ‘cannot proceed’ without him puts the matter the wrong way around; a court does not know whether a particular person is ‘indispensable’ until it has examined the situation to determine whether it can proceed without him.”).

⁸⁴ **Indispensability.** See, e.g., *Ente Nazionale Idrocarburi v. Prudential Sec. Group, Inc.*, 744 F. Supp. 450, 456 (S.D.N.Y. 1990) (citing Moore’s, “The major question is whether the court can render a decision which will not impair the rights of the absent party.”).

^{84.1} See *Fed. R. Civ. P. 19(b)*; *Fed. R. Civ. P. 19*, advisory committee note of 2007.

^{84.2} *Fed. R. Civ. P. 19*, advisory committee note of 2007 (“Former Rule 19(b) described the conclusion that an action should be dismissed for inability to join a Rule 19(a) party by carrying forward traditional terminology: ‘the absent person being thus regarded as indispensable.’ ‘Indispensable’ was used only to express a conclusion reached by applying the tests of Rule 19(b). It has been discarded as redundant.”).

^{84.3} **Continued use of term “indispensable.”** *Federal Ins. Co. v. SafeNet, Inc.*, 758 F. Supp. 2d 251, 257 n.7 (S.D.N.Y. 2010) (“Rule 19 was amended in 2007. ... Among other things, the amendment eliminated the word ‘indispensable’ from the text of Rule 19. ... However, courts nevertheless use this term for the sake of convenience.”); see, e.g., *CP Solutions PTE, Ltd. v. GE*, 553 F.3d 156, 159 n.2 (2d Cir. 2009) (“Effective December 1, 2007, Rule 19(b) no longer uses the term ‘indispensable.’ ... We use the term here for the sake of convenience.”); cf. *Alto v. Black*, 738 F.3d 1111, 1118 n.6 (9th Cir. 2013) (“Following stylistic amendments enacted in 2007, Federal Rule of Civil Procedure 19 no longer refers to ‘indispensable’ parties, but instead uses the term ‘required party.’ We do so as well.”).

⁸⁵ **Abuse of discretion standard.**

1st Circuit *Picciotto v. Continental Cas. Co.*, 512 F.3d 9, 14–15 (1st Cir. 2008) (abuse of discretion standard applies in both *Fed. R. Civ. P. 19(a)* and *Fed. R. Civ. P. 19(b)* contexts; these are pragmatic judgments that turn on specific facts and, therefore, warrant deference to district court).

2d Circuit *MasterCard Int’l, Inc. v. Visa Int’l Serv. Ass’n, Inc.*, 471 F.3d 377, 385 (2d Cir. 2006) (*Fed. R. Civ. P. 19* decisions are reviewed for abuse of discretion; district court abuses its discretion when its decision either (1) rests on error of law or clearly erroneous factual finding, or (2) when its decision cannot be located within range of permissible decisions).

4th Circuit *National Union Fire Ins. Co. v. Rite Aid, Inc.*, 210 F.3d 246, 250 n.7 (4th Cir. 2000) (abuse of discretion standard applies to both *Fed. R. Civ. P. 19(a)* and *Fed. R. Civ. P. 19(b)* determinations).

determinations.⁸⁶ There is authority for the opposite proposition, that even though Rule 19(b) determinations are reviewed for abuse of discretion, Rule 19(a) determinations are reviewed de novo.⁸⁷ However, given that Rule 19(b) calls for district courts to make fact-specific weighings of competing interests in ruling on Rule 19(b) motions to dismiss (*see* § 19.06[1]), the reasoning of the courts applying the abuse of discretion standard to such rulings is more persuasive.

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7th Circuit *Cf. Thomas v. United States*, 189 F.3d 662, 666 (7th Cir. 1999) (while “respectable arguments can be made in favor of each standard,” it was unnecessary to decide question since result would be same under either standard).

9th Circuit *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1021 (9th Cir. 2002) (Fed. R. Civ. P. 19(a) and Fed. R. Civ. P. 19(b) determinations are reviewed for abuse of discretion, although underlying questions of law are decided de novo).

10th Circuit *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1277 (10th Cir. 2012) (court’s determinations under both Fed. R. Civ. P. 19(a) and 19(b) are reviewed for abuse of discretion); *Davis v. United States*, 192 F.3d 951, 956 n.3 (10th Cir. 1999) (abuse of discretion standard of review applies to both Fed. R. Civ. P. 19(a) “necessary party” analysis and Fed. R. Civ. P. 19(b) “indispensable party” analysis).

⁸⁶ **Sixth Circuit applies de novo standard.** *Glancy v. Taubman Ctrs., Inc.*, 373 F.3d 656, 665–666 (6th Cir. 2004) (“We review de novo the district court’s decision that a party is indispensable under Federal Rule of Civil Procedure 19(b) as well as the decision that the court lacks subject matter jurisdiction.”); *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1346 (6th Cir. Mich. 1993) (“[W]e review a Rule 19(a) finding that a party is necessary to an action under an abuse of discretion standard, while we review a Rule 19(b) determination that a party is indispensable to an action de novo.”); *accord Laethem Equip. Co. v. Deere & Co.*, 2012 U.S. App. LEXIS 12135, at **9 (unpublished) (6th Cir. June 13, 2012) (court reviews Fed. R. Civ. P. 19(b) determinations using de novo standard; whether a party is necessary under Fed. R. Civ. P. 19(a) is reviewed for abuse of discretion).

⁸⁷ **Rule 19(a) rulings reviewed de novo, even though Rule 19(b) rulings reviewed for abuse of discretion.**

3d Circuit *Koppers Co. v. Aetna Cas. & Sur. Co.*, 158 F.3d 170, 174 (3d Cir. 1998) (Fed. R. Civ. P. 19(a) determinations reviewed de novo and Fed. R. Civ. P. 19(b) determinations reviews for abuse of discretion).

D.C. Circuit *Western Md. Ry. Co. v. Harbor Ins. Co.*, 910 F.2d 960, 963 (D.C. Cir. 1990) (“We review determination under rule 19(a)(2)(ii) de novo.”).

EXHIBIT 21

14D Fed. Prac. & Proc. Juris. § 3828.3 (4th ed.)

Federal Practice & Procedure
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Jurisdiction and Related Matters
Chapter 8. Venue in the District Courts

Arthur R. Miller^{a409}
A. Venue—In General

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§ 3828.3 Forum Non Conveniens—Alternative Forum

A motion to dismiss for forum non conveniens will not be granted unless there is an alternative forum in which the action can be brought. As discussed in the preceding section, the defendant bears the burden of persuasion on all issues related to forum non conveniens. Thus, among other things, the defendant must show that the proposed alternative forum is both (1) available and (2) adequate.¹ Although some courts conflate these two issues, availability and adequacy of the proposed alternative forum are better considered as independent issues that warrant separate consideration.²

The doctrine of forum non conveniens “presupposes at least two forums in which the defendant is amenable to process.”³ Thus, an alternative forum generally is deemed available if the case and all of the parties come within that alternative court’s jurisdiction. Courts often allow a defendant to satisfy the availability requirement by stipulating that it will submit to personal jurisdiction in the alternative forum as a condition for the dismissal on forum non conveniens grounds. Similarly, the dismissal may be conditioned on the acceptance of the case by the alternative forum. Indeed, a federal court may impose these and other conditions before agreeing to dismiss in favor of the alternative forum.⁴

Even if the alternative forum is available, it cannot be considered adequate—and thus the forum non conveniens motion will be denied—if the remedy offered by the other forum is clearly unsatisfactory.⁵ Undeniably, the defendant faces a rather low bar for establishing that the alternative forum is adequate. Courts have concluded, for example, that an alternative forum is adequate so long as the plaintiff will not be deprived of all remedies or subjected to unfair treatment there.⁶ A mere decrease in the amount potentially recoverable,⁷ or the lack of contingent fee arrangements⁸ or of a right to a jury trial,⁹ or the loss of various other procedural advantages—such as the alternative forum’s restrictions on the scope or nature of discovery and the lack of a class action or other aggregation procedures—normally will not prevent dismissal.¹⁰ Likewise, general accusations of corruption, delay, or other problems with the alternative forum’s judicial system normally will not suffice, because federal courts appear reluctant to look closely at the quality of justice or competence of judicial personnel in the alternative forum.¹¹

According to many of the cases, a proposed alternative forum will be deemed inadequate only if a plaintiff truly will be deprived of any opportunity to remedy the grievance asserted¹² or if specific facts support an inference that unfair treatment is likely in the other court.¹³ As a result, it is not unusual for an alternative forum to be considered adequate even though the federal judge knows that the proposed tribunal will process the case quite differently, apply significantly different substantive rules, and provide limited remedies.

An example of the ease with which a defendant can establish the adequacy of the alternative forum is *Banco Latino v. Gomez Lopez*,¹⁴ a Florida district court case. The plaintiffs challenged the adequacy of the courts of Venezuela, the proposed alternative forum. The judge began by noting that the burden on the defendant to show that the alternative is adequate “is not a heavy one.”¹⁵ Citing *Piper Aircraft Company v. Reyno*,¹⁶ he explained that the fact that plaintiff has a lesser chance of recovery in the alternative is not dispositive. Moreover, because the alternative need not provide procedural safeguards comparable to those in federal courts, the relatively narrow scope of discovery in Venezuela did not render that forum inadequate. The court similarly rejected the plaintiffs’ assertion that Venezuela was inadequate because

of corruption—in part because it was uncomfortable assessing the integrity of a foreign nation’s judicial system. Finally, the court categorically rejected the plaintiffs’ objection to adequacy based on the substantial delays in the Venezuelan courts. It said: “Delay is an unfortunate but pervasive aspect of the legal process.”¹⁷ Thus, the defendant was able to prevail on the adequacy question with little evidence beyond mere assertions that Venezuela was an acceptable alternative forum.¹⁸ The cursory approach courts often take to the adequacy inquiry perhaps should not be surprising. The heavy docket pressure faced by many United States district courts occasionally encourages judges to use any reasonable means to eliminate cases from their calendars. More importantly, perhaps, respect for the sovereignty of foreign nations and legitimate foreign policy concerns counsel against having American courts sit in judgment of their foreign counterparts. As the Second Circuit said in *Chesley v. Union Carbide Corporation*:¹⁹ “It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an approach would directly conflict with the principle of comity”

Despite these legitimate considerations, the failure of federal courts to inquire more searchingly into the adequacy of an alternative forum before granting a dismissal on forum non conveniens grounds is bothersome for two reasons. First, by simply focusing on whether the plaintiff is deprived of all legal remedy in the alternative forum, courts fail to distinguish between theoretical and practical access to courts and remedy.²⁰ A wide range of procedural rules and legal arrangements—including attorney’s fee possibilities, class action procedures, discovery regimes, restrictive legal doctrines, and amounts recoverable—may affect the practicality of actually pursuing a remedy that is theoretically available in the proposed alternative forum.

For example, in *Gonzalez v. Chrysler Corporation*,²¹ the Fifth Circuit noted that the parties agreed at oral argument that the case would never be brought in Mexico because a severe damages cap made it economically unviable in the courts of that country. Nevertheless, the court held that the adequacy inquiry in a forum non conveniens dispute could not include an evaluation of how much economic sense it would make to file the lawsuit in an alternative forum. An “economic viability” test would hinge on arbitrary differences in various plaintiffs’ cases and would result in an exercise of random line-drawing with respect to the point at which a damage cap renders another forum inadequate. Thus, the court found the alternative forum adequate because the plaintiff had a theoretical remedy in Mexico, even though it knew that meaningful relief was not a practical possibility. The decision is typical, but it seems unfortunate that the question of forum non conveniens—a doctrine ultimately about convenience—should be based on theoretical rather than realistic possibilities of a suit elsewhere.

Second, by categorically rejecting generalized accusations of corruption, delay, and other inadequacies in foreign judicial systems, or imposing too high a level of proof on these points, federal courts ignore the realities of the nature of the justice systems of many nations.²² The modest burden that is placed on the moving defendant to show the alternative forum’s adequacy places a heightened burden on plaintiffs, particularly those from developing countries, who cannot point to specific unfairness in their particular case but in fact will have little opportunity to vindicate their claim in their home country because of corruption, disarray, strife, or other problems.

In *Carijano v. Occidental Petroleum Corporation*,²³ the plaintiffs, who included an indigenous Peruvian group, alleged that an American oil company’s operations in Peru caused environmental contamination and personal injuries. The plaintiffs presented affidavit evidence that they feared barriers to justice because of their ethnicity, poverty, and isolation. In one affidavit, a Peruvian lawyer and professor, averred that Peru’s judiciary systematically abstained from intervening in cases of discrimination. Moreover, they argued, the plaintiffs were deterred from vindicating rights because of procedural barriers such as filing fees and documentation requirements. The court concluded that the district court had not erred when it found the expert affidavits too generalized and anecdotal to show that the legal system was so fraught with corruption, delay or bias as to provide no remedy at all.²⁴

There are cases, however, in which the evidence of corruption, bias, or other problem is strong enough to defeat application of forum non conveniens. For instance, in *Daventree Ltd. v. Republic of Azerbaijan*,²⁵ the corporate plaintiffs brought suit against, among others, the government of Azerbaijan for damages resulting from the alleged fraud and corruption involved in a program to privatize a government-owned oil company. In support of their motion to dismiss for forum non conveniens, the sovereign defendants offered an affidavit from an Azeri legal expert attesting to the adequacy of the alternative forum and the independence of the Azeri judiciary. That same expert, however, had co-authored an article describing the proposed Azeri forum as infected with national bias, rampant corruption, and judicial inexperience. Furthermore, the plaintiffs presented evidence that the sovereign defendants could dictate the outcome of the dispute through their extensive control over the Azeri judiciary. Given the weight of the evidence and the fact that the plaintiffs had presented more than general allegations of corruption, the district court held that the defendants had not met their burden of establishing Azerbaijan as an adequate alternative forum.²⁶

The federal courts’ generally limited approach to the adequacy inquiry means that many defendants can employ forum non conveniens to engage in “reverse forum shopping.” That is, they can eliminate the plaintiff’s lawsuit because it is unlikely

that the case will be recommenced in the foreign court. There is little doubt, for example, that the defendant in *Gonzalez v. Chrysler Corporation*, the Fifth Circuit case discussed above, favored the Mexican forum not because it would be more convenient but because dismissal in an American court would essentially terminate the plaintiff's lawsuit. There are few data on this point, but one generation-old survey of 85 cases dismissed in favor of a foreign court showed that every case was either abandoned or settled for a nominal amount.²⁷

On the other hand, it is reasonable to question whether an American court is in position to make a meaningful assessment of the competence or character of a foreign tribunal. By what criteria should that be judged and how can a district court assure itself of accurate and meaningful information? In individual cases, effective lawyering and a variety of public domain sources can fill the gap. Moreover, as noted, American courts must be mindful of potential implications for international relations. Sometimes, guidance from the State Department might provide some assistance on these sensitive matters.²⁸

Finally, some countries seem to desire to render their courts inadequate by enacting legislation declining jurisdiction over cases dismissed in the United States on forum non conveniens grounds.²⁹ The federal courts appear to deal with these "blocking statutes" inconsistently. The cases reflect three approaches.

First, some courts find that the presence of a blocking statute in a foreign forum effectively makes the forum unavailable, and therefore dismissal for forum non conveniens is improper. For example, in *Canales Martinez v. Dow Chemical Company*,³⁰ the court found that Costa Rica, Honduras, and the Philippines were inadequate fora because statutes prevented their respective courts from exercising jurisdiction over the defendants.³¹

Second, some courts have found that the foreign forum is adequate despite the existence of a blocking statute, so long as the defendants submit themselves to jurisdiction as a condition of dismissal.³² If the alternative forum refuses to exercise jurisdiction over the defendants, then the plaintiffs may return to the district court.

Finally, some courts will dismiss a case when it appears that a foreign forum is unavailable due to the plaintiff's litigation strategy. For instance, in *In re West Caribbean Airways*,³³ the district court found France to be an available and adequate alternative forum, and dismissed for forum non conveniens. Plaintiff then filed suit in France, but the French Supreme Court held that it lacked jurisdiction because the original suit had been filed originally in an American court. Following the French dismissal, the plaintiff re-filed his in the same district court that had dismissed. That court dismissed again, and said:

American courts do not blindly accept the jurisdictional rulings or laws of foreign jurisdictions that purport to render their forum unavailable ... Rather, even where there is a barrier to jurisdiction in the alternate forum, this Court is entitled to make an independent evaluation of availability, informed by circumstance and context. This is true even where refusing to reinstate the case may potentially leave plaintiffs without a forum.³⁴

According to this view, then, once an American court has ruled that a foreign forum is available, a foreign ruling declining jurisdiction will not necessarily warrant reinstatement of the action, particularly where plaintiffs themselves had advocated against jurisdiction in that foreign forum.³⁵

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Footnotes

- a256 Charles Alan Wright Chair in Federal Courts, The University of Texas.
- a257 University Professor, New York University. Formerly Bruce Bromley Professor of Law, Harvard University.
- a258 Thomas M. Cooley Professor of Law, University of Michigan.
- a259 Professor of Law, University of California, Hastings College of the Law.
- a260 Robert Howell Hall Professor of Law, Emory University.
- a261 Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties, New York University.
- a262 Distinguished Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology.
- a263 Professor of Law, University of Pennsylvania.

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University Professor, New York University. Formerly Bruce Bromley Professor of Law, Harvard University.

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Available and adequate

Supreme Court

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 265 n.22, 70 L. Ed. 2d 419 (1981). This case is discussed at length in § 3828.1.

The Supreme Court has found it improper to remit a United States citizen to the courts of a foreign country without assuring that the respondents would appear in those courts and that security would be given equal to what had been obtained by attachment in the district court. *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 697–698, 70 S. Ct. 861, 869, 94 L. Ed. 1206 (1950).

Second Circuit

“At step two, [the court] considers whether the alternative forum proposed by the defendants is adequate to adjudicate the parties’ dispute.” *Frederiksson v. HR Textron, Inc.*, 484 Fed. Appx. 610, 612 (2d Cir. 2012).

The appellate court affirmed the district court’s holding that a complaint may only be dismissed for forum non conveniens if an adequate alternative forum exists. *Niv v. Hilton Hotels Corp.*, 358 Fed. Appx. 282, 283 (2d Cir. 2009).

“[T]he court must consider whether the alternative forum proposed by the defendants is adequate to adjudicate the parties’ dispute.” *Overseas Media, Inc. v. Skvortsov*, 277 Fed. Appx. 92, 96 (2d Cir. 2008).

The Second Circuit vacated the district court’s forum non conveniens dismissal and remanded for consideration of, among other factors, the preclusive effect of a Russian default judgment on the plaintiff’s claim. *Norex Petroleum Ltd. v. Access Industries, Inc.*, 416 F.3d 146, 162 (2d Cir. 2005).

“An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute.” *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 75 (2d Cir. 2003).

In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 499 (2d Cir. 2002).

Aguinda v. Texaco, Inc., 303 F.3d 470, 476–479 (2d Cir. 2002).

DiRienzo v. Philip Services Corp., 294 F.3d 21, 29 (2d Cir. 2002).

An alternative forum generally is “adequate,” for purposes of the forum non conveniens analysis, if the defendants are subject to service of process there and the forum permits litigation of the subject matter of the dispute; a court may be inclined to use the conditional dismissal device to protect the plaintiff’s interests if the alternative forum may not be adequate. *Bank of Credit and Commerce International (Overseas) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001).

Court in Colombia is an adequate alternative forum. *Iragorri v. International Elevator, Inc.*, 243 F.3d 678, 680 (2d Cir. 2001), on reh’g en banc, 274 F.3d 65 (2d Cir. 2001).

“Ultimately, it is the defendant who has the burden to establish that an adequate alternative forum exists.” *Rabbi Jacob Joseph School v. Allied Irish Banks, P.L.C.*, 2012 WL 3746220, *3 (E.D. N.Y. 2012).

“At the second step of the forum non conveniens analysis, the district court considers whether the alternative forum proposed by the defendants is adequate to adjudicate the parties’ dispute.” *Sonera Holding B.V. v. Kukurova Holding A.S.*, 895 F. Supp. 2d 513, 523 (S.D. N.Y. 2012).

“[A] movant must demonstrate the availability of an adequate forum otherwise the motion must be denied.” *Schmerzler v. Intercontinental Hotels Group Resources, Inc.*, 2011 WL 3652174, *3 (D. Conn. 2011).

Klonis v. National Bank of Greece, S.A., 487 F. Supp. 2d 351, 358 (S.D. N.Y. 2006).

Do Rosario Veiga v. World Meteorological Organisation, 486 F. Supp. 2d 297, 303 (S.D. N.Y. 2007).

The court denied a motion to dismiss based on forum non conveniens because the defendant had given the court no basis on which to determine the availability or adequacy of Switzerland as an alternative forum. *Dale v. Banque SCS Alliance S.A.*, 2005 WL 2347853, *4 (S.D. N.Y. 2005).

Court in Netherlands provided an adequate alternative forum. *Alnwick v. European Micro Holdings, Inc.*, 281 F. Supp. 2d 629, 647 (E.D. N.Y. 2003).

Because Canadian courts had already dismissed the claims for lack of jurisdiction, Canada did not provide an adequate alternative forum. *Giaguara S.p.A. v. Amiglio*, 257 F. Supp. 2d 529, 537 (E.D. N.Y. 2003).

Nigeria was an adequate alternative forum for the defendant’s libel and false imprisonment counterclaims, as the defendant already had sued the plaintiff in two closely related pending actions in Nigeria and did not contend that the Nigerian courts were unable to effectuate a just resolution of the counterclaims. *United Bank for Africa PLC v. Coker*, 2003 WL 22741575, *4 (S.D. N.Y. 2003).

The United Kingdom provided an adequate alternative forum because the bill of lading of disputed shipment designated United Kingdom as appropriate forum. *Chubb Ins. Co. of Europe S.A. v. M/V HUMBOLDT EXPRESS*, 2003 WL 22434092, *2 (S.D. N.Y. 2003).

Illinois state court was unquestionably an adequate alternative forum. *LSP-Kendall Energy, LLC v. Dick Corp.*, 2003 WL

21705223, *3 (S.D. N.Y. 2003).

Court in Italy was an adequate alternative forum, *Traver v. Officine Meccaniche Toschi SpA*, 233 F. Supp. 2d 404, 415 (N.D. N.Y. 2002).

The alternative forum is adequate if defendants are subject to service of process there and the forum permits litigation of subject matter of dispute. *HD Brous & Co., Inc. v. Synthesys Secure Technologies, Inc.*, 229 F. Supp. 2d 191, 196 (E.D. N.Y. 2002).

Because defendants are amenable to suit in Canada and that forum permits litigation of subject matter of this action, Canada is a suitable alternative forum. *In re Rezulin Products Liability Litigation*, 214 F. Supp. 2d 396, 398 (S.D. N.Y. 2002).

An unfavorable difference of law generally is not enough, by itself, for a court to find forum inadequate. *In re CINAR Corp. Securities Litigation*, 186 F. Supp. 2d 279, 297 (E.D. N.Y. 2002).

Despite the fact that the plaintiff probably was time-barred from bringing suit in Canada, an alternative forum existed there because “no party has argued that Canadian law is intrinsically inadequate.” *Gamarra v. Alamo Rent A Car, Inc.*, 2001 WL 118575, *2 n.4 (W.D. N.Y. 2001).

In considering a forum non conveniens motion, the court found that an article from a Peruvian newspaper offered by the plaintiffs was not sufficient in itself to establish Peru as an inadequate forum. *Flores v. Southern Peru Copper Corp.*, 2001 WL 1658213, *1 (S.D. N.Y. 2001).

The plaintiff’s claim concerning “insurmountable difficulties” in proceeding in Ecuador was conjectural at best. *Valarezo v. Ecuadorian Line, Inc.*, 2001 WL 740773, *3 (S.D. N.Y. 2001).

British court was an adequate alternative forum. *Wesoke v. Contract Services Ltd.*, 2001 WL 327759, *5 (S.D. N.Y. 2001).

Ontario was an adequate alternative forum. *Sempra Energy Trading Corp. v. Algoma Steel, Inc.*, 2001 WL 282684, *4 (S.D. N.Y. 2001), *aff’d*, 300 F.3d 242 (2d Cir. 2002).

The defendant’s burden to show the existence of an alternative forum is not heavy. The defendant is required to show that a) the defendant is subject to service in the proposed forum, b) the forum permits the relevant litigation and has procedural safeguards, and c) the forum provides an adequate remedy. *Dorfman v. Marriott Intern. Hotels, Inc.*, 2001 WL 69423, *7 (S.D. N.Y. 2001).

Third Circuit

A district court’s analysis of a forum non conveniens issue must first consider the availability of an adequate alternative forum to hear the case. *Chigurupati v. Daiichi Sankyo Co., Ltd.*, 480 Fed. Appx. 672, 674 (3d Cir. 2012).

“When considering a motion to dismiss on forum non conveniens grounds, a district court must first determine whether an adequate alternate forum can entertain the case.” *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 160 (3d Cir. 2010).

Analysis of a forum non conveniens argument requires consideration of the availability of an adequate alternative forum. *J & H Intern. v. Karaca Zucchiye Tic. San A.S.*, 2012 WL 4742176, *9 (D.N.J. 2012).

A court, when deciding whether to dismiss a case on the grounds of forum non conveniens, must address the availability of an adequate alternative forum. *Princeton Football Partners LLC v. Football Ass’n of Ireland*, 2012 WL 2995199, *3 (D.N.J. 2012).

In determining a motion to dismiss for forum non conveniens, “the Court must first determine whether an adequate alternative forum exists to hear the case.” *Hardy v. Fernandez*, 2009 WL 2518211, *2 (E.D. Pa. 2009).

Technology Development Co., Ltd. v. Onischenko, 536 F. Supp. 2d 511, 517–518 (D.N.J. 2007).

Ohio state court was an adequate alternative forum for the automotive accident negligence action. *Brice v. C.R. England, Inc.*, 278 F. Supp. 2d 487, 489 (E.D. Pa. 2003).

Lexington Ins. Co. v. Forrest, 263 F. Supp. 2d 986, 1000 (E.D. Pa. 2003).

Fourth Circuit

“The defendant bears the burden of proving the adequacy, availability and overall convenience of the alternative forum.” *DiFederico v. Marriott Intern., Inc.*, 714 F.3d 796 (4th Cir. 2013).

A district court must determine whether the alternative forum is available and adequate. *Jiali Tang v. Synutra Intern., Inc.*, 656 F.3d 242, 248 (4th Cir. 2011).

“[T]he defendant has the burden to provide enough information to the District Court to demonstrate that the alternative forum is both available and adequate.” *Galustian v. Peter*, 591 F.3d 724, 731 (4th Cir. 2010).

“It is true that the doctrine of forum non conveniens can be applied only where another forum having jurisdiction is available at the time of the district court’s decision to resolve the dispute.” *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*, 569 F.3d 189, 202 (4th Cir. 2009).

The defendant failed to show for each plaintiff that there was an alternative forum in which suit would not be barred by the statute of limitations and had not even suggested what states would serve as the alternative forums for the plaintiffs who had moved since their claims arose. *Kontoulas v. A.H. Robins Co., Inc.*, 745 F.2d 312, 316 (4th Cir. 1984).

“The moving party bears the burden of showing that an adequate alternative forum exists.” *NLA Diagnostics LLC v. Theta Technologies Ltd.*, 2012 WL 3202274, *3 (W.D. N.C. 2012).

“[T]he defendant has the burden of proof to show the existence of an alternate, adequate, and available forum.” *SAS Institute Inc. v. World Programming Ltd.*, 2011 WL 2491591, *3 (E.D. N.C. 2011).

“When the Court conducts its inquiry into whether certain claims should be dismissed on forum non conveniens grounds, it must determine, as a threshold matter, whether there exists an alternative forum in which such claims can be heard.” *MicroAire Surgical Instruments, LLC v. Arthrex, Inc.*, 2010 WL 2757351, *3 (W.D. Va. 2010).

“In considering whether dismissal for forum non conveniens is appropriate, courts must determine, as a threshold matter, whether there exists an alternative forum.” In re XE Services Alien Tort Litigation, 665 F. Supp. 2d 569, 602 (E.D. Va. 2009).

The defendant failed to address the threshold argument of whether Germany was an available forum before focusing on the private and public factors that supported the adequacy of Germany as an alternative forum. As a German court would not have jurisdiction over the defendant, Germany was not an available forum and dismissal on forum non conveniens grounds therefore was inappropriate. *Lockwood Bros., Inc. v. Arnold Speditions GmbH*, 453 F. Supp. 2d 928, 935 (E.D. Va. 2006). The court denied forum non conveniens dismissal when there was no evidence that Japanese court would exercise jurisdiction over Texas defendants. *Southeastern Const., Inc. v. Tanknology-NDE Intern., Inc.*, 2005 WL 3536239, *16 (S.D. W. Va. 2005).

Fifth Circuit

“The doctrine of forum non conveniens presupposes at least two forums where the defendant is amenable to process and simply furnishes criteria for choice between them.” *Innovation First Intern., Inc. v. Zuru, Inc.*, 513 Fed. Appx. 386 (5th Cir. 2013).

“First, the defendant seeking dismissal must establish that there is an alternate forum that is both available and adequate.” *Perforaciones Exploracion Y Produccion v. Maritimas Mexicanas, S.A. de C.V.*, 356 Fed. Appx. 675, 679 (5th Cir. 2009).

It was within discretion of district court to determine that Brazil was available forum for family’s wrongful death action against owner of drilling rig; most directly involved parties could be brought before Brazilian courts, and parent corporations could likely be brought before them, and rig owner and employer’s parent company agreed to lawsuit in Brazil. *O’Keefe v. Noble Drilling Corp.*, 347 Fed. Appx. 27, 31 (5th Cir. 2009).

“A district court should first consider whether an available and adequate alternative forum exists.” *Akerblom v. Ezra Holdings Ltd.*, 848 F. Supp. 2d 673, 679 (S.D. Tex. 2012), aff’d, 509 Fed. Appx. 340 (5th Cir. 2013).

“A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum. A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court.” *Costinel v. Tidewater, Inc.*, 2011 WL 446297, *5 (E.D. La. 2011).

“A defendant seeking dismissal on the basis of forum non conveniens must demonstrate that an alternative forum exists which is both available and adequate.” *Taylor v. Tesco Corp. (US)*, 754 F. Supp. 2d 840, 843 (E.D. La. 2010).

S & D Trading Academy, LLC v. AAFIS, Inc., 494 F. Supp. 2d 558, 571 (S.D. Tex. 2007).

Dtex, LLC v. BBVA Bancomer, S.A., 512 F. Supp. 2d 1012, 1021 (S.D. Tex. 2007), aff’d, 508 F.3d 785 (5th Cir. 2007).

Canada did not provide an alternative forum because defendants never offered to waive the applicable statute of limitations to make the forum available. *De Shazo v. Nations Energy Co., Ltd.*, 2006 WL 2729289, *2 (S.D. Tex. 2006).

Mexico was not an available forum because the applicable statute of limitations had run, Mexican courts would not allow the defendants to consent to jurisdiction, and a Mexican court might consider its jurisdiction preempted by the filing of suit in a United States forum. *Sacks v. Four Seasons Hotel Ltd.*, 2006 WL 783441, *8 (E.D. Tex. 2006).

United Van Lines, LLC v. Marks, 366 F. Supp. 2d 468, 474 (S.D. Tex. 2005).

An otherwise proper alternative forum is considered available even though the plaintiffs do not wish to submit their case in that forum. *Lizardo v. Ford Motor Co.*, 2005 WL 1164200, *1 (S.D. Tex. 2005).

The United Kingdom provided an adequate alternative forum, as the defendant was amenable to process in the United Kingdom and the substantive law of the United Kingdom provided adequate alternative remedies to those offered in the courts of the United States. *Oyuela v. Seacor Marine (Nigeria), Inc.*, 290 F. Supp. 2d 713, 725 (E.D. La. 2003).

Switzerland was an adequate alternative forum. *Encompass Ind./Mech. of TX, Inc. v. GTEC S.A.*, 2003 WL 124483, *11 (N.D. Tex. 2003).

Italy was an adequate alternative forum. *Delta Brands, Inc. v. Danieli Corp.*, 2002 WL 31875560, *7 (N.D. Tex. 2002), judgment aff’d, 99 Fed. Appx. 1 (5th Cir. 2004).

It is not necessary to establish the availability of the alternative forum if a forum non conveniens dismissal is granted on the condition that the alternative forum be available. The court concluded that Costa Rica was an adequate alternative forum because there was no evidence that the plaintiffs would be treated unfairly or deprived of all remedies in the Costa Rican courts. *Borja v. Dole Food Co., Inc.*, 2002 WL 31757780, *3–4 (N.D. Tex. 2002), order vacated on other grounds, 2003 WL 21529297 (N.D. Tex. 2003).

Sixth Circuit

“The requirement of an available and adequate alternative forum is ordinarily satisfied when the defendant is amenable to process in the other jurisdiction.” *DRFP L.L.C. v. Republica Bolivariana de Venezuela*, 622 F.3d 513, 519 (6th Cir. 2010).

First, “an adequate alternative forum must be identified.” *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 830 (6th Cir. 2009).

Venture Global Engineering, LLC v. Satyam Computer Services, Ltd., 233 Fed. Appx. 517, 521 (6th Cir. 2007).

“The Court must first determine whether there is an adequate alternative forum.” *Ajuba Intern., L.L.C. v. Saharia*, 871 F.

Supp. 2d 671, 693 (E.D. Mich. 2012).

“An alternate forum is not an available forum if it does not permit litigation of the subject matter of the dispute, and it appears possible that the Bahamian courts could decline to permit the instant litigation to proceed in that forum, leaving Plaintiffs without an available forum.” *Clark v. Bucyrus Intern.*, 634 F. Supp. 2d 814, 819 (E.D. Ky. 2009).

Estate of Thomson v. Toyota Motor Corp. Worldwide, 2007 WL 1795271, *3 (N.D. Ohio 2007), decision aff’d, 545 F.3d 357 (6th Cir. 2008).

Seventh Circuit

“A threshold requirement for any forum non conveniens dismissal is the existence of an alternative forum that is both ‘available’ and ‘adequate.’” *Stroitelstvo Bulgaria Ltd. v. Bulgarian-American Enterprise Fund*, 589 F.3d 417, 421 (7th Cir. 2009).

Courts in the United Kingdom offered an adequate alternative forum for a lawsuit brought against American manufacturers, even if UK law was not identical to, or as favorable to plaintiffs, as U.S. law. *In re Factor VIII or IX Concentrate Blood Products Litigation*, 484 F.3d 951, 957–958 (7th Cir. 2007).

The district court’s forum non conveniens dismissal was vacated and remanded for further fact-finding when a Mexican court declared that it lacked jurisdiction over the defendants in the action, thus raising a new dispute between the parties as to whether Mexico was an available alternative forum. *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 705 (7th Cir. 2005).

An adequate alternative forum was available in Texas state court. *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 643 (7th Cir. 2003).

Hyatt Intern. Corp. v. Coco, 302 F.3d 707, 718 (7th Cir. 2002).

A threshold requirement for any forum non conveniens dismissal is the existence of an alternative forum that is both “available” and “adequate.” *MacNeil Automotive Products, Ltd. v. Cannon Automotive Ltd.*, 2012 WL 6021547, *3 (N.D. Ill. 2012).

“The availability and adequacy of another forum are necessary conditions of a forum non dismissal. An alternative forum is ‘available’ if all parties are amenable to service of process and are subject to jurisdiction in that forum. The forum is ‘adequate’ if it provides a fair hearing that offers a potential remedy for the subject matter of the dispute. The remedy need not be as comprehensive or as favorable as the American claims, they need only offer some avenue of redress.” *Harris v. France Telecom, S.A.*, 2011 WL 3705078, *4 (N.D. Ill. 2011).

In re Air Crash Near Athens, Greece on August 14, 2005, 479 F. Supp. 2d 792, 797–798 (N.D. Ill. 2007).

England was an adequate alternative forum because the English court could accept jurisdiction and could provide an adequate remedy. *Penge v. Hillenbrand Industries, Inc.*, 228 F. Supp. 2d 929, 933 (S.D. Ind. 2002).

Gupta v. Austrian Airlines, 211 F. Supp. 2d 1078, 1086 (N.D. Ill. 2002).

For purposes of a forum non conveniens motion, the courts of Venezuela did not provide an alternative available forum for product liability claims against American automobile and tire manufacturers arising from accidents that occurred in Venezuela, in light of a Venezuelan statute providing that the “first forum for bringing suit against a non-domiciliary defendant is the country where the defendant is domiciled.” However, the courts in Colombia provided an adequate alternative forum for accidents that occurred in Colombia, since all the parties were amenable to process in Colombia, and the Colombian courts had procedures and substantive law capable of providing a remedy in product liability cases. *In re Bridgestone/Firestone, Inc.*, 190 F. Supp. 2d 1125, 1130–1134 (S.D. Ind. 2002).

In re Bridgestone/Firestone, Inc. ATX, ATX II and Wilderness Tires Products Liability Litigation., 131 F. Supp. 2d 1027, 1029 (S.D. Ind. 2001).

Ontario was an adequate alternative forum. *ISI Intern., Inc. v. Borden Ladner Gervais, LLP.*, 2001 WL 1382572, *3 (N.D. Ill. 2001).

London courts were well equipped to handle the dispute and all parties and likely witnesses were subject to English court’s jurisdiction. *CNA Reinsurance Co., Ltd. v. Trustmark Ins. Co.*, 2001 WL 648948, *7 (N.D. Ill. 2001).

Eighth Circuit

“The determination of whether an adequate alternative forum exists is a two-step process which requires a finding of availability and adequacy. An alternate forum will be considered available when all parties are amenable to process in the alternative forum, and all parties are within the alternative forum’s jurisdiction. An alternative forum will be considered adequate when all the parties can expect fair treatment and will not be deprived of their remedies.” *Star Ins. Co. v. Continental Services, Inc.*, 916 F. Supp. 2d 936, 942 (D.N.D. 2013).

“The court must first determine whether there is an adequate alternative forum available in which the dispute can be resolved. This is a two-part inquiry; availability and adequacy.” *Pro Edge, L.P. v. Gue*, 374 F. Supp. 2d 711, 755 (N.D. Iowa 2005), modified, 411 F. Supp. 2d 1080 (N.D. Iowa 2006).

Central States Industrial Supply, Inc. v. McCullough, 218 F. Supp. 2d 1073, 1081 (N.D. Iowa 2002).

Ninth Circuit

“An alternative forum is deemed adequate if: (1) the defendant is amenable to process there; and (2) the other jurisdiction offers a satisfactory remedy.” *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1225 (9th Cir. 2011).

“Before the doctrine of forum non conveniens may be applied to dismiss a case, a district court must first determine

whether an adequate alternative forum is available to the plaintiff.” *Gutierrez v. Advanced Medical Optics, Inc.*, 640 F.3d 1025, 1029 (9th Cir. 2011).

The defendant “bears the burden of demonstrating that an alternative forum exists and that it is adequate.” *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006).

Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1118 (9th Cir. 2002).

Canada permits litigation of the subject matter of plaintiff’s lawsuit and therefore provides an adequate alternative forum.

McNeil v. Stanley Works, 33 Fed. Appx. 322, 325 (9th Cir. 2002).

Germany was an adequate alternative forum. *Leetsch v. Freedman*, 260 F.3d 1100, 1103 (9th Cir. 2001).

The defendant failed to provide an explanation of how Canadian trademark laws “would provide a remedy that would be an adequate alternative to remedies available under the Lanham Act and California law,” and therefore dismissal under forum non conveniens was denied. *Life Alert Emergency Response, Inc. v. Lifealert Sec., Inc.*, 2008 WL 5412431, *7 (C.D. Cal. 2008).

The court found that despite showing “Dutch law provides for an action arising from an unlawful act (‘onrechtmatige daad’),” the defendant failed to establish that the courts of The Netherlands had jurisdiction over the matter. *Local Billing, LLC v. Webbilling*, 2008 WL 5210667, *11–12 (C.D. Cal. 2008).

Germany was an adequate alternative forum because all defendants were amenable to service of process in Germany. *U.S. Vestor, LLC v. Biodata Information Technology AG*, 290 F. Supp. 2d 1057, 1058 (N.D. Cal. 2003).

No alternative forum existed without a showing that all defendants were amenable to suit outside the United States or that a copyright infringement derivative action would be available outside the United States. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1094 (C.D. Cal. 2003).

Tenth Circuit

“First, there must be an adequate alternative forum in which the defendant is amenable to process.” *Fireman’s Fund Ins. Co. v. Thyssen Min. Const. of Canada, Ltd.*, 703 F.3d 488, 495 (10th Cir. 2012).

The court must first ask whether there is an adequate alternative forum. *Boone v. MVM, Inc.*, 2007 WL 549833, *7 (D. Colo. 2007).

No available and adequate forum existed. *Bulletproof Technologies, Inc., a California corporation v. Navitaire, Inc., a Delaware corporation*, 2005 WL 2265701, *7 (D. Utah 2005).

Eleventh Circuit

“An alternative forum is ‘available’ to the plaintiff when the foreign court can assert jurisdiction over the litigation sought to be transferred.” *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1330 (11th Cir. 2011).

“The first prong of the forum non conveniens inquiry simply asks whether the alternative forum is ‘adequate’ and ‘available.’” *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1290 (11th Cir. 2009).

“The defendant bears the burden of demonstrating an adequate alternative forum is available.” *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1382 (11th Cir. 2009).

Tyco Fire & Sec., LLC v. Alcocer, 218 Fed. Appx. 860, 865–866 (11th Cir. 2007).

“A federal court has discretion to dismiss a case on the ground of forum non conveniens when an alternative forum has jurisdiction to hear the case.” *Capital Trans Intern., LLC v. International Petroleum Inv. Co.*, 2013 WL 557236, *15 (M.D. Fla. 2013).

“The defendants must establish both that trial in the Dominican Republic is available and that such a trial will be adequate.” *Group CG Builders and Contractors v. Cahaba Disaster Recovery, L.L.C.*, 2012 WL 3245972, *2 (S.D. Ala. 2012), report and recommendation adopted, 2012 WL 3206671 (S.D. Ala. 2012), *aff’d*, 2013 WL 4046020 (11th Cir. 2013).

“Generally, an alternative forum is available when the defendant is amenable to process in the other jurisdiction.” *Del Istmo Assur. Corp. v. Platon*, 2011 WL 5508641, *2 (S.D. Fla. 2011).

Perez-Lang v. Corporacion de Hoteles, S.A., 575 F. Supp. 2d 1345, 1349 (S.D. Fla. 2008), *aff’d*, 325 Fed. Appx. 900 (11th Cir. 2009).

Defendant failed to establish availability of alternative adequate forum. *Estate of Miller v. Toyota Motor Corp.*, 2007 WL 4482589, *5 (M.D. Fla. 2007).

“For a court to dismiss a claim based on forum non conveniens, an adequate alternative forum must be available. Availability and adequacy warrant separate consideration.” *Exter Shipping Ltd. v. Kilakos*, 310 F. Supp. 2d 1301, 1320 (N.D. Ga. 2004).

Warter v. Boston Securities, S.A., 380 F. Supp. 2d 1299, 1308–1311 (S.D. Fla. 2004).

The burden of showing the existence of an alternative forum is on the movant, but the burden is not heavy. *Del Monte Fresh Produce Co. v. Dole Food Co., Inc.*, 136 F. Supp. 2d 1271, 1276 (S.D. Fla. 2001).

D.C. Circuit

“A court may nonetheless dismiss a suit for forum non conveniens if the defendant shows there is an alternative forum that is both available and adequate and, upon a weighing of public and private interests, the strongly preferred location for the litigation.” *MBI Group, Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 571 (D.C. Cir. 2010).

In deciding forum non conveniens claims, a court must decide whether an adequate alternative forum for the dispute is

available. *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 950 (D.C. Cir. 2008).

“In order to establish that an alternative forum is adequate, the defendant must first establish that an alternative forum is available where the plaintiff may bring his claims. Normally, an alternative forum is considered available when the defendant is amenable to process in that forum.” *Lans v. Adduci Mastriani & Schaumberg L.L.P.*, 786 F. Supp. 2d 240, 290 (D.D.C. 2011), **citing Wright, Miller & Cooper**.

“First, the court determines whether an adequate alternative forum exists. In making this determination, the court asks preliminarily whether the defendant is amenable to process in the foreign jurisdiction.” *Stromberg v. Marriott Intern., Inc.*, 474 F. Supp. 2d 57, 60 (D.D.C. 2007), judgment aff’d, 256 Fed. Appx. 359 (D.C. Cir. 2007).

“[P]laintiffs’ decision to use these very same Columbian courts to bring a breach of contract claim suggests very strongly that that it is an adequate forum.” *Termorio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87, 103 (D.D.C. 2006), judgment aff’d, 487 F.3d 928 (D.C. Cir. 2007).

Sweden was an adequate alternative forum because plaintiff could assert all claims in Swedish courts and all the defendants were subject to Swedish jurisdiction. *BPA Intern., Inc. v. Kingdom of Sweden*, 281 F. Supp. 2d 73, 85 (D.D.C. 2003).

A forum non conveniens motion requires a preliminary showing that an adequate alternative forum exists. *Burnett v. Al Baraka Inv. and Development Corp.*, 274 F. Supp. 2d 86, 96 n.6 (D.D.C. 2003).

The court ordered the defendant to provide supplemental brief demonstrating the existence of an alternative forum because the existence of such is a threshold inquiry for further forum non conveniens analysis. *Mutambara v. Lufthansa German Airlines*, 2003 WL 1846083, *4 (D.D.C. 2003).

No alternative forum with personal jurisdiction over the defendant existed. *Manifold v. Wolf Coach, Inc.*, 231 F. Supp. 2d 58, 63 (D.D.C. 2002).

See generally

Whytock & Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 *Colum. L. Rev.* 1444 (2010).

Samuels, *When is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 *Ind. L.J.* 1059, 1096 (2010).

Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 *Rich. J. Global L. & Bus.* 513 (2009).

Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 *Tul. L. Rev.* 309 (2002).

Note, *Forum Non Conveniens in the Absence of an Alternative Forum*, 86 *Colum. L. Rev.* 1021 (1986).

2

Separate consideration

Establishment of foreign tribunal as available and adequate is a prerequisite to considering public and private factors that may support dismissal. *Cotemar S.A. De C.V. v. Hornbeck Offshore Services, L.L.C.*, 569 Fed. Appx. 187, 190 (5th Cir. 2014).

“Availability and adequacy warrant separate consideration.” *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1330 (11th Cir. 2011).

Party seeking dismissal on grounds of forum non conveniens must show existence of adequate alternative forum and that the balance of private and public factors favors dismissal. *Boston Telecommunications Group, Inc. v. Wood*, 588 F.3d 1201, 1206 (9th Cir. 2009).

“The first prong of the forum non conveniens inquiry simply asks whether the alternative forum is ‘adequate’ and ‘available.’ As we have observed, availability and adequacy are separate issues.” *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1290 (11th Cir. 2009).

“Availability and adequacy are two separate inquiries.” *Adams v. Merck & Co. Inc.*, 353 Fed. Appx. 960, 962 (5th Cir. 2009).

“The first factor involves two inquiries: whether the alternative forum is adequate and available. Availability and adequacy warrant separate consideration.” *McLane v. Marriott Intern., Inc.*, 24 Fla. L. Weekly Fed. D 157, 2013 WL 1810649, *3 (S.D. Fla. 2013).

Determining the existence of an alternative, adequate forum involves two inquiries; availability and adequacy warrant separate consideration. *Falzon v. Johnson*, 2012 WL 4801558, *7 (E.D. N.Y. 2012), report and recommendation adopted, 2012 WL 4798670 (E.D. N.Y. 2012).

Court addressing forum non conveniens motion assesses first whether alternative forum is available and adequate. “Next, if the court is satisfied that an adequate alternative forum exists, it must then proceed to weigh a host of private and public interest factors to determine the appropriateness of dismissal.” *Domanus v. Lewicki*, 645 F. Supp. 2d 697, 701 (N.D. Ill. 2009).

Alpine Atlantic Asset Management AG v. Comstock, 552 F. Supp. 2d 1268, 1275 (D. Kan. 2008), **citing Wright, Miller & Cooper**.

But compare

In determining that the proposed alternative was inadequate, the court failed to distinguish between availability and adequacy. *Concesionaria DHM. S.A. v. International Finance Corp.*, 307 F. Supp. 2d 553, 563 (S.D. N.Y. 2004).

3

Amenable to process

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506–507, 67 S. Ct. 839, 842, 91 L. Ed. 1055 (1947). The case is discussed in § 3828.1.

“The district court properly determined that Peru provides an adequate alternative forum for Plaintiffs to pursue their claims against Occidental. An alternative forum is deemed adequate if: (1) the defendant is amenable to process there; and (2) the other jurisdiction offers a satisfactory remedy.” *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1225 (9th Cir. 2011). The Ninth Circuit determined, however, that the district court abused its discretion in its balancing of the relevant factors to conclude that dismissal was appropriate and in failing to impose sufficient conditions on the dismissal. 643 F.3d at 1227–1236.

Bulgarian forum was “available” because all parties are amenable to process there. *Stroitelstvo Bulgaria Ltd. v. Bulgarian-American Enterprise Fund*, 589 F.3d 417, 421 (7th Cir. 2009).

“An alternative forum is adequate if (1) the defendants are amenable to service of process there and (2) it permits litigation of the subject matter of the dispute.” *Fournier v. Starwood Hotels & Resorts Worldwide, Inc.*, 908 F. Supp. 2d 519 (S.D. N.Y. 2012).

“The availability requirement is generally satisfied when the defendant is amenable to process in the foreign jurisdiction.” *Sonoco Products Co. v. ACE INA Ins.*, 877 F. Supp. 2d 398, 411 (D.S.C. 2012).

“The Court must first determine whether there is an adequate alternative forum. Generally, this requirement is satisfied if the defendant is ‘amenable to process’ in the alternative forum.” *Ajuba Intern., L.L.C. v. Saharia*, 871 F. Supp. 2d 671, 693 (E.D. Mich. 2012).

“That Plaintiffs may ultimately refuse to file their lawsuit in Mexico does not mean that a Sinaloa court is not ‘available,’ as that term is defined in the context of a forum non conveniens analysis.” *Snaza v. Howard Johnson Franchise Systems, Inc.*, 2008 WL 5383155, *6 (N.D. Tex. 2008).

Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322, 340 (D.D.C. 2007).

Defendant did not meet the burden of demonstrating his amenability to process in Australia. *Williams v. Wilson*, 2005 WL 2100980, *2 (W.D. Wis. 2005).

Zermeno v. McDonnell Douglas Corp., 246 F. Supp. 2d 646, 657 (S.D. Tex. 2003).

Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd., 243 F. Supp. 2d 1073, 1095 (C.D. Cal. 2003).

The alternative forum requirement ordinarily is satisfied when the defendant is amenable to process in another jurisdiction. *Realuyo v. Villa Abrille*, 2003 WL 21537754, *12 (S.D. N.Y. 2003), judgment *aff’d*, 93 Fed. Appx. 297 (2d Cir. 2004).

The alternative forum generally is adequate if defendants are subject to service of process there and forum permits litigation of subject matter of dispute. *New Hampshire Ins. Co. v. Sphere Drake Ins. Ltd.*, 2002 WL 1586962, *6 (S.D. N.Y. 2002), *aff’d in part, vacated in part on other grounds*, 51 Fed. Appx. 342 (2d Cir. 2002).

4

Impose conditions

First Circuit

The court granted dismissal for forum non conveniens subject to conditions: (1) that the defendant submit to the jurisdiction of the competent court in St. Martin chosen by the plaintiff and submit to valid service of process with respect to that action within 90 days of this dismissal; (2) that the defendant waive any statute of limitations-based defense that would not have been available had this court retained jurisdiction; and (3) that, on or before the defendant’s acceptance of service of process, the defendant produce a letter of guaranty from the insurance carrier providing his defense stating that a judgment by the St. Martin court, if rendered, will be satisfied subject to the applicable policy limits. *Phillips v. Talty*, 555 F. Supp. 2d 265, 273 (D.N.H. 2008).

Second Circuit

The appellate court affirmed the district court’s conditional dismissal for forum non conveniens. *Lleras v. Excelaire Services Inc.*, 354 Fed. Appx. 585, 587 (2d Cir. 2009).

Norex Petroleum Ltd. v. Access Industries, Inc., 416 F.3d 146, 160 (2d Cir. 2005).

A dismissal for forum non conveniens of an action for breach of contract and fraud with respect to several shipments of fgs should have been conditioned on the willingness of the Belgian courts to hear the case and upon the consent of all of the defendants to submit to jurisdiction in Belgium. It also should have been conditioned upon an agreement by the defendant underwriter both to waive any statute of limitations defense that had arisen since the commencement of the action in New York and to pay any judgment that might be rendered against them. *Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 968–969 (2d Cir. 1980).

In a situation in which an alternative forum will have jurisdiction only if the defendant consents, a district court should not, on a defense motion, dismiss unless it justifiably believes that the alternative forum will take jurisdiction if the defendant consents. Once that finding has been made, the remaining but unlikely possibility that the plaintiff ultimately may have to return to the inconvenient forum is a factor to be weighed in deciding whether to dismiss, but this kind of improbability

should not automatically preclude the use of forum non conveniens. *Schertenleib v. Traum*, 589 F.2d 1156, 1164 (2d Cir. 1978).

“Dismissal will be conditioned upon defendants’ ... consenting to the jurisdiction of the appropriate courts in Dubai and Great Britain for the litigation of this action, and to accept service of process if sued by [plaintiff] in either of those forums in connection with this action.” *Payne v. Jumeirah Hospitality & Leisure (USA) Inc.*, 808 F. Supp. 2d 604, 605–606 (S.D. N.Y. 2011).

The district court conditioned dismissal on: (1) a Canadian court accepting jurisdiction; (2) the defendants not raising any statute of limitation defenses; (3) the defendants producing witnesses who were beyond the subpoena power of the Canadian court; and (4) the defendants paying any post-appeal judgment awarded against them. *Khan v. Delta Airlines, Inc.*, 2010 WL 3210717, *10 (E.D. N.Y. 2010).

“The dismissal, however, is subject to Defendants’ expressing to the Court their consent to certain conditions: that in the event Plaintiffs commence litigation in Switzerland arising out of the circumstances and general claims asserted in this case, Defendants agree to accept service of process and to the exercise of personal jurisdiction by the relevant tribunal in Switzerland; that Defendants not assert any defenses based on statutes of limitations that would not be available to them were this litigation prosecuted in this Court; and that Defendants would satisfy any final judgment rendered by a Swiss court in connection with such litigation.” *In re Alcon Shareholder Litigation*, 719 F. Supp. 2d 263, 279 (S.D. N.Y. 2010).

The court dismissed for forum non conveniens, provided that: (1) defendants consent to jurisdiction and to accept process in any suit plaintiffs file in Spain on claims that arise out of the facts of the instant suit; (2) defendants waive any statute of limitations defense that may be available to them in Spain that arose on or after the date of this lawsuit, so long as litigation is pursued in Spain in a reasonable period of time; (3) defendants make available for discovery and for trial, at their own expense, any documents, or witnesses, including retired employees, within their control that are needed for a fair adjudication of the plaintiffs’ claims; and (4) defendants will not act to prevent plaintiffs from returning to this court if the Spanish courts decline to accept jurisdiction of this action, if it is filed here within thirty days of the Spanish court’s ruling. *Melgares v. Sikorsky Aircraft Corp.*, 613 F. Supp. 2d 231, 252–253 (D. Conn. 2009).

In an action brought by a U.K. plaintiff, based on ingestion of pharmaceuticals manufactured, marketed, and sold in the U.K., and in which the alleged injuries were suffered and treated in the U.K., the court conditioned its dismissal on the basis of forum non conveniens, on the defendants acceptance of a number of conditions including a waiver of any applicable statute of limitations defenses, consent to jurisdiction in the courts of the U.K., and consent to produce any employee witness in the foreign forum. *In re Fosamax Products Liability Litigation*, 2009 WL 3398930, *7–8 (S.D. N.Y. 2009).

Cortec Corp. v. Erste Bank Ber Oesterreichischen Sparkassen AG (Erste Bank), 535 F. Supp. 2d 403, 413 (S.D. N.Y. 2008).

“Plaintiffs request that any dismissal be conditioned on defendants’ written agreement (1) to submit to the jurisdiction of the appropriate Israeli tribunal and to service of process in an action to be commenced in that tribunal, (2) to waive any defense to the Israeli action based upon any statute of limitations or otherwise based on the passage of time, and (3) to preserve documents and electronically stored information pending the filing of an Israeli action and for a reasonable time thereafter.” *Wilson v. ImageSat Intern. N.V.*, 2008 WL 2851511, *8 (S.D. N.Y. 2008), *aff’d*, 349 Fed. Appx. 649 (2d Cir. 2009).

Banco De Seguros Del Estado v. J.P. Morgan Chase & Co., 500 F. Supp. 2d 251, 264 (S.D. N.Y. 2007).

“[T]he Court notes that the Court can address any valid concerns Veiga may have regarding Switzerland as an adequate forum by placing appropriate conditions on this dismissal The court also pointed out that “[c]onditional forum non conveniens dismissals are standard in the Second Circuit. Such conditions, as is the case here, may be necessary to the forum non conveniens analysis itself, for such conditions create the adequate alternative forum.” *Do Rosario Veiga v. World Meteorological Organisation*, 486 F. Supp. 2d 297, 305 (S.D. N.Y. 2007).

“This willingness to consent disposes of the personal jurisdiction issue.” *Republic of Colombia v. Diageo North America Inc.*, 531 F. Supp. 2d 365, 406 (E.D. N.Y. 2007).

The defendant’s consent to jurisdiction in the alternative forum weighed in favor of dismissal on grounds of forum non conveniens. *BlackRock, Inc. v. Schroders PLC*, 2007 WL 1573933, *7–8 (S.D. N.Y. 2007).

Although the defendants had consented to the jurisdiction of the Swiss Arbitral Tribunal, the tribunal was an inadequate alternative forum. *Motorola Credit Corp. v. Uzan*, 274 F. Supp. 2d 481, 503 (S.D. N.Y. 2003), *aff’d in part, vacated in part on other grounds, remanded*, 388 F.3d 39 (2d Cir. 2004).

The court dismissed on forum non conveniens grounds subject to reinstatement if defendants failed to submit to jurisdiction or waive statute of limitations defenses in Russia. *Tarasevich v. Eastwind Transport Ltd.*, 2003 WL 21692759, *4 (S.D. N.Y. 2003).

The court has the power to condition dismissal on the defendant’s consent to jurisdiction in the alternative forum, the alternative forum’s acceptance of the case, and a stay of the United States’ statute of limitations. *Varnelo v. Eastwind Transport. Ltd.*, 2003 WL 230741, *14 (S.D. N.Y. 2003), *adhered to*, 2004 WL 103428 (S.D. N.Y. 2004).

Helog Ag v. Kaman Aerospace Corp., 228 F. Supp. 2d 91, 93 (D. Conn. 2002).

An alternative forum generally is adequate if defendant may be served there. *Cromer Finance Ltd. v. Berger*, 158 F. Supp. 2d 347, 353 (S.D. N.Y. 2001).

A dismissal was granted conditioned on the defendant’s agreement to submit to the jurisdiction of the Canadian courts. *Florian v. Danaher Corp.*, 2001 WL 1504493, *3 (D. Conn. 2001), *judgment aff’d*, 69 Fed. Appx. 473 (2d Cir. 2003).

Third Circuit

“[C]ourts routinely condition the granting of a forum non conveniens motion upon the defendants’ willingness to consent to jurisdiction in the alternate forum.” *Kisano Trade & Invest Ltd. v. Lemster*, 2012 WL 7149444, *6 (W.D. Pa. 2012), report and recommendation adopted, 2013 WL 594017 (W.D. Pa. 2013).

“[T]his Court shall require that Alcoa submit to the jurisdiction of the appropriate court as a condition of the dismissal based upon forum non conveniens.” *Auxer v. Alcoa, Inc.*, 2010 WL 1337725, *7 (W.D. Pa. 2010), *aff’d*, 406 Fed. Appx. 600 (3d Cir. 2011).

“[T]his Court has discretion to condition dismissal on Defendant’s agreement to make available in the alternative forum all evidence necessary for the just adjudication of this matter.” *Miller v. Boston Scientific Corp.*, 380 F. Supp. 2d 443, 453 (D.N.J. 2005).

Faat v. Honeywell Intern., Inc., 2005 WL 2475701, *7 (D.N.J. 2005).

Fourth Circuit

“We do, however, modify the district court’s judgment to make it conditional on [defendant]’s not raising or asserting a defense based on a statute of limitations or court-imposed deadline in response to any claim made.” *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*, 569 F.3d 189, 205 (4th Cir. 2009).

“Where a forum non conveniens motion is granted, the vast majority of courts, including the Fourth Circuit, have used the conditional dismissal device as a safeguard against the uncertainty that the alternative forum will exercise jurisdiction over the claims.” *Tang v. Synutra Intern., Inc.*, 2010 WL 1375373, *13 (D. Md. 2010), *aff’d*, 656 F.3d 242 (4th Cir. 2011).

Fifth Circuit

Alternative forum is available if entire case and all parties come within its jurisdiction. Because defendant agreed to submit to jurisdiction of Mexican court, it was available. Mexico is an adequate forum because plaintiff can recover damages there, even though the recovery in Mexico would be lower than in the United States. Moreover, plaintiff failed to show that she was unlikely, because of corruption, to receive justice in Mexico. Public and private factors favored litigation in Mexico for wrongful death claim by Mexican widow of Mexican decedent killed while working in Mexico on vessel owned by an American company and leased to a Mexican company. *Saqui v. Pride Cent. America, LLC*, 595 F.3d 206, 211–214 (5th Cir. 2010).

Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 681 (5th Cir. 2003).

The district court had determined that the Spanish-language courts of Venezuela, which was the buyer’s place of business and the place where the contract was negotiated, rather than the English-language courts of the seller’s place of business and the place where the plane was delivered, were more convenient fora. However, it was not clear that the Venezuelan court urged by the seller as the most practicable had personal jurisdiction over seller or, even if it had jurisdiction, that the Venezuelan court could order the necessary documentation of title to the aircraft, should the buyer prevail and such be found an appropriate remedy. Therefore, the district court order had to be modified to provide that it was conditional, *inter alia*, on the seller’s waiving objections to personal jurisdiction and stipulating that, if the buyer prevailed and the seller was ordered to provide the title documents, the seller would assume responsibility for effectuating the judgment. *Constructora Spilimer, C.A. v. Mitsubishi Aircraft Co., Inc.*, 700 F.2d 225, 226 (5th Cir. 1983).

“This Court may reassert jurisdiction upon timely notification if Akerblom is unable to seek remedies in Singaporean courts because he has been precluded from reentering that country. The Court may also reassert jurisdiction upon timely notification if [defendant] does not consent to the jurisdiction of Singaporean courts with respect to this action, asserts jurisdictional defenses concerning that forum, or refuses to accept service of process in the United States or Singapore requiring his appearance in a Singaporean court. The Court retains jurisdiction to supervise the terms of this dismissal.” *Akerblom v. Ezra Holdings Ltd.*, 2012 WL 464917, *5 (S.D. Tex. 2012), *aff’d*, 509 Fed. Appx. 340 (5th Cir. 2013).

“When considering what conditions should be imposed on an order of dismissal on forum non conveniens grounds, a district court must take care to ensure that a plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice and that if the defendant obstructs such reinstatement in the alternative forum that the plaintiff may return to the American forum.” *In re BP Shareholder Derivative Litigation*, 2011 WL 5880946, *3 (S.D. Tex. 2011).

All the defendants agreed to submit to jurisdiction of the Mexican court. *Snaza v. Howard Johnson Franchise Systems, Inc.*, 2008 WL 5383155, *6 (N.D. Tex. 2008).

The court may condition a forum non conveniens dismissal on the consent of all the defendants to jurisdiction in a foreign forum and the waiver of the applicable statute of limitations defenses. *Zermeno v. McDonnell Douglas Corp.*, 246 F. Supp. 2d 646, 658 (S.D. Tex. 2003).

The court conditioned dismissal on the defendants’ consent to submit to the jurisdiction of Costa Rica, the acceptance and exercise of jurisdiction by the Costa Rican courts, the defendants’ waiver of statute of limitations defenses, the defendants’ agreement to the enforceability of a Costa Rican judgment, and the defendants’ consent to reinstatement of the action if Costa Rica proved to be an unavailable forum. *Borja v. Dole Food Co., Inc.*, 2002 WL 31757780, *7 (N.D. Tex. 2002), order vacated on other grounds, 2003 WL 21529297 (N.D. Tex. 2003).

The suit brought in Louisiana was stayed, rather than dismissed, to prevent the plaintiff from being unable to obtain relief in the event that the defendant successfully obtained a dismissal of the foreign suit on jurisdiction or venue grounds. *Yan*

Wong v. United Airlines, Inc., 2001 WL 30192, *2 (E.D. La. 2001).

Sixth Circuit

Defendants agreed to submit to service of process in Sierra Leone. *Rustal Trading US, Inc. v. Makki*, 17 Fed. Appx. 331, 337 (6th Cir. 2001).

A product liability action brought in an Ohio district court by residents of England and Scotland against a pharmaceutical corporation with its principal place of business in Ohio properly was dismissed under the doctrine of forum non conveniens because the corporation had consented to suit in the United Kingdom and had agreed to make documents and witnesses within its control available in an action brought in the United Kingdom. *Watson v. Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 354, 357 (6th Cir. 1985).

The court granted the defendants' motion to dismiss under the doctrine of forum non conveniens, subject to the following conditions: (1) the defendants consent to suit and acceptance of process in Australia; (2) the defendants stipulate that the United States courts can enforce any final decision; and (3) the defendants waive any statute of limitations defense that did not exist prior to the plaintiff bringing this action. *Urban Global v. Dibbsbarker*, 2011 WL 2802904, *8 (E.D. Mich. 2011).

The court granted a conditional dismissal for forum non conveniens on the defendant's promise not to contest jurisdiction in the alternate forum. *Gering v. Fraunhofer-Gesellschaft e.V.*, 2009 WL 2922847, *3 (E.D. Mich. 2009).

"The parties did not raise the issue of conditional dismissal, but it has been the practice of courts granting dismissals on the ground of forum non conveniens to impose conditions to protect the interests of the plaintiff, which generally include, but are not limited to, waiver of service, jurisdictional, and statute of limitations defenses; consent to enforceability of any judgment from the new forum in the prior one; and acceptance of reinstatement of the proceeding in the prior forum if litigation does not proceed in the new forum." In re *I.E. Liquidation, Inc.*, 2009 WL 1586706, *14 (Bankr. N.D. Ohio 2009).

Spain is an adequate alternative forum because the defendant "consents to a dismissal of this action conditioned on his recognition of Spanish jurisdiction over Barak's claims against him, waives any applicable limitations defenses, and stipulates that any Spanish judgment may be enforced against him in the United States." *Barak v. Zeff*, 2007 WL 1098530, *3 (E.D. Mich. 2007), *aff'd*, 289 Fed. Appx. 907 (6th Cir. 2008).

"The willingness of a defendant to consent, coupled with conditioning dismissal upon the fulfillment of that condition, can establish the adequacy of the alternate forum." *Duha v. Agrium, Inc.*, 340 F. Supp. 2d 787, 793 (E.D. Mich. 2004), vacated and remanded on other grounds, 448 F.3d 867 (6th Cir. 2006).

Seventh Circuit

The court granted the motion to dismiss for forum non conveniens provided that the defendant submit to the jurisdiction of the Brazilian courts. *Barcode Informatica Limitada v. Zebra Technologies Corp.*, 2011 WL 1100449, *2 (N.D. Ill. 2011).

The court granted the motion to dismiss for forum non conveniens on the conditions that the defendants: (1) submit to the jurisdiction of the Cameroonian courts, and (2) toll the applicable statute of limitations for 120 days after the dismissal. *Pettitt v. Boeing Co.*, 2010 WL 3861066, *2 (N.D. Ill. 2010).

The court granted the motion to dismiss for forum non conveniens on the conditions that the defendants submit to jurisdiction in Mexico and waive any statute of limitations defenses. *Gonzalez v. Ford Motor Co.*, 2010 WL 1576831, *3 (S.D. Ind. 2010), *aff'd*, 662 F.3d 931 (7th Cir. 2011).

The court granted the motion to dismiss for forum non conveniens on the condition that defendant submits to the jurisdiction of the Bulgarian courts. *Stroitelstvo Bulgaria Ltd. v. Bulgarian-American Enterprise Fund*, 598 F. Supp. 2d 875, 882 (N.D. Ill. 2009), *aff'd*, 589 F.3d 417 (7th Cir. 2009).

In re Factor VIII or IX Concentrate Blood Products Litigation, 531 F. Supp. 2d 957, 982 (N.D. Ill. 2008), judgment *aff'd*, 563 F.3d 663 (7th Cir. 2009).

In re Air Crash Near Athens, Greece on August 14, 2005, 479 F. Supp. 2d 792, 805 (N.D. Ill. 2007).

The defendants' stipulation and expert testimony that the United Kingdom would accept stipulation constituted sufficient demonstration of availability. In re Factor VIII or IX Concentrate Blood Products Liability Litigation, 408 F. Supp. 2d 569 (N.D. Ill. 2006), *aff'd*, 484 F.3d 951 (7th Cir. 2007).

Eighth Circuit

A green pepper importer brought suit based on an alleged civil conspiracy to evade and violate the federal Food, Drug, and Cosmetic Act and federal Insecticide, Fungicide, and Rodenticide Act, as well as an alleged civil conspiracy to evade and violate the laws of Mexico by means of false representations and the false labeling of insecticide. The conclusion of the federal district court for the Western District of Missouri that the balance of convenience weighed so heavily against trial of the claims in Missouri that the action should be dismissed was permissible. However, the dismissal should have been conditional only, due to allegations that Mexico was not an available forum because the defendant was not amenable to process there; the better procedure was to dismiss the action subject to the conditions outlined in the opinion of the court of appeals. *Mizokami Bros. of Arizona, Inc. v. Mobay Chemical Corp.*, 660 F.2d 712, 719 (8th Cir. 1981).

Switzerland was an adequate alternative forum because the defendant agreed to submit to Swiss jurisdiction and accept service of process. *Alpine Atlantic Asset Management AG v. Comstock*, 552 F. Supp. 2d 1268, 1276 (D. Kan. 2008), **citing Wright, Miller & Cooper.**

Because the defendant waived any statute of limitation defenses, the court found that Japan was an adequate, alternative forum. *Fluoroware, Inc. v. Dainichi Shoji K.K.*, 999 F. Supp. 1265, 1271 (D. Minn. 1997). Guatemala was available as a forum in products liability action, supporting dismissal under forum non conveniens doctrine, where defendant United States corporation consented to jurisdiction in Guatemala. *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512, 1525 (D. Minn. 1996).

Ninth Circuit

Although district court dismissed the case without prejudice to plaintiffs' right to re-file, it abused its discretion by failing to impose appropriate conditions on the dismissal. Courts are not required to impose conditions, but it is an abuse of discretion to fail to do so when there is justifiable reason to doubt that a party will cooperate in the foreign tribunal. Because defendant would likely raise a statute of limitations defense in any Peruvian proceeding, the court should have imposed the condition of waiver. *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1225, (9th Cir. 2011). "The district court could have cured this problem by imposing appropriate conditions. We have affirmed forum non conveniens dismissals that addressed statute of limitations concerns by requiring waiver in the foreign forum." 643 F.3d at 1235.

District court has discretion to grant forum non conveniens dismissal on condition, including a return jurisdiction clause to allow the case to be re-filed in the dismissing court. The Ninth Circuit declined to hold that a district court's failure to include a return jurisdiction clause is a per se abuse of discretion. *Gutierrez v. Advanced Medical Optics, Inc.*, 640 F.3d 1025, 1031 (9th Cir. 2011). However, while case was on appeal, Mexican courts rejected jurisdiction over plaintiff's case. Court of appeals remanded to district court with instructions to take into account Mexico's refusal to hear the case in deciding afresh whether to dismiss under forum non conveniens. 640 F.3d at 1031–1032. "[W]e reject Plaintiffs' arguments that the district court abused its discretion by granting Defendant's motion to dismiss Plaintiffs' case on forum non conveniens ground, based on the evidence before it at the time, and by not imposing return conditions. We nonetheless recognize that subsequent changes in the factual circumstances previously considered by the district court compel a new forum non conveniens analysis based upon those new facts." 640 F.3d at 1032.

Kinney v. Occidental Oil & Gas Corp., 109 Fed. Appx. 135, 136 (9th Cir. 2004).

Dismissal was not warranted on grounds of forum non conveniens given that one defendant had not agreed to submit to jurisdiction of the foreign court that purportedly provided an adequate alternative forum for the case. *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002).

McNeil v. Stanley Works, 33 Fed. Appx. 322, 325 (9th Cir. 2002).

Defendants' stipulation that they will submit to the jurisdiction of Pakistani courts is sufficient to make Pakistan an adequate alternative forum. *Chloe SAS v. Sawabeh Information Services Co.*, 2012 WL 7679386, *22 (C.D. Cal. 2012).

"When a defendant willingly submits to jurisdiction in a foreign forum, a court may grant a forum non conveniens dismissal." *Best Aviation Ltd. v. Chowdry*, 2012 WL 5457439, *5 (C.D. Cal. 2012).

"In light of [Defendants'] stipulation, the Court concludes that Defendants are amenable to process in Spain." *In re Air Crash at Madrid, Spain, on August 20, 2008*, 893 F. Supp. 2d 1020, 1027 (C.D. Cal. 2011), aff'd, 504 Fed. Appx. 573 (9th Cir. 2013).

"A voluntary submission to service of process" typically suffices to meet the first requirement for establishing an adequate alternative forum." *STM Group, Inc. v. Gilat Satellite Networks Ltd.*, 2011 WL 2940992, *3 (C.D. Cal. 2011).

The defendants met their burden of demonstrating there was an adequate alternative forum by agreeing to submit to jurisdiction in Hong Kong. *Cook v. Champion Shipping AS*, 732 F. Supp. 2d 1029, 1033 (E.D. Cal. 2010), aff'd, 463 Fed. Appx. 626 (9th Cir. 2011).

The court dismissed for forum non conveniens subject to the "condition that Tiberon submit to jurisdiction in Canada and waive any statute of limitations defenses." *Moss v. Tiberon Minerals Ltd.*, 2007 WL 3232266, *5 (N.D. Cal. 2007), aff'd, 334 Fed. Appx. 116 (9th Cir. 2009).

Defendants seeking a forum non conveniens dismissal agreed to (1) consent to Singapore's jurisdiction; (2) waive any statute of limitations defense that might apply for sixty days after the dismissal; (3) make available any evidence or witnesses in their possession that the Singapore court deems appropriate; (4) pay any final, post-appeal judgment awarded against them by a Singapore court. *Van Schijndel v. Boeing Co.*, 434 F. Supp. 2d 766, 773 (C.D. Cal. 2006), decision aff'd, 263 Fed. Appx. 555 (9th Cir. 2008).

Dismissal for forum non conveniens was conditioned on the defendants' consent to personal jurisdiction and on the French court's exercise of jurisdiction over plaintiffs' claim. *Gambra v. International Lease Finance Corp.*, 377 F. Supp. 2d 810, 827–828 (C.D. Cal. 2005).

The fact that Mexico previously had determined in a separate action that it did not have personal jurisdiction over the corporate defendant did not render that forum unavailable when the defendant had stipulated to submit to Mexico's jurisdiction in the case at hand. *Ruelas Aldaba v. Michelin North America, Inc.*, 2005 WL 3560587, *9 (N.D. Cal. 2005).

The district court granted the defendant's motion to dismiss with the conditions that a) the defendant waive any statute of limitations defense and submit to personal jurisdiction in the foreign forum, and b) the foreign court exercise jurisdiction over the case and permit the introduction of written testimony from American witnesses who were unable to travel. *Ioannidis/Riga v. M/V SEA CONCERT*, 132 F. Supp. 2d 847, 850 (D. Or. 2001).

Eleventh Circuit

“[T]he manufacturers have stipulated that they will consent to service of process in Brazil; toll any applicable Brazilian statutes of limitation; make relevant witnesses and documents available to a Brazilian civil court; and respect the final judgment of a Brazilian court. These stipulations ensure the availability of Brazil as an alternative forum.” *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1330 (11th Cir. 2011).

In a wrongful death action brought by European plaintiffs against an American aircraft manufacturer following an airplane crash in Italy, the Eleventh Circuit found that although the district court had not abused its discretion, in finding that private and public interest factors weighed in favor of dismissing the cause of action on forum non conveniens grounds to allow the plaintiffs to pursue their claims in the adequate, alternative forum of Italy, they modified the dismissal order to require the manufacturer to submit to the jurisdiction of the Italian courts and to waive the statute of limitations. Additionally, the Eleventh Circuit further modified the dismissal order to provide that any case dismissed pursuant to the district court’s order could be reinstated in the event that jurisdiction to entertain the case was rejected by a final decision of a court in Italy. *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1384 (11th Cir. 2009).

The court affirmed the district court’s conditional dismissal for forum non conveniens. *Paolicelli v. Ford Motor Co.*, 289 Fed. Appx. 387, 392 (11th Cir. 2008).

Satz v. McDonnell Douglas Corp., 244 F.3d 1279, 1283 (11th Cir. 2001).

“A foreign forum can also be available because the defendant consents to personal jurisdiction, waives statute of limitations defenses, or agrees to other conditions designed to prevent prejudice to the plaintiff if the suit is reinstated in the foreign forum.” *In re Banco Santander Securities-Optimal Litigation*, 732 F. Supp. 2d 1305, 1330 (S.D. Fla. 2010), *aff’d*, 439 Fed. Appx. 840 (11th Cir. 2011).

The district court granted the motion to dismiss for forum non conveniens provided that the defendant (1) waives any statute of limitations defenses; (2) waives any entitlement to costs and attorney’s fees; and (3) consents to the enforcement in the United States of any judgment awarded against it. *McLane v. Marriott Intern., Inc.*, 777 F. Supp. 2d 1302, 1321 (S.D. Fla. 2010), *rev’d in part on other grounds*, 476 Fed. Appx. 831 (11th Cir. 2012).

“Generally, a forum is available if it is amenable to service of process or the opposing party consents to jurisdiction in the alternative forum.” *Inverpan v. Britten*, 646 F. Supp. 2d 1354, 1357 (S.D. Fla. 2009).

“[T]he Starwood Defendants agree to submit to the jurisdiction of the Bahamian courts and waive any jurisdictional or venue defenses available to them in the Bahamian courts and under Bahamian law.” *Campbell v. Starwood Hotels & Resorts Worldwide, Inc.*, 2008 WL 2844020, *2 (S.D. Fla. 2008).

To avoid undue inconvenience and prejudice to plaintiff, in her action arising out of the collision of two boats which resulted in the death of her husband, a resident of the Bahamas, district court’s dismissal of her case for forum non conveniens would be conditioned on defendants’ submission to service of process and jurisdiction in the Bahamas for all relevant purposes, waiver of any statute of limitations defense, and provision of access to all evidence and witnesses in their custody and control. *Pinder v. Moscetti*, 666 F. Supp. 2d 1313, 1321 (S.D. Fla. 2008).

The defendants agreed to submit to the jurisdiction of Guatemalan courts. *Lisa, S.A. v. Gutierrez Mayorga*, 441 F. Supp. 2d 1233, 1241 (S.D. Fla. 2006), *aff’d*, 240 Fed. Appx. 822 (11th Cir. 2007).

D.C. Circuit

The District of Columbia Circuit upheld district court’s denial of motion to reconsider its conditional dismissal of suit. “A conditional forum non conveniens dismissal protects a plaintiff against the possibility that the foreign forum will not hear his case. It does not give the plaintiff license to deliberately prevent his suit in the foreign court from going forward in order to render an alternative forum defective.” *MBI Group, Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 572 (D.C. Cir. 2010).

Atlantic Tele-Network, Inc. v. Inter-American Development Bank, 251 F. Supp. 2d 126, 136 (D.D.C. 2003).

See also

“Whether or not the defendant is subject to jurisdiction in the foreign forum, the granting of a forum non conveniens motion is usually conditioned upon the defendant submitting itself to that jurisdiction. Generally, the conditions a defendant must follow are:

- 1) consent to the jurisdiction of the foreign court;
- 2) the foreign court must in fact exercise jurisdiction;
- 3) agree to satisfy judgments by the foreign court;
- 4) waiver of statute of limitations;
- 5) agree to facilitate discovery;
- 6) translation of documents; and
- 7) make witnesses available to the action in the foreign jurisdiction.”

Fitzpatrick, “Reyno”: Its Progeny and Its Effects on Aviation Litigation, 48 J. Air L. & Com. 539, 542 (1983).

5

Remedy clearly unsatisfactory

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254, 102 S. Ct. 252, 265, 70 L. Ed. 2d 419 (1981). This case is discussed at length in § 3828.1.

“A dismissal on grounds of forum non conveniens may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff’s chance of recovery, but an alternate forum offering a ‘clearly unsatisfactory’ remedy is inadequate.” *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1225 (9th Cir. 2011).

Alternative forum is available if entire case and all parties come within its jurisdiction. Because defendant agreed to submit to jurisdiction of Mexican court, it was available. Mexico is an adequate forum because plaintiff can recover damages there, even though the recovery in Mexico would be lower than in the United States. Moreover, plaintiff failed to show that she was unlikely, because of corruption, to receive justice in Mexico. *Saqui v. Pride Cent. America, LLC*, 595 F.3d 206, 211–214 (5th Cir. 2010).

“‘Adequacy’ does not require that the alternative forum provide identical relief, either qualitative or quantitative, as an American court ... A difference in the law that is unfavorable to the plaintiff should not play a significant role in the forum non conveniens analysis unless the remedy in the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.” *Logan Intern. Inc. v. 1556311 Alberta Ltd.*, 929 F. Supp. 2d 625 (S.D. Tex. 2012).

“For a difference in substantive law to be outcome-determinative, Plaintiffs would have to demonstrate that the relief available in Swiss courts is so clearly inadequate or unsatisfactory that it is no remedy at all.” *In re Alcon Shareholder Litigation*, 719 F. Supp. 2d 263, 274 (S.D. N.Y. 2010).

Even though Mexican law lacked strict liability against product manufacturers and imposed a version of contributory negligence that absolved a defendant in the event of any plaintiff negligence, the mere fact that Mexico’s legal system differed from American law did not mean that the plaintiff had no remedies there. *Taylor v. Tesco Corp. (US)*, 754 F. Supp. 2d 840, 845 (E.D. La. 2010).

Under forum non conveniens analysis, Colombian courts afforded adequate forum for products liability action of representatives of deceased Colombian crew members of aircraft that crashed in Venezuela against several United States companies that were, at some time prior to crash, allegedly responsible for maintenance, repair, and airworthiness of aircraft or its engine parts; representatives’ concerns regarding witnesses’ safety and security in Colombia did not render Colombian courts so unsatisfactory as to foreclose any remedy. *In re West Caribbean Crew Members*, 632 F. Supp. 2d 1193, 1201 (S.D. Fla. 2009).

“[I]f the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight. The district court may then determine that dismissal would not be in the interests of justice.” *Lisenbee v. FedEx Corp.*, 579 F. Supp. 2d 993, 1006 (M.D. Tenn. 2008).

The fact that the case was time-barred in the Netherlands meant that the defendant’s forum non conveniens argument must fail. *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 335 (D.D.C. 2007).

The court found Panama to be “an unavailable forum at this time. In 2006, the Panamanian National Assembly passed a statute that deprives Panamanian courts of jurisdiction over cases filed in foreign countries that have been dismissed under the doctrine of forum non conveniens.” *Johnston v. Multidata Systems Intern. Corp.*, 2007 WL 1296204, *27 (S.D. Tex. 2007), order rev’d on other grounds, 523 F.3d 602 (5th Cir. 2008).

“[T]ypically, a forum will be inadequate only where the remedy provided is so clearly inadequate or unsatisfactory, that it is no remedy at all.” *Krish v. Balasubramaniam*, 2007 WL 1219281, *2 (E.D. Cal. 2007).

Chelios v. National Hockey League Players’ Ass’n, 2007 WL 178326, *4 (N.D. Ill. 2007).

Ramirez de Arellano v. Starwood Hotels & Resorts Worldwide, Inc., 448 F. Supp. 2d 520, 527 (S.D. N.Y. 2006).

Indonesia was not an adequate alternative forum when there was a genuine risk of reprisal to plaintiffs, supported by recorded experience, from attempting to litigate there. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 29 (D.D.C. 2005).

Ukraine was not an adequate forum because it offered no private cause of action for trade libel, interference with contracts, or unfair competition, and the available administrative remedy would have provided compensation to the Ukrainian government, not the plaintiff. *EDAPS Consortium v. Kiyanichenko*, 2005 WL 2000940, *2–3 (N.D. Cal. 2005).

A foreign forum is adequate when the entire case and all the parties can come within the jurisdiction of the court, and the parties will not be deprived of all remedies or be treated unfairly, even when the parties may not enjoy the same benefits available in an American court. *Oyuela v. Seacor Marine (Nigeria), Inc.*, 290 F. Supp. 2d 713, 725 (E.D. La. 2003).

The alternative forum’s remedy is significant only if it is so clearly inadequate or unsatisfactory that it is no remedy at all. *In re Corel Corp. Inc. Securities Litigation*, 147 F. Supp. 2d 363, 365 (E.D. Pa. 2001).

Costa Rica was not a satisfactory alternative forum for a suit regarding unfair trade practices since the defendant provided no evidence that Costa Rican courts would entertain such a suit, or that a judgment entered in a Costa Rican court would be internationally binding. *Del Monte Fresh Produce Co. v. Dole Food Co., Inc.*, 136 F. Supp. 2d 1271, 1276–1277 (S.D. Fla. 2001).

The defendant failed to offer evidence to show Liechtenstein law provided remedy for tortious interference with contractual relations. *Cleary v. Sterenbuch*, 2001 WL 1035285, *3 (N.D. Ill. 2001).

See

In product liability suit by woman of hemophiliac infected with HIV by sexual contact with hemophiliac, court upheld dismissal under forum non conveniens, in favor of litigation in Taiwan, which is where pertinent evidence was to be found. *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 730–737 (7th Cir. 2010). In his opinion for the court, Judge Posner addressed the adequacy of the foreign tribunal if the statute of limitations will have run there:

[I]f the plaintiff's suit would be time-barred in that alternative forum, his remedy there is inadequate—is not remedy at all, in a practical sense—and in such a case dismissal on grounds of forum non conveniens should be denied unless the defendant agrees to waive the statute of limitations in that forum and the waiver would be enforced there. There is an exception, however, for cases in which a plaintiff seeks to defeat dismissal by waiting until the statute of limitations in the alternative forum has expired and then filing suit in his preferred forum (with the longer limitations period) and arguing that the alternative forum is inadequate. That is different from the case in which as a consequence of delays inherent in litigation the defendant has acquired an airtight defense of untimeliness in the alternative forum since the litigation began. The basis for dismissal on grounds of forum non conveniens should be the superior convenience of the alternative forum rather than a difference in substantive law that spells doom for the plaintiff's case if it is sent there.

599 F.3d at 736 (citations omitted). The court found the exception inapplicable and affirmed dismissal of the case. 599 F.3d at 737.

Compare

A plaintiff's inability to assert a RICO claim in the foreign forum does not preclude a forum non conveniens dismissal. *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 952 (11th Cir. 1997).

The United States' antitrust law is not categorically distinct from the antitrust laws that are enforceable in certain other nations and, as a result, the doctrine of forum non conveniens is appropriately applied in antitrust cases. Whether certain countries would enforce the United States' antitrust law or the fact that other nations do not provide treble damages for antitrust violations are not appropriate grounds for restricting an antitrust claim to a United States forum. *CSR Ltd. v. Federal Ins. Co.*, 146 F. Supp. 2d 556, 565 (D.N.J. 2001).

In an adequate alternative forum analysis, the foreign court remedy does not have to be equivalent to the United States court remedy. *Pavlov v. Bank of New York Co., Inc.*, 135 F. Supp. 2d 426, 434 (S.D. N.Y. 2001), judgment vacated on other grounds, 25 Fed. Appx. 70 (2d Cir. 2002).

6

Adequate if not deprived of all remedies

"Though defendants must carry the burden of proving an adequate forum, they may rely on a presumption that the foreign forum is adequate. A plaintiff may overcome that presumption by making a contrary showing. *InduSoft* did not show that the law of Brazil is inadequate." *InduSoft, Inc. v. Taccolini*, 560 Fed. Appx. 245, 248-249 (5th Cir. 2014).

"The district court did not abuse its discretion by weighing the evidence presented by the parties' experts [in affidavits] and concluding that the Peruvian legal system can adequately resolve Plaintiffs' claims." *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1225 (9th Cir. 2011). The requirement that the alternative forum provide "some remedy" is easy to pass. A foreign tribunal is inadequate only where the remedy is so clearly inadequate or unsatisfactory that it amounts to no remedy at all. 643 F.3d at 1225-1226.

Plaintiff's financial inability to bring suit in the Bahamas does not affect assessment of whether alternative forum is adequate, but does bear on weighing private interests. *Wilson v. Island Seas Investments, Ltd.*, 590 F.3d 1264, 1271-1272 (11th Cir. 2009).

Despite the fact that the potential amount of recovery would be significantly smaller, and the fact that the plaintiff may have difficulty financing her suit, due to the policy of Mexican lawyers not to work on contingency fee arrangements, the Ninth Circuit found that the district court's determination that Baja California Sur, Mexico was a more convenient forum, was not unreasonable. *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 666 (9th Cir. 2009) (internal citations omitted).

Adams v. Merck & Co. Inc., 353 Fed. Appx. 960, 963 (5th Cir. 2009).

The Fifth Circuit upheld dismissal for forum non conveniens in a case involving the death of an Australian citizen that took place while he was working in Brazil for a Brazilian company, and the defendants had agreed to a lawsuit in Brazil. *O'Keefe v. Noble Drilling Corp.*, 347 Fed. Appx. 27, 33 (5th Cir. 2009).

"While the district court found no cause of action analogous to unfair competition, it correctly noted that 'the availability of an adequate alternative forum does not depend on the existence of the identical cause of action in the other forum, nor on identical remedies.'" *BFI Group Divino Corp. v. JSC Russian Aluminum*, 298 Fed. Appx. 87, 91-92 (2d Cir. 2008).

DTEX, LLC v. BBVA Bancomer. S.A., 508 F.3d 785, 787 (5th Cir. 2007).

Acosta v. JPMorgan Chase & Co., 219 Fed. Appx. 83, 86 (2d Cir. 2007).

Brokerwood Intern. (U.S.) Inc. v. Cuisine Crotone, Inc., 104 Fed. Appx. 376, 384 (5th Cir. 2004).

According to the Second Circuit, whether a forum is an adequate alternative involves three questions: "Is the defendant amenable to process in the alternative forum? Is the plaintiff able to have his claims adjudicated fairly (i.e. is the judiciary corrupt)? Can the plaintiff litigate his claims safely and with peace of mind (i.e. free from threats of violence and/or trauma

connected with the particular claims)?” *Base Metal Trading Ltd. v. Russian Aluminum*, 98 Fed. Appx. 47, 49–50 (2d Cir. 2004).

“A forum is adequate even though it provides a remedy that would be substantially less than the remedy in the United States.” *Wagner v. Island Romance Holidays, Inc.*, 984 F. Supp. 2d 1310, 1313–1314 (S.D. Fla. 2013).

“Plaintiff argues also that Canada is not an adequate forum because it is unlikely to recover punitive damages and jury trials in civil cases are largely unavailable in Canada. That Plaintiff’s recovery may be less in Canada than it would hope to recover here does not render the Canadian court inadequate.” *Logan Intern. Inc. v. 1556311 Alberta Ltd.*, 929 F. Supp. 2d 625, 633 (S.D. Tex. 2012).

“[A] foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court.” *Beaman v. Maco Caribe, Inc.*, 790 F. Supp. 2d 1371, 1376 (S.D. Fla. 2011).

“The substantive law of the foreign forum is presumed to be adequate unless the plaintiff makes some showing to the contrary, or unless conditions in the foreign forum made known to the court, plainly demonstrate that the plaintiff is highly unlikely to obtain basic justice there.” *Festor v. Wolf*, 647 F. Supp. 2d 750, 753 (W.D. Tex. 2009).

“[A] forum is still adequate even if the forum’s substantive law is decidedly less favorable to the plaintiff than the present forum.” *Cruz v. Cooper Tire & Rubber Co.*, 2009 WL 4016606, *2 (W.D. Ark. 2009).

Alpine Atlantic Asset Management AG v. Comstock, 552 F. Supp. 2d 1268, 1277 (D. Kan. 2008), citing **Wright, Miller & Cooper**.

The fact that racketeering is not illegal in alternative forum is not sufficient to warrant denial of motion to dismiss on forum non conveniens grounds when there would still be a remedy. *Vivendi S.A. v. T-Mobile USA, Inc.*, 2008 WL 2345283, *14 (W.D. Wash. 2008), aff’d, 586 F.3d 689 (9th Cir. 2009).

Esheva v. Siberia Airlines, 499 F. Supp. 2d 493, 497–498 (S.D. N.Y. 2007).

The alternative forum in China was determined to be adequate after an expert affidavit asserted that Chinese law recognized claims at issue. *S & D Trading Academy, LLC v. AAFIS, Inc.*, 494 F. Supp. 2d 558, 571 (S.D. Tex. 2007).

In re Ski Train Fire in Kaprun Austria on November 11, 2000, 499 F. Supp. 2d 437, 442–443 (S.D. N.Y. 2007), judgment aff’d, 357 Fed. Appx. 377 (2d Cir. 2009).

“[T]his test is easy to pass.” *Krish v. Balasubramaniam*, 2007 WL 1219281, *2 (E.D. Cal. 2007).

“‘Adequacy’ does not require that the alternative forum provide the same relief as an American court. A number of Fifth Circuit cases have held that Mexico is an adequate forum for litigation, despite differences in Mexican and American substantive and procedural law.” *Dtex, LLC v. BBVA Bancomer, S.A.*, 512 F. Supp. 2d 1012, 1022 (S.D. Tex. 2007), aff’d, 508 F.3d 785 (5th Cir. 2007).

An adequate forum need not be a perfect forum. Absent a showing to the contrary, an alternative forum is presumed adequate. *Da Rocha v. Bell Helicopter Textron, Inc.*, 451 F. Supp. 2d 1318, 1332 (S.D. Fla. 2006).

The adequacy of the forum is not dependent on the existence of an identical cause of action in the foreign forum. *Otor, S.A. v. Credit Lyonnais, S.A.*, 2006 WL 2613775, *4 n.11 (S.D. N.Y. 2006).

A claim must be cognizable in the alternative forum for that forum to be adequate. Therefore, the defendant must establish that the alternative forum permits litigation of the subject matter of the dispute, provides adequate procedural safeguards, and offers a remedy that is not so inadequate as to be no remedy at all. *In re Air Crash Over Taiwan Straits on May 25, 2002*, 331 F. Supp. 2d 1176, 1183 (C.D. Cal. 2004).

An alternative forum is considered available to a plaintiff haling from the forum if the defendant has agreed to submit to its jurisdiction, even if the plaintiff is unwilling to avail itself of this forum. *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672, 675 (S.D. Tex. 2004).

In multi-defendant cases, all defendants must be amenable to process in the alternative forum for it to be adequate. *In re Air Crash near Nantucket Island, Mass., on October 31, 1999*, 2004 WL 1824385, *6 (E.D. N.Y. 2004).

Decrease in recovery

“Plaintiffs are essentially arguing that China is an inadequate forum because they cannot obtain in China a judicial remedy ... But, the forum non conveniens doctrine does not limit adequate alternative remedies to judicial ones.” *Jiali Tang v. Synutra Intern., Inc.*, 656 F.3d 242, 250 (4th Cir. 2011).

“[T]he mere fact that the amount of damages would be more limited under Mexican as opposed to American law, does not provide the basis for finding Mexican courts an inadequate alternative forum.” *Saqui v. Pride Cent. America, LLC*, 595 F.3d 206, 212 (5th Cir. 2010).

“Switzerland is not inadequate just because it may not permit the identical remedies that [Defendant’s] suit seeks, such as his request for punitive damages or a constructive trust.” *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1177 (10th Cir. 2009).

Fact that Bulgarian law “might not support the full array of legal claims” asserted by plaintiff in federal court would not defeat forum non conveniens motion. *Stroitelstvo Bulgaria Ltd. v. Bulgarian-American Enterprise Fund*, 589 F.3d 417, 422–424 (7th Cir. 2009).

In re Compania Naviera Joanna S.A., 531 F. Supp. 2d 680, 686–687 (D.S.C. 2007), aff’d as modified, 569 F.3d 189 (4th Cir. 2009).

DTEX, LLC v. BBVA Bancomer, S.A., 508 F.3d 785, 794 (5th Cir. 2007).

The fact that Mexico provided a comparable cause of action, albeit with severe damage caps, made it an “adequate” alternative forum. A court may find an alternative forum even when lawsuit would be unviable economically. *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 671–672 (5th Cir. 2003).

The failure of Mexican law to allow for strict liability and the limitation on amount for tort recovery does not render Mexico an inadequate forum. *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 383 (5th Cir. 2002).

Judgments against two of the three defendants could be enforced in the UAE. Therefore, plaintiff’s possible recovery would only be reduced, not completely prevented. *Capital Trans Intern., LLC v. International Petroleum Inv. Co.*, 2013 WL 557236, *16 (M.D. Fla. 2013).

“That Plaintiff’s recovery may be less in Canada than it would hope to recover here does not render the Canadian court inadequate.” *Logan Intern. Inc. v. 1556311 Alberta Ltd.*, 929 F. Supp. 2d 625, 633 (S.D. Tex. 2012).

“[T]he mere fact that the amount of damages would be more limited under Mexican as opposed to American law, does not provide the basis for finding that Mexican courts are an inadequate alternative forum.” *Dominguez v. Gulf Coast Marine & Associates, Inc.*, 2011 WL 1526973, *4 (E.D. Tex. 2011).

Though remedies in Mexican court would be different from those in federal court, plaintiffs would not be left altogether without a remedy. Nonetheless, after assuming that Mexico would provide an adequate forum, the court concluded that the case should not be dismissed. *Festor v. Wolf*, 647 F. Supp. 2d 750, 755–759 (W.D. Tex. 2009).

“Plaintiffs’ concerns about the possible limitations on punitive damages are similarly immaterial. Courts have found that the availability of punitive damages is not a requisite to a satisfactory recovery.” *Valenti ex rel Valenti v. Marriott Intern., Inc.*, 2011 WL 869189, *4 (D.N.J. 2011).

“[T]he fact that the alternative forum does not permit punitive damages generally does not render it inadequate.” *Alpine Atlantic Asset Management AG v. Comstock*, 552 F. Supp. 2d 1268, 1278 (D. Kan. 2008), **citing Wright, Miller & Cooper**.

An alternative forum exists even when potential damages might be smaller. *German Free State of Bavaria v. Toyobo Co., Ltd.*, 480 F. Supp. 2d 948, 952–953 (W.D. Mich. 2007).

The unavailability of relief on a strict liability theory did not render a Mexican forum inadequate. *Ruelas Aldaba v. Michelin North America, Inc.*, 2005 WL 3560587, *4 (N.D. Cal. 2005).

Lack of availability of punitive damages did not render Thai forum inadequate. *Boonma v. Bredimus*, 2005 WL 1831967, *3 (N.D. Tex. 2005).

An alternative forum may be adequate even if a particular remedy is not available or if the plaintiff would recover less. *Campbell v. Bridgeview Marina, Ltd.*, 347 F. Supp. 2d 458, 465 (E.D. Mich. 2004).

A remedy is not so insufficient as to make the alternative forum inadequate merely because the amount recoverable is substantially less. *Reers v. Deutsche Bahn AG*, 320 F. Supp. 2d 140, 159 (S.D. N.Y. 2004).

If compensatory damages are recoverable, then the alternative forum’s remedy is not so insufficient as to make it inadequate merely because punitive damages are not permitted. *Exter Shipping Ltd. v. Kilakos*, 310 F. Supp. 2d 1301, 1322 (N.D. Ga. 2004).

The difference in recoverable damages between forums does not justify denial of a forum non conveniens motion. *Benn v. Seventh-Day Adventist Church*, 304 F. Supp. 2d 716, 720 n.1 (D. Md. 2004).

The unavailability of punitive damages was insufficient to render Argentina an inadequate alternative forum. *Warner v. Boston Securities, S.A.*, 380 F. Supp. 2d 1299, 1309 (S.D. Fla. 2004).

A forum is adequate so long as it permits litigation of the subject matter of the dispute, provides adequate procedural safeguards, and offers a remedy that is not so inadequate as to amount to no remedy at all. Although an award in Russia was not likely to be as great as an award in the United States, the remedy of the Russian courts was not akin to no remedy at all, and therefore Russia was an adequate alternative forum. *Tarasevich v. Eastwind Transport Ltd.*, 2003 WL 21692759, *3 (S.D. N.Y. 2003).

The Royal Court of Jersey, in the United Kingdom, provided an adequate alternative forum, as the plaintiff had not shown that differences in the controlling law would amount to unfairness; the plaintiff’s causes of action were available under Jersey law; and it was not necessary that the Jersey remedy be identical to the Louisiana remedy. *Kovzac Ltd. v. Westway Trading Corp.*, 2003 WL 21459953, *4 (E.D. La. 2003), **citing Wright, Miller & Cooper**.

Russia was an adequate alternative forum because Russian courts likely would exercise jurisdiction over defendants on consent. The fact that plaintiff’s recovery in Russia would probably be smaller did not render Russia an inadequate forum. *Varnelo v. Eastwind Transport, Ltd.*, 2003 WL 230741, *17 (S.D. N.Y. 2003), adhered to, 2004 WL 103428 (S.D. N.Y. 2004).

Germany was an adequate alternative forum because Germany provided the same causes of action and the defendants had stipulated they would submit to German jurisdiction. The unavailability of a jury trial and punitive damages did not render the forum inadequate. *Helog Ag v. Kaman Aerospace Corp.*, 228 F. Supp. 2d 91, 93 (D. Conn. 2002).

8

Contingent fee arrangements

Australia’s lack of contingent-fee arrangements did not render it an inadequate forum. *Auxer v. Alcoa, Inc.*, 406 Fed. Appx. 600, 603 (3d Cir. 2011).

Although Mexican attorneys do not work on a contingency basis, this did not render Mexico an inadequate forum. *Loya v.*

Starwood Hotels & Resorts Worldwide, Inc., 583 F.3d 656, 664 (9th Cir. 2009).

Although the plaintiffs argued that the prohibition against contingent fee agreements in Argentina presented them “with a practical impediment,” this factor was not dispositive in a forum non conveniens analysis. *Paolicelli v. Ford Motor Co.*, 289 Fed. Appx. 387, 390–391 (11th Cir. 2008).

“[T]he financial position of the plaintiff and lack of contingency fee arrangements in the alternative fora are among many factors to be considered in the forum non conveniens analysis, and weak ones at that.” *Vega v. Cruise Ship Catering and Service Intern.*, N.V., 279 Fed. Appx. 946, 947 (11th Cir. 2008).

“In fact, the United States stands almost alone in its approach toward attorneys’ fees, and so if we were to find that dismissal was wrong for this reason, we would risk gutting the doctrine of forum non conveniens entirely.” *In re Factor VIII or IX Concentrate Blood Products Litigation*, 484 F.3d 951, 958 (7th Cir. 2007).

“[T]he lack of a contingent-fee system is not a determinative factor in the forum non conveniens analysis.” *Prophet v. International Lifestyles, Inc.*, 778 F. Supp. 2d 1358, 1366 (S.D. Fla. 2011), *aff’d in part, rev’d in part on other grounds*, 447 Fed. Appx. 121 (11th Cir. 2011).

“This Court similarly concludes that the relative unavailability of contingency fee arrangements in Spain does not counsel against dismissal. As with fee-shifting, the U.S. is an outlier on contingency fee arrangements.” *In re Air Crash at Madrid, Spain*, on August 20, 2008, 893 F. Supp. 2d 1020, 1036 (C.D. Cal. 2011), *aff’d*, 504 Fed. Appx. 573 (9th Cir. 2013).

Despite the unavailability of contingent fee arrangements in Swiss civil litigation, Swiss courts were adequate alternative forums for forum non conveniens purposes. *In re Alcon Shareholder Litigation*, 719 F. Supp. 2d 263, 273 (S.D. N.Y. 2010).

“While the Court recognizes that the absence of a contingency fee system is a private interest factor that may be taken into consideration in determining whether an action should be dismissed on grounds of forum non conveniens ... the lack of a contingent fee system and the lack of a trial by jury are not entitled to substantial weight.” *Horberg v. Kerzner Intern. Hotels Ltd.*, 744 F. Supp. 2d 1284, 1294–1295 (S.D. Fla. 2007).

The court held that Germany was adequate alternative forum despite the fact that German courts use different fee structure. *Fagan v. Deutsche Bundesbank*, 438 F. Supp. 2d 376, 382–383 (S.D. N.Y. 2006).

Canada was an adequate alternative forum. Generally, a court may find a forum inadequate only when there is a complete absence of due process and an inability of a plaintiff to obtain substantial justice. The unavailability of contingent fee arrangements is irrelevant to the alternative forum analysis. *VictoriaTea.com, Inc. v. Cott Beverages, Canada*, 239 F. Supp. 2d 377, 383 (S.D. N.Y. 2003).

England was an adequate alternative forum. Although obtaining counsel under a contingent fee arrangement would be difficult but possible for plaintiff. *Gross v. British Broadcasting Corp.*, 2003 WL 346110, *2 (S.D. N.Y. 2003), *vacated and remanded on other grounds*, 386 F.3d 224 (2d Cir. 2004).

Compare

Fee arrangement was a factor to be weighed in considering private interests component of forum non conveniens analysis. *Campbell v. Starwood Hotels & Resorts Worldwide, Inc.*, 2008 WL 2844020, *7 (S.D. Fla. 2008).

9

Absence of jury trial

The district court did not abuse its discretion by finding that the UK was an adequate forum despite the unavailability of a jury trial. *Adams v. Merck & Co. Inc.*, 353 Fed. Appx. 960, 964 (5th Cir. 2009).

“[T]he absence of a right to trial by jury does not render the Canadian court inadequate.” *Logan Intern. Inc. v. 1556311 Alberta Ltd.*, 929 F. Supp. 2d 625, 633 (S.D. Tex. 2012).

The unavailability of jury trial does not render a forum inadequate. *Akerblom v. Ezra Holdings Ltd.*, 2012 WL 464917, *3 (S.D. Tex. 2012), *aff’d*, 509 Fed. Appx. 340 (5th Cir. 2013).

“Courts have found that the absence of trial by jury—a common feature of civil law systems—does not make a forum inadequate.” *Valenti ex rel Valenti v. Marriott Intern., Inc.*, 2011 WL 869189, *4 (D.N.J. 2011).

“Even if Ecuador does not allow for a jury trial, that does not render a forum inadequate.” *Clough v. Perenco, L.L.C.*, 2007 WL 2409357, *3 (S.D. Tex. 2007).

The lack of a jury trial does not have substantial weight in a forum non conveniens analysis. *Horberg v. Kerzner Intern. Hotels Ltd.*, 744 F. Supp. 2d 1284, 1295 (S.D. Fla. 2007).

France was an adequate alternative forum despite the fact that civil litigants in French courts do not have a right to a jury trial. *Adamowicz v. Barclays Private Equity France S.A.S.*, 2006 WL 728394, *3 (S.D. N.Y. 2006).

A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy all of the benefits of an American court. Neither discovery limitations nor the lack of a jury trial in a foreign forum makes that forum inadequate. *Zermeno v. McDonnell Douglas Corp.*, 246 F. Supp. 2d 646, 659 (S.D. Tex. 2003).

But compare

“[T]he fact that a plaintiff may exercise her constitutional right to a jury trial is not something that properly may weigh against keeping a case in the United States.” The district court erroneously concluded that “the administrative difficulties stemming from court congestion strongly favor the U.K. forum.” In reaching that conclusion, the district court had erroneously given substantial weight to the fact that there would be no jury trial in the United Kingdom, whereas there

would be a Seventh Amendment right to a jury in the United States. In re Factor VIII or IX Concentrate Blood Products Litigation, 484 F.3d 951, 958 (7th Cir. 2007).

10

Loss of other procedural advantages

Although only an American court could attach assets of American litigant, Peruvian court was not inadequate. *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 390 (2d Cir. 2011).

Argentina was an adequate alternative forum for a product liability action, even though the plaintiffs expressed concerns about filing fees, lack of discovery, and possible delays in Argentine courts. Such concerns did not render the forum clearly unsatisfactory or incapable of offering a remedy. *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001).

The plaintiffs had an adequate remedy available in New Zealand despite (1) New Zealand's restrictive tort laws and (2) the fact that the plaintiffs' case was subject to administrative, rather than judicial, proceedings there. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001).

"Plaintiff argues that discovery will be more difficult in Canada because Canadian courts have a limited ability to require the production of American documents ... this argument relates to the private interest factors, not to the adequacy of the Canadian forum." *Logan Intern. Inc. v. 1556311 Alberta Ltd.*, 929 F. Supp. 2d 625 (S.D. Tex. 2012).

Differences in the rules of procedure between the two forums are not dispositive. *Howden North America Inc. v. Ace Property & Cas. Ins. Co.*, 875 F. Supp. 2d 478, 490 (W.D. Pa. 2012).

"Differences in discovery procedures do not provide a sufficient basis for finding an alternative forum to be inadequate." *Harp v. Airblue Ltd.*, 879 F. Supp. 2d 1069, 1074 (C.D. Cal. 2012).

Discovery limitations do not render a forum inadequate. *Akerblom v. Ezra Holdings Ltd.*, 2012 WL 464917, *3 (S.D. Tex. 2012), *aff'd*, 509 Fed. Appx. 340 (5th Cir. 2013).

"Aruba's limited pretrial discovery system also does not render it an unacceptable forum." *Valenti ex rel Valenti v. Marriott Intern., Inc.*, 2011 WL 869189, *4 (D.N.J. 2011).

"The availability of a class action procedure goes to the issue of convenience, not adequacy." In re *Banco Santander Securities-Optimal Litigation*, 732 F. Supp. 2d 1305, 1334 (S.D. Fla. 2010), *aff'd*, 439 Fed. Appx. 840 (11th Cir. 2011).

"The unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate." *Navarrete De Pedrero v. Schweizer Aircraft Corp.*, 635 F. Supp. 2d 251, 263 (W.D. N.Y. 2009).

Foreign tribunal was not rendered inadequate due to discovery provisions that are different from those in federal court. *Alpine Atlantic Asset Management AG v. Comstock*, 552 F. Supp. 2d 1268, 1278 (D. Kan. 2008), **citing Wright, Miller & Cooper**.

The court concluded that "less liberal pretrial discovery rules, [do not] render Germany an inadequate forum." *Flex-N-Gate Corp. v. Wegen*, 2008 WL 5448994, *5 (S.D. N.Y. 2008).

"[L]itigation delay is a fact of life ... and the prospect of some delay does not render a forum inadequate." In re *Bancredit Cayman Ltd.*, 50 Bankr. Ct. Dec. (CRR) 257, 2008 WL 5396618, *4 (Bankr. S.D. N.Y. 2008).

"Discovery mechanisms that are not identical to those in the United States do not render an alternative forum inadequate." *Vivendi S.A. v. T-Mobile USA, Inc.*, 2008 WL 2345283, *11 (W.D. Wash. 2008), *aff'd*, 586 F.3d 689 (9th Cir. 2009).

"If this action were barred by the statute of limitations in South Africa, there would be no adequate alternative. However, because I have assumed for purposes of this motion that equitable tolling is available under South African law, South Africa is available as an alternative forum." *Omollo v. Citibank, N.A.*, 2008 WL 1966721, *5 (S.D. N.Y. 2008), *aff'd*, 361 Fed. Appx. 288 (2d Cir. 2010).

Alternative forum was adequate even though plaintiff might not be able to proceed on particular legal theory. *German Free State of Bavaria v. Toyobo Co., Ltd.*, 480 F. Supp. 2d 948, 952–953 (W.D. Mich. 2007).

The Greek legal system's procedural differences are not enough to render it an inadequate forum. In re *Air Crash Near Athens, Greece on August 14, 2005*, 479 F. Supp. 2d 792, 797 (N.D. Ill. 2007).

"Courts may not refuse to dismiss a case, however, simply because the alternative forum has law, choice of law rules, or procedures less favorable to the plaintiff than those found in American courts." *Mt. Hawley Ins. Co. v. Packers Sanitation Services, Inc., Ltd.*, 2007 WL 1959216, *3 (N.D. Ohio 2007).

In re *Ski Train Fire in Kaprun Austria on November 11, 2000*, 499 F. Supp. 2d 437, 443 (S.D. N.Y. 2007), *judgment aff'd*, 357 Fed. Appx. 377 (2d Cir. 2009).

The presence of a statute-of-limitations defense in the alternative forum is not sufficient to prevent a forum non conveniens dismissal. *First Colonial Ins. Co. v. Custom Flooring, Inc.*, 2007 WL 1651155, *5 (D.N.J. 2007).

"[T]he unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate." The court also noted that "courts in this District have repeatedly found Germany to be an adequate alternative forum despite the differences in discovery procedures." *BlackRock, Inc. v. Schroders PLC*, 2007 WL 1573933, *7 (S.D. N.Y. 2007) (quoting *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir. 1993)).

A possible delay of several years for judicial remedy in Indian courts does not affect the forum non conveniens analysis. *Krish v. Balasubramaniam*, 2007 WL 1219281, *3 (E.D. Cal. 2007).

France and Italy were adequate alternative forums despite the lack of class action devices, the employment of fee-shifting, and the prohibition of contingent-fee arrangements. In re *Vioxx Products Liability Litigation*, 448 F. Supp. 2d 741, 746

(E.D. La. 2006).

An Israeli forum was adequate because it provided a cause of action, even though plaintiffs' chances of success allegedly were lower. *Miller v. Boston Scientific Corp.*, 380 F. Supp. 2d 443, 448 (D.N.J. 2005).

An alternative forum is adequate if a plaintiff is treated fairly and not deprived of all remedies, even if a plaintiff does not receive same benefits as in American court. *Dunsby v. Transocean, Inc.*, 329 F. Supp. 2d 890, 895 (S.D. Tex. 2004).

For an alternative forum to be adequate, it need only provide some avenue of redress. The admissibility of evidence and delays in adjudication do not affect the adequacy inquiry. *In re Bridgestone/Firestone, Inc.*, 305 F. Supp. 2d 927, 932 (S.D. Ind. 2004), vacated and remanded, 420 F.3d 702 (7th Cir. 2005) and judgment reinstated, 470 F. Supp. 2d 917 (S.D. Ind. 2006).

A foreign forum is available when the entire case and all of the parties can come within the jurisdiction of that forum, and a foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy all of the benefits of an American court. Mexico was an adequate alternative forum if all of the defendants agreed to submit to the jurisdiction of the Mexican courts and waive any limitations defenses that accrued after the suit was filed; neither discovery limitations nor the lack of a jury trial in a foreign forum makes that forum inadequate. *Zermeno v. McDonnell Douglas Corp.*, 246 F. Supp. 2d 646, 658 (S.D. Tex. 2003).

Both Italy and Ecuador were adequate alternative fora; neither procedural differences, nor insufficient penalties for defaulting witnesses, nor the need to apply foreign law, nor general allegations of corruption render a forum inadequate. A court will deem an alternative forum adequate as long as the dispute may be litigated in that forum. *F.D. Import & Export Corp. v. M/V Reefer Sun*, 2003 WL 21512065, *2 (S.D. N.Y. 2003).

Procedural disadvantages did not render Argentina an inadequate forum. *Hidrovia, S.A. v. Great Lakes Dredge & Dock Corp.*, 2003 WL 2004411, *2 (N.D. Ill. 2003).

A foreign forum is "adequate" for purposes of forum non conveniens analysis when parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court. *Canales Martinez v. Dow Chemical Co.*, 219 F. Supp. 2d 719, 725 (E.D. La. 2002).

The lack of a strict product liability cause of action in a foreign forum does not render that forum inadequate. *Urena Taylor v. Daimler Chrysler Corp.*, 196 F. Supp. 2d 428, 432 (E.D. Tex. 2001).

The plaintiffs claimed that Ecuador was not an adequate forum for several reasons, including: (1) tort claims were seldom brought in Ecuador, (2) class actions were unavailable, (3) procedural deficiencies such as discovery restrictions and cross examination limitations, (4) corruption in the Ecuadorian judiciary, and (5) an Ecuadorian law, adopted after the suit was filed in the United States, precluded actions brought in foreign countries from being brought in Ecuador. Despite these claims, Ecuador was found to be an adequate alternative forum. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 539–543 (S.D. N.Y. 2001), judgment aff'd as modified, 303 F.3d 470 (2d Cir. 2002).

The lack of a class action device was not a basis for finding Russia an inadequate forum. *Pavlov v. Bank of New York Co., Inc.*, 135 F. Supp. 2d 426, 434 (S.D. N.Y. 2001), judgment vacated on other grounds, 25 Fed. Appx. 70 (2d Cir. 2002).

Hungary was found to be an adequate alternative forum. The plaintiff's arguments that Hungarian courts did not provide the same causes of action and were procedurally inadequate were speculative, at best. *Moscovits v. Magyar Cukor Rt.*, 2001 WL 767004, *4–5 (S.D. N.Y. 2001), judgment aff'd, 34 Fed. Appx. 24 (2d Cir. 2002).

See also

Although the court noted that the safety of litigants properly may be considered when considering a forum non conveniens dismissal, a general allegation of political and social instability in the region is insufficient to justify dismissal. *BFI Group Divino Corp. v. JSC Russian Aluminum*, 481 F. Supp. 2d 274, 284 (S.D. N.Y. 2007), aff'd, 298 Fed. Appx. 87 (2d Cir. 2008).

But see

That Belgium does not have a class action mechanism and does not recognize fraud-on-the-market theory rendered its courts an unsuitable alternative forum. *In re Lernout & Hauspie Securities Litigation*, 208 F. Supp. 2d 74, 91–92 (D. Mass. 2002).

11

Federal courts reluctant to look closely

"Even assuming that Zeevi's employees and agents were subjected to harassment by Bulgarian government officials, nothing in the record suggests that the courts of Bulgaria are gravely inconvenient or unfair." *Zeevi Holdings Ltd. v. Republic of Bulgaria*, 494 Fed. Appx. 110, 114 (2d Cir. 2012).

Carijano v. Occidental Petroleum Corp., 643 F.3d 1216, 1226–1227 (9th Cir. 2011).

"It is true that all of the experts lamented a public perception of corruption in the Bulgarian courts, and [one expert] even claimed that the Bulgarian legal system was incapable of providing a fair hearing. Still, the experts made no attempt to quantify this purported corruption or document particular plaintiffs or claims that were treated unfairly. Their generalized, anecdotal complaints of corruption are not enough for a federal court to declare that an EU nation's legal system is so corrupt that it can't serve as an adequate forum." *Stroitelstvo Bulgaria Ltd. v. Bulgarian-American Enterprise Fund*, 589 F.3d 417, 421 (7th Cir. 2009).

“Where a plaintiff rebuts the defendant’s claim of adequacy of the forum with charges that the foreign judicial process is biased or corrupt, this Court and our district courts are reluctant to agree. ... Furthermore, this Court will not presume judicial bias against the plaintiff when the defendant is a state-owned entity.” *BFI Group Divino Corp. v. JSC Russian Aluminum*, 298 Fed. Appx. 87, 91 (2d Cir. 2008).

“Litigation of foreign claims in American courts may undermine local governments, who may be seen as weak or unresponsive when they were given no opportunity to address the problem in the first instance. ... Taking up cases that can be handled domestically aggravates diplomatic and local tensions because it interferes with local control and stirs up unnecessary publicity.” *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1239 (9th Cir. 2007), on reh’g en banc, 550 F.3d 822 (9th Cir. 2008).

Plaintiff’s “anecdotal evidence of corruption and delay provides insufficient basis for the district court’s dramatic holding that the courts of the Philippines are an inadequate forum in this civil case.” *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179 (9th Cir. 2006).

“With respect to corruption in the Russian judicial system, we note that it is not the business of our courts to assume responsibility for supervising the integrity of the judicial system of another sovereign nation. Where the integrity of a foreign court is challenged, considerations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards.” *Base Metal Trading Ltd. v. Russian Aluminum*, 98 Fed. Appx. 47, 50 (2d Cir. 2004).

An alternative forum ordinarily is adequate if the defendants are amenable to service of process there and the forum permits litigation of the subject matter of the dispute. Ukraine was an adequate alternative forum, notwithstanding the alleged general corruption in the body politic of Ukraine, the fact that the action involved a state-owned enterprise of Ukraine, and the claim that execution on assets would not be possible. *In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 499 (2d Cir. 2002).

On appeal from a dismissal, the plaintiffs argued that Ecuador was not an adequate alternative forum due to an Ecuadorian preclusion statute, the instability in the Ecuadorian legal system, and the general shortcomings of the Ecuadorian legal system such as congestion and a lack of financial resources. The dismissal was affirmed because the Ecuadorian preclusion statute did not apply to the case, the alleged instability in the Ecuadorian courts had been resolved, and there was no showing that the general problems with the Ecuadorian legal system would preclude a fair and reasonably expeditious adjudication of the issues presented. *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1314 (11th Cir. 2001).

Expert affidavits produced by the defendants did not establish that Sierra Leone was an adequate alternative forum since the plaintiff’s contention that ten-year civil rendered it unsafe and corrupt did not address judicial system there. *Rustal Trading US, Inc. v. Makki*, 17 Fed. Appx. 331, 336–337 (6th Cir. 2001).

Although the plaintiff provided human rights reports, State Department reports, and Pakistani newspaper reports to support its contention that the Pakistani legal system was corrupt, the court held that these documents were “generalized, anecdotal, or simply irrelevant.” *Harp v. Airblue Ltd.*, 879 F. Supp. 2d 1069, 1073 (C.D. Cal. 2012). Therefore, the plaintiff had not adequately shown that the corruption in Pakistan’s legal system would “prevent a just resolution of this case.” 879 F. Supp. 2d at 1073.

The plaintiffs’ generalized concerns about corruption in Indonesia failed to provide concrete proof of corruption or to connect that proof to their case. Absent such proof, the court was reluctant to find the entirety of the Indonesian judicial system so irretrievably corrupt as to render it an inadequate alternative forum. *In re Air Crash Disaster Over Makassar Strait, Sulawesi*, 2011 WL 91037, *5 (N.D. Ill. 2011).

“Plaintiffs’ generalized allegations regarding the state of Cameroon’s judiciary are unavailing.” Therefore, the court found that Cameroon was an adequate alternative forum in spite of a State Department report and a law review article both expressing concerns about the independence of Cameroon’s judiciary. *MBI Group, Inc. v. Credit Foncier du Cameroun*, 558 F. Supp. 2d 21, 30 (D.D.C. 2008), aff’d, 616 F.3d 568 (D.C. Cir. 2010).

Russia was an adequate forum despite allegations of massive corruption in their judicial system. *Esheva v. Siberia Airlines*, 499 F. Supp. 2d 493, 500 (S.D. N.Y. 2007).

“[T]he Second Circuit repeatedly has cautioned against judges giving serious consideration to such conclusory attacks on the judicial systems of foreign jurisdictions, underscoring the concerns that censures of this kind raise if endorsed by our courts, especially when based on bare aspersions and expansive generalizations.” *Do Rosario Veiga v. World Meteorological Organisation*, 486 F. Supp. 2d 297, 304 (S.D. N.Y. 2007).

“[I]t will be a black day for comity among sovereign nations when a court of one country, because of a perceived ‘negative predisposition,’ declares the incompetence or worse of another nation’s judicial system.” *BFI Group Divino Corp. v. JSC Russian Aluminum*, 481 F. Supp. 2d 274, 283 (S.D. N.Y. 2007) (quoting *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510, 539 (S.D. N.Y. 2002)).

Despite a report from the United States Department of State detailing business communities’ lack of confidence in Panamanian justice system, the court ignored claims of corruption because the assertion was not supported by expert testimony. *Johnston v. Multidata Systems Intern. Corp.*, 2007 WL 1296204, *27 (S.D. Tex. 2007), order rev’d on other grounds, 523 F.3d 602 (5th Cir. 2008).

“American courts should be wary of branding other nations’ judicial forums as deficient in the substance or procedures that their laws contain.” *Corporacion Tim, S.A. v. Schumacher*, 418 F. Supp. 2d 529, 532–533 (S.D. N.Y. 2006), judgment aff’d, 223 Fed. Appx. 37 (2d Cir. 2007).

An unsupported allegation of hostility is insufficient to make an alternative forum inadequate. *D’Onofrio v. Il Corriere Della Sera*, 373 F. Supp. 2d 555, 558 (E.D. Pa. 2005).

The court refused to examine the parties’ conflicting social science data on the integrity of Argentina’s judicial system, and noted that general allegations of corruption were insufficient to render an Argentine forum inadequate. *Warter v. Boston Securities, S.A.*, 380 F. Supp. 2d 1299, 1310–1311 (S.D. Fla. 2004).

Generalized allegations of corruption did not render Russia inadequate as an alternative forum. An alternative forum must be adequate, not identical. *Base Metal Trading SA v. Russian Aluminum*, 253 F. Supp. 2d 681, 709 (S.D. N.Y. 2003), *aff’d*, 98 Fed. Appx. 47 (2d Cir. 2004).

There was no compelling reason to find Guyana to be an inadequate forum; generalized allegations of delay and potential corruption were insufficient. *Atlantic Tele-Network, Inc. v. Inter-American Development Bank*, 251 F. Supp. 2d 126, 137 (D.D.C. 2003).

Despite allegations of corruption, the courts of the Philippines offered an adequate alternative forum because 1) the law of the Philippines recognized the plaintiff’s cause of action, 2) the defendants had consented to jurisdiction in the Philippines, and 3) the defendants had agreed to waive any statute of limitations defenses arising after the current suit was filed. *Realuyo v. Villa Abrille*, 2003 WL 21537754, *12 (S.D. N.Y. 2003), judgment *aff’d*, 93 Fed. Appx. 297 (2d Cir. 2004).

A litigant’s conclusory allegations that Ukrainian courts were corrupt and claims of inability to execute against assets of Ukrainian company or Ukrainian government were insufficient to render Ukraine an inadequate forum since Ukrainian law provided for execution of judgment against government property. *Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377, 385–386 (S.D. N.Y. 2001), judgment *aff’d*, 311 F.3d 488 (2d Cir. 2002).

Venezuela was an “adequate alternative forum” for the trial of a racketeering action arising out of the collapse of the Venezuelan banking industry and of a Venezuelan’s bank’s United States subsidiary. Neither allegedly pervasive delays in the Venezuelan legal system nor the fact that Venezuelan law might be less favorable to the plaintiffs’ chance of recovery rendered Venezuela an inadequate forum. *Banco Latino v. Gomez Lopez*, 17 F. Supp. 2d 1327, 1332 (S.D. Fla. 1998).

Compare

“Despite the assertions of LSI, the Court is hesitant to declare Saudi Arabia as a presumptively inadequate forum. Still, the Court is wary to discredit and diminish the factors listed by LSI as they tend to lend credence, due to the specific facts of this case, to the inadequacy of litigation against the Kingdom in the Kingdom. Nevertheless, because the Court is hesitant to declare Saudi Arabia an inadequate forum, the Court will consider the private and public factors in the forum non conveniens analysis.” *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*, 2008 WL 2946059, *19 (W.D. Tex. 2008), *aff’d in part, rev’d in part on other grounds and remanded*, 581 F.3d 210 (5th Cir. 2009).

But see

Delay can make an alternative forum inadequate, and on the facts shown to it, the district court did not err in finding that the delay in the courts of India was so great that the defendant had failed to prove that India would be an adequate alternative forum. *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1227–1228 (3d Cir. 1995).

“Since defendants have not presented evidence to rebut plaintiffs’ convincing proof that delays in the Mumbai Bench would essentially provide ‘no remedy at all,’ the court concludes that India is an inadequate forum.” *Weisel Partners LLC v. BNP Paribas*, 2008 WL 3977887, *10 (N.D. Cal. 2008).

12

Deprived of any opportunity

Canadian court was not an adequate alternative forum where defendants had raised statute of limitations defense in Canadian proceedings, and if Canadian court ruled in defendants’ favor, dismissal of American case would deprive insurers of any forum. *Fireman’s Fund Ins. Co. v. Thyssen Min. Const. of Canada, Ltd.*, 703 F.3d 488 (10th Cir. 2012).

Iraq was not an available alternative since serious questions arose as to whether a British citizen could bring suit in an Iraqi court, whether defamation would be an available remedy, and the possibility of one defendant’s immunity to suit there. *Galustian v. Peter*, 591 F.3d 724, 732 (4th Cir. 2010).

“[T]hat the law, or the remedy afforded, is less favorable in the foreign forum is not determinative. A foreign forum must only provide the plaintiff with “some” remedy in order for the alternative forum to be adequate.” *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 666 (9th Cir. 2009) (internal citations omitted).

The foreign plaintiffs in a product liability action against Merck, the maker of Vioxx, argued that because a cause of action for loss of consortium does not exist in the U.K., dismissal based on forum non conveniens would be a total deprivation of all remedies. However the Fifth Circuit held, “[w]hile loss of consortium may not be a viable claim in some parts of the U.K., English law, at least, allows for damages for losses incurred caring for an injured spouse, which means that those Appellants who are spouses of allegedly injured parties would not be left without any remedy in the forum identified below. Further, loss of consortium is a derivative cause of action that does not, standing alone, generally support maintaining jurisdiction in an inconvenient forum.” *Adams v. Merck & Co. Inc.*, 353 Fed. Appx. 960, 962–963 (5th Cir. 2009).

A foreign jurisdiction is not adequate unless it will permit plaintiff to litigate the subject matter of dispute. *Royal and Sun Alliance Ins. Co. of Canada v. Century Intern. Arms, Inc.*, 466 F.3d 88, 95 (2d Cir. 2006).

The Second Circuit vacated and remanded the district court’s forum non conveniens dismissal when the alternative forum

in Russia would deem the core issues underlying the plaintiff's claims to be precluded by a previous default judgment; the court of appeals emphasized that an alternative forum must be presently available and adequate. *Norex Petroleum Ltd. v. Access Industries, Inc.*, 416 F.3d 146, 157–158 (2d Cir. 2005).

The court found no adequate alternative forum for an action brought to confirm an arbitration award because only a court of the United States has the power to attach the commercial property of a foreign nation located in the United States. *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 366 (D.C. Cir. 2005).

The court found no adequate alternative forum when a foreign war claims commission created a right of recovery for the plaintiff's nation, but not a direct, personal right of recovery for the plaintiff. The possibility of indirect recovery was no equivalent remedy at all. *Nemariam v. Federal Democratic Republic of Ethiopia*, 315 F.3d 390, 395 (D.C. Cir. 2003). This case is noted and criticized in 114 *Yale L.J.* 443 (2004).

The affidavit of a professor of law and practicing attorney in Turkey was insufficient to establish that Turkey would be an adequate alternative forum upon the dismissal on forum non conveniens grounds of an action brought against a hotel owner for breach of a contract to operate a casino in a hotel in Turkey. The affidavit failed to state expressly that Turkish law recognized claims for breach of contract and tortious interference with contract or some analogous action, but merely stated that “commercial claims” could be adjudicated in Turkey. The affidavit also failed to address the statute of limitations issues and announced its conclusions in rather summary fashion. *Mercier v. Sheraton Intern., Inc.*, 935 F.2d 419, 425–426 (1st Cir. 1991).

“While a forum in which defendants are amenable to service of process and which permits litigation of the dispute is generally adequate, such a forum may nevertheless be inadequate if it does not permit the reasonably prompt adjudication of a dispute, if the forum is not presently available, or if the forum provides a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all.” *Skanga Energy & Marine Ltd. v. Arevenca S.A.*, 875 F. Supp. 2d 264, 273 (S.D. N.Y. 2012), *aff'd*, 2013 WL 1442466 (2d Cir. 2013).

Court in Poland was not adequate alternative forum because “Polish law does not recognize many of the causes of action asserted, including shareholder derivative claims, and that to the extent defendants may be convicted in criminal proceedings based on the conduct alleged here, restitution is unavailable to plaintiffs.” *Domanus v. Lewicki*, 645 F. Supp. 2d 697, 702 n.2 (N.D. Ill. 2009).

The court refused to accept defendant's reliance on other court opinions demonstrating that Russia was an adequate forum because defendant had failed to show that Russia was an adequate alternative forum for particular claims of this action. *Technology Development Co., Ltd. v. Onischenko*, 536 F. Supp. 2d 511, 520 (D.N.J. 2007).

“Because the province of Alberta does not recognize a child's claim for loss of consortium as a result of wrongful injury to the child's parent, the remedy afforded by that forum would be clearly unsatisfactory.” *Mecum v. Host Marriott Corp.*, 2005 WL 997320, *3 (E.D. Tex. 2005).

The court found that Switzerland was an inadequate forum because there was no evidence that the plaintiff would be able to litigate fully its United States trademark rights there. *Greenlight Capital, Inc. v. GreenLight (Switzerland) S.A.*, 2005 WL 13682, *5 (S.D. N.Y. 2005).

The defendant failed to carry its burden of showing that the proposed alternative forum would entertain the subject matter of the suit. *Motown Record Co., L.P. v. iMesh.Com, Inc.*, 2004 WL 503720, *6 (S.D. N.Y. 2004).

13

Unfair treatment is likely

“The alternative forum must provide the plaintiff with a fair hearing to obtain some remedy for the alleged wrong.” *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 736 (7th Cir. 2010).

“A forum in which defendants are amenable to service of process and which permits litigation of the dispute is generally adequate. Such a forum may nevertheless be inadequate if it does not permit the reasonably prompt adjudication of a dispute, if the forum is not presently available, or if the forum provides a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all.” *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009). In this case, Nigerian children and their guardians sued a drug manufacturer and others under the Alien Tort Claims Act (ATCA), alleging that the defendant violated a norm of customary international law that prohibits involuntary medical experimentation on humans. The claims involved alleged testing of an experimental antibiotic on children in Nigeria without consent or knowledge. The defendants moved to dismiss on the grounds that the ATCA did not apply to the acts and on forum non conveniens grounds. The plaintiffs noted that a Nigerian action based upon the same events had been dismissed after a judge declined jurisdiction for personal reasons. Plaintiffs asserted that the dismissal was the result of rampant corruption and that Nigeria was therefore not an adequate forum. The district judge granted dismissal on forum non conveniens. 2002 WL 31082956, *12 (S.D. N.Y. 2002). The Second Circuit vacated that dismissal and remanded for fact finding regarding the adequacy of a forum in Nigeria. 77 Fed. Appx. 48 (2d Cir. 2003). Specifically, the record was inconclusive regarding reasons for the dismissal of the Nigerian action. 77 Fed.Appx. at 53.

On remand, the district court dismissed for failure to state a claim under the ATCA and, in the alternative, for forum non conveniens. The Second Circuit again reversed, discussing mostly the ATCA issue, but concluding that the district judge erred in placing the burden on the plaintiff under forum non conveniens to show that the Nigerian forum was inadequate. 562 F.3d 163, 189–190. In the interim, “a tectonic change had altered the relevant political landscape” in Nigeria. The Nigerian government and that of a Nigerian state had brought criminal and civil charges against the drug company, leading

it to abandon its reliance on forum non conveniens. 562 F.3d at 172.

“A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy all the benefits of an American court.” *Logan Intern. Inc. v. 1556311 Alberta Ltd.*, 929 F. Supp. 2d 625, 632 (S.D. Tex. 2012).

“An alternative forum is deemed to be an adequate forum if the parties will not be deprived of all remedies or treated unfairly. In order to be adequate, an alternative forum need only provide the plaintiff with a fair hearing to obtain some remedy for the alleged wrong.” *Barcode Informativa Limitada v. Zebra Technologies Corp.*, 2011 WL 1100449, *3 (N.D. Ill. 2011).

“The mere fact that” co-founder of plaintiff corporation “could not personally travel to the proceedings in Cameroon without fear of reprisal does not establish that Cameroon is an inadequate alternative forum.” *MBI Group, Inc. v. Credit Foncier du Cameroun*, 558 F. Supp. 2d 21, 31 (D.D.C. 2008), *aff’d*, 616 F.3d 568 (D.C. Cir. 2010).

“Plaintiffs argue first and foremost that no matter what the Lieutenant Governor might say, that they only went to Curacao because they were forced, that the [sic] fled Curacao at risk to their lives, and that they were granted political asylum after escaping from Curacao, and so simply cannot go back there. The Court, while not passing judgment on the courts or government of Curacao, finds the interest of the government of Curacao in this particular matter, as evidenced by the curious fact that the Lieutenant Governor has come forth with testimony in a private lawsuit, peculiar. The government has evinced something other than what one might call a regulatory or governmental interest in this lawsuit, and something more akin to a personal interest in this lawsuit, which threatens to not only be embarrassing, but to be embarrassing in a very small community in which the Defendant plays a major economic role. The Lieutenant Governor’s affidavit does little to make this court believe that Curacao is an adequate alternative forum or that the Plaintiffs can reinstate their suit there without undue inconvenience or prejudice.” *Licea v. Curacao Drydock Co., Inc.*, 537 F. Supp. 2d 1270, 1274 (S.D. Fla. 2008).

The court refused to dismiss a torture suit brought under the Alien Tort Claims Act against a former head of state of Nigeria, as the defendant had not met the threshold burden of demonstrating that an adequate alternative forum existed. Nigeria did not provide an adequate alternative forum when there was no evidence that the plaintiff would be treated fairly or receive an adequate remedy in the Nigerian courts. The court noted that a motion to dismiss on forum non conveniens grounds raises special concerns in Alien Tort Claims Act cases involving allegations of torture and other human rights abuses. *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 918 (N.D. Ill. 2003), *aff’d and remanded*, 408 F.3d 877 (7th Cir. 2005).

The Sudan was not an adequate forum for an Alien Tort Claims Act suit, which alleged that an energy company collaborated with the Sudanese government in ethnic cleansing activities against the plaintiffs, because the plaintiffs would have been unable to obtain justice in the Sudan and might well have exposed themselves to great danger in trying to do so. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 336 (S.D. N.Y. 2003).

The International Commission on Holocaust Era Insurance Claims (ICHEIC), a non-governmental entity funded by the defendant insurers, was not an adequate alternative forum for the litigation of the plaintiffs’ Holocaust era claims against the insurers. There is a fundamental difference between a public and a private forum, and ICHEIC lacked independence and permanence. *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation*, 228 F. Supp. 2d 348, 353 (S.D. N.Y. 2002).

Compare

14

Banco Latino case

17 F. Supp. 2d 1327 (S.D. Fla. 1998).

15

“Not a heavy one”

17 F. Supp. 2d at 1331.

16

Piper Aircraft case

454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981). The case is discussed in § 3828.1.

17

Delay

17 F. Supp. 2d at 1332.

18

Very little evidence

At least one district court went even farther. In *Abdullahi v. Pfizer, Inc.*, 2005 WL 1870811 (S.D. N.Y. 2005), the district judge placed the burden on the plaintiffs to demonstrate that the proposed alternative forum in Nigeria was inadequate. The Second Circuit reversed on this point: “When the district court granted [the defendant’s] motion, it identified the pivotal issue as whether the plaintiffs produced sufficient evidence to show that Nigeria is an inadequate alternative forum. In so doing, the district court omitted an analysis of whether [the defendant] discharged its burden of persuading the court as to

the adequacy and present availability of the Nigerian forum and improperly placed on plaintiffs the burden of proving that the alternative forum is inadequate. On remand, the district court will have an opportunity to reassess this issue” *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189–190 (2d Cir. 2009).

19

Union Carbide case

927 F.2d 60, 66 (2d Cir. 1991) (quoting *Jhirad v. Ferrandina*, 536 F.2d 478, 484–485 (2d Cir. 1976)).

20

Courts fail to distinguish

Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 *Houston J. Int’l L.* 385, 397 (2004).

See also

Note, *Forum Non Conveniens: Whose Convenience and Justice?*, 86 *Tex. L. Rev.* 1079 (2008).

21

Gonzalez case

301 F.3d 377 (5th Cir. 2002).

See also

The District Court for the District of Columbia’s decision to grant the defendant’s motion for dismissal in *Irwin v. World Wildlife Fund, Inc.*, 448 F. Supp. 2d 29 (D.D.C. 2006), further exemplifies the failure of courts to distinguish between theoretical and practical access to courts and remedies in the forum non conveniens context. The plaintiff and her husband were injured in a boating accident in Gabon while living temporarily in Africa. Although the standard forum non conveniens factors may have weighed in favor of adjudication in Gabon—Ms. Irwin originally was treated there and most of the witnesses resided there—the defendant corporation had its principal place of business in the District of Columbia and a memo from the United States Department of State was presented explaining the corrupt and inefficient state of the Gabonese legal system. Most notable, however, was the fact that the severity of Ms. Irwin’s devastating injuries put her at risk of serious complications and death if she did not remain close to adequate medical care. Rather than keep the case in the District of Columbia, where Ms. Irwin could be treated at a nearby hospital, the court dismissed the case based on the presumption that her husband was available to attend the trial in Gabon.

22

Ignoring the realities

Note, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 *Conn. L. Rev.* 1475, 1499 (2004).

See also

Note, *The Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts*, 50 *Va. J. Int’l L.* 1021 (2010).

Casey, *Boomerang Litigation: How Convenient is Forum Non Conveniens in Transnational Litigation?*, 4 *B.Y.U. Int’l L. & Mgmt. Rev.* 21 (2007).

Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 *U. Kan. L. Rev.* 609 (2008).

Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 *Rich. J. Global L. & Bus.* 513 (2009).

Note, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 *Conn. L. Rev.* 1475 (2004).

But see

Delay can make an alternative forum inadequate, and on the facts shown to it, the district court did not err in finding that the delay in the courts of India was so great that the defendant had failed to prove that India would be an adequate alternative forum. *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1227–1228 (3d Cir. 1995).

“Since defendants have not presented evidence to rebut plaintiffs’ convincing proof that delays in the Mumbai Bench would essentially provide ‘no remedy at all,’ the court concludes that India is an inadequate forum.” *Weisel Partners LLC v. BNP Paribas*, 2008 WL 3977887, *10 (N.D. Cal. 2008).

23

Carijano case

643 F.3d 1216 (9th Cir. 2011).

24

Evidence too general and anecdotal

“The district court correctly noted that ‘one of the central ends of the forum non conveniens doctrine is to avert ‘unnecessary indictments by our judges condemning the sufficiency of the courts and legal methods of other nations.’” 643 F.3d at 1226 (quoting *Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377, 385 (S.D. N.Y. 2001)). The district court disregarded plaintiffs’ expert and credited the expert affidavit proffered by the defendant to the effect that Peruvian law would permit processing of a claim for damages on the facts of the case. “This was a proper exercise of the broad discretion trial courts possess to weigh such evidence in this context.” 643 F.3d at 1225. In *Leon v. Millon Air, Inc.*, 251 F.3d 1305 (11th Cir. 2001), the court found Ecuador to be an adequate alternative forum despite evidence of a recent judicial strike, delays of up to twelve years in commercial cases, and financing problems caused by less than two percent of the national budget being apportioned to the courts. 251 F.3d at 1313–1314.

25

Daventree case

349 F. Supp. 2d 736 (S.D. N.Y. 2004).

26

Not adequate forum

349 F. Supp. 2d at 756.

27

Abandoned or settled for a nominal amount

Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction,”* 103 L.Q. Rev. 398, 418–420 (1987).

See also

Note, *Striking A Better Public-Private Balance in Forum Non Conveniens*, 93 Cornell L. Rev. 819 (2008).

Duval-Major, *A One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 Cornell L. Rev. 650 (1992).

28

State department

The author argues that State Department reports provide valuable information and cure some concerns of comity. Note, *Forum Non Conveniens: Whose Convenience and Justice?*, 86 Texas L. Rev. 1079, 1110 (2008).

29

Foreign legislation

The author reviews the relevant of legislation in Latin American countries to forum non conveniens inquiry and potential enforceability of foreign judgments in courts in the United States. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. Kan. L. Rev. 609 (2008).

30

Canales Martinez case

219 F. Supp. 2d 719 (E.D. La. 2002).

31

Statutes prevented

Under Costa Rica law, “once a plaintiff has chosen a particular forum, all other possible for a are divested of jurisdiction.” 219 F.Supp.2d at 728. Regarding Honduran law, defendant failed to show “that the Honduran courts would accept jurisdiction over cases first-filed seomwerhe else, as has occurred here” 219 F.Supp.2d at 737. “[I]t appears to the this Court that there is indeed a preemptive jurisdiction bar to plaintiffs filing suit in the Philippines on the claims herein, since they were first filed here.” 219 F.3d at 739.

See also

“We thus adopt the view that based on Article 40(2) Venezuelan courts are not an available forum on the basis of the presence in Venezuela of relevant contracts or ‘verified facts.’” In re *Bridgestone/Firestone, Inc.*, 190 F. Supp. 2d 1125, 1130 (S.D. Ind. 2002).

32

Adequate if defendant submits

Morales v. Ford Motor Co., 313 F. Supp. 2d 672, 689 (S.D. Tex. 2004). The court discussed the *Canales Martinez* case

from the preceding footnote, in considerable detail, both questioning and distinguishing the holding. 313 F.Supp.2d at 676 & n.3.

See also

In *Leon v. Millon Air. Inc.*, 251 F.3d 1305, 1315 (11th Cir. 2001), the court affirmed a forum non conveniens dismissal in favor of suit in Ecuador despite a blocking statute that rendered jurisdiction in that country uncertain.

33

West Caribbean Airways case

2012 U.S. Dist. LEXIS 74149 (S.D. Fla. 2012), citing *Wright & Miller*.

34

May potentially leave plaintiffs

2012 U.S. Dist. LEXIS 84149 at *33 and *37.

35

Not necessarily warrant reinstatement

Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1325 (S.D. Fla. 2009), aff'd, 635 F.3d 1277 (11th Cir. 2011).
Scotts Co. v. Hacienda Loma Linda, 2 So. 1013, 1017 (Fla. Dist. Ct. App. 2008).

EXHIBIT 22

§ 2.04 Insiders by Deputization

As the discussion above demonstrates,¹ the determination whether an individual is as an officer or director for purposes of Section 16 often requires careful and difficult analysis of the functions the individual performs and the individual's influence on the issuer's policies. The task of identifying all of the issuer's statutory insiders is complicated still further by the fact that the courts and the SEC have extended the reach of Section 16 to persons who "deputize" someone to serve as a director or officer on their behalf.² Under the deputization theory, a partnership, corporation, individual, or other person may be subject to Section 16 based on the insider status of a natural person who serves as its deputy.³ As discussed below, the deputization theory is most commonly invoked to declare a deputizing person to be a director, although the theory also is applicable to a person who deputizes another to serve as an officer.⁴

¹ See §§ 2.01 and 2.02 *supra*.

² In a rule adopted in 1991, the SEC created yet another category of indirect insider by subjecting to Section 16 any trust for which an insider served as trustee with investment control and of which the insider or a member of the insider's immediate family was a beneficiary. The application of Section 16 to such trusts was accomplished through an amendment to Rule 16a-8(a)(1)(ii). See Release No. 34-28869 (1991). The trust's holdings also were deemed beneficially owned by the insider-trustee under the attribution principles of Rule 16a-8(b)(2) (discussed *infra* in § 4.05), and therefore the primary effect of the new rule was to require the trust to file reports under Section 16(a) that were duplicative of reports being filed by the insider-trustee in his or her individual capacity. The new rule gave rise to a number of interpretive issues. See the following SEC No-Action Letters: *American Bar Association*, Q.3 (May 2, 1991); *D'Ancona & Pflaum* (February 18, 1992) (amending *D'Ancona & Pflaum* (August 5, 1991)); *Ralston Purina Co.* (May 6, 1991); *American Bar Association* (July 2, 1992); *Chandler Trust No. 2* (August 14, 1991); *Bryan, Cave, McPheeters & McRoberts* (June 20, 1991); *Manatt, Phelps & Phillips* (August 5, 1991); *Anheuser-Busch Companies, Inc.* (July 29, 1991); *Philip L. Ball* (August 14, 1991); *Kirkland & Ellis* (May 11, 1992); *Taylor Voting Trust*, Q.5 (January 3, 1992). After five years' experience with the rule, the SEC rescinded it as unnecessary. See Release No. 34-37260, § IV.F. (1996).

³ Neither the language of Section 16 nor definitions of some of its terms preclude a partnership or corporation from being deemed a director or officer. Both Section 3(a)(7) of the 1934 Act and Rule 16a-1(f) under the 1934 Act, which define the terms "director" and "officer," respectively, encompass any "person" who meets the requirements of those provisions. Section 3(a)(9) of the 1934 Act defines "person" to include a natural person, company, government, or political subdivision, agency, or instrumentality of a government. Corporations and partnerships are generally viewed as "companies" for purposes of Section 3(a)(9) and therefore may be "directors" within the meaning of Section 3(a)(7).

⁴ See, e.g., *Stirling v. Chemical Bank*, 382 F. Supp. 1146 (S.D.N.Y. 1974), *aff'd*, 516 F. 2d 1396 (2d Cir. 1975). Indeed, because officers have day-to-day knowledge of and control over the affairs of the issuer, the

Whether a person is an “indirect insider” by deputization is a question of fact.⁵ The factual issues that must be resolved in determining a person’s status as a director by deputization are different from those involved in determining whether the deputized individual (or any other individual) is a director or officer. The factors relevant to the determination are not addressed in any SEC rule, and instead have been developed by the courts on a case by case basis in litigation under Section 16(b).⁶

[1] Origin of the Theory

The possibility that a person could be an insider by deputization was first suggested by Judge Learned Hand in his concurring opinion in *Rattner v. Lehman*.⁷ The case involved short-swing transactions by Lehman Bros. (a partnership engaged in the business of trading in and underwriting securities) in the stock of an issuer of which one of Lehman’s partners served as a director.

possibility of abuse of inside information in the case of a deputized officer is arguably greater than in the case of a deputized director. See Roy A. Wentz, *Refining a Crude Rule: The Pragmatic Approach to Section 16(b) of the Securities Exchange Act of 1934*, 70 NW. U. L. REV. 221, 256-57 n. 118 (1975).

⁵ See, e.g., *Dreiling v. American Express Co.*, 351 F. Supp. 2d 1077, 1083 (W.D. Wash. 2004), *rev’d on other grounds*, 458 F. 3d 942, 952 (9th Cir. 2006), and the SEC’s brief amicus curiae filed in that case; *Feder v. Martin Marietta Corp.*, 406 F. 2d 260, 263 (2d Cir. 1969).

⁶ When the Commission overhauled the Section 16 rules in 1991, it expressly declined to address the deputization doctrine, preferring instead to leave development of the doctrine to case law. See Release No. 34-28869, § II.A.1. n. 27 (1991). In 2010, the Commission adopted Rule 14a-11, providing security holders with the right in certain circumstances to include in the issuer’s proxy statement the security holders’ nominees to the issuer’s board of directors. See Release No. 34-62764 (2010). In the proposing release for the rule, the SEC had noted a potential concern among certain investors that a nominating security holder’s successful use of Rule 14a-11 to elect one or more directors to an issuer’s board could result in the security holder becoming subject to Section 16 as a “director by deputization.” See Release No. 34-60089 (2009). The Commission did not, however, propose or adopt any exclusion from the deputization theory for a nominating security holder, nor did it endorse any standards for establishing the independence of a nominee from the nominating security holder that might preclude application of the deputization theory. Instead, the SEC stated in the adopting release that the application of the deputization theory should be left to the courts. Rule 14a-11 was declared invalid in *Business Roundtable v. SEC*, 647 F. 3d 1144 (D.C. Cir. 2011). A version of Rule 14a-11 proposed in 2003 did not, in the SEC’s view, raise deputization concerns, because the proposed rule would have required that a security holder’s nominee be independent of the nominee. See Release No. 34-48626 (2003).

⁷ 193 F. 2d 564 (2d Cir. 1952).

The plaintiff sought to recover all of the profits realized by the partnership, but the court held that only the partner serving as a director was liable for short-swing profits, and only to the extent of his pro-rata share of the partnership's profits.

Judge Hand concurred in the court's opinion, noting that the partnership's transactions in the issuer's stock were effected without the knowledge, advice, or concurrence of the partner who served on the issuer's board. Judge Hand was unwilling, however, to endorse an ironclad rule of non-liability for partnerships in such cases, stating that: "I wish to say nothing as to whether, if a firm deputed the partner to represent its interests as a director on the board, the other partners would not be liable."⁸

[2] The Supreme Court's View

Judge Hand's suggestion that the theory of deputization might be applicable under Section 16(b) was later endorsed by the Supreme Court in another case involving Lehman Bros. In *Blau v. Lehman*,⁹ a stockholder of Tidewater Associated Oil Company alleged that Lehman Bros. deputed one of its partners, a Mr. Thomas, to represent its interests on Tidewater's board of directors, and that Lehman then engaged in short-swing transactions in Tidewater's stock. Thomas was a member of Tidewater's board at the time of Lehman's transactions, but the Supreme Court accepted the district court's finding that Lehman had not deputed Thomas to represent its interests on Tidewater's board and that Lehman purchased the Tidewater stock without Thomas's advice or knowledge.¹⁰ The Supreme Court indicated, however, that a partnership would be deemed a "director" of a corporation if the partnership actually functioned as a director through a partner who had been deputed to perform a director's duties "not for himself but for the partnership."¹¹

In ruling against the plaintiffs, the Court held that establishing the existence of deputization requires something more than a mere showing that the partnership might have received confidential information from its representative on the

⁸ 193 F. 2d at 567 (Hand, J., concurring). For a discussion of the common law definition of "deputy," see Comment, *The Extension of Section 16(b) Liability Through the "Deputization" Theory*, 43 TEMP. L.Q.381, 384-85 (1970).

⁹ 368 U.S. 403 (1962).

¹⁰ *Id.* at 408.

¹¹ *Id.* at 410.

corporation's board.¹² The Court observed that the drafters of Section 16 rejected an "anti-tipping" provision which would have extended liability to non-insiders who actually receive inside information.¹³ Thus, according to the Court, Congress must have intended Section 16(b) to apply only to persons deemed to fall within one of the three classes of statutory insiders, and not to persons who merely receive confidential information.

The Court's approach imposed a heavy burden of proof upon a person seeking to establish deputization in a case under Section 16(b). The decision requires a litigant to show, in cases like *Blau v. Lehman*, that the partnership and the partner intended the partner to perform his or her directorial duties for the benefit of the partnership and that the partner acted in the interest of the partnership when performing those duties.¹⁴ According to the Court, only if these facts are established can a deputizing person be deemed to be "functioning as a director."

Justice Douglas registered a vigorous dissent,¹⁵ in which Chief Justice Warren concurred, arguing that a partner represents the partnership's interests whether the partner has been formally deputized or not. Douglas further asserted that the majority's opinion eliminated the "great Wall Street trading firms" from the operation of Section 16(b) and permitted them to "make a rich harvest" on inside information by trading in the securities of corporations on whose boards they gained representation.¹⁶

[3] The *Feder* Decision

The Supreme Court's opinion in *Blau v. Lehman* did not articulate the factual considerations relevant to a determination whether a deputizing person actually functioned as a director through a representative on the issuer's board. That task

¹² *Id.* at 411.

¹³ For a discussion of congressional consideration of the anti-tipping provision, see § 1.02[3][e][i] *supra*.

¹⁴ See, e.g., Comment, *The Extension of Section 16(b) Liability Through the "Deputization" Theory*, 43 TEMP. L.Q. 381, 386 (1970).

¹⁵ 368 U.S. at 414.

¹⁶ Douglas' frustration at the majority's approach was obviously deeply felt, perhaps partly because he had helped administer Section 16 during its early years while he was Chairman of the SEC. His frustration was to resurface in dissents in two subsequent Supreme Court decisions favoring insiders on other Section 16(b) issues. See *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 427 (1972); *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 605 (1973).

fell to the Second Circuit in *Feder v. Martin Marietta Corp.*,¹⁷ the first case in which a corporation was held liable under Section 16(b) based on the deputization theory.¹⁸ The defendant in the case, Martin Marietta Corporation, was held to have deputized its chief executive officer, George Bunker, to serve on the board of directors of Sperry Rand Corporation, and therefore to be liable for its short-swing profits in Sperry stock.

Bunker, who had twice turned down invitations to become a member of Sperry's board of directors, eventually decided to accept a position on the board. Between the time Bunker received his first invitation and the time he decided to sit on Sperry's board, Martin Marietta had, with Bunker's approval, purchased in the open market almost \$10 million of Sperry common stock. Before accepting a seat on Sperry's board, Bunker sought and obtained the approval of Martin Marietta's board. In obtaining the board's approval, Bunker informed the board of Martin Marietta's investment in Sperry.

After Bunker became a member of Sperry's board, Martin Marietta continued to purchase Sperry stock. Approximately three months after becoming a director, Bunker submitted to Sperry's chairman a letter of resignation in which he stated that, when he joined the board, Sperry representatives believed that "the Martin Marietta ownership of a substantial number of shares of Sperry Rand should have representation on [Sperry's] board." Approximately one month after Bunker's resignation, Martin Marietta sold all of its Sperry stock.

The district court held that the foregoing facts were insufficient to establish deputization. The Second Circuit reversed, holding that the district court's findings were clearly erroneous. In so ruling, the court held that whether a person is a deputy is a question of fact which must be determined on a case-by-case basis.¹⁹ In *Feder*, the Second Circuit relied heavily on the following facts in

¹⁷ 406 F. 2d 260 (2d Cir. 1969), *cert. denied*, 396 U.S. 1036 (1970).

¹⁸ The *Feder* decision has been the subject of numerous commentaries. See, e.g., Carroll L. Wagner, *Deputization Under Section 16(b): The Implications of Feder v. Martin Marietta Corp.*, 78 YALE L.J. 1151 (1969); Comment, *The Extension of Section 16(b) Liability Through the "Deputization" Theory*, 43 TEMP. L.Q. 381 (1970); Note, *Deputization Under 16(b): The Elements of a Cause of Action*, 31 U. PITT. L. REV. 724 (1970). Recent Decisions appear at 54 MINN. L. REV. 886 (1970); 44 B.U.L. REV. 598 (1969); 21 CASE WESTERN L. REV. 113 (1969); 1969 DUKE L.J. 812; 38 GEO. WASH. L. REV. 329 (1969); 6 HOUSTON L. REV. 568 (1969); 22 VAND. L. REV. 1003 (1969); 11 W. & M. L. REV. 550 (1969); 35 MO. L. REV. 265 (1970).

¹⁹ 406 F. 2d at 263.

concluding that Bunker served as Martin Marietta's deputy: (i) Bunker's letter of resignation indicated that Sperry viewed Bunker as representing Martin Marietta's interests; (ii) Bunker's membership on Sperry's board was approved by Martin Marietta's board of directors, and the board had been informed that Martin Marietta had accumulated a significant investment position in Sperry; (iii) Bunker controlled Martin Marietta's investments, including its transactions in Sperry stock; (iv) Bunker was in a position to obtain inside information regarding Sperry; and (v) Martin Marietta had representatives on boards of numerous other corporations who appeared to function as deputies.

Although *Blau v. Lehman* suggests that the test for determining deputization is whether the deputized person functions as a director on behalf of the deputizer, the Second Circuit placed heavy emphasis on the potential for abuse of inside information,²⁰ without necessarily relying on a finding that Martin Marietta "functioned as a director." This suggests that an "earpiece" director, serving merely to pass information to his or her firm regarding the issuer, might be found to be a deputy under the Second Circuit's approach.²¹ Such a suggestion, however, is inconsistent with the Supreme Court's view, discussed above, that the mere receipt of inside information by a person who realizes short-swing profits is insufficient to attach Section 16 liability to the person.²²

The court also appeared to relax the requirement of *Blau v. Lehman* that the representative on the issuer's board have been expressly deputized to represent the deputizer's interests. The court seemed to consider it sufficient that Bunker in fact represented Martin Marietta's interests on Sperry's board. This conclusion is evident in the court's statement that "a person in Bunker's unique position could act as a deputy for Martin Marietta even in the absence of factors indicating an

²⁰ In view of Bunker's position as the person who approved Martin Marietta's investments, there was little if any need in *Feder* for the plaintiff to show that Bunker in fact conveyed inside information to officials of Martin Marietta.

²¹ 1 JOEL STEINBERG, SECURITIES REGULATION: LIABILITIES AND REMEDIES § 4.03 at 4-52.2 (2011).

²² See *Blau v. Lehman*, 368 U.S. 403, 411 (1962), and the discussion accompanying note 12 *supra*. In fact, the Second Circuit may have had in mind that Bunker was promoting Martin Marietta's interests while serving on Sperry's board. The record showed that Martin Marietta was looking for a merger partner. Sperry was a likely candidate, and Bunker may have been encouraged by Martin Marietta to join Sperry's board to try to cultivate an interest in a merger. See Carroll L. Wagner, *Deputization Under Section 16(b): The Implications of Feder v. Martin Marietta Corp.*, 78 YALE L.J. 1161 at n. 47 (1969).

intention or belief on the part of both companies that he was so acting.”²³ This statement may be viewed as *dicta*, however, since Bunker’s letter of resignation, and the fact that Martin Marietta’s board approved Bunker’s membership on Sperry’s board, are strong evidence that both Sperry and Martin Marietta intended Bunker to represent Martin Marietta’s interests while serving on Sperry’s board.

[4] Subsequent Application of Deputization Theory

The Second Circuit’s decision in *Feder v. Martin Marietta Corp.* provoked alarm among some members of the corporate community.²⁴ The *Wall Street Journal*, in a front page article, described the opinion as “a whole new can of worms,” and reported forecasts of a rash of actions under Section 16(b) against investment banking firms and companies with interlocking directorates.²⁵ The soundings of alarm, however, proved to be groundless, for there have been only five other reported decisions in which the deputization theory has been applied to hold that a person was a director by deputization, and in all of those cases the deputizer was already subject to Section 16 as a ten percent owner.²⁶ In those cases courts held that

- a corporation was a director by deputization where, upon acquiring a controlling interest in the issuer, it elected four of its officers and directors to the issuer’s six-person board, and routinely received reports regarding all matters discussed at the issuer’s board meetings;²⁷

²³ 406 F. 2d at 265.

²⁴ When the defendant in *Feder* applied to the U.S. Supreme Court for a writ of certiorari, the Court took the unusual step of seeking the Solicitor General’s opinion regarding whether the writ should be granted. The Solicitor General did not argue against liability, and the writ was ultimately denied. See BARRY RIDER & H. LEIGH FRENCH, REGULATION OF INSIDER TRADING 31 (1979).

²⁵ WALL ST. J., February 24, 1969, at 1.

²⁶ As discussed in § 2.04[5][b] *infra*, in four of these cases the defendant ten percent owner affirmatively asserted that it also was a director by deputization, for the purpose of availing itself of a defense to liability under Section 16(b) that was available only to officers and directors.

²⁷ *Lewis v. Dekcraft Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 94,620 (S.D.N.Y. 1974). The court in *Lewis* invoked the deputization theory to find that the defendant was a director and therefore was not eligible for the arbitrage exemption of Section 16(e). The finding of deputization was not necessary even for that purpose, since the court had already found that the transactions did not constitute arbitrage.

- a corporation and a limited liability company were directors by deputization where each was represented on the issuer's board of directors by at least one officer who could be considered its "agent";²⁸
- a group of investors were all directors by deputization where, in connection with their becoming "controlling shareholders" through their purchase from the issuer of 32.9% of its outstanding stock, they acquired the right to appoint three directors to the issuer's board and exercised that right by appointing three employees of an affiliate of one of the investors;²⁹
- a limited liability company and certain of affiliates who co-invested in an issuer were directors by deputization where the limited liability company appointed two of its managing directors to represent its interests on the board of directors, and the representatives routinely provided confidential information to the limited liability company to assist it in evaluating its investment in the issuer;³⁰ and
- a limited liability company and its members were directors by deputization based on the limited liability company's appointment, pursuant to a contractual right, of six of the seven members of the issuer's board of directors.³¹

²⁸ *Levy v. Sterling Holding Co., LLC*, Fed. Sec. L. Rep. (CCH) ¶ 91,689, at 98,099 (D. Del. 2002), *rev'd on other grounds and remanded*, 314 F.3d 106 (3d Cir. 2002), *cert. denied*, 124 S. Ct. 389 (2003), *aff'd after remand*, 544 F.3d 493 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 2827 (2009). Although the court's decision disposed of the defendants' motion to dismiss and therefore accepted as true the allegations in the complaint, it appears that the court independently concluded that the entities were directors by deputization. The holding arguably was *obiter dictum*, though, because the status of the entities as directors was irrelevant to the court's decision.

²⁹ *Segen v. CDR-Cookie Acquisitions, LLC*, (CCH) Fed. Sec. L. Rep. ¶ 93, 664 (S.D.N.Y. 2006). Surprisingly, the court made its finding in connection with the defendant's motion to dismiss the complaint under F.R.C.P. Rule 12(b)(6), based solely on allegations contained in the complaint.

³⁰ *Roth v. Perseus, L.L.C.*, 2006 WL 2129793 (S.D.N.Y. July 28, 2006), *aff'd*, 522 F.3d 942 (2d Cir. 2008).

³¹ *Roth v. PHAWK, LLC*, 05 Civ. 9247 (S.D.N.Y. March 31, 2006). Six of the limited liability company's members were the appointed directors of the issuer and therefore were directors in their own right, whether or not they might also have been considered directors by deputization.

Deputization has been alleged in other cases in which the defendant denied that deputization occurred, but none resulted in a finding of deputization.³² The courts in these cases did not always find that deputization did not occur, but instead the cases often were decided on other grounds or settled before the question of deputization was decided. Nevertheless, these cases, together with the cases that established the deputization theory and the subsequent cases in which defendants affirmatively asserted that they were directors by deputization,³³ shed light on the factors that might lead a court to conclude that a person is a director by deputization.

[a] Factors Relevant to Finding of Deputization

It is clear that the mere presence on an issuer's board of directors of a member of a partnership or investment bank is insufficient by itself to establish that the partnership or investment bank is a director by deputization.³⁴ A director who had interests in various investment partnerships, for example, was held not to have been deputized by the partnerships where there were "no affairs of the partnerships which defendant was protecting or policies which he was seeking to promote" while serving on the issuer's board.³⁵ Similarly, the fact that a director is the controlling shareholder of a family corporation that holds issuer stock does not make the director the corporation's deputy, because an insider's control over a corporation does not mean that he or she performs directorial functions for the benefit of that corporation.³⁶

³² In *Dreiling v. American Express Travel Related Services Co.*, 351 F. Supp. 2d 1077 (W.D. Wash. 2004), *rev'd on other grounds*, 458 F. 3d 942 (9th Cir. 2006), the court assumed for purposes of a motion to dismiss, but did not find, that a person who was not a ten percent owner was a director by deputization.

³³ See § 2.04[4][b] *infra*.

³⁴ See *Blau v. Lehman*, 368 U.S. 403 (1962); *Rattner v. Lehman*, 193 F. 2d 564 (2d Cir. 1952); *Lasker v. Pyle-National Co.*, Fed. Sec. L. Rep. (CCH) ¶ 91,684 (S.D.N.Y. 1966); *Shattuck Denn Mining Corp. v. La Morte*, Fed. Sec. L. Rep. (CCH) ¶ 94,429 (S.D.N.Y. 1974). Even in the absence of deputization, however, a partner-director will be liable for his pro rata share of the partnership's short-swing profits. See *Blau v. Lehman*, 368 U.S. 403 (1962); *Rattner v. Lehman*, 193 F. 2d 564 (2d Cir. 1952).

³⁵ *Shattuck Denn Mining Corp. v. La Morte*, Fed. Sec. L. Rep. (CCH) ¶ 94,429 (S.D.N.Y. 1974).

³⁶ *Marquette Cement Mfg. Co. v. Andreas*, 239 F. Supp. 962 (S.D.N.Y. 1965). It has been held that an insider-shareholder of a corporation that is not a personal holding company is not deemed to "realize" a pro rata portion of the corporation's short-swing profits. See *Popkin v. Dingman*, 366 F. Supp. 534 (S.D.N.Y. 1973). Where the insider-shareholder is deemed the beneficial owner of a pro rata portion of the corporation's holdings under Rule 16a-1(a)(2), however, the corporation's transactions in issuer securities will be attributed to the insider for purposes of Section 16(b) to the extent of the insider's pro rata ownership interest in the corporation. See *Feder v. Frost*, 220 F. 3d 29 (2d Cir. 2000).

To establish that a director in fact is a deputy, a plaintiff must show that either (i) the director regularly shared confidential information about the issuer with the alleged deputizer, (ii) the director had a relationship with the deputizer that allowed the deputizer to influence the director's decisions as a director, or (iii) the director had a relationship with the deputizer that allowed the director routinely to influence the deputizer's investment policy, or at least its investment policy regarding the issuer.³⁷ Then, to establish that the deputizer "functioned as a director," the plaintiff must show that the director performed his or her duties on behalf of the issuer for the benefit of the deputizer³⁸ rather than for the purpose of guiding or enhancing the issuer's business activities.³⁹ It has been suggested that a plaintiff may show this by establishing that the director regularly conveyed confidential information to the deputizer and that the deputizer acted on it.⁴⁰ This

³⁷ Failure to establish the presence of at least one of these factors generally will preclude a finding of deputization. See, e.g., *Colan v. Cutler-Hammer, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,806, at 93,947 n. 9 (N.D. Ill. 1986), *aff'd on other grounds*, 812 F.2d 357 (7th Cir.), *cert. denied*, 420 U.S. 820 (1987) (chief executive officer of issuer not a deputy of another corporation where his only relationship to the other corporation is that of an outside director). The determination of an entity's status as a director by deputization should not necessarily be affected by whether the entity's representative was appointed to the board pursuant to a written agreement between the entity and the issuer allowing the entity to name a representative to the issuer's board. However, an entity's appointment of one or more representatives to the issuer's board of directors in connection with the entity's becoming a controlling shareholder of the issuer is strong evidence of deputization. See *Roth v. Perseus, LLC*, 2006 WL 2129793 (S.D.N.Y. July 28, 2006), *aff'd*, 522 F.3d 242 (2d Cir. 2008).

³⁸ The AMERICAN BAR ASSOCIATION, COMMITTEE ON CORPORATE LAWS, CORPORATE DIRECTOR'S GUIDEBOOK (6th ed. 2011) provides that "[a] director should exercise independent judgment for the overall benefit of the corporation and all of its shareholders." Nevertheless, a director may, consistent with his or her fiduciary duty to shareholders, provide information or promote policies that are intended to benefit the director's sponsor. See generally Cyril Moscow, *The Representative Director Problem*, 6 INSIGHTS (June 2002) at 12.

³⁹ See, e.g., Herbert J. Deitz, *A Practical Look at Section 16(b) of the Securities Exchange Act*, 43 FORDHAM L. REV. 1, 4 (1974); Robert Todd Lang & Melvin Katz, *Section 16(b) and "Extraordinary" Transactions: Corporate Reorganizations and Stock Options*, 49 NOTRE DAME LAW. 705, 707 n. 5 (1974); Carroll L. Wagner, *Deputization under Section 16(b): The Implications of Feder v. Martin Marietta Corp.*, 78 YALE L.J. 1151, 1160 (1969). The Ninth Circuit has said that an entity may be a director by deputization "without intending to be and without acknowledging that a deputy represents its interests on the issuer's board." See *Dreiling v. American Express Co.*, 458 F.3d 942, 952 (9th Cir. 2006). In some cases, courts appear to be willing to assume that a director acts for the benefit of an entity where the director has a close relationship with the entity. See, e.g., *Segen v. CDR-Cookie Acquisitions, LLC*, (CCH) Fed. Sec. L. Rep. ¶ 93,664 (S.D.N.Y. 2006).

⁴⁰ William H. Painter, *Section 16(d) of the Securities Exchange Act: Legislative Compromise or Loophole?*, 113 U.P.A. L. REV. 358, 375-76 (1965). See *Roth v. Perseus, LLC*, 2006 WL 2129793 (S.D.N.Y. July 28, 2006), *aff'd*, 522 F.3d 242 (2d Cir. 2008), in which the defendants succeeded in establishing that

conduct alone, however, would not necessarily establish deputization, and the plaintiff's case would be more compelling if the plaintiff could show that the deputy exercised little or no independence when acting as a member of the issuer's board of directors, but instead consulted the deputizer before taking a position at board meetings.⁴¹

The importance of addressing these factors is demonstrated by *Lowey v. Howmet Corp.*,⁴² in which the plaintiff alleged that a director of the defendant corporation served as the corporation's deputy on the issuer's board of directors. The alleged deputy (an investment banker) represented the corporation during negotiations with the issuer regarding the corporation's sale of stock of one of its subsidiaries in exchange for common stock of the issuer. In denying the corporation's motion for summary judgment, the court held that whether the corporation's representative in fact became a deputy by virtue of having promoted the corporation's interests in connection with the exchange transaction depended on a resolution of the following questions of fact: the extent of the representative's disclosure of confidential information to the corporation, the degree of control exercised by the representative over the corporation's decisions concerning the issuer, and the extent to which the representative represented the corporation in the negotiations.⁴³

Courts have looked to a variety of factors in analyzing whether an alleged deputizer functioned as a director through its representative on the issuer's board. Among the types of entities that regularly seek to promote their own interests through board representation are banks, investment banks, venture capital investors, private equity funds, hedge funds, unions, and institutional investors.⁴⁴ Banks and

they were directors by deputization based in part on the fact that their representatives on the board gave them access to confidential information about the issuer which they used in making investment decisions, and *Dreiling v. Kellett*, No. 01 Civ.1528 (W.D. Wash. February 13, 2003), in which a plaintiff's allegation that a director served as a deputy for various investment partnerships withstood a motion for summary judgment where the plaintiff alleged that the director passed confidential information to the partnerships and influenced their trading activities.

⁴¹ See Robert Todd Lang & Melvin Katz, *Section 16(b) and "Extraordinary" Transactions: Corporate Reorganizations and Stock Options*, 49 NOTRE DAME LAW. 705, 707 n. 5 (1974). See also Arnold S. Jacobs, *An Analysis of Section 16 of the Securities Exchange Act of 1934*, 32 N.Y.L. SCH. L. REV. 209, 283-85 (1987).

⁴² 424 F. Supp. 461 (S.D.N.Y. 1977).

⁴³ *Id.* at 464-65. See also the extensive findings of fact made by the court in *Roth v. Perseus, L.L.C.*, 2006 WL 2129793 (S.D.N.Y. July 28, 2006), *aff'd*, 522 F. 3d 242 (2d Cir. 2008).

⁴⁴ See, e.g., 3D HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, *SECURITIES AND FEDERAL CORPORATE LAW* § 21:12 (2d ed., rev. 2011); RIDER & FRENCH, *REGULATION OF INSIDER TRADING* 31 (1979); Carroll L.

other lenders typically join the boards of their borrowers to help the borrower execute its business strategy and thereby remain a creditworthy borrower. This type of agenda is consistent with that of any good corporate director and should not necessarily be viewed as promoting the lender's interests over those of the issuer or its shareholders. Other entities, like investment partnerships and other professional investors, are more likely to be viewed as using board representation to promote their own interests, which often are to learn as much information as possible to guide their strategy for trading in the issuer's securities. The good news for all entities that seek board representation is that so few plaintiffs have been successful in establishing deputization, in the face of the defendant's denial, that no particular type of investor seems to be in serious danger of having to choose between board representation and freedom from the restrictions of Section 16.

[b] Defendant's Admission of Director by Deputization Status

Although it is not impossible for a plaintiff to prove the existence of deputization where the defendant denies that deputization occurred, the harsh reality is that it is highly difficult to do so in the absence of some form of admission by the defendant. Rarely is there a smoking gun of the type that existed in the *Feder* case, in the form of Bunker's letter of resignation expressly stating that he had been representing Martin Marietta's interests on Sperry's board. Often the determination whether deputization occurred must be based on the testimony of the deputy and the deputizer, neither of whom is likely to be forthcoming about actions or attitudes that might support a finding of deputization.

Perhaps the closest thing to an admission in most cases would be the voluntary filing of reports under Section 16(a) by the purported deputizer without any disclaimer of deputizer status. Rarely, however, does a person who is not otherwise subject to Section 16 file reports under Section 16(a) as a director or officer by deputization. The reason is that most entities that have a representative serving as a director or officer of the issuer believe that the representative is not a deputy for purposes of Section 16, or at least that there is a reasonable basis in the

Wagner, *Deputization under Section 16(b): The Implications of Feder v. Martin Marietta Corp.*, 78 YALE L.J. 1151, 1168-72 (1969); WALL ST. J., February 24, 1969, at 1.

existing case law for reaching that conclusion. Where reaching the alternative conclusion would subject the entity to Section 16, entities have little incentive to resolve uncertainty in favor of concluding that deputization occurred.

In some circumstances, however, an entity that is already subject to Section 16 as a ten percent owner may perceive a benefit to being considered a director by deputization as well. The reason is that a director by deputization is eligible for the exemption from Section 16(b) provided by Rule 16b-3, which exempts transactions between the issuer and an officer or director (but not a ten percent owner who is not also an officer or director) if the conditions specified in the rule are met.⁴⁵ Because many ten percent owners that have representation on the issuer's board of directors serve as sources of equity capital for the issuer, it is not uncommon for the ten percent owner to engage in transactions directly with the issuer. If the ten percent owner qualifies as a director by deputization, its transactions with the issuer may qualify for exemption from Section 16(b) by virtue of Rule 16b-3, thus eliminating the risk that those transactions may be matched with open-market transactions by the ten percent owner that occur within less than six months. The availability of Rule 16b-3 would, for example, permit a ten percent owner to provide additional equity financing to the issuer in a private placement, and still be free to sell stock in the open market less than six months later.⁴⁶

The potential for directors by deputization to avail themselves of the Rule 16b-3 exemption has meant that the deputization doctrine is no longer a weapon for plaintiffs only, and increasingly defendants have used the doctrine to facilitate a defense to liability under Section 16(b).⁴⁷ Of course, an entity that wishes to be deemed a director by deputization should structure its relationship with the deputized director in a manner that incorporates the factors that have led courts to

⁴⁵ Initially, it was uncertain whether Rule 16b-3 would apply to a director by deputization, but the SEC has expressed the view that the rule applies to directors by deputization, and the courts that have considered the question have agreed. See the discussion in § 2.04[5][b] *infra*.

⁴⁶ There is a potential downside to being deemed a director as well as a ten percent owner, in that a director or officer, unlike a ten percent owner, may be subject to Section 16 for up to six months after termination of insider status. For a discussion of the application of Section 16 to transactions occurring after termination of insider status, see § 6.02[10] *infra*.

⁴⁷ See, e.g., *Segen v. CDR-Cookie Acquisitions, LLC*, (CCH) Fed. Sec. L. Rep. ¶ 93, 664 (S.D.N.Y. 2006); *Roth v. Perseus, L.L.C.*, 522 F. 3d 242 (2d Cir. 2008); *Roth v. PHAWK, LLC*, 05 Civ. 9247 (S.D.N.Y. March 31, 2006); *Dreiling v. American Express Travel Related Services Co.*, 351 F. Supp. 2d 1077 (W.D. Wash. 2004), rev'd on other grounds, 458 F. 3d 942 (9th Cir. 2006).

deem entities to be directors by deputization. And, a ten percent owner that wishes to document its position that it is a director by deputization before the question arises in litigation can do so by indicating in Box 4 of Form 3 or Box 5 of Form 4 or Form 5 that it is a director as well as a ten percent owner.⁴⁸

[5] Consequences of Deputization

A finding that a person has deputized someone to serve as an officer or director of an issuer is the equivalent of a finding that the deputizing person is an officer or director of the issuer. The imputation of officer or director status has various potential consequences under the federal securities laws.

[a] Application of Section 16

As an officer or director, a deputizer is liable to the issuer under Section 16(b) for any profit realized on short-swing transactions in the issuer's equity securities. In addition, the deputizer also must comply with the beneficial ownership reporting requirements of Section 16(a). An early district court case, *Stirling v. Chemical Bank*,⁴⁹ noted that the deputization theory had been applied only in actions under Section 16(b) and declined to extend it to Section 16(a). The SEC staff soon expressed disagreement with that result,⁵⁰ and the Commission reiterated in connection with its 1991 overhaul of the Section 16 rules that a director by deputization is subject to Section 16 to the same extent as an elected director, including the reporting requirements of Section 16(a).⁵¹

The SEC's view is supported by the express language of the statute. Section 16(b) imposes liability only on the persons referred to in Section 16(a). The language is unambiguous and contradicts the notion that a person can be a statutory insider for purposes of one subsection but not the other. Moreover, nothing in the legislative history of Section 16 supports such a notion. The SEC's view also has persuaded at least one court to reject the holding in *Stirling* and to

⁴⁸ See ROMEO & DYE, SECTION 16 FORMS AND FILINGS HANDBOOK, Model Form 2 (7th ed. 2009).

⁴⁹ 382 F. Supp. 1146, 1152 (S.D.N.Y. 1974), aff'd, 516 F. 2d 1396 (2d Cir. 1975).

⁵⁰ See Release No. 34-18114, Q.3 (1981). Accord ROBERT FROME & VICTOR ROSENZWEIG, SALES OF SECURITIES BY CORPORATE INSIDERS 186 (1975); Recent Development, 1969 DUKE L.J. 812, 817; Recent Case, 22 VAND L. REV. 1003, 1007 (1969).

⁵¹ See Release No. 34-26333, § III.A.2. n. 50 (1988).

conclude that directors by deputization are subject to Section 16(a).⁵² In view of these developments, a deputizer who fails to comply with Section 16(a) would face considerable difficulty in defending against an SEC enforcement action on the basis of *Stirling*.

Neither the courts nor the SEC has addressed whether an insider by deputization is subject to Section 16(c), which prohibits insiders from engaging in short sales of the issuer's equity securities. Given that Section 16(c), on its face, applies to the same insiders referred to in Sections 16(a) and 16(b), it logically follows that a deputizer is subject to Section 16(c) and therefore should refrain from short sales of the issuer's securities.

[b] Availability of Defenses to Section 16(b) Liability

One of the more radical changes to flow from the SEC's overhaul of the Section 16 rules in 1991 was an expansion of the exemption from Section 16(b) provided by Rule 16b-3. The expansion of Rule 16b-3 occurred in 1996, after the version of Rule 16b-3 adopted in 1991 proved unworkable.⁵³ While prior versions of the rule exempted qualifying transactions by officers and directors that occurred pursuant to issuer-sponsored equity compensation plans, the version of Rule 16b-3 adopted in 1996 greatly expanded the types of transactions that could qualify for exemption under the rule. Now, Rule 16b-3 makes it possible to exempt from Section 16(b) not only acquisitions and dispositions pursuant to equity compensation plans, but also virtually any other transaction between an officer or director and the issuer.⁵⁴

By its terms, Rule 16b-3 is available to exempt transactions between the issuer and an officer or director, but is not available to exempt transactions with a ten percent owner who is not also an officer or director.⁵⁵ Initially, it was uncertain

⁵² See *Dreiling v. American Express Travel Related Services Co.*, 351 F. Supp. 2d 1077 (W.D. Wash. 2004), rev'd on other grounds, 458 F. 3d 942 (9th Cir. 2006).

⁵³ For a discussion of the 1991 rulemaking project and the related rule amendments adopted in 1996, see § 1.01[2][a] *supra*. For a discussion of the current version of Rule 16b-3, see Chapter 14 *infra*.

⁵⁴ The Third Circuit held in *Levy v. Sterling Holding Co., LLC*, 314 F. 3d 106, 122-25 (3d Cir. 2002), *cert. denied*, 124 S. Ct. 389 (2003), that Rule 16b-3 exempts only transactions that have a "compensatory purpose." The Commission amended Rule 16b-3 in 2005 to reverse the effect of the *Levy* decision. Release No. 34-52202 (2005).

⁵⁵ Rule 16b-3 is available, however, to exempt an individual officer's or director's indirect pecuniary interest in transactions that occur between the issuer and a ten percent owner. See *American Bar Association*,

whether Rule 16b-3 could be relied upon by a director by deputization, or instead would be deemed to apply to elected directors only. In *Levy v. Sterling Holding Co., LLC*, the Third Circuit assumed that a director by deputization was eligible to rely on the rule, but disposed of the case on other grounds.⁵⁶ Later, in April 2005, the SEC took the position in an amicus curiae brief filed in the Ninth Circuit that a director by deputization may rely on Rule 16b-3 to exempt its transactions with the issuer if the conditions of the rule are satisfied.⁵⁷ The Ninth Circuit agreed that a director by deputization is eligible to rely on Rule 16b-3 but held (as the SEC urged) that board approval of a transaction with a director by deputization exempts the transaction under Rule 16b-3(d)(1) only if the board was aware, when it approved the transaction, that the insider was a director by deputization.⁵⁸ Only in that manner, the court held, can the board of directors be aware that the board representative is a conduit for inside information and appropriately exercise its gatekeeping function.

Since the SEC filed its amicus curiae brief in the Ninth Circuit, three district court decisions have been issued in which the court held that defendants who were alleged by the plaintiff to be ten percent owners also were directors by deputization. In each of those cases, the defendants, not the plaintiff, raised the deputization issue, and in each case the court held that the defendants' transactions with the issuer were exempted by Rule 16b-3.⁵⁹

Achieving the status of director by deputization can also have a negative effect on the availability of exemptions under Section 16(b). In *Lewis v. Dekcraft Corp.*,⁶⁰ the deputizer, a ten percent owner, argued that its short-swing transactions were "arbitrage transactions," exempt from Section 16(b) under

SEC No-Action Letter, Q.4 (February 10, 1999); *Donoghue v. Casual Male Retail Group, Inc.*, 375 F. Supp. 2d 226, 235 (S.D.N.Y. 2005).

⁵⁶ 314 F. 3d 106, 109 (3d Cir. 2002), cert. denied, 124 S. Ct. 389 (2003).

⁵⁷ See BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE (April 5, 2005), filed in *Dreiling v. American Express Co.*, 458 F. 3d 942 (9th Cir. 2004). Prior to the SEC's filing of its amicus curiae brief with the Ninth Circuit, the district court in that case had rendered a decision that implicitly assumed the rule was available to a director by deputization. 351 F. Supp. 2d 1077, 1083-84 (W.D. Wash. 2004).

⁵⁸ See 458 F. 3d at 954-55.

⁵⁹ See, e.g., *Segen v. CDR-Cookie Acquisitions, LLC*, (CCH) Fed. Sec. L. Rep. ¶ 93,664 (S.D.N.Y. 2006); *Roth v. Perseus, L.L.C.*, 2006 WL 2129793 (S.D.N.Y. July 28, 2006), aff'd, 522 F. 3d 242 (2d Cir. 2008); *Roth v. PHAWK, LLC*, 05 Civ. 9247 (S.D.N.Y. March 31, 2006).

⁶⁰ Fed. Sec. L. Rep. (CCH) ¶ 94,620 (S.D.N.Y. 1974).

Section 16(e). Under Rule 16e-1, the arbitrage exemption is available only to ten percent owners, and is not available to directors or officers. The court invoked the deputization theory to find that the defendant was a director and therefore was not eligible for the exemption.

In addition, a director or officer, unlike a ten percent owner, may be subject to Section 16 for up to six months after termination of insider status.⁶¹ While a former ten percent owner may trade freely in the issuer's equity securities once its ownership falls below 10 percent, a former officer or director (including a director by deputization) who, prior to termination of insider status, engaged in a transaction that was not exempt from Section 16(b), remains subject to Section 16 with respect to any opposite-way transaction that occurs within less than six months of that transaction.⁶²

[c] Applicability of Other Provisions of 1933 Act and 1934 Act

Officers and directors are subject to various requirements and liabilities under both the 1933 Act and the 1934 Act, including the obligation to sign registration statements and potential liability for false statements in registration statements and periodic reports. In addition, the issuer is required to identify its directors and executive officers in various filings, including its annual meeting proxy statement and its annual report on Form 10-K. It seems unlikely, however, that a director by deputization would be deemed a director for purposes of these other provisions of the federal securities laws. Section 16 is intended to cover persons who, by virtue of their access to inside information about an issuer, may derive economic benefits from transactions in the issuer's securities, and the deputization theory arguably facilitates Section 16's broad remedial purpose. No similar or other legitimate purpose would be served by treating deputizers as directors or officers for purposes of other provisions of the federal securities laws.⁶³

⁶¹ See Rule 16a-2(b).

⁶² For a discussion of the application of Section 16 to transactions occurring after termination of insider status, see § 6.02[10] *infra*.

⁶³ See, e.g., Recent Development, 1969 DUKE L.J. 812, 817-18.

[6] Problems with the Deputization Theory

Several commentators, after weighing the advantages and disadvantages of the deputization theory, have argued for its retention.⁶⁴ The theory suffers, however, from some significant deficiencies.

[a] Uncertainty of Application

Because the elements of deputization are ill-defined, many business entities that have a relationship with an issuer cannot be certain whether they may trade freely in the issuer's stock. The difficulty of determining whether a particular relationship involves deputization is highlighted by the fact that courts reach different conclusions on the same facts, as evidenced by the Second Circuit's reversal in the *Feder* case.⁶⁵ Uncertainty over whether the deputization theory may be applicable can chill effective representation on the boards of public companies and may cause potential indirect insiders to delay or forego legitimate transactions for the purpose of avoiding potential liability under Section 16(b).

[b] Difficulties of Detection and Proof

Transactions by deputizers are often difficult to detect unless the deputizer is already subject to Section 16 as a ten percent owner. Because the determination of deputizer status is largely subjective, entities that have a representative on the issuer's board often reach the good faith conclusion that they are not a director by deputization and therefore do not file reports under Section 16(a). Without Section 16(a) reports, plaintiffs' attorneys are unlikely to learn of short-swing transactions by deputizers.

Even if an alleged short-swing violation by a purported deputizer were uncovered, a plaintiff might find it exceedingly difficult to prove that deputization occurred.⁶⁶ Establishing deputization requires a searching inquiry into the facts that may, in the end, prove fruitless. It is certainly conceivable that some

⁶⁴ See, e.g., 1 STEINBERG, SECURITIES REGULATION: LIABILITIES AND REMEDIES § 4.03 at 4-52.2 (2011); WILLIAM H. PAINTER, THE FEDERAL SECURITIES CODE AND CORPORATE DISCLOSURE 89 (1979).

⁶⁵ In *Feder* the district court found that deputization had not occurred, but the appeals court reached the opposite conclusion on the same facts. See *Feder v. Martin Marietta Corp.*, 286 F. Supp. 937, 948 (S.D.N.Y. 1968), *rev'd*, 406 F. 2d 260, 269 (2d Cir. 1969), *cert. denied*, 396 U.S. 1036 (1970).

⁶⁶ See § 2.04[4][b] *supra*.

plaintiffs' attorneys, after balancing the probability of success against both the effort required and the potential award, would not be inclined to pursue a deputization claim in court unless the stakes were high. The stark reality that a deputization case will involve much more time and expense than the usual Section 16(b) case, which ordinarily involves no factual dispute and can be decided on a summary judgment motion, presents a strong deterrent to the pursuit of many claims based on deputization.⁶⁷

The difficulties of detection and proof raise serious doubts whether the retention of the deputization theory is worth the uncertainty created by its continued existence. On balance, the answer is probably not.⁶⁸ The more sensible approach would be simply to discard the theory, since its benefits (primarily, an occasional short-swing profit recovery) hardly appear to outweigh its detriments (principally, the deterrence of legitimate transactions due to uncertainty as to its application).⁶⁹ The courts are unlikely to adopt this approach, however, in view of the Commission's endorsement of the theory.⁷⁰

⁶⁷ The difficulty of proving deputization is evidenced by the fact that there have been only five instances, in the more than 75 years that Section 16 has existed, in which a court has held that deputization occurred.

⁶⁸ Other commentators have expressed a similar view. See, e.g., Robert Todd Lang & Melvin Katz, *Section 16(b) and "Extraordinary" Transactions: Corporate Reorganizations and Stock Options*, 49 NOTRE DAME LAW. 707, 706-07 n. 5 (1974); Note, *Reliance Electric and 16(b) Litigation: A Return to the Objective Approach?*, 58 VA. L. REV. 907, 914 (1972).

⁶⁹ Both the aborted AMERICAN LAW INSTITUTE, FEDERAL SECURITIES CODE (1980) and an American Bar Association Task Force on the Regulation of Insider Trading supported elimination of the deputization theory. The Code proposed to eliminate the deputization theory by defining "director" to exclude any "person who deputizes another person to be director." AMERICAN LAW INSTITUTE, at § 202(40). The ABA Task Force on Regulation of Insider Trading proposed to eliminate deputization by defining "director" as "an elected member of the board of directors . . . [who] . . . is legally entitled to vote on and participate generally in matters brought before the board of directors." American Bar Association, Committee on Federal Regulation of Securities, *Report of the Task Force on Regulation of Insider Trading, Part II: Reform of Section 16*, 42 BUS. LAW. 1087, 1108 (1987).

⁷⁰ See Release No. 34-28869, n. 27 (1991), in which the Commission indicated that the deputization theory "is not affected" by the changes to the Section 16 regulatory scheme adopted in that release "and will be left to case law." See also Release No. 34-26333, § III.A.2. (1988), in which the Commission stated that it was not proposing to codify the deputization theory because of the "fact-intensive" nature of the theory and the Commission's belief that deputization should continue to be determined on a case-by-case basis.

[7] Protective Measures

Although it is difficult to know precisely what factors may give rise to a finding of deputation, it is somewhat easier to formulate steps that would likely preclude such a finding. For those investors and other parties who need or want to designate a representative to serve as a director or officer of a public company, there are ways to minimize, if not eliminate, exposure to short-swing liability based on the deputation theory.

First and foremost, an “information barrier” should be constructed between the persons who make investment decisions for the investor and the representative serving as an insider of the issuer. This arrangement would enable the investor to establish that its transactions in the issuer’s securities could not have been based on confidential information received from the representative, thus eliminating the possibility of speculative abuse.

Second, the representative should be given as much freedom to vote and participate in the issuer’s affairs as possible, without a requirement that the representative consult with principals of the investor before taking a position on behalf of the issuer. This practice should provide a further safeguard against a finding that the representative served on the issuer’s board solely to represent the investor’s interests.

Third, the investor should avoid influencing its representative in connection with the representative’s activities on behalf of, or with respect to, the issuer. The exertion of influence over the representative’s actions might result in a finding that, through the representative, the investor functioned as a director.

Finally, and obviously, the investor may assure its non-liability under Section 16(b) by simply not engaging in short-swing transactions.⁷¹

⁷¹ See ROBERT FROME & VICTOR ROSENZWEIG, SALES OF SECURITIES BY CORPORATE INSIDERS 192-93 (1975).

EXHIBIT 23