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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARC HAZOUT, Defendant Below – Appellant, v. TSANG MUN TING, Plaintiff Below – Appellee.	)	No. 353, 2015 On Appeal from the Superior Court in and for New Castle County (C.A. No. N14C-12-067 WCC)

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NATURE AND STAGE OF PROCEEDINGS

Appellee Tsang Mun Ting ("Tsang") commenced this action on September 19, 2014 in the Court of Chancery, seeking to recover $1,014,140 in funds misappropriated by Appellant and Defendant Below Marc Hazout ("Hazout") and the other Defendants Below Silver Dragon Resources Inc. ("Silver Dragon") and Travellers International, Inc. ("Travellers," and together with Hazout and Silver Dragon, "Defendants").

On November 24, 2014, Tsang elected to transfer the case to the Superior Court. On January 7, 2015, Hazout and Travellers moved to dismiss the action against them for lack of personal jurisdiction under Rule 12(b)(2) of the Superior Court Rules. On June 3, 2014, the Superior Court granted the motion to dismiss as to Travellers, but denied the motion to dismiss as to Hazout, finding that jurisdiction over Hazout was proper in Delaware under 10 *Del. C.* § 3114. *Tsang Mun Ting v. Silver Dragon Resources, Inc.*, 2015 Del. Super. LEXIS 277 (June 3, 2015). Hazout filed a motion for reargument on June 8, 2015, which the Superior Court denied on June 18, 2015. *Tsang Mun Ting v. Silver Dragon Res., Inc.*, 2015 Del. Super. LEXIS 332 (June 18, 2015).

Hazout filed a Notice of Appeal on July 7, 2015, which this Court accepted on August6, 2015. Hazout filed his Opening Brief on Appeal on September 8, 2015. This is Tsang's Answering Brief on Appeal.

SUMMARY OF ARGUMENT

1. Appellant's summary of argument is denied. Hazout is subject to personal jurisdiction in Delaware under 10 *Del. C.* § 3114, because this action involves a dispute in which (a) Tsang, a stockholder of Silver Dragon, a Delaware corporation, has sued Silver Dragon and Hazout, an officer and director of Silver Dragon; (b) Hazout abused his position as an officer and director of Silver Dragon to perpetrate a fraud against stockholder Tsang for Hazout's own personal benefit; and (c) Hazout used the corporation itself as a vehicle for the fraud, inducing Tsang to transfer a substantial sum of money to Silver Dragon, which Hazout retained for his own benefit, based on false representations that Hazout and Silver Dragon would complete a transaction permitting Tsang and a group of related stockholders to elect a majority of Silver Dragon's board of directors. Additionally, personal jurisdiction over Hazout in this action comports with due process.

STATEMENT OF FACTS

A. The Parties

Defendant Silver Dragon is a publicly traded Delaware corporation with its principal place of business in Toronto, Canada (B-4 at ¶ 13). Appellant Hazout is the President, Chief Executive Officer, and Principal Financial and Accounting Officer of Silver Dragon (B-4 at ¶ 15). Hazout is also a director of Silver Dragon and owns a significant portion of Silver Dragon's stock through his wholly-owned company, Defendant Travellers (B-4 at ¶¶ 14-15). In addition, Hazout is the President, Chief Executive Officer, and sole stockholder of Travellers (*id.*). Appellee Tsang is a professional investor, residing in Hong Kong, China and specializing in cross-border investments and international financial transactions, and he is a stockholder of Silver Dragon (B-1 at ¶ 2, B-4 at ¶ 12).

B. The Agreement

In the Spring of 2013, as part of a group of affiliated investors owning stock in Silver Dragon (the "Investors"), Tsang entered into negotiations to acquire operating control of Silver Dragon by appointing a new slate of directors to replace all but one of the directors on Silver Dragon's then-current board (B-1 at ¶ 2, B-5 at ¶ 18). In exchange, the Investors were to recapitalize Silver Dragon by providing it with loans totaling $3,417,265 (B-6 at ¶ 23).

Toward the end of December 2013, the terms of the deal were memorialized in a series of agreements (collectively the "Agreement") to be

executed by the Investors and the existing directors of Silver Dragon (B-5 at ¶ 20). The Agreement contained both a Delaware choice-of-law provision and a forum-selection clause dictating that any action arising out of or relating to the Agreement or the transactions contemplated by the Agreement would be brought solely and exclusively in Delaware (B-5 at ¶ 21, B-30 at § 5.3(b), B-31 at § 5.6).

C. Hazout and the Other Defendants Misappropriate Tsang's Funds

Throughout December 2013, Hazout, acting as Director, President, CEO, and Principal Financial and Accounting Officer of Silver Dragon, represented to Tsang and the Investors that the Agreement would be signed by all of the resigning directors and would be delivered to them within days, and that Silver Dragon's current board members would resign on December 31, 2013 (B-6 at ¶¶ 25-27). On December 30, 2013, in reliance upon representations that the executed documents would be delivered the next day, Tsang wire transferred $1,014,140 to Silver Dragon, which constituted the initial tranche and a significant portion of the funding that the Investors were to provide Silver Dragon under the Agreement (B-7 at ¶ 28). Shortly after Silver Dragon received the funds, its counsel wrote to the Investors to say that they were waiting for one more signature, but in the meantime attaching the signatures of three of the four directors, including Hazout (B-7 at ¶¶ 28-30).

Despite their promises to the contrary, Defendants never provided the Investors with a fully executed Agreement (B-8 at ¶ 31). Instead, Defendants informed the Investors, including Tsang, that director Manuel Chan was unwilling to execute the Agreement and that the transaction would not close (*id.*). During the ensuing months, Tsang made repeated written demands to Hazout and Silver Dragon to return the $1,014,140 (B-8 at ¶ 32). Defendants refused to return the funds (*id.*).

Instead, in early April 2014, Defendants informed Tsang that Silver Dragon had transferred approximately $750,000 of Tsang's funds to Hazout's wholly-owned company, Travellers, and had used roughly $250,000 to satisfy various Silver Dragon debts (B-8 at ¶¶ 33-34). Between April and August 2014, Tsang made additional demands that Defendants return the $1,014,140, but Defendants continued to refuse to return the funds (B-8 at ¶ 35). As a result, Tsang initiated this action to recover the funds that the Defendants had stolen from him.

ARGUMENT

HAZOUT IS SUBJECT TO PERSONAL JURISDICTION IN DELAWARE PURSUANT TO 10 *DEL. C.* § 3114

A. Question Presented

Whether 10 *Del. C.* § 3114 and the Due Process Clause authorize personal jurisdiction over an officer and director of a Delaware corporation who, acting in his corporate capacity, used the corporation as a vehicle to defraud a stockholder by falsely representing that the corporation would consent to a written agreement containing a Delaware venue and choice-of-law provisions, under which the stockholder would be entitled to elect a majority of the corporation's board of directors in exchange for recapitalizing the corporation.

Tsang raised this issue in his opposition to Hazout's motion to dismiss for lack of personal jurisdiction (B-75-77), and the Superior Court addressed it in its opinion denying Hazout's motion to dismiss (B-85-90).

B. Scope of Review

The Court reviews "a trial court's denial of a motion to dismiss for lack of personal jurisdiction under a *de novo* standard of review." *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.*, 871 A.2d 428, 437 (Del. 2005). To determine whether personal jurisdiction is proper in Delaware, our courts apply a two-step analysis – the court must first determine whether service of process is authorized by statute, and it must then determine whether subjecting the

nonresident to jurisdiction in Delaware would be consistent with the Due Process Clause of the Fourteenth Amendment. *Id.* at 438.

C. Merits of The Argument

Hazout is subject to jurisdiction in Delaware under 10 *Del. C.* § 3114, because (1) Section 3114 statutorily authorizes personal jurisdiction over Hazout and (2) exercising jurisdiction over Hazout pursuant to Section 3114 would comport with due process.

1. Section 3114 Statutorily Authorizes Personal Jurisdiction Over Hazout

Section 3114 statutorily authorizes personal jurisdiction over Hazout for two reasons: Hazout is a "necessary or proper party" in an action against a Delaware corporation, and this action seeks recourse against Hazout for actions that he took in his capacity as an officer and director of Silver Dragon that amount to a "violation of a duty in such capacity."

Sections 3114(a) and (b) authorize service of process on nonresident directors and officers. Combining the two sections into one, by inserting "[officer]" into Section 3114(a), the two sections provide for personal jurisdiction over directors and officers by consent in the following categories of actions:

> in all civil actions or proceedings brought in this State, by or on behalf of, or *against such corporation*, in which such [officer,] director, trustee or member is a *necessary or proper party*, ***or*** in any action or proceeding against

> such [officer,] director, trustee or member for *violation of a duty in such capacity* . . . .

10 *Del. C.* §§ 3114(a), (b) (emphasis added).[1] Section 3114(a), which authorizes service of process on corporate directors, and section 3114(b), which authorizes service of process on corporate officers, have been interpreted consistently with each other. *See e.g.*, *Ryan v. Gifford*, 935 A.2d 258, 266 n.14 (Del. Ch. 2007).

Section 3114 was adopted after the United States Supreme Court held in *Shaffer v. Heitner*, 433 U.S. 186, 216-17 (1977), that Delaware's sequestration statute, 10 *Del. C.* § 366, had been unconstitutionally applied against officers and directors of a Delaware corporation under the circumstances in that case. The Supreme Court suggested, however, that Delaware may subject officers and directors of Delaware corporations to jurisdiction in Delaware by enacting a statute treating the acceptance of a position as an officer or director "as consent to jurisdiction in the State." *Id.* at 216. Delaware's General Assembly responded by adopting Section 3114, the stated "purpose and intent" of which was "to fill a void" created by the Supreme Court's decision in *Shaffer*. 61 Del. Laws, c.119

[1] "Officer" is defined in Section 3114 to include the "president," "chief executive officer," "chief financial officer," and "chief accounting officer" of a corporation and any person identified as an executive officer in a corporation's public filings with the Securities and Exchange Commission. 10 *Del. C.* § 3114(b)(1), (2). Hazout is an officer as defined in Section 3114(b), because he is the President, CEO, and Principal Financial and Accounting Officer of Silver Dragon (B-4 at ¶ 15), and he is the only executive officer listed in Silver Dragon's most recent Form 10-K.

(July 7, 1977) (quoted in *Armstrong v. Pomerance*, 423 A.2d 174, 179 n.8 (Del. 1980)).

Section 3114, as drafted by the General Assembly in response to *Shaffer*, contains two clauses that provide two separate and independent grounds for asserting personal jurisdiction by consent over corporate officers and directors. *See In re USACafes, L.P. Litigation*, 600 A.2d 43, 53 (Del. Ch. 1991). The first clause, to which we refer as the Necessary or Proper Party Clause, authorizes jurisdiction when the officer or director is a "necessary or proper party" in an action in which the corporation itself is a real or nominal party. *Id.* The second clause, the Violation of Duty Clause, authorizes jurisdiction over an officer or director where the conduct alleged in the action involves a violation of the officer's or director's duties in his or her capacity as an officer or director. *Id.* As discussed below, each of the two clauses separately and independently authorizes personal jurisdiction over Hazout in Delaware for the purposes of the claims made in this action.

a. Personal Jurisdiction Over Hazout is Statutorily Authorized Under Section 3114's Necessary or Proper Party Clause

Personal jurisdiction over Hazout in Delaware is appropriate under the Necessary or Proper Party Clause of Section 3114, the plain language of which authorizes jurisdiction over any officer or director who is a "necessary or proper

party" in an action against a Delaware corporation, because Hazout has an interest in the subject matter of the litigation and because he is the principal wrongdoer who caused injury to Tsang.

Persons legitimately made parties to suits "belong to three classes: First, proper parties, second, necessary parties, and, third, indispensable parties."[2] Proper parties to a lawsuit include any person who has a direct or indirect "interest" in the subject matter of the lawsuit and the relief granted. 1 Pomeroy, EQUITY JURISPRUDENCE § 114, at 153 (5th ed. 1941). Necessary parties include "alleged wrongdoers because it is they who arguably caused the injury and should pay any damage award." *Cede & Co. v. Technicolor*, 542 A.2d 1182, 1189 (Del. 1988).

Hazout is both a necessary party and a proper party to this lawsuit. He is a necessary party because he is the principal wrongdoer who caused injury to Tsang for which the Defendants should be held liable, and he is a proper party because he has an interest in the subject matter of the lawsuit and the relief that

[2] *Mathieson v. Craven*, 164 F. 471, 475 (D. Del. 1908) ("The phrases proper parties, necessary parties and indispensable parties, in their technical sense, are distinguishable from one another, each denoting a separate and independent class. But in a broader sense the first is the most and the last the least comprehensive class; for proper parties may or may not be either necessary or indispensable, and necessary parties may or may not be indispensable. In the same broad sense an indispensable party is both a necessary and a proper party, and, though a necessary party may or may not be indispensable, he is nevertheless a proper party.").

Tsang seeks. Hazout's wrongdoing was his misappropriation of Tsang's funds. The injury to Tsang was the loss of funds that were rightfully his. Hazout has an interest in the lawsuit because Tsang is seeking repayment of the funds that Hazout, in his capacity as an officer and director of Silver Dragon, fraudulently stole from Tsang and transferred to Travellers (Hazout's wholly-owned company) for his own benefit and to Silver Dragon for Silver Dragon's benefit, all in breach of Tsang's rights and to Tsang's detriment. Hazout is therefore both a necessary and proper party to this lawsuit, and as such, is subject to jurisdiction in Delaware under the Necessary or Proper Party Clause of Section 3114.

Tsang acknowledges that to reach that conclusion, the Court will need to overrule the Court of Chancery's decision in *Hana Ranch, Inc. v. Lent*, 424 A.2d 28 (Del. Ch. 1980). In *Hana Ranch*, then-Chancellor Marvel, apparently concerned that the Necessary or Proper Party Clause of Section 3114 could be susceptible to unconstitutional application, essentially rewrote Section 3114, by redefining the word "or" after the phrase "necessary or proper party" to mean "and." The result was in effect to read the Necessary or Proper Party Clause out of the statute.[3] The Court of Chancery has since felt duty-bound to interpret Section

[3] 424 A.2d at 30-31; *accord Ryan*, 935 A.2d at 268-69 (noting that the two clauses of Section 3114(b), "connected by the disjunctive rather than the conjunctive, plainly contain two distinct bases upon which to assert jurisdiction," but that *Hana Ranch* "effectively rewrote the disjunctive 'or' into a conjunctive 'and'"); *HMG/Courtland Props., Inc. v. Gray*, 729 A.2d 300, 305 (Del. Ch. 1999)

3114 in accordance with that decision under the doctrine of *stare decisis*. *See USACafes*, 600 A.2d at 53.

This Court, as the highest judicial tribunal of the State, is not bound by *Hana Ranch*, and for the reasons that follow, the Court should overrule that decision. By rewriting Section 3114, *Hana Ranch* infringed upon the province of the General Assembly, in violation of the separation of powers doctrine. As the Court has repeatedly recognized, "courts lack the constitutional power to rewrite [a] statute."[4] Accordingly, a court may not "rewrite [a] statute so that it covers only what [the court] think[s] is necessary to achieve what [the court] think[s] the [legislature] really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010). Rather, courts must "give effect to the intent of the General Assembly as clearly expressed in the language of a statute." *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982).

(*Hana Ranch* "essentially read out of the statute the first clause of § 3114 providing for jurisdiction over nonresident directors in any case involving their corporation where such directors are necessary or proper parties . . . ."); *USA Cafes*, 600 A.2d 43 at 53 (*Hana Ranch* effectively read Section 3114's first "clause out of the statute").

[4] *Cordero v. Gulfstream Dev. Corp.*, 56 A.3d 1030, 1037 (Del. 2012); *accord State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 465 (Del. 2010) ("it is not within our province to rewrite [a] statute . . . ."); *Deptula v. Horace Mann Ins. Co.*, 842 A.2d 1235, 1236 (Del. 2004) ("courts cannot usurp the legislative function by rewriting [a] statute."); *Rafferty v. Hartman Walsh Painting Co.*, 760 A.2d 157, 160 (Del. 2000) ("Mindful of the separation of powers doctrine . . . we cannot rewrite [a] statute.").

Consistent with these principles, two former Chancellors of the Court of Chancery – Chancellor Allen and Chancellor Chandler – have suggested that rather than rewrite the statute, the court in *Hana Ranch* should have chosen to construe Section 3114 literally, exactly as the General Assembly wrote it, and that the courts should then protect against any unconstitutional application of the statute on a case-by-case basis, by applying the minimum contacts test. *USA Cafes*, 600 A.2d at 53 (Allen, C.); *Ryan*, 935 A.2d at 268 n.24 (Chandler, C.). Indeed, in *USA Cafes*, Chancellor Allen stated that "[a]n alternative [to *Hana Ranch*'s judicial rewriting of Section 3114] might have been to give the legislature's word its ordinary meaning, but to protect against unconstitutional use of the statute on a case-by-case basis – employing the test of the *International Shoe* line of cases to do so." 600 A.2d at 53. Likewise, in *Ryan*, Chancellor Chandler, after discussing *Hana Ranch*'s judicial revision of the text of Section 3114, noted that the approach suggested by Chancellor Allen in *USA Cafes*, which would give effect to the plain language of Section 3114 as drafted by the General Assembly, was "one with which [he] agree[d]."[5]

[5] *Ryan*, 935 A.2d at 268 n.24 ("Then-Chancellor Allen, in *In re USACafes, L.P. Litig.*, 600 A.2d 43, 53 (Del. Ch. 1991), suggested a different approach with which I agree: 'An alternative might have been to give the legislature's word its ordinary meaning, but to protect against unconstitutional use of the statute on a case-by-case basis--employing the test of the *International Shoe [v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)] line of cases to do so.'").

The approach advocated by former Chancellors Allen and Chandler is consistent with the analytical framework that this Court employed to analyze the constitutionality of Section 3114 in *Armstrong.* 423 A.2d at 175-77. Unlike then-Chancellor Marvel's decision in *Hana Ranch*, the Court in *Armstrong* interpreted Section 3114's language literally, stating that "§ 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."[6] The *Armstrong* Court did not rewrite the statute, did not substitute the substitute the word "and" for "or" after the phrase "necessary or proper party," did not convert the statute's language from the disjunctive to the conjunctive, and did not read the Necessary or Proper Party Clause out of the statute. *Armstrong*, 423 A.2d at 176 n.5. Rather, after quickly finding that the statute's plain language authorized service of process, *id.* at 175, the Court analyzed whether Section 3114 was "unconstitutional ***as applied***" under the test set forth in *International Shoe. Id.* at 176 (emphasis added). Thus, the Court's

[6] *Id.* at 176 n.5 (emphasis added). *See also Istituto Bancario Italiano SpA v. Hunter Engineering Co.*, 449 A.2d 210, 227-228 (Del. 1982) (stating that Section 3114 authorizes personal jurisdiction over directors in cases "in which such director, trustee or member is a necessary or proper party, ***or*** in any action or proceeding against such director, trustee or member for violation of his duty in such capacity, whether or not he continues to serve as such director, trustee or member at the time suit is commenced.") (emphasis added).

Armstrong decision appears to have employed the very approach later suggested by former Chancellors Allen and Chandler in *USA Cafes* and *Ryan*.

Furthermore, that approach – construing the language of the statute literally and analyzing the statute's constitutionality as applied on a case-by-case basis – is precisely the way Delaware courts police the constitutionality of the implied consent provision of the Limited Liability Company Act, 6 *Del. C.* § 18-109(a). That statute authorizes service of process on nonresident managers of limited liability companies (emphasis added):

> 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 or the liquidating trustee of a duty to the limited liability company or any member of the limited liability company.

Although Section 18-109(a) is drafted even "more broadly than § 3114 of the DGCL," because it authorizes personal jurisdiction over LLC managers in disputes merely "involving or relating to the business" of their companies, the courts have refused to judicially rewrite Section 18-109(a). *Cornerstone Techs. LLC v. Conrad*, 2003 Del. Ch. LEXIS 34, at *40 (Mar. 31, 2003). Instead, our courts have interpreted the language chosen by the General

Assembly in Section 18-109(a), including the word "or" after the phrase "involving or relating to the business of the limited liability company," literally.[7]

For instance, in *Assist Stock*, the Court of Chancery held that although "the 'involving or relating to' language found in § 18-109 can, too, be susceptible to too broad an application," protection against "unconstitutional application of the statute could be provided on a ***case-by-case basis*** by applying the minimum-contacts analysis mandated by due process." 753 A.2d at 980 (emphasis added). Likewise, in *Cornerstone*, the Court of Chancery "respected the General Assembly's" chosen language, holding that such language "must be given effect and that protection against an unconstitutional application of the statute can be afforded by the minimum contacts analysis." 2003 Del. Ch. LEXIS 34, at *40.

Section 3114 should be interpreted in the same manner. The plain language of Section 3114 should be given effect, and the constitutionality of the statute should be analyzed as applied on a case-by-case basis under the minimum contacts analysis set forth in *International Shoe* and its progeny. Such an approach, unlike the approach adopted in *Hana Ranch*, respects the institutional

[7] *Cornerstone*, 2003 Del. Ch. LEXIS 34, at *40 (discussed in text); *Assist Stock Mgm't LLC v. Rosheim*, 753 A.2d 974, 980 (Del. Ch. 2000) (discussed in text); *Palmer v. Moffat*, 2001 Del. Super. LEXIS 386, at *2 (Oct. 10, 2001) (stating that a "case-by-case analysis would eliminate any risk of an unconstitutionally broad application of the statute"); *see also Christ v. Cormick*, 2007 U.S. Dist. LEXIS 49825, at *11 (D. Del. July 10, 2007) (same).

province of the General Assembly and is consistent with the analytical framework established by this Court in *Armstrong*. It is also the approach two former Chancellors would have adopted had they not been bound by *Hana Ranch*, and it is the approach Delaware courts employ to assess the constitutionality of the implied consent statute in the Limited Liability Company Act. For those reasons, the Court should overrule *Hana Ranch*, construe the language of Section 3114, including the word "or" after the phrase "necessary or proper party," literally, and test the constitutionality of the statute's application on a case-by-case basis.

As noted on pages 9-11 above, if the Court adopts such an approach, Section 3114's Necessary or Proper Party Clause would statutorily authorize personal jurisdiction over Hazout in Delaware.

b. Personal Jurisdiction Over Hazout is Statutorily Authorized Under Section 3114's Violation of Duty Clause

Even if the Court declines to overrule *Hana Ranch*'s judicial redrafting of Section 3114, Hazout is subject to jurisdiction under the statute's Violation of Duty Clause, which authorizes personal jurisdiction over officers and directors of Delaware corporations for violations of duty in their directorial or official capacities. Under that clause, every nonresident defendant who serves as an officer or director of a Delaware corporation consents to jurisdiction in

Delaware for all actions alleging violations of duty "relating to the defendant's capacity" as an officer or director. *Armstrong*, 423 A.2d at 175.

Whether service of process is proper under the Violation of Duty Clause of Section 3114 "turns on whether those defendants are charged with committing wrongful acts in a directorial [or officerial] capacity." *Harris v. Carter*, 582 A.2d 222, 232 (Del. Ch. 1990). Section 3114 is not limited to cases in which a cause of action for breach of fiduciary duty is expressly pleaded. The court in *Hana Ranch* "not only spoke of fiduciary duties but also stated that the statute was intended to apply in cases involving the 'rights duties, and obligations' of directors arising under Delaware law." Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 3.04[a][2], at 3-59 (Matthew Bender & Co., 2015). Accordingly, the Court of Chancery has held that formulations limiting the Violation of Duty Clause's reach to cases in which a breach of fiduciary duty claim is expressly pleaded are both "overbroad" and "imprecise."[8]

[8] *Assist Stock*, 753 A.2d at 980 (characterizing cases that limit the reach of the Violation of Duty Clause to those actions in which plaintiff directly pleads a cause of action for breach of fiduciary duty as "imprecise"); *In re USACafes*, 600 A.2d at 52 (stating that cases limiting the Violation of Duty Clause's scope to actions in which plaintiff directly pleads a cause of action for breach of fiduciary duty are "overbroad").

Indeed, adopting Hazout's proferred interpretation of Section 3114, limiting it to actions in which a breach of fiduciary duty claim is expressly pleaded, would effectively preclude the Superior Court from utilizing the statute. Any interpretation of Section 3114 that would operate to preclude the Superior Court from employing Section 3114 is contrary to the "purpose and intent" of the statute – to "fill a void" created by the United States Supreme Court's holding in *Shaffer*, which constitutionally cabined the reach of 10 *Del. C.* § 366. Before the Court's decision in *Shaffer*, the Superior Court utilized 10 *Del. C.* § 366 to obtain jurisdiction over corporate officers and directors in actions in which such officers and directors were alleged to have committed wrongful conduct in their directorial or official capacities. *See First Western Financial Corp. v. Neumeyer*, 240 A.2d 579, 579, 582 (Del. Super. 1968) (utilizing 10 Del. C. § 366 to obtain jurisdiction over officers and directors in an action "to recover corporate funds [] allegedly diverted" by the officers and directors). Thus, part of the void created by *Shaffer* was the Superior Court's inability to use Section 366 as a means to subject officers and directors to its jurisdiction. Because limiting Section 3114's reach to cases in which breach of fiduciary duty claims are expressly pleaded would embrace only Court of Chancery actions, effectively precluding the Superior Court from employing Section 3114, such an approach would be contrary to the General Assembly's intent to fill the "void" created by *Shaffer*.

Accordingly, the Violation of Duty Clause of Section 3114 was enacted to authorize jurisdiction over officers and directors not only where a breach of fiduciary duty claim is expressly pleaded against officers or directors, but also where the "conduct alleged ***constitute[s]*** a breach of fiduciary duty . . . for which the plaintiff has standing to sue." *Lisa v. Morgan*, 2009 Del. Ch. LEXIS 115, at *17 (June 22, 2009) (emphasis added). In other words, jurisdiction is proper under the Violation of Duty Clause when the plaintiff alleges a breach of fiduciary duty either "directly ***or by inference***," *Kelly v. McKesson HBOC, Inc.*, 2002 Del. Super. LEXIS 39, at *57 (Jan. 17, 2002) (emphasis added); when the conduct alleged is "***inherently intertwined*** with [an officer's or director's] fiduciary position," *Assist Stock*, 753 A.2d at 981 (emphasis added); or when the causes of action pleaded are "***not entirely unrelated*** to a director's [or officer's] fiduciary duty," *Gans v. MDR Liquidating Corp.*, 1990 Del. Ch. LEXIS 3, at *27 (Jan. 10, 1990) (emphasis added).

Thus, Delaware courts have jurisdiction over corporate officers and directors even where a breach of fiduciary duty claim was not, or could not have been, expressly pleaded.[9] For instance, in *Gans*, the Court of Chancery held that

[9] *See e.g.*, *Gans v. MDR Liquidating Corp.*, 1990 Del. Ch. LEXIS 3, at *27 (Jan. 10, 1990) (discussed in text); *accord Assist Stock*, 753 A.2d at 980 (finding personal jurisdiction over a manager of the limited liability company under Section 18-109(a) "regardless of whether he is alleged to be breaching his fiduciary duties"); *id.* at 978 n.18 ("While I am inclined to view the allegations of plaintiffs'

even if plaintiffs' claim that defendants breached their statutory and fiduciary duties as directors in violation of 8 *Del. C.* § 281(b) failed, "plaintiffs' allegations of a fraudulent conveyance . . . were clearly sufficient to confer personal jurisdiction over the individual director defendants [under Section 3114] because such charges allege [by inference] the violation of a fiduciary duty imposed upon the directors of corporations not to improperly convey assets to themselves." 1990 Del. Ch. LEXIS 3, at *23.

Section 3114 authorizes personal jurisdiction here, as in *Gans*, because the conduct alleged in the complaint constitutes a breach of fiduciary duty for which Tsang, a Silver Dragon stockholder (B-1 at ¶ 2), has standing to sue. This case is not, as Hazout contends in his Opening Brief, a tort or contract case unconnected with the internal affairs or corporate governance issues with which Delaware law is especially concerned. Indeed, unlike the cases that Hazout cites

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amended complaint as potentially stating a claim for breach of fiduciary duty, I do not rest my decision on that basis alone."); *Furnari v. Wallpang, Inc.*, 2014 Del. Super. LEXIS 199, at *33 (Apr. 16, 2014) (finding personal jurisdiction over corporate director under Section 3114 even though no fiduciary duty claim was pleaded); *Palmer v. Moffat*, 2001 Del. Super. LEXIS 386, at *2 (Oct. 10, 2001) (finding personal jurisdiction over managers of a Delaware LLC under Section 18-109(a) in an action by a former member alleging that "the members and managers of the Company successfully conspired to defraud him of more than $15 million of his equity interest in the Company").

on pages 12-13 of his Opening Brief,[10] which involve claims brought against corporate directors or officers by unrelated third parties, this case involves a dispute between members of Silver Dragon's intra-corporate family, and it arises out of a failed agreement involving critical aspects of a Delaware corporation's structure, namely its capitalization and membership on its board.

Further, as Judge Carpenter recognized, the Complaint alleges that Hazout used his position as a director and the sole executive officer of Silver Dragon to commit fraud by transferring $750,000 of Tsang's funds to Travellers (his wholly-owned company) for his own benefit (B-12 at ¶ 57), to Tsang's

[10] *Lisa*, 2009 Del. Ch. LEXIS 115, at *17 (noting that claims do "not involve any duty owed to Lisa or to any corporation of which Lisa is now or ever has been a stockholder"); *Corporate Prop. Assocs. 14 Inc. v. CHR Holding Corp.*, 2008 Del. Ch. LEXIS 45, at *3, 11-17, 46 n.78 (Apr. 10, 2008) (noting that plaintiff did "not have standing to bring" fiduciary duty claims because "warrantholders are not owed fiduciary duties"); *Kelly v. McKesson HBOC, Inc.*, 2002 Del. Super. LEXIS 39, at *2 (Jan. 17, 2002); *Hirshman v. Vendamerica, Inc.*, 1992 Del. Super. LEXIS 70, at *7 (Mar. 9, 1992) (noting that complaint alleges that defendants "committed tortious acts to and breaches of a contract with third parties (the Plaintiffs) . . . in an arms-length relationship"); *Prudential-Bache Secur., Inc. v. Franz Mfg. Co.*, 531 A.2d 953, 955 (Del. Super. 1987) ("The difficulty with this argument is that [plaintiff] is not an entity to whom [defendant] owes a fiduciary duty."); *Oryx Capital Corp. v. Phoenix Laser Sys.*, 1990 Del. Super. LEXIS 149, at *9 (Feb. 26, 1990) ("In the case at bar, the plaintiff is an entity to whom the individual defendants owe no fiduciary duty."); *Steinberg v. Prudential-Bache Secs., Inc.*, 1986 Del. Ch. LEXIS 417, at *9 (Apr. 30, 1986) ("The statute does not apply to tort and contract claims asserted on behalf of parties other than the Delaware corporation or its stockholders."); *Pestolite, Inc. v. Cordura Corp.*, 449 A.2d 263, 267 (Del. Super. 1982) ("The complaint alleges that as directors of a Delaware corporation, the Defendants committed tortious acts to and breaches of a contract with a third party, the Plaintiff.").

detriment. Hazout acted in his corporate capacity as a Director and as Silver Dragon's President, CEO, and Principal Financial and Accounting Officer when he transferred the funds to Travellers, and his self-dealing conduct constitutes a breach of his fiduciary duties to Tsang as a stockholder of Silver Dragon. For those reasons, personal jurisdiction over Hazout in Delaware is proper under the Violation of Duty Clause of Section 3114.

2. Exercising Jurisdiction Over Hazout Under Section 3114 Would Comport With Due Process

Exercising jurisdiction over Hazout in this case, whether under the Necessary or Proper Party Clause or the Violation of Duty Clause, would comport with due process. The Due Process Clause of the Fourteenth Amendment requires that a nonresident defendant 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." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). When determining whether 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." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). This standard requires a particularized inquiry into the purposive actions of the defendant and the reasonable expectation of one in his position. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985). The purposive acts of

defendant need not occur within the jurisdiction, so long as they create a relationship with the forum jurisdiction. *Id.* at 476.

Once the defendant's minimum contacts with the forum have been established, the court should turn its analysis to issues of fairness and justice. *Id.* at 476-77. In that regard, the Supreme Court of the United States has recognized that when a person 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" should be given weight in determining whether, under the circumstances, the exercise of jurisdiction would be consistent with fundamental notions of fair play and substantial justice. *World-Wide Volkswagen*, 444 U.S. at 292. Indeed, even where "the defendant's contacts [with the forum state] are minimal, [if] the state's interest in providing a forum is strong, [then] the exercise of jurisdiction is constitutional." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Armstrong*, 423 A.2d at 176 n.5. Thus, to determine whether exercising jurisdiction over a defendant is constitutional, the Court must conduct a "realistic evaluation" of the relationship the defendant has established with Delaware, including the defendant's purposive acts and Delaware's interest in the dispute.[11]

[11] *USACafes*, 600 A.2d at 52; *accord* Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 3.04[a][2], at 3-64 (Matthew Bender & Co., 2015) ("[T]he determination of whether jurisdiction is properly premised on Section 3114 necessarily entails an examination of the merits of the causes of action, . . .

Hazout has the requisite minimum contacts with Delaware such that he should have reasonably anticipated being haled into Delaware to defend this action. Indeed, he purposefully availed himself of the benefits and protections of Delaware law by accepting a position as an officer and director of Silver Dragon, a Delaware corporation, thereby consenting to jurisdiction in Delaware for suits relating to his capacity as an officer or director of Silver Dragon. By virtue of Section 3114, Hazout was put on notice that he could be haled into court in Delaware to answer for actions taken as an officer or director of Silver Dragon. As such, Hazout should have reasonably anticipated being haled to Delaware to defend against a claim, such as this one, that he misused his position as an officer and director of Silver Dragon for his own personal benefit and to the detriment of one of the corporation's stockholders.

That conclusion is bolstered by the fact that Hazout signed an Agreement in which he agreed to submit to Delaware's exclusive jurisdiction for actions, such as this action, that arise out of or relate to the Agreement or the transaction contemplated by the Agreement. Indeed, Defendant Hazout signed the Agreement four times – once on behalf of Defendant Silver Dragon (B-32), once on his own behalf as a resigning director (B-32), once as president of his wholly-

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including whether the cause of action asserts claims against a nonresident director in his or her capacity as a director, whether such cause of action asserts a breach of fiduciary duty, whether a duty is owed to the class of persons seeking relief[.]").

owned company Travellers (B-34), and once as president of the lessor entity that was a party to the Agreement (B-34). The Agreement dictated that any action arising or relating to the Agreement or the transactions contemplated by the Agreement must be filed exclusively in a state or federal court in Delaware (B-30 at § 5.3(b)). This action arises out of the Defendants' theft and subsequent refusal to return $1,014,140 that Tsang provided pursuant to the Agreement. Tsang's transfer of $1,014,140 was expressly contemplated by the Agreement (B-24 at § 1.1(b)). Although the Agreement was never completely executed, the Agreement that Hazout signed in four capacities contains a mandatory Delaware forum-selection clause, and that provides even more reason for why Hazout should have reasonably anticipated being haled into Delaware in this action.

Furthermore, the interests of fairness and justice support a finding of jurisdiction. Indeed, Delaware's interest in adjudicating this dispute is substantial, which, as noted in *McGee*, justifies the exercise of jurisdiction even where the defendants' contacts with the forum state are minimal. Delaware has a substantial interest in this case, because it will resolve a dispute between a Delaware corporation (Silver Dragon), an officer and director of the Delaware corporation (Hazout), and a stockholder of the Delaware corporation (Tsang) where:

- the officer and director of the Delaware corporation misused his position to misappropriate funds, for his own personal benefit, from the stockholder of the Delaware corporation;
- the stockholder provided the funds under an agreement involving critical aspects of a Delaware corporation's structure, namely its capitalization and membership on its board; and
- the agreement under which the stockholder provided funds to the Delaware corporation contained a Delaware choice-of-law provision and a Delaware forum-selection clause.

This is precisely the type of case in which Delaware has a substantial interest. In former Chancellor Allen's formulation in *USA Cafes*, "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." 600 A.2d at 52. Indeed, although "Delaware does not have a significant and substantial interest in overseeing each and every tort and contract claim that may be asserted against the [officers or] directors of a Delaware corporation," *Lisa, S.A. v. Mayorga*, 2009 Del. Ch. LEXIS 115, at *17 (June 22, 2009), Delaware courts do have a "substantial interest in addressing lawsuits brought against Delaware corporations," *Autodesk Can. v. Assimilate, Inc.*, 2009 U.S. Dist. LEXIS 89794, at *25 (D. Del. Sept. 29, 2009), "overseeing the conduct of those owing fiduciary

duties to shareholders of Delaware corporations," *Armstrong*, 423 A.2d at 177, "protecting investors in its corporations," *Am. Int'l Group, Inc. v. Greenberg*, 965 A.2d 763, 821 (Del. Ch. 2009), and "preventing the entities that it charters from being used as vehicles for fraud," *Hamilton Partners, L.P. v. Englard*, 11 A.3d 1180, 1213 (Del. Ch. 2010); *accord CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987) (chartering state has "a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing"). Delaware also has a "significant [] interest" in making "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." *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 1000 (Del. 2004).

Therefore, because Hazout has the requisite minimum contacts with Delaware such that he should have reasonably anticipated being haled into Delaware to defend this action, and because Delaware's interest in resolving this dispute is substantial, such that interests of fairness and justice favor a finding of jurisdiction, the exercise of personal jurisdiction over Hazout in Delaware in this action would comport with due process, and jurisdiction over Hazout is accordingly constitutional.

CONCLUSION

For the foregoing reasons, Appellee Tsang Mun Ting respectfully requests that the Court affirm the Superior Court's ruling that Appellant Marc Hazout is subject to personal jurisdiction in Delaware in this action.

Respectfully submitted,

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