

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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New Castle County Courthouse
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Date Submitted: November 19, 2013

Date Decided: November 21, 2013

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RE: *Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC*, C.A. No. 6546-VCL

Dear Counsel:

On September 27, 2013, plaintiffs Foundry Hill Holdings, Ltd. and Kajeer Yar (collectively, "Plaintiffs"), individually and derivatively on behalf of nominal defendant Foundry Hill Holdings LP (the "Partnership"), filed a third amended complaint (the "Complaint"), against defendants Ulric Taylor, Christopher Klee, Progressive Packaging Corp., Milton R. Smith III, Three Zero Three Capital Partners, LLC ("Three Zero"), and Triple Line Trading, LLC ("Triple Line"). The Complaint alleges that the defendants

participated in a conspiracy to (i) take ownership of the Partnership's intellectual property (the "Partnership IP"), (ii) misappropriate the Partnership IP, and (iii) retain all of the value of the misappropriated Partnership IP for themselves.

On October 28, 2013, defendants Klee, Progressive Packaging, Smith, and Three Zero moved to dismiss pursuant to Court of Chancery Rule 12(b)(2) for lack of personal jurisdiction. On November 4, Plaintiffs moved to conduct discovery and to defer any ruling on the motions to dismiss.

LEGAL ANALYSIS

On a motion to dismiss for lack of personal jurisdiction, "the plaintiff has the burden to show a basis for the Court's jurisdiction over the nonresident defendant." *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *5 (Del. Ch. July 14, 2008) (collecting cases). "[P]leadings, affidavits, and any discovery of record" may be considered. *Id.* Absent an evidentiary hearing or jurisdictional discovery, "plaintiffs need only make a *prima facie* showing, in the allegations of the complaint, of personal jurisdiction and the record is construed in the light most favorable to the plaintiff."¹

¹ *Id.* The defendants (particularly Smith) rely on this Court's decision in *Computer People* for the proposition that "conclusory allegations in [the] pleading that are unsupported by evidence" are insufficient to overcome a motion to dismiss for lack of personal jurisdiction if a defendant has submitted "factual evidence controverting personal jurisdiction." *Computer People, Inc. v. Best Int'l Gp., Inc.*, 1999 WL 288119, at *6-7 (Del. Ch. Apr. 27, 1999). Subsequent cases have made clear that, if there has not been jurisdictional discovery, then the allegations in the pleadings are sufficient. *See, e.g., Ryan v. Gifford*, 935 A.2d 258, 268 (Del. Ch. 2007) (relying on plaintiffs' allegations and not requiring "evidence"); *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251, at *2 (Del. Ch. Mar. 4, 2004) ("Prior to discovery, the plaintiff need only make a *prima facie* showing of jurisdiction in order to survive a motion to dismiss. Once jurisdictional discovery has been completed, however, the plaintiff

Determining “whether a Delaware court has jurisdiction over a nonresident defendant” involves a two-step analysis. *Matthew v. Fläkt Woods Gp. SA*, 56 A.3d 1023, 1027 (Del. 2012). “First, the court must determine whether Delaware’s long arm statute, 10 *Del. C.* § 3104(c), is applicable.” *Id.* “If so, the court must decide whether subjecting the nonresident defendant to jurisdiction would violate due process.” *Id.* “[A] nonresident defendant must have sufficient ‘minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’” *Id.* (alteration in original) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

“Under § 3104(c)(1), a court may exercise personal jurisdiction over a nonresident who, ‘in person or through an agent . . . [t]ransacts any business or performs any character of work or service in the State’” *Id.* at 1027 (alteration in original) (quoting 10 *Del. C.* § 3104(c)(1)). Section 3104 is a “single act” statute. *Eudaily v. Harmon*, 420 A.2d 1175, 1180 (Del. 1980). Therefore, a “single transaction is sufficient to confer jurisdiction where the claim is based on that transaction.” *Crescent/Mach I P’rs, L.P. v. Turner*, 846 A.2d 963, 978 (Del. Ch. 2000) (internal quotation marks and footnote omitted). Making a corporate filing in the state of Delaware has been found sufficient to subject the filer to personal jurisdiction under § 3104(c)(1). *See Matthew*, 56

must allege specific facts supporting its position.” (internal quotation marks and footnote omitted); *Cornerstone Techs., LLC v. Conrad*, 2003 WL 1787959, at *3 (Del. Ch. Mar. 31, 2003) (“[W]hen no evidentiary hearing has been held, the plaintiffs’ burden is a relatively light one – *i.e.*, they must only make a *prima facie* showing that the exercise of personal jurisdiction is appropriate. And, in such a case, the record is construed in the light most favorable to the plaintiff.” (internal quotation marks and footnote omitted)).

A.3d at 1027-28. Because § 3104(c)(1) confers specific, not general, jurisdiction, there must be a nexus between the Delaware filing and the conduct forming the basis of the suit. *Compare Solae, LLC v. Hershey Can., Inc.*, 557 F. Supp. 2d 452, 459-60 (D. Del. 2008) (finding filing of UCC financing statement insufficient under § 3104(c)(1) because plaintiff did not assert any nexus between that act and the conduct giving rise to plaintiff's claim), and *Sanitec Indus., Inc. v. Sanitec Worldwide, Ltd.*, 376 F. Supp. 2d 571, 574 (D. Del. 2005) (same), with *In re Mobilactive Media, LLC*, 2013 WL 297950, at *28 (Del. Ch. Jan. 25, 2013) (finding § 3104(c)(1) satisfied where defendant incorporated Delaware entities for the purpose of accomplishing one of the challenged acts), and *Conn. Gen. Life Ins. Co. v. Pinkas*, 2011 WL 5222796, at *2 (Del. Ch. Oct. 28, 2011) (“[A] single act of incorporation, *if done as part of a wrongful scheme*, will suffice to confer personal jurisdiction under § 3104(c)(1).” (citing *Papendick v. Bosch*, 410 A.2d 148 (Del. 1978))).

The Delaware Supreme Court has adopted the conspiracy theory of personal jurisdiction as one framework for analyzing the constitutional sufficiency of a nonresident's contacts with Delaware. *Istituto Bancario Italiano SpA v. Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982). “[A]ny act by a conspirator in furtherance of the conspiracy which takes place in the jurisdiction is attributable to the other conspirators.” *Id.* at 222. “Consequently, if the purposeful act or acts of one conspirator are of a nature and quality that would subject the actor to the jurisdiction of the court, all of the conspirators are subject to the jurisdiction of the court.” *Id.* In *Istituto*, the Delaware

Supreme Court explained that, for purposes of due process, “a defendant who has so voluntarily participated in a conspiracy with knowledge of its acts in . . . the forum state can be said to have purposefully availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws.” *Id.* at 225. The “participation is a substantial contact with the jurisdiction of a nature and quality that it is reasonable and fair to require the defendant to come and defend an action there.” *Id.*; see *Hercules Inc. v. Leu Trust & Banking (Bah.) Ltd.*, 611 A.2d 476, 482 n.6 (Del. 1992) (“Although termed a ‘theory’ of jurisdiction, our use of the ‘conspiracy theory’ merely provides a framework with which to analyze a foreign defendant’s contacts with Delaware. We do not view the conspiracy as an independent jurisdictional basis, nor do we simply attribute the acts of one conspirator to another for purposes of the due process analysis.”).

The *Istituto* decision established a five-part test for determining personal jurisdiction under the conspiracy theory:

[A] conspirator who is absent from the forum state is subject to the jurisdiction of the court . . . if the plaintiff can make a factual showing that: (1) a conspiracy . . . existed; (2) the defendant was a member of that conspiracy; (3) a substantial act . . . in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state . . . ; and (5) the act in . . . the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.

Id. at 225. To allege a conspiracy, a pleading must assert the existence of “(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds between or

among such persons relating to the object or a course of action; (4) one or more unlawful acts; and (5) damages as a proximate result thereof.” Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 3.04[b], at 3–83 (2012); *accord Zirn v. VLI Corp.*, 1989 WL 79963, at *9 (Del. Ch. July 17, 1989).

The Complaint alleges that the defendants participated in a conspiracy to take ownership of the Partnership IP, misappropriate the Partnership IP, and retain all of the value of the misappropriation for themselves. In support of this theory, the Complaint alleges the following:

- Between January and June 2012, Taylor, Klee, and Progressive Packaging entered into a series of sham security agreements designed to allow Klee and Progressive Packaging to take ownership of the Partnership IP for an amount well below fair market value. As part of these maneuvers, Klee caused a UCC financing statement to be filed with the Delaware Department of State (the “UCC Financing Statement”). Compl. ¶¶ 167-76.
- In June 2012, Taylor caused the Partnership to execute a collateral surrender agreement (the “Collateral Surrender Agreement”) and transfer all of the Partnership’s assets to Klee, through Progressive Packaging, in exchange for forgiveness of \$100,000 of the alleged loans. Compl. ¶ 177.
- In June 2012, Smith joined Taylor and Klee in the creation of Triple Line, a Delaware entity formed for the purpose of using the Partnership IP. Compl. ¶¶ 182-83.
- In June 2012, Taylor, Klee, Progressive Packaging, and Smith partnered with defendant Buttonwood Group Trading LLC (“Buttonwood”) in an arrangement where Buttonwood would provide infrastructure and financial support in exchange for the opportunity to use the Partnership IP. Compl. ¶¶ 179-84.

- In December 2012, Three Zero replaced Buttonwood as the entity providing infrastructure and capital support to Triple Line in exchange for use of the Partnership IP. Compl. ¶ 185.

A. Klee's Motion to Dismiss

In light of the allegations in the Complaint, Klee's motion to dismiss for lack of personal jurisdiction is denied. Plaintiffs allege that their claims against Klee arise out of two distinct "transactions of business" that occurred in Delaware: the filing of the UCC Financing Statement and the forming of a Delaware entity. The affidavit submitted in support of Klee and Progressive Packaging's motion to dismiss (the "Klee Affidavit") asserts that Klee did not participate in the formation of Triple Line. Jurisdictional discovery into the formation of Triple Line is unnecessary because the UCC Financing Statement alone is sufficient to confer jurisdiction over Klee. The filing of a UCC financing statement can be sufficient under § 3104(c)(1) because Delaware's long arm statute is a single-act statute. *See Crescent/Mach*, 846 A.2d at 978.

The filing of a UCC financing statement is insufficient when there is no nexus between the Delaware filing and the conduct giving rise to a plaintiff's claim. *See Solae*, 557 F. Supp. 2d at 459-60. In *Solae*, a seller of soy lecithin sought a declaratory judgment that it was not liable for damages arising from the recall of a buyer's products necessitated by contaminated lots of its soy lecithin. *Id.* at 454. In support of its argument that Delaware had personal jurisdiction over the buyer, the seller pointed to a single UCC financing statement filed by the buyer in Delaware a decade earlier. *Id.* at 458. This was the only Delaware contact alleged, and the seller made no allegations that

the UCC financing statement was related in any way to the soy lecithin contamination or the product recall. *Id.* at 459-60. In contrast, the Complaint alleges that the UCC Financing Statement was filed to gain ownership over the Partnership IP in conjunction with sham security agreements in furtherance of the conspiracy. Compl. ¶ 171. The filing of the UCC Financing Statement gave third parties notice of the defendants' purported claim to ensure that the defendants gained priority over other claimants, such as Plaintiffs. Unlike in *Solae*, there is a sufficient nexus between the filing of the UCC Financing Statement and the alleged conspiracy for purposes of § 3104(c)(1).

Under the due process minimum contacts analysis, “a defendant who has so voluntarily participated in a conspiracy with knowledge of its acts in . . . the forum state can be said to have purposefully availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws.” *Istituto*, 449 A.2d at 225. The first two *Istituto* requirements are satisfied because the Complaint sufficiently alleges that (i) there was a conspiracy to take ownership of the Partnership IP, misappropriate the Partnership IP, and retain the value of the misappropriation and (ii) Klee participated in the conspiracy. Compl. ¶¶ 167-77, 179-85. Likewise, the third *Istituto* requirement is satisfied because the Complaint sufficiently alleges that the UCC Financing Statement was filed in furtherance of the conspiracy's first element. Compl. ¶ 171. Klee caused the UCC Financing Statement to be filed, so his knowledge “of the act in the forum state” is not at issue; thus, the fourth *Istituto* requirement is satisfied. *Id.* Finally, the fifth *Istituto* requirement, that the Delaware act be “a direct and foreseeable

result of” the conspiracy, is satisfied because the UCC Financing Statement was an important step in ensuring that defendants gained ownership of the Partnership IP. Subjecting Klee to this court’s jurisdiction does not violate due process.

Accordingly, this Court has personal jurisdiction over Klee. Plaintiffs’ request for jurisdictional discovery from Klee is moot.

B. Progressive Packaging’s Motion to Dismiss

In light of the allegations in the Complaint, Progressive Packaging’s motion to dismiss for lack of personal jurisdiction is denied without prejudice pending jurisdictional discovery. Under the conspiracy theory of jurisdiction, acts “by a conspirator in furtherance of the conspiracy” that occur in Delaware are “attributable to the other conspirators.” *Istituto*, 449 A.2d at 222. The Complaint alleges that (i) Klee’s filing of the UCC Financing Statement can be imputed to Progressive Packaging because Klee was an officer or director of Progressive Packaging and (ii) Progressive Packaging took possession of the Partnership’s assets pursuant to the Collateral Surrender Agreement in furtherance of the conspiracy’s first element. Compl. ¶¶ 18, 176-77. The Klee Affidavit disputes Progressive Packaging’s role in the transaction. Plaintiffs are permitted to test the allegations in the Klee Affidavit. Jurisdictional discovery shall be completed by December 31, 2013. The Court defers ruling on whether Progressive Packaging is subject to jurisdiction pending jurisdictional discovery.

C. Smith's Motion to Dismiss

In light of the allegations in the Complaint, Smith's motion to dismiss for lack of personal jurisdiction is denied without prejudice pending jurisdictional discovery. The Complaint alleges that (i) Taylor and Klee, with assistance from Smith, formed Triple Line to facilitate the misappropriation of the Partnership IP and (ii) as a developer or trader for Triple Line, Smith misappropriated the Partnership IP. Compl. ¶¶ 182, 184. The affidavit submitted in support of Smith's motion to dismiss (the "Smith Affidavit") disputes many facts regarding the nature of the transaction and Smith's participation, including the degree of Smith's involvement in the formation and ownership of Triple Line and whether he knowingly participated in the alleged conspiracy to misappropriate the Partnership IP. Plaintiffs are permitted to test the allegations in the Smith Affidavit. Jurisdictional discovery shall be completed by December 31, 2013. The Court defers ruling on whether Smith is subject to jurisdiction pending jurisdictional discovery.

D. Three Zero's Motion to Dismiss

Three Zero's motion to dismiss for lack of personal jurisdiction is granted. The only substantive allegation against Three Zero asserts that it provided office space and IT support in exchange for its use of the Partnership IP to execute trades. Compl. ¶ 185. From this, Plaintiffs allege in a conclusory manner that Three Zero "collaborated" with defendants and participated in the conspiracy to misappropriate the Partnership IP. Notably, the Complaint does not allege that Three Zero knew, or should have known, either that Triple Line's ownership and use of the Partnership IP was unlawful or about

the UCC Financing Statement, which is the requisite Delaware act. The lone substantive allegation of the Complaint depicts Three Zero as contracting with defendants in a third party commercial transaction to barter algorithms that Triple Line appeared to own in exchange for office space and IT support. The allegation does not reasonably support an inference that Three Zero “was a member of [the] conspiracy” or had knowledge “of the act in the forum state.” At present, there is no basis for personal jurisdiction under the conspiracy theory and no basis for jurisdictional discovery. The request for jurisdictional discovery from Three Zero is moot.

CONCLUSION

Klee’s motion to dismiss for lack of personal jurisdiction is denied. Progressive Packaging’s and Smith’s motions to dismiss for lack of personal jurisdiction are denied without prejudice pending jurisdictional discovery. Three Zero’s motion to dismiss for lack of personal jurisdiction is granted.

Very truly yours,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor