

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.,

Defendant/Respondents,

BLUCORA, INC.

Nominal Defendant/Respondent.

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TABLE OF CONTENTS

I. INTRODUCTION1

II. THE FIRST CLAUSE OF THE BLUCORA BYLAW APPLIES BECAUSE SHATAS’ FIDUCIARY DUTY CLAIM COULD NOT BE ASSERTED WITHOUT THE SHAREHOLDER AGREEMENTS1

 A. The CIG Entities Were Directors of Blucora by Deputization at the Time of the Insider Stock Sale2

 B. The CIG Entities Were Directors (and Thus Fiduciaries) at the Time of the Stock Sale Only Because of the Shareholder Agreements.....5

III. THE LAST CLAUSE OF THE BLUCORA BYLAW APPLIES BECAUSE CIG IS INDISPENSABLE AND HAS NOT CONSENTED TO THE JURISDICTION OF DELAWARE7

 A. CIG Is an Indispensable Party to this Insider Trading Suit7

 B. Delaware Lacks Jurisdiction Over CIG10

 1. CIG Never Consented to Jurisdiction10

 2. Blucora’s New Claim of Statutory Jurisdiction Should be Disregarded.....12

IV. SHATAS’ STANDING IS NOT PROPERLY BEFORE THIS COURT14

V. CONCLUSION.....15

TABLE OF AUTHORITIES

Cases

A.W. Fin. Servs., S.A. v. Empire Res., Inc., 981 A.2d 1114 (Del. 2009) 5

Am. Standard, Inc. v. Crane Co., 510 F.2d 1043 (2d Cir. 1974)..... 3

Arikson v. Ethan Allen, Inc., 160 Wn.2d 535, 160 P.3d 13 (2007)..... 10

Auto. United Trades Org. v. State, 175 Wn.2d 214, 285 P.3d 52 (2012)..... 8

Bonar, Inc. v. Schottland, 631 F. Supp. 990, 1000 (E.D. Pa. 1986)..... 8

Carijano v. Occidental Petroleum Corp., 643 F.3d 1216 (9th Cir. 2011) 12

Concerned Coupeville Citizens v. Coupeville, 62 Wn. App. 408, 814 P.2d 243 (1991)..... 13

Dreiling v. Am. Exp. Co., 458 F.3d 942 (9th Cir. 2006)..... 4, 6

Feder v. Martin Marietta Corp., 406 F.2d 260 (2d Cir. 1969)..... 6

Gen. Protecht Group, Inc. v. Leviton Mfg. Co., 651 F.3d 1355 (Fed. Cir. 2011) 11

Gollust v. Mendell, 501 U.S. 115 (1991) 3

John Wyeth & Brother Ltd. v. Cigna Int’l Corp., 119 F.3d 1070 (3d Cir. 1997) 11

Kahn v. Kolberg Kravis Roberts & Co., L.P., 23 A.3d 831 (Del. 2011) 4, 9

Lisby v. PACCAR, Inc., 178 Wn. App. 516, 316 P.3d 1097 (2013) 11

Lockman Found. v. Evangelical All. Mission, 930 F.2d 764 (9th Cir. 1991) 11

Motorola Inc. v. Amkor Tech., Inc., 958 A.2d 852 (Del. 2008)..... 10

TABLE OF AUTHORITIES

Parfi Holding AB v. Mirror Image Internet, Inc., 817 A.2d 149 (Del. 2002) 1, 2, 5

Sales v. Weyerhaeuser Co., 163 Wn.2d 14, 177 P.3d 1122 (2008)..... 11, 12

Sec. & Exch. Comm’n v. Wyly, 71 F. Supp. 3d 399 (S.D.N.Y 2014) 9

Smith v. Shannon, 100 Wn.2d 26, 666 P.2d 351 (1983)..... 13

Tyler Pipe Indus., Inc. v. Wash. Dep’t of Revenue, 105 Wn.2d 318, 715 P.2d 123 (1986)..... 14

Statutes

Section 16(b) of the Securities Exchange Act of 1934 2, 3

Other Authorities

7 Wright & Miller, FED. PRAC. & PROC. § 1604 (3d ed.) 8

7 Wright & Miller, FED. PRAC. & PROC. § 1608 (1972) 8

Peter J. Romeo & Alan L. Dye, SECTION 16 TREATISE & REPORTING GUIDE § 2.04 (4th ed. 2012) 3

RESTATEMENT (FIRST) OF RESTITUTION § 200 (1937) 9

Rules

RAP 17 14

RAP 2.5 13, 14

I. INTRODUCTION

The trial court's dismissal of Shatas' shareholder derivative suit for improper venue was erroneous. Blucora's forum selection bylaw provides two bases for setting venue in King County Superior Court: (1) Blucora agreed in writing to a venue other than Delaware; and (2) CIG is an indispensable party that had not consented to personal jurisdiction in Delaware when the action was filed, and still has not done so. For either of these reasons, or both, this Court should reverse the trial court's dismissal and allow the claim to proceed in King County Superior Court.

II. THE FIRST CLAUSE OF THE BLUCORA BYLAW APPLIES BECAUSE SHATAS' FIDUCIARY DUTY CLAIM COULD NOT BE ASSERTED WITHOUT THE SHAREHOLDER AGREEMENTS

The parties agree that the *Parfi* case provides the rule regarding whether the first clause of the Blucora bylaw controls. The parties' disagreement arises from Blucora's characterization of the key question under the *Parfi* analysis. As explicitly stated in *Parfi*, the key question is whether the fiduciary duty claim at issue "would be assertable had there been no" Shareholder Agreements. *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 157 (Del. 2002). Because the answer here is no – Shatas would not have an assertable fiduciary duty claim against the CIG entities without the Shareholder Agreements – the first clause of

Blucora's forum selection bylaw applies and venue is proper in King County Superior Court.

A. The CIG Entities Were Directors of Blucora by Deputization at the Time of the Insider Stock Sale

Shatas' fiduciary duty claims are only assertable against the CIG entities because of those entities' fiduciary status. If they were not fiduciaries, Shatas would not be able to assert fiduciary duty claims against them. But they are fiduciaries. They are fiduciaries because they are *virtual* directors of Blucora – directors by deputization. And, critical to the *Parfi* analysis, the CIG entities held that fiduciary status **solely** because of the Shareholder Agreements.

Blucora purports to dismiss Shatas' "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" arguing that it is "novel." Blucora's Appellee Brief ("BB") at 22. In support, Blucora quotes a treatise that characterizes as "unlikely" the application of the director by deputization doctrine outside of the Section 16(b) context.¹ *Id.* at 22-23 n. 9. However, the very next sentence from the same treatise states:

¹ Section 16(b) of the Securities Exchange Act of 1934 was enacted to prevent a corporate director, officer, or more than 10% shareholder from profiting through short-swing transactions in their company's stock. It is a strict liability statute, and any profit realized through transactions in company shares within periods of

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.

Peter J. Romeo & Alan L. Dye, SECTION 16 TREATISE & REPORTING GUIDE § 2.04, at 228 (4th ed. 2012) (emphasis added). In rationalizing the application of the director by deputization doctrine, the treatise specifically distinguishes Section 16(b)'s fundamental purpose of combating insider trading from other, dissimilarly-purposed provisions of securities law. *Id.*

While many securities law provisions may not share the same purpose as Section 16(b), the insider trading claim brought by Shatas clearly does. Precisely like the "abuse of confidential information" by insiders Section 16(b) was enacted to combat,² Shatas' fiduciary duty claim against Snyder and the CIG entities is against fiduciaries "who, by virtue of their access to inside information ... derive[d] economic benefits from" their sale of Blucora stock. Romeo & Dye, *supra* p. 2 at 228.

less than six months must be disgorged to the company. The Securities and Exchange Commission ("SEC") has no enforcement authority under Section 16(b). Instead, Congress entrusted that authority exclusively to corporations directly and to individual shareholders derivatively. *Gollust v. Mendell*, 501 U.S. 115, 116-17 (1991).

² "The essential policy objective of Section 16(b) is to prevent the abuse of confidential information by directors, officers and beneficial owners." *Am. Standard, Inc. v. Crane Co.*, 510 F.2d 1043, 1055 (2d Cir. 1974).

Blucora states that it “is unaware of a single case” under Delaware state law that has used this definition of director. BB at 22-23 n.9. The concept, however, is entrenched in Delaware law. The Delaware Supreme Court case on which Shatas’ fiduciary duty claim is based, *Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831 (Del. 2011), has a similar fact pattern and the defendant’s fiduciary status was never questioned. See CP 14 ¶ 33. Like the CIG entities here, the defendant in *Kahn* was a fiduciary prohibited from trading on inside information because it “controlled approximately 60% of Primedia’s outstanding stock and had three of its designees on Primedia’s board.” *Kahn*, 23 A.3d at 834. And, just as CIG used CIG I as its proxy to transact trades in Blucora shares, the *Kahn* defendant “formed [an] LLC as an investment vehicle to purchase Primedia’s preferred shares” *Id.* Even though the *Kahn* defendant was not an **actual** director and the purchases at issue were transacted through another entity, there was no question that the defendant was a **virtual** director³ with fiduciary status that prohibited it from trading shares that it beneficially owned based on inside information.

³ “The Supreme Court has recognized that a corporation may be a virtual director, and thus an insider for purposes of § 16(b) liability, by deputizing a natural person to perform its duties on the board.” *Dreiling v. Am. Exp. Co.*, 458 F.3d 942, 952 (9th Cir. 2006).

B. The CIG Entities Were Directors (and Thus Fiduciaries) at the Time of the Stock Sale Only Because of the Shareholder Agreements

Blucora argues that Shatas ignores the *Parfi* court's "emphasis on the source of the legal obligation" BB at 45 (emphasis removed).

However, Shatas has argued all along that the *source* of the legal obligation creating the CIG entities' fiduciary duties is the Shareholder Agreements.

Shatas agrees that to succeed on his insider trading claim, he must prove the essential element of fiduciary status. Shatas' Opening Br. at 28.

As stated by the Delaware Supreme Court,

Although a claim for damages for breach of fiduciary duty is cognizable under Delaware law, that claim presupposes that the defendants are 'fiduciaries' that owed fiduciary duties to the plaintiff.

A.W. Fin. Servs., S.A. v. Empire Res., Inc., 981 A.2d 1114, 1127 (Del. 2009).

The question under *Parfi* then becomes what is the source of the fiduciary duty. *Parfi*, 817 A.2d at 157 ("[T]he analysis must turn on the issue of whether the fiduciary duty claims would be assertable had there been no . . . Agreement."). This is where the parties diverge.

The trial court held that Shatas' fiduciary duty claim against Snyder and the CIG entities "is not dependent on the terms of the

[Shareholder] Agreement[s] for its resolution.” CP 317. This was erroneous, arguably as to Snyder but conclusively as to the CIG entities.⁴

The CIG entities’ status as fiduciaries at the time of the insider transaction existed solely by virtue of the Shareholder Agreements that established the CIG entities as directors by deputization. *Dreiling*, 458 F.3d at 952 (defining director by deputization); *see also Feder v. Martin Marietta Corp.*, 406 F.2d 260, 263 (2d Cir. 1969). Moreover, the fact that Snyder was a Blucora board member while also being an executive officer of the CIG entities is not determinative of the CIG entities’ fiduciary status. *Dreiling*, 458 F.3d at 945, 955 (a company executive’s membership on the board of another company does not give rise to his company’s fiduciary status). Independent of the Shareholder Agreements, **nothing** under Delaware or federal law established the CIG entities as a Blucora fiduciary at the time of the insider transaction at issue.

Blucora entirely avoids analyzing the source of the CIG entities’ fiduciary status. First, it describes as “absurd” the notion “that Shatas needs the Agreements to prove Snyder’s fiduciary status. Snyder sits on the Blucora Board.” BB at 46. Then, it side-steps the issue of the CIG

⁴ It is possible to reach this conclusion as to Snyder because his status as a sitting Blucora board member alone establishes him as a fiduciary under Delaware law – notwithstanding the fact that the Shareholder Agreement also establishes his fiduciary status. However, the **sole** source of the CIG entities’ fiduciary status is the Shareholder Agreements, not Delaware law.

entities' fiduciary status by arguing: "CIG's fiduciary status [cannot] be proved by reference to the Agreements. CIG is not a signatory to the Agreements" *Id.* However, this cursory analysis simply ignores the undisputed fact that CIG I was merely a shell entity under the total control of CIG. CP 217; CP 232-47. Moreover, CIG I was a signatory to the Agreements and its fiduciary status is undisputed, yet Blucora fails to address in any manner the source of CIG I's fiduciary obligation.

In sum, Shatas' insider trading claim requires proof of the essential element of a fiduciary/insider status. Here, the source of the CIG entities' fiduciary status is the Shareholder Agreements, not Delaware or federal law. And, the Shareholder Agreements irrevocably establish King County as the "exclusive" venue for claims "relating to or arising from" the Agreements. Accordingly, under the Blucora forum selection bylaw, the first clause governs because Blucora agreed in writing to a forum other than Delaware.

**III. THE LAST CLAUSE OF THE BLUCORA BYLAW
APPLIES BECAUSE CIG IS INDISPENSABLE AND HAS
NOT CONSENTED TO THE JURISDICTION OF
DELAWARE**

A. CIG Is an Indispensable Party to this Insider Trading Suit

Blucora uses 12 pages of its brief to address what it deems a "purely hypothetical" question about CIG's indispensability. BB at 28-40.

It does so only to confuse the fact that CIG is indeed an indispensable party in this insider trading case.

Blucora urges form over substance with regard to the indispensability analysis. That is not the law. 7 Wright & Miller, FED. PRAC. & PROC. § 1604 (3d ed.) (“There is no precise formula for determining whether a particular nonparty” is indispensable.); *see also Auto. United Trades Org. v. State*, 175 Wn.2d 214, 227-28, 285 P.3d 52 (2012). Courts should consider “general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them.” 7 Wright & Miller, FED. PRAC. & PROC. § 1604 (3d ed.). A party is indispensable when, without that party, “the Court may end up rendering hollow or incomplete relief because of the inability to bind persons who could not be joined.” *Bonar, Inc. v. Schottland*, 631 F. Supp. 990, 1000 (E.D. Pa. 1986) (quoting 7 Wright & Miller, FED. PRAC. & PROC. § 1608 (1972)).

Here, the parties do not dispute that CIG is the beneficial owner of the Blucora shares at issue in this action. And, the parties do not dispute that CIG I is merely the record owner of those same shares. Instead, Blucora suggests that Shatas ignored the possibility that he may be able to

recover complete relief from CIG I and Snyder. *See* BB at 29-31, 34-37.

This line of reasoning disregards two key matters:

First, this is an insider trading action. In cases alleging insider trading, the beneficial owner of the shares at issue is an absolutely necessary party. *See, e.g., Kahn v. Kohlberg Kravis Roberts & Co., L.P.*, 23 A.3d 831 (Del. 2011) (a derivative action for insider trading where the defendant used an LLC as an investment vehicle to purchase and direct the disposition of shares); *Sec. & Exch. Comm'n v. Wyly*, 71 F. Supp. 3d 399 (S.D.N.Y. 2014) (the SEC brought a civil action against the beneficial owners of stock who used offshore entities to make insider trades).

Indeed, the record owner of the shares, like CIG I, is rarely, if ever, joined as a party. *Id.* This is because complete relief cannot be obtained if the beneficial owner is not a party. *See* RESTATEMENT (FIRST) OF RESTITUTION § 200 (1937) (a fiduciary acquiring property through confidential information “holds the property so acquired upon a constructive trust for the beneficiary”).

Second, CIG is the entity that directed the insider trading transactions made through CIG I. CP 217 (“CIG makes all investment decisions for CIG I”). CIG controls the disposition of the profits that Shatas seeks to disgorge. *See* CP 217; CP 232-47. Any remedy related to

the insider trading orchestrated by CIG must be obtained from CIG, not through its shell company, CIG I.

Any pragmatic review of the circumstances here – as is required – shows that CIG is an indispensable party.

B. Delaware Lacks Jurisdiction Over CIG

1. CIG Never Consented to Jurisdiction

Blucora argues that judicial estoppel would apply to CIG’s statement that it may, at some indeterminate time, consent to Delaware jurisdiction. Judicial estoppel only applies where (1) a party attempts to take a clearly inconsistent position from that previously asserted, and (2) the party benefited because the court was persuaded by the earlier inconsistent position. *See Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859-60 (Del. 2008); *Arikson v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007). Neither element applies here.

First, CIG did not actually take the position that it consented to jurisdiction in Delaware. The actual statement made in the trial court was: “Counsel for CIG has indicated to counsel for Blucora that CIG *is prepared to* consent to jurisdiction in Delaware.” CP 273 n. 5 (emphasis added). This statement does not show actual express consent to Delaware jurisdiction, but only the potential that CIG *may* consent at some future indeterminate date.

Second, the trial court misapplied the law relating to consent, thus, its “finding” of consent is erroneous and cannot create a benefit. As discussed in Shatas’ opening brief, post-filing willingness to consent to Delaware jurisdiction as a litigation tactic is *irrelevant* to evaluating personal jurisdiction. Shatas’ Opening Br. at 20-24.

Blucora asserts that courts dismiss cases even when the events giving rise to the dismissal occur during the course of litigation. BB at 25. It is unclear, however, why Blucora cited the cases it did in support of this proposition as neither case involves post-filing consent issues at all. *Gen. Protecht Group, Inc. v. Leviton Mfg. Co.*, 651 F.3d 1355 (Fed. Cir. 2011); *John Wyeth & Brother Ltd. v. Cigna Int’l Corp.*, 119 F.3d 1070 (3d Cir. 1997). In those cases, the courts simply enforced the terms of forum selection clauses that were triggered by the filing of the lawsuits.

Moreover, Blucora relies on forum non conveniens cases to argue that consent to jurisdiction during litigation is sufficient to proceed in an alternative forum. BB at 25-27 (citing *Lockman Found. v. Evangelical All. Mission*, 930 F.2d 764 (9th Cir. 1991); *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 177 P.3d 1122 (2008)). Dismissal on forum non conveniens grounds “presupposes that there are at least two forums in which the defendant is amenable to process.” *Lisby v. PACCAR, Inc.*, 178 Wn. App. 516, 519-20, 316 P.3d 1097 (2013); *see also Sales*, 163 Wn.2d at 20-21.

And, forum non conveniens cases may actually favor Shatas because courts generally do not interfere with the plaintiff's choice of forum in such cases. *Sales*, 163 Wn.2d at 19. Only after determining that another forum exists where the case may be brought and balancing several other factors will a court decline to exercise its jurisdiction over a case that plaintiff brought in that court. *See id.* at 20-21.⁵

Accordingly, at the time of filing, Delaware courts could not exercise jurisdiction over CIG; a fact that is not changed by CIG's post-filing statement that it *may* consent to Delaware jurisdiction at some time in the future.

2. Blucora's New Claim of Statutory Jurisdiction Should be Disregarded

Blucora, for the first time on appeal, contests that Delaware courts lack personal jurisdiction over CIG by asserting several statutory arguments. BB at 12-24. Because none of these statutory bases was raised or addressed below, such arguments are not properly before this Court.

⁵ Blucora cites *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216 (9th Cir. 2011) to support its argument that a defendant can be "amenable-to-process" by "consenting to jurisdiction in an alternate forum." BB at 26. *Carijano* is distinguishable. There the defendant's activities in Peru were sufficient to make it amenable to process. The defendant's express stipulation to service of process just confirmed that an alternate forum existed. *Carijano*, 643 F.3d at 1225. Here, CIG is a Maryland corporation with headquarters in New York, and it has never expressly stipulated to service of process in Delaware.

“Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.” *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); *see also* RAP 2.5. Parties must “inform a court acting as a trier of fact of the rules of law they wish the court to apply.” *Smith*, 100 Wn.2d at 37. This Court need not consider contentions not advanced in the trial court. *Concerned Coupeville Citizens v. Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991).

CIG appeared in this Washington case. CIG filed several pleadings in this suit. CP 324-25, 406-07, 414-15. Not once below did CIG or Blucora raise any of the statutory arguments advanced now to contest the Delaware jurisdictional issue. Blucora states that it did not have space to argue these statutory arguments in its pleadings below. BB at 13 n. 4. However, in the trial court, Blucora filed a motion to dismiss (CP 28-45), a reply to that motion (CP 268-75), and a response to Shatas’ motion for reconsideration (CP 288-96). At no point in any of those 32 pages of pleadings, or in the 41 pages available under court rules, did Blucora even mention these statutory arguments – or the factual basis that Blucora contends supports the arguments. These arguments should not be considered on appeal.

IV. SHATAS' STANDING IS NOT PROPERLY BEFORE THIS COURT

Finally, Blucora raises the issue of whether Shatas has standing to pursue this derivative action. As with the issue of statutory jurisdiction, Shatas' standing is an issue that was never raised in the trial court by Blucora or any defendant. There is no trial court record for this Court to assess.

“The appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5. Blucora suggests, in its appellee brief and improper motions⁶ to this Court, that Shatas' standing can be considered for the first time on appeal. BB at 11; Blucora's Mot. on the Merits (filed Oct. 26, 2015); Blucora's Mot. to Dismiss Appeal (filed Nov. 10, 2015). The Washington Supreme Court has said otherwise: “If the issue of standing is not submitted to the trial court, it may not be considered on appeal.” *Tyler Pipe Indus., Inc. v. Wash. Dep't of Revenue*, 105 Wn.2d 318, 327, 715 P.2d 123 (1986) (judgment vacated on other grounds by 483 U.S. 232 (1987)).

⁶ First, Blucora filed a motion on the merits, which Commissioner Neel denied because such motions are not allowed in this Court. Comm'r Notation Ruling, No. 73716-3-I (Wash. Ct. App. Nov. 9, 2015). Then, Blucora filed a motion to dismiss the appeal under RAP 17, which again is procedurally improper. Blucora's Mot. to Dismiss Appeal (filed Nov. 11, 2015). This argument is further discussed in Shatas' Opposition to that motion.

Because there is no trial court record regarding this issue, it is not appropriately before this Court. Moreover, even if Blucora were correct regarding Shatas' standing, the trial court's ultimate remedy (dismissal, substitution of a new shareholder plaintiff, etc.) would require it to make further factual determinations and conduct a balancing of various equitable factors. For a more robust discussion of why this issue should not be addressed in this Court, on this appeal, Shatas respectfully refers the Court to his Opposition to Blucora's Motion to Dismiss Appeal (to be filed December 1, 2015).

Blucora's argument on this standing issue should be disregarded, and this Court should consider the merits of the appeal.

V. CONCLUSION

As set forth in Shatas' Opening Brief and above, Blucora's forum selection bylaw provides two separate bases for concluding King County Superior Court is the proper venue for this shareholder derivative case. Under either provision, this Court should reverse the trial court's dismissal and remand for further proceedings.

DATED this 25th day of November, 2015.

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