EFiled: Sep 08 2015 03:26PM EDT
Filing ID 57829753
Case Number 353,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARC HAZOUT,	)	No. 353, 2015
	)	
Defendant-below/Appellant,	)	ON APPEAL FROM
	)	INTERLOCUTORY ORDERS OF
v.	)	THE HON. WILLIAM C.
	)	CARPENTER, JR. OF THE
TSANG MUN TING,	)	SUPERIOR COURT DATED
	)	JUNE 3 AND JUNE 18, 2015 IN
Plaintiff-below/Appellee.	)	C.A. NO. N14C-12-067 WCC

OPENING BRIEF ON APPEAL OF DEFENDANT-BELOW/APPELLANT MARC HAZOUT

David L. Finger (DE Bar ID #2556)
Finger & Slanina, LLC
One Commerce Center
1201 N. Orange St., 7th floor
Wilmington, DE 19801-1186
(302) 573-2525
Attorney for Defendant-below/Appellant
Marc Hazout

Dated: September 8, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

NATURE AND STAGE OF THE PROCEEDINGS

On September 19, 2014, plaintiff-below/appellant Tsang Mun Ting ("Ting") filed Civil Action 10148-VCP in the Court of Chancery of the State of Delaware against defendants-below Silver Dragon Resources, Inc. ("Silver Dragon") and Travellers International, Inc., and defendant-below/appellant Marc Hazout ("Hazout").

The Complaint did not allege any claim for breach of fiduciary duty, but only claims for common law fraud and unjust enrichment, and a claim of fraudulent transfer purportedly pursuant to 6 Del C. §1304.

On October 20, 2014, defendants-below filed a Motion to Dismiss on the grounds that (i) the Court of Chancery lacked subject matter jurisdiction as damages were an adequate remedy, (ii) the defendants had a right to a jury trial, and (iii) the Court of Chancery lacked personal jurisdiction over Hazout and Travelers.

On November 24, 2014, before briefing was completed on the Motion to Dismiss, Ting filed with an election to transfer the case to the Superior Court, which election was granted by the Court of Chancery that same day.

Ting transferred the action to the Superior Court on December 8, 2015. On January 7, 2015, Hazout and Travellers moved to dismiss the action as to them on the ground of lack of personal jurisdiction.[1]

By Opinion dated June 3, 2015, the Superior Court granted the motion to dismiss as to Travelers and denied the motion to dismiss as to Hazout. *Ting v. Silver Dragon Resources, Inc.*, 2015 WL 3551871 (Del. Super. June 3, 2015) ("*Ting I*"). Hazout filed a Motion for Reargument on June 8, 2015. That motion was denied by letter ruling dated June 18, 2015. *Ting v. Silver Dragon Resources, Inc.*, 2015 WL 4111716 (Del. Super. June 18, 2015) ("*Ting II*").

On July 7, 2015, the Superior Court granted Hazout's Motion for Certification of an Interlocutory Appeal.

Hazout filed a Notice of Appeal from Interlocutory Order on July 7, 2015. This Court accepted the interlocutory appeal by an Order dated August 6, 2015.

This is Hazout's Opening Brief on Appeal.

---

[1] That same day Silver Dragon filed its Answer to the Complaint.

SUMMARY OF ARGUMENT

10 Del. C. §3114(a) does not authorize exercising personal jurisdiction over a non-resident director of a Delaware corporation in circumstances where (i) the Complaint does not plead a viable claim for breach of fiduciary duty, (ii) the case is in a court that lacks subject matter jurisdiction to hear breach of fiduciary duty claims, (iii) the tort claims alleged are not governed by Delaware law, (iv) the causes of action alleged do not affect the internal governance of a Delaware corporation or involve the common law or statutory duties imposed upon directors of Delaware corporations.

STATEMENT OF FACTS ALLEGED IN THE COMPLAINT

Ting, a resident of Hong Kong, China, is a professional investor who specializes in cross-border investments and international financial transactions. (Appendix ("A-__") A-12).

Hazout, an individual residing in Toronto, Canada, serves as Director, President, CEO and Principal Financial and Accounting Officer for Silver Dragon. Additionally, Hazout is the President, CEO, and sole stockholder of Travellers. (A-12). He is not the sole director of Silver Dragon (A-14-16), and it is not alleged that he dominates or controls, directly or indirectly, of the board of directors of Silver Dragon.

Defendant-below Silver Dragon is a publicly traded mining and metals company focused on the global acquisition, exploration, development and operation of silver mines. Silver Dragon is incorporated in Delaware and maintains its principal place of business in Toronto, Canada. (A-12).

Defendant-below Travellers is a private investment banking company incorporated in Ontario, Canada with its principal place of business in Toronto, Canada. (A-12).

Beginning in the Spring of 2013, a group of investors including Ting (the "Investor Group") entered into negotiations with the defendants to pursue a

transaction whereby the Investor Group would acquire operating control of Silver Dragon by appointing a new slate of directors to replace all but one of the directors then on Silver Dragon's board (the "Transaction"). (A-13).

These negotiations advanced to the point that the parties were able to reach agreement on all the terms and conditions for the Transaction. (A-13).

Toward the end of December 2013, the terms and conditions of the Transaction were reduced to a written agreement, which consisted of multiple documents including: a Line of Credit Loan Agreement, an Equity Interest Pledge and All Asset Security and Agreement, a Warrant for the Purchase of Shares of Common Stock of Silver Dragon Resources, Inc., and a master "Agreement." (A-13).

The documents comprising the Agreement were to be signed on behalf of the Investor Group by one of Ting's business partners, Man Kwan Fong. (A-14).

The Agreement contemplated that the Investor Group would provide loans to Silver Dragon totaling $3,417,265, subject to a series of conditions including the grant of a security interest in all of Silver Dragon's assets. (A-14).

Within the Investor Group, Ting was nominated to provide personally the initial funding called for under the Agreement. (A-14).

Throughout December 2013, Hazout, on behalf of himself and the other defendants, made representations to the Investor Group, including Ting, that all

documents comprising the Agreement would be executed by the necessary parties and returned to the Investor Group, and that the Transaction would close. (A-14).

In the final week of December 2013, Hazout represented to the Investor Group, including Ting, that the executed documents would be delivered within days and that Silver Dragon's directors would resign on December 31, 2013. (A-14).

On or about December 30, 2013, in reliance upon representations that the executed documents would be delivered the following day, Ting caused the Payment to be made to Silver Dragon in the amount of $1,014,140. (A-15).

On December 31, 2013, Hazout forwarded to the Investor Group, including Ting, email correspondence among Silver Dragon's board of directors indicating that Silver Dragon had "received the first tranche of funds" from the Investor Group, and that Silver Dragon had "signed the attached Line of Credit Agreement, Line of Credit Note, and Equity Pledge." (A-15).

The written correspondence further confirmed that "[t]he Company has also received approval from Glen MacMullin, Charles McAlpine and Marc Hazout. Upon approval from Manuel Chan today and his funds advanced the transaction will close and all resignations will take effect as of this day December 31, 2013. A[n] 8K Filing with the SEC and press release will follow accordingly." (A-15).

Later that day, counsel for Silver Dragon wrote to counsel for the Investor Group and said that "[w]e are awaiting release of Manuel Chan's signatures. In the meantime, please find attached all other signatures of Silver Dragon, the departing directors and [Hazout's] associated entities on the settlement agreement, line of credit agreement, pledge agreement, note, officer's certificate and resignations." (A-15).

Despite the promise of a fully executed Agreement, however, the defendants never provided the Investor Group with such a fully executed Agreement. Instead, the defendants informed the Investor Group, including Ting, that director Chan was unwilling to execute the agreement and that the Transaction would not be completed. (A-16).

After being so informed, and over the ensuing months, Ting made repeated written demands to Hazout and Silver Dragon for the return of the $1,014,140, which had been advanced based solely on the defendants' representations that the Transaction would be completed. The defendants, however, refused to return the funds. (A-16).

On April 1, 2014, the defendants informed Ting that approximately $250,000 of the Payment had been used to pay various debts of Silver Dragon. (A-16).

On April 4, 2014, the defendants informed Ting that approximately $750,000 of the Payment had been disbursed by Silver Dragon to Travellers. (A-16).

Between April and August 2014, Ting made repeated demands that the defendants return the $1,014,140 Payment, but the defendants continued to refuse to return these funds. (A-16).

ARGUMENT

I. 10 DEL. C. §3114 MAY NOT BE INVOKED TO ASSERT PERSONAL JURISDICTION OVER A NON-RESIDENT DIRECTOR OF A DELAWARE CORPORATION FOR TORT CLAIMS NOT INVOLVING INTERNAL CORPORATE GOVERNANCE AND NOT ARISING UNDER DELAWARE LAW IN THE ABSENCE OF A VIABLE FIDUCIARY DUTY CLAIM.

A. QUESTION PRESENTED.

Does 10 Del. C. §3114 authorize the Superior Court to assert personal jurisdiction over a non-resident director of a Delaware corporation in the absence of any claim of breach of fiduciary duty, and in a court with no jurisdiction to hear a breach of fiduciary duty claims, to address tort claims not arising under Delaware law or involving the internal affairs of the corporation or duties imposed on directors under Delaware law?

This issue was raised in Hazout's Motion to Dismiss (D.I. 4) and was directly addressed in the Superior Court's Opinion denying that Motion to Dismiss. (Ex. A hereto).

B. SCOPE OF REVIEW.

Application of a long arm statute involves questions of statutory interpretation and due process which are reviewed by this Court *de novo*. *Hercules, Inc. v. Leu Trust and Banking (Bahamas) Ltd.*, 611 A.2d 476, 481 (Del. 1992).

C. MERITS OF THE ARGUMENT.

The Delaware Legislature adopted 10 Del. C. §3114 as a response to *Shaffer v. Heitner*, 433 U.S. 186 (1977), which held that ownership of stock in a Delaware corporation, and the sequestration thereof, is not a constitutional basis for obtaining jurisdiction over a nonresident director when the cause of action is not related to the property being sequestered. *Armstrong v. Pomerance*, 423 A.2d 174 n.2 (Del. 1980).

Section 3114(a), relevant here, states that:

> (a) Every nonresident of this State who after September 1, 1977, accepts election or appointment as a director, trustee or member of the governing 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 and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable.

In adopting 10 Del. C. §3114, the Delaware Legislature stated:

> Delaware has a substantial interest in defining, regulating and enforcing the fiduciary obligations which directors of Delaware corporations owe to such corporations and the shareholders who elected them. In promoting that interest, it is essential that Delaware afford a convenient and available forum for supervising the affairs of Delaware corporations and the conduct of directors of Delaware corporations. This legislation is designed to accomplish that objective.

61 Del. Laws, c. 119 (July 7, 1977) (quoted in *Armstrong*, 423 A.2d at 179 n.8).

In *Armstrong*, in upholding the constitutionality of §3114, this Court defined the parameters of the statute as follows:

> We emphasize here that s 3114 authorizes service only in actions where directors, trustees or members of the governing body of a Delaware corporation are necessary or proper parties or where the cause of action is grounded on such individuals' breach of the fiduciary duties owed to the corporation and its owners. Thus, s 3114 authorizes jurisdiction only in actions which are inextricably bound up in Delaware law and where Delaware has a strong interest in providing a forum for redress of injuries inflicted upon or by a Delaware domiciliary, i.e., the Delaware corporation.

Id. at 176 n.5.[2]

---

[2] In light of subsequent decisions of the United States Supreme Court on the question of long arm jurisdiction and due process, there has been some renewed questioning of the constitutionality of Section 3114. *E.g.,* Eric A. Chiappinelli, "The Myth of Director Consent: After *Shaffer*, Beyond *Necastro*," 37 *Del. J. Corp. Law* 783 (2013). This appeal does not challenge the facial constitutionality of Section 3114, only its expansion into cases bringing exclusively tort claims not truly grounded in Delaware law.

Lower courts have since required two conditions for exercising personal jurisdiction over directors for non-fiduciary claims. First, the Complaint must plead a viable fiduciary duty claim. *E.g., Lisa, S.A. v. Mayorga,* 2009 WL 1846308 at *5 (Del. Ch. June 22, 2009) ("'Delaware cases have consistently interpreted [Section 3114] as ... [applying] only in connection with suits involving the statutory and nonstatutory fiduciary duties of nonresident directors.' Moreover, the conduct alleged must have constituted a breach of fiduciary duty to a Delaware corporation for which the plaintiff has standing to sue—that is a duty which runs to the plaintiff either directly or derivatively," (footnotes omitted)), *aff'd,* 993 A.2d 1042 (Del. 2010); *Corporate Property Associates 14 Inc. v. CHR Holding Corp.*, 2008 WL 963048 at *10 n.77 (Del. Ch. Apr. 10, 2008) ("[w]ere I to accept Corporate Property Associates' argument that a plaintiff can use § 3114 simply by pleading non-viable fiduciary duty claims that go against settled Delaware law and thereby escape the need to satisfy the long-arm statute, I would create an incentive for plaintiffs to assert pretextual fiduciary duty claims"); *Kelly v. McKesson HBOC Inc.*, 2002 WL 88939 at *16-17 (Del. Super. Jan. 17, 2002); *Hirshman v. Vendamerica Inc.*, 1992 WL 52141 at *3 (Del. Ch. Mar. 9, 1992) (in a case accusing directors of making false statements in connection with a contract, "[a]lthough the complaint alleges that Mr. Doniger committed tortious acts to and breaches of a contract with third parties (the Plaintiffs),

it contains no allegation that Mr. Doniger breached any fiduciary duty as a director of a Delaware corporation. All that the complaint presents, is a request for damages for breach of an arms-length relationship. The complaint, stripped down to its essential elements, does not arise out of or relate to any breaches of fiduciary duties imposed on Mr. Doniger by the very laws which empowered him to act in his corporate capacity"); *Oryx Capital Corp. v. Phoenix Laser Systems, Inc*., 1990 WL 58180 at *2-3 (Del. Super. Feb. 26, 1990); *Prudential-Bache Securities, Inc. v. Franz Mfg. Co.*, 531 A.2d 953 (Del. Super. 1987); *Pestolite, Inc. v. Cordura Corp.*, 449 A.2d 263 (Del. Super. 1982) ("[t]he jurisdictional reach of section 3114 [is] no broader than necessary to oversee, define, regulate and enforce the statutory and nonstatutory fiduciary duties and obligations of nonresident directors to their Delaware corporation and its shareholders").[3]

---

[3] In *Furnari v. Wallpang, Inc.*, 2014 WL 1678419 (Del. Super. Apr. 16, 2014), a non-stockholder filed suit against a director claiming fraud and breach of contract, with no claim of breach of fiduciary duty. Relying on the fact that the director had signed a letter agreement confirming the plaintiff's commission on a sale, the Superior Court held:

> The Court notes that Plaintiff's only remaining viable claim is breach of contract stemming from the Letter Agreement. Greiner signed the Letter Agreement in his corporate capacity as Shapewriter's president. Based on that, jurisdiction is viable under 10 Del. C. §3114(b). Even if jurisdiction were not viable under the Code, Greiner

(continued...)

Second, any non-fiduciary duty claim must be sufficiently related to the viable fiduciary duty claim. *E.g., North American Catholic Educational Programming Foundation, Inc. v. Gheewalla,* 2006 WL 2588971 at *1 (Del. Ch. Sept. 1, 2006), *aff'd*, 930 A.2d 92 (Del. 2007).

As demonstrated below, the Complaint in this action fails to meet any of the requirements established and followed over the past 40 years.

1. Delaware Law Does Not Govern This Action.

The trial court did not analyze whether Delaware law would apply to the claim to ensure that its exercise of personal jurisdiction complied with *Armstrong.*

Ting's claims for unjust enrichment and fraud arise from communications between Hazout in Canada and Ting (and Ting's associates) in Hong Kong. No actions occurred in Delaware. As such, either Canadian or Chinese law will apply.

---

[3](...continued)
filed suit in a related matter in the Delaware Court of Chancery, thereby effectively waiving the lack of personal jurisdiction defense.

WL Op. at *11. The Section 3114 holding, stated in the alternative,and without analysis, application or reference to the case law construing that statute, has no persuasive value. *See In re Transamerica Airlines, Inc.,* 2009 WL 2217748 at *5 (Del. Ch. July 22, 2009) (the "opinion has little persuasive force, because it is largely conclusory and bereft of any supporting citations or legal reasoning"), *aff'd mem.*, 991 A.2d 19 (Del. 2010).

Delaware law does not apply merely because a Delaware corporation is a party.[4] Under conflicts of law principles, situs of incorporation is but one factor in determining the jurisdiction with the most significant relationship. *E.g., Tomlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 987 (Del. 2013). *See also In re American Intern. Group, Inc.*, 965 A.2d 763, 779 (Del. Ch. 2009) ("[a]lthough PWC's duties as auditor affect AIG's internal affairs, the internal affairs doctrine is not directly invoked by the claims against PWC, and thus I must use the Restatement's 'most significant relationship' test to determine what law applies to the claims against PWC", applying New York law because wrongful conduct occurred in New York where principal offices were located), *aff'd mem.*, 11 A.3d 228 (Del. 2011).[5]

---

[4] Delaware courts have often found that non-Delaware law applies to fraud and unjust enrichment claims brought against Delaware corporations. *E.g., Hurst v. Gen. Dynamic Corp*., 583 A.2d 1334, 1338-39 (Del. Ch. 1990) (fraud and unjust enrichment claims, among others, were brought against a Delaware corporation were negotiated in Canada. There was no conduct in Delaware. The Court of Chancery concluded that "it appear[ed] probable that Delaware law [would] not govern four of the plaintiffs' five counts," the fifth being a claim for breach of fiduciary duty); *VTB Bank v. Navitron Projects Corp.*, 2014 WL 1691250 at *10 (Del. Ch. Apr. 28, 2014) (fraudulent transfer and unjust enrichment claims governed by Ukranian law); *Gloucester Holding Corp. v. U.S. Tape and Sticky Products, LLC*, 832 A.2d 116, 124 (Del. Ch. 2003) (fraud claim against Delaware corporation governed by Massachusetts law); *Int'l Business Machines Corp. v. Comdisco, Inc.*, 1991 WL 269965 at *9 (Del. Super. Dec. 4, 1991) (Illinois law applies because Delaware corporation enjoyed the unjust enrichment at its principal place of business).

[5] (continued...)

Unjust enrichment claims are governed by the "most significant relationship" test and fraud claims are governed by either the "most significant relationship test" or the law of where the fraud occurred. *Hurst*, 583 A.2d at 1338 n.5. The facts alleged do not show any basis for Delaware law to apply to these claims.

Ting also asserted a claim under Delaware's fraudulent conveyance statute, 6 Del. C. §1304. That claim, however, is not valid to suggest the application of Delaware law as the statute does not apply to transfers occurring outside of Delaware (and the United States) simply because they involve a Delaware corporation. Instead, traditional jurisdictional tests must be applied. *See Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977) (Delaware Blue Sky law does not apply merely because corporation is incorporated in Delaware, noting presumption against extraterritorial application of state statutes), *overruled on other grounds, Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983). There is no allegation of any transfers in Delaware.

2. The Complaint Does Not Plead a Viable Fiduciary Duty Claim.

The Complaint fails to state a viable fiduciary duty claim, both procedurally and substantively.

---

[5](...continued)

"The term 'internal affairs' has no very definite or fixed meaning; but we do not think that it extends to cheating creditors, and it must be confined to relations affecting only the stockholders and the corporation among themselves." *Edwards v. Schillinger*, 91 N.E. 1048, 1052 (Ill. 1910).

First, the Superior Court lacks subject matter jurisdiction to entertain a breach of fiduciary duty claim, as the Court of Chancery has exclusive jurisdiction over such claims. *Harmon v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 498 (Del. 1982).

Second, there are no allegations excusing demand on the board of directors. *E.g., Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 366-67 (Del. 2006); *Beam v. Stewart*, 845 A.2d 1040, 1048-52 (Del. 2004). Even assuming for the moment self-interest on the part of Hazout, there are no allegations of fact showing that Hazout dominates and controls the rest of the board such that they could not disinterestedly review a demand. *See Malpiede v. Townson,* 780 A.2d 1075, 1084-85 (Del. 2001) (concluding that the claim of breach of fiduciary duty of loyalty was insufficient because it alleged self-interest of only one director).

Third, the Complaint does not allege (even in a conclusory manner) self-dealing, waste, violation of the Delaware General Corporation Law or other harm to the corporation or its stockholders. The Complaint does not allege that the transactional dealings were not at arms' length (and Ting was represented by counsel, Compl. ¶30) or that the terms or process were unfair. There are no facts alleged that show that Hazout and the other directors of Silver Dragon are not entitled to the benefit of the business judgment rule.

The trial court concluded that "these claims involve the misuse of Hazout's position as a director of a Delaware corporation to commit fraud and a fraudulent transfer." Again, even if the claim was cognizable in the Superior Court, it does not necessarily follow that this lawsuit is brought against Hazout in his capacity as a director or for violation of his duty as a directors. Ting does not allege that Hazout owed him any special duty in that transaction because Hazout is a director of Silver Dragon. Ting sued for acts which, if proven, would be tortious regardless of Hazout's status vis-á-vis the corporation.

3. Personal Jurisdiction in this Action Violates Due Process.

"A state must have some palpable interest rationally connected with public policy in adjudicating a dispute within its borders for jurisdiction to be lawfully acquired" in a manner comporting with due process. *Empire Abrasive Equipment Corp. v. H.H. Watson, Inc*., 567 F.2d 554, 557 (3d Cir. 1977), *quoting Jonnet v. Dollar Savings Bank of New York*, 530 F.2d 1123, 1140 (3d Cir. 1976) (Gibbons, J., concurring).

Ting has brought tort claims, which are not governed by Delaware law, seeking damages. Delaware does not have a substantial interest in overseeing these types of claims. *Pestolite*, 449 A.2d at 267; *Kelly*, WL Op. at *16. This is particularly so where neither the plaintiff nor the claims have any connection to Delaware. *Ruggiero*

v. FuturaGene, plc, 948 A.2d 1124, 1138-39 (Del. Ch. 2008) (Delaware has no strong interest in adjudicating cases applying foreign law); *Magid v. Marcal Paper Mills, Inc.*, 517 F.Supp. 1125, 1131 (D. Del. 1991). As the Superior Court stated in *Pestolite*:

> Clearly there is no nexus between Delaware and the acts complained of since these acts do not arise out of or relate to any breaches of duties imposed on the individual Defendants by the very laws which empowered the Defendants to act in their corporate capacities. These duties and obligations specifically include statutory and nonstatutory fiduciary duties owed the corporation and its shareholders. Thus, the qualitative contacts of the Defendants with Delaware and the litigation are waterish at most. To subject these Defendants to personal jurisdiction under 10 Del. C. § 3114 would be constitutionally impermissible. Although the dismissal of an action is a drastic remedy, resort to it becomes necessary when the facts and circumstances of a particular case call for adherence to the Constitution as a priority.

449 A.2d at 267. *Accord Magid*, 517 F.Supp. at 1131 ("where the forum state has no interest in adjudicating the dispute, it cannot exercise jurisdiction").[6]

---

[6] In *Candlewood Timber Group, LLC v. Pan America Energy, LLC*, 859 A.2d 989 (Del. 2004), this Court stated that Delaware has a significant interest in "mak[ing] available to litigants a neutral forum to adjudicate *commercial* disputes against Delaware entities, even where the dispute involves foreign law and the parties and conduct are centered in a foreign jurisdiction." *Id.* at 1000 (italics added). That statement, however, was made in the context of a *forum non conveniens* analysis, which already presumes the parties are lawfully before the court, and did not address interpretation of a long-arm statute and the related due process analysis.

4. *In re USACafes* Does Not Support Personal Jurisdiction Here.

The Superior Court relied heavily on *In re USACafes, L.P. Litig.*, 600 A.2d 43 (Del. Ch. 1990), in its analysis, stating:

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

Ting I, WL Op. at *3 (footnotes omitted).

Unfortunately, the Superior Court divorced Chancellor Allen's comment from its context. The issue in *In re USACafes* was whether it would be consistent with due process to assert personal jurisdiction over directors of a corporation that is the general partner of a limited partnership where there is a claim that the general partner breached fiduciary duties owed to the limited partners. The defendants had argued that their duties as directors flowed only to their corporation, and not to the limited partnership. The Court of Chancery ruled:

> The Delaware corporation which the individual defendants serve as directors was created for the sole purpose of conducting the affairs of another Delaware entity, the Partnership. 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 internal affairs or corporate governance issues that Delaware law is especially concerned with. The wrongs here are alleged breaches of fiduciary duties of the General Partner and of its directors qua directors created by Delaware law and of especial concern to it.* I conclude that it would constitute no offence to traditional notions of fairness to require those who have chosen to serve as directors of the General Partner to defend their actions here rather than elsewhere.

Id. at 52 (citations omitted, italics added). The Court went on to hold:

> I conclude that the directors of the corporate General Partner did owe duties to the Partnership in the nature of a duty of loyalty and that that duty was owed in the "capacity" of director of the corporation. Thus, I conclude that service of process is duly authorized by Section 3114 with respect to these claims.

Id. at 53 (citations omitted).

The present action, by contrast, does not raise a fiduciary duty claim, but rather a tort claim, the resolution of which does not have any effect on the internal governance of Silver Dragon. Ting essentially abandoned any fiduciary duty claim by electing to transfer this action to the Superior Court.

Ting did not plead a viable claim for breach of fiduciary duty under Delaware law in a procedurally proper manner in a court capable of addressing the claim. Section 3114 is not applicable.

CONCLUSION

WHEREFORE, for the foregoing reasons, defendant-below/appellant Marc Hazout respectfully requests that this Court reverse the interlocutory ruling of the Superior Court and dismiss him from this action for lack of personal jurisdiction.

Respectfully submitted,

/s/David L. Finger
David L. Finger (DE Bar ID #2556)
Finger & Slanina, LLC
One Commerce Center
1201 N. Orange St., 7th floor
Wilmington, DE 19801-1186
(302) 573-2525
Attorney for Defendant-below/Appellant
Marc Hazout

Dated: September 8, 2015