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Re: *Czarninski Baier de Adler v.*
Upper New York Investment Company LLC
C.A. No. 6896-VCN
Date Submitted: January 7, 2015

Dear Counsel:

This letter opinion addresses a dispute over the scope of jurisdictional discovery. The Plaintiff relies primarily on Delaware's long-arm statute, and its "conspiracy theory" concepts, to support her contention that this Court has personal jurisdiction over the individual defendants. According to the Plaintiff,

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formation of Delaware entities was part of the scheme or effort to defraud her, thereby exposing the participants to application of the long-arm statute.¹

One side seemingly wants to use this opportunity to gain additional knowledge about the merits of the various claims. The other side comes close to arguing that there is no need for jurisdictional discovery because, well obviously, there is no personal jurisdiction.² The answer, of course, lies in between. Finding the proper boundary line for jurisdictional discovery is the Court's current task.

¹ 10 *Del. C.* § 3104. The Court focuses on the conspiracy theory because it is necessarily more far-reaching than Plaintiff's theory of jurisdiction based on individual conduct not integral to any conspiracy.

² Defendants engage in the jurisdictional debate by arguing that the record demonstrates that the "fraudulent scheme"—Plaintiff's primary basis for personal jurisdiction in Delaware (other than references to 6 *Del. C.* § 18-109 which has not been argued with respect to the pending motion)—had been completed before any of the Delaware entities was created. *See, e.g., Lisa, S.A. v. Mayorga*, 2009 WL 1846308, at *6 (Del. Ch. June 22, 2009) (reasoning that formation did not "form an intrinsic part of the underlying alleged fraud"), *aff'd*, 993 A.2d 1042 (Del. 2010).

In addition, Defendants argue that formation of the Delaware entities had a proper purpose. Relocating from the British Virgin Islands is said to have been made necessary by Ecuadorian legislation that restricted the use of "tax havens."

Perhaps the Defendants are correct, but jurisdictional discovery is the current topic under the case structure adopted by the parties, not the ultimate issue of whether the Court has personal jurisdiction over the individual defendants.

Demonstrating that this Court has personal jurisdiction is a burden that a plaintiff must bear. The scope of discovery is tied to what the plaintiff must show. To establish personal jurisdiction pursuant to Delaware’s long arm statute, a plaintiff must show that the statute applies and that exercising jurisdiction comports with due process.³ “[A] single transaction is sufficient to confer jurisdiction,” but that Delaware transaction must have a sufficient nexus to the basis for the claim.⁴ Participation in a conspiracy involving the formation of a Delaware entity can support personal jurisdiction. Establishing conspiracy jurisdiction involves a five-part test. The plaintiff must make a factual showing that: (1) a conspiracy to defraud existed; (2) the defendant was a member of that

On the other hand, there is no inherent right to jurisdictional discovery. Indeed, a plaintiff must “articulate a non-frivolous basis for the Court’s assertion of jurisdiction.” *See, e.g., IM2 Merch. & Mfg., Inc. v. Tirex Corp.*, 2000 WL 1664168, at *4 (Del. Ch. Nov. 2, 2000).

Plaintiff’s basis for personal jurisdiction is far from compelling if the “scheme” was completed in 2007 as the Court noted in a prior opinion, *see de Adler v. Upper N.Y. Inv. Co., LLC*, 2013 WL 5874645, at *14 (Del. Ch. Oct. 31, 2013), but her explanation of the need to pursue discovery to link formation of the Delaware entities to the conduct that she views as wrongful does not fall to the level of frivolous.

³ *Lake Treasure Hldgs., Ltd. v. Foundry Hill GP LLC*, 2013 WL 6184066, at *2 (Del. Ch. Nov. 21, 2013).

⁴ *Id.* (internal quotation marks omitted) (collecting cases).

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conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in Delaware; (4) the defendant knew or had reason to know of the act in Delaware or that acts outside of Delaware would have an effect in Delaware; and (5) the act in, or effect on, Delaware was a direct and foreseeable result of the conduct and furtherance of the conspiracy.⁵

The allegedly wrongful events primarily took place in Ecuador. Three Delaware limited liability companies were established in 2008 (and one in 2009) at the behest of Defendants Johny Jacobo Czarninski Baier (“Johny”) and Danny David Czarninski Baier (“Danny”). The formation of those entities is alleged to have been part of the conspiracy (or an individually-undertaken effort) to defraud the Plaintiff of her interests in assets located primarily in Ecuador. The events that occurred in Delaware, essentially the filing of entity formation documents, are narrow and, apparently, relatively undisputed. Yet, there is a broader dispute about the context in which the entities were formed, and the *Istituto Bancario* test, which is said to be applied strictly, ranges far in the factual field. Was there a fraudulent

⁵ *Istituto Bancario Italiano SpA v. Hunter Eng’g Co.*, 449 A.2d 210, 225 (Del. 1982); *see also* Donald J. Wolfe, Jr. and Michael A. Pittenger, *Corporate & Commercial Practice in the Delaware Court of Chancery* § 3.04[b], at 3-86 (2014).

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act? Was there a conspiracy to carry out the fraudulent act? When (or over what period of time) was the conspiracy carried on? Who were the “members” of the conspiracy? This listing certainly is not comprehensive, but it demonstrates how extensive jurisdictional discovery may sometimes necessarily be. In addition, the Plaintiff was not aware of, involved in, or even geographically close to (at least for the most part) the questioned conduct. In other words, to make the factual showing required to sustain inter-country personal jurisdiction, the factual inquiry may unavoidably be extensive. Conversely, the Plaintiff is only entitled to discovery on “the narrow issue of whether . . . Defendants are subject to personal jurisdiction in Delaware.”⁶ It is in this context that the Court turns to the parties’ debate about the information to which the Plaintiff is entitled.

The Plaintiff is entitled to discovery supporting her basic claim of fraudulent acts that occurred primarily in Ecuador. This is not a searching or detailed effort. Instead, all that is necessary is to develop the basic showing of wrongful conduct and who the participants (members of the alleged conspiracy) were. Then Plaintiff

⁶ *Van de Walle v. L.F. Rothschild Hldgs., Inc.*, 1994 WL 469150, at *5 (Del. Ch. Aug. 2, 1994).

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may follow the allegedly converted assets (or equity) and seek to learn how the formation of Delaware entities facilitated that scheme or otherwise played an integral role in the scheme. The actions of the Delaware entities (limited though they may be) are a proper topic. Transfers of the assets (or equity) to entities beyond Delaware should round out the range of discovery. What happened after those transfers were completed would not be material to the question of jurisdictional discovery, unless those actions somehow relate to Delaware.⁷

Depositions of Johnny and Danny will undoubtedly be a burden on all, if for no other reason than geography. The Court, however, can find no good reason to preclude their depositions.⁸ Plaintiff also wants to depose Defendant Taly Czarninski Shefi de Schwartz (“Taly”), Johnny’s daughter. In an effort to limit the

⁷ If Plaintiff is able to demonstrate that this Court has personal jurisdiction, the discovery may need to be done again to a significant extent, but this is a consequence of focused jurisdictional discovery. The critical issue, for present purposes, is how formation of the Delaware entities facilitated carrying out the alleged wrongful conduct.

⁸ Danny’s submission of an untested affidavit in an effort to minimize discovery does not suffice in a matter as complicated (or as convoluted) as this. *See* Defs. Danny David Czarninski Baier and Vistamar Investments LLC’s Answering Br. in Opp’n to Pl.’s Mot. to Compel Ex. A.

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discovery burden and because it may turn out that Taly's deposition is either unnecessary or, more specifically, duplicative, Taly's deposition will not be taken without a showing of need for that deposition after the depositions of Danny and Johny have been completed. If the discovery that the Plaintiff reasonably needs can be achieved through those two depositions, Taly's deposition can be avoided. If the parties on further consideration conclude that it would simply be more convenient to proceed with Taly's deposition, they are free to follow that course.

One concern is that Danny and Defendant Vistamar Investments LLC have not devoted much attention to Plaintiff's individual discovery requests. In fairness, however, Johny and the defendant entities associated with him have addressed several specific issues.

Discovery directed to certain Florida-named entities is appropriate if, as Plaintiff alleges, they own the Delaware limited liability companies⁹ that are identified with Johny. Ownership between the time the Delaware entities were formed and the time the Florida-named entities were formed is a reasonable topic

⁹ Those entities are Defendants Upper New York Investment Company LLC, North Park Avenue Investment Company LLC, and Upper Hudson Investment Company LLC.

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for inquiry in order to ascertain the identity of potential participants in what Plaintiff characterizes as the conspiracy. Certain concerns identified by the Defendants can be addressed through confidential treatment.

As a general matter, the full inquiry into financial and tax records suggested by Plaintiff likely would not be appropriate, but Defendants have offered tax issues, and the derivative financial benefits, as the basis for establishing the Delaware entities. While discovery on these topics may turn out not to be helpful, Defendants cannot say that such information is both not relevant and the very basis for forming Delaware entities. Although an appropriate topic for discovery, the inquiry is not unlimited and certain constraints are required to avoid making the effort unduly burdensome and expensive. Unfortunately, the Court has not been offered a functional basis for establishing that line between reasonably necessary and unduly burdensome.

One hopes that with clarification of the scope of appropriate jurisdictional discovery in this action, counsel will be able to narrow the scope of disagreements they have over the pending jurisdictional discovery. They are in a better position

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than the Court to determine, at least as an initial matter, how the individual discovery requests relate to the proper scope.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K