



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOHN S. DESIMONE,

Plaintiff,

v.

TIMOTHY A. BARROWS, et al.,

Defendants,

and

SYCAMORE NETWORKS, INC.,

Nominal Defendant.

Civil Action No. 2210-N

**DEFENDANT FRANCES M. JEWELS' REPLY BRIEF IN FURTHER
SUPPORT OF HER MOTION TO DISMISS THE AMENDED COMPLAINT**

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INTRODUCTION

Plaintiff's Answering Brief barely -- and insufficiently -- addresses Ms. Jewels' argument that this Court does not have personal jurisdiction over her because 10 Del. C. § 3114 cannot be applied retroactively. Plaintiff seems to concede this point and simply argues that this Court has jurisdiction over Ms. Jewels based on alleged conduct that arose *after* January 1, 2004, which is when the statute was amended to reach corporate officers such as Ms. Jewels. The primary problem with this argument is that there are no claims asserted against Ms. Jewels in the Amended Derivative Action Complaint (the "Complaint") that are based on this alleged conduct.

Additionally, Plaintiff's Answering Brief provides no serious rebuttal to Ms. Jewels' and the other Defendants' arguments that the Complaint must be dismissed because it fails to adequately plead demand futility; it fails to state a claim upon which relief can be granted; Plaintiff does not have standing to maintain the claims he is pursuing; and the claims themselves are untimely.

ARGUMENT

Plaintiff's Answering Brief devotes little attention to the issue of personal jurisdiction with respect to Ms. Jewels. *See* Answering Brief, at pp. 39-42. The obvious reason for this lack of attention is that there is little, if any, room for argument on this matter. Simply put, 10 Del. C. § 3114 cannot be applied retroactively in order to assert jurisdiction over conduct by corporate officers that occurred prior to the statute's effective amendment date of January 1, 2004. And because all of the claims asserted against Ms. Jewels are based on conduct that occurred prior to January 1, 2004, 10 Del. C. § 3114 does not provide Plaintiff with any basis for asserting personal jurisdiction over her.

Moreover, for the reasons set forth in the Reply Brief filed by Defendants Barrows, Chisholm, Deshpande, Ferri, Gerdelman, Smith, Brearton, Trampedach, Kiel, Oye, and Sycamore (hereinafter, the “Barrows Reply Brief”), Plaintiff’s Answering Brief fails to sufficiently address the other issues raised by Ms. Jewels’ opening brief.

I. 10 DEL. C. § 3114 DOES NOT APPLY RETROACTIVELY, AND THE AMENDED DERIVATIVE ACTION COMPLAINT DOES NOT ASSERT ANY CLAIMS AGAINST MS. JEWELS FOR ALLEGED CONDUCT THAT OCCURRED AFTER THE STATUTE’S AMENDMENT BECAME EFFECTIVE.

As Ms. Jewels set forth in her opening brief, 10 Del. C. § 3114 is an implied consent statute that cannot be used to confer jurisdiction over officers of Delaware corporations for conduct that occurred prior to the effective date of the statute’s amendment, which was January 1, 2004. Plaintiff does not provide any rebuttal on this point.¹ Instead, Plaintiff’s sole argument is that Ms. Jewels signed certain SEC filings made by Sycamore after the amendment to 10 Del. C. § 3114 became effective on January 1, 2004.

But there are two independent -- and equally fatal -- problems with Plaintiff’s reliance on this argument. The first problem is that none of the claims asserted against Ms. Jewels in the Complaint are based on allegations that she signed misleading SEC filings. *See* Complaint, at ¶¶ 73, 79, 88, 92, 96, and 99. Put simply, a complaint that fails to make any allegation that an

¹ Plaintiff’s discussion of the cases upon which Ms. Jewels relied, *CRI Liquidating REIT, Inc. v. A.F. Evans Co., Inc.*, 730 A.2d 1244, 1246 (Del. Ch. 1997) and *Teacher’s Retirement Sys. of La. v. Scrushy*, 2004 WL 423122 (Del. Ch. March 2, 2004) makes it clear that Plaintiff is not seriously disputing the fact that 10 Del. C. § 3114 cannot be applied retroactively. Plaintiff’s sole discussion of those cases focuses on the fact that the alleged conduct in those cases all occurred prior to the effective date of the statute’s amendment. Answering Brief, at p. 40. By attempting to distinguish the current case solely on this basis, Plaintiff has essentially admitted that there would be no personal jurisdiction over Ms. Jewels if all of the asserted claims against her are based on alleged conduct that occurred prior to January 1, 2004.

officer signed certain SEC filings cannot be read as somehow asserting claims against that officer for allegedly making misleading filings. It is actually Plaintiff's Answering Brief, and not his Complaint, that for the first time alleges that Ms. Jewels signed allegedly misleading financial statements. The fact that the Complaint does not contain even a single allegation that Ms. Jewels signed *any* SEC filings confirms this conclusion that Plaintiff is not bringing an action against her based on allegedly false SEC filings.

What is also clear from the Complaint here is that all of Plaintiff's claims against Ms. Jewels are based on alleged acts of "improper modification" of stock option grant dates that occurred *prior* to January 1, 2004. *See* Complaint, at ¶¶ 11, 43-49, 73, 79, 88, 92, 96, and 99. For example, the gravamen of the Complaint as described in Paragraph 2 is that "Defendants have engaged in *certain transactions* including the exercise of options with modified grant dates to reap millions of dollars in unlawful windfall profits...." Complaint, at ¶ 2 (emphasis added). The Complaint goes on to assert that the Defendants allegedly "authorized, modified, or failed to halt the modification of stock option grant dates in dereliction of their fiduciary duties...." Complaint, at ¶ 4. These are just two of many examples from the Complaint that, very simply, prevent it from being read as alleging any basis for its claims *other than* the alleged "improper modification" of stock option grants.²

Even if this Court were to indulge Plaintiff's attempt to plead facts in his Answering Brief in order to assert personal jurisdiction over Ms. Jewels, those alleged facts would still fail to demonstrate that Ms. Jewels engaged in any conduct after January 1, 2004 that could form the

² In his Answering Brief, Plaintiff seems to argue that the Director Defendants are liable for their alleged failures with respect to Sycamore's internal investigation that began in 2005. Even if the Complaint could be read as making such an allegation, such arguments do not apply to Ms. Jewels who is not alleged to have ever been a Director and who was no longer Sycamore's CFO in 2005. *See* Complaint at ¶ 24.

basis of a claim against her. In his Answering Brief, Plaintiff alleges that Ms. Jewels signed Sycamore 10-Qs dated February 12, 2004, February 23, 2004, and May 13, 2004, and signed a Sycamore Form 10-K on August 23, 2004. But there are no allegations in the Complaint or in the Answering Brief that these statements were somehow misleading by virtue of the alleged modification of the stock option grants.

Plaintiff seems to argue that the 10-K filed by Sycamore on August 23, 2004 for the fiscal year ending July 31, 2004 was somehow misleading because in that 10-K, Sycamore disclosed that it was restating certain of its financials after its internal investigation. *See* Answering Brief, at p. 40. The Answering Brief then cites Paragraph 32 of the Complaint to support this argument. But the allegations in that paragraph of the Complaint undermine Plaintiff's argument by alleging that the restated financials based on the accounting for stock options only resulted in an increase in the *net loss* for the fiscal years ending July 31, 2001, 2002, and 2003. The Complaint itself, therefore, not only fails to allege that Ms. Jewels signed the 2004 10-K, but it also fails to allege that there was something materially misleading about that 10-K.

Finally, Plaintiff's Answering Brief also seems to argue that Plaintiff has claims against Ms. Jewels based on the fact that she allegedly failed to correct previously filed SEC filings made in 2004 with respect to Sycamore's stock option grants. This argument fails for the same reasons as Plaintiff's other arguments. As is set forth above, the Complaint does not make any such allegations, and, in fact, such allegations appear for the first time in Plaintiff's Answering Brief.

Furthermore, even if the Complaint had made such allegations, the alleged failure to correct past disclosures does not give rise to a new wrong or claim for the purposes of imposing

personal jurisdiction. Plaintiff appears to argue that this Court should apply a novel “continuing wrongs” theory with respect to the 2004 filings. There are several problems with this argument.

First, as set forth in the Barrows Reply Brief, the concept of “continuing wrongs” is not applicable in this case, given Plaintiff’s clear allegations that he is basing his claims on purported discrete acts involving the allegedly improper modification of stock option grants in the 1999 to 2002 time period. *See* Barrows Reply Brief, at pp. 19-21.

Second, application of such a “continuing wrongs” argument to a personal jurisdiction analysis would not only be unprecedented, but would also eviscerate the fundamental principle (not challenged by Plaintiff) against retroactive application of an implied consent statute. In other words, plaintiffs would be able to do an end run around the rule against retroactive effect by merely claiming that the failure to disclose *after* the statute’s effective date any alleged wrong-doing that occurred *prior to* the statute’s effective date constituted a new wrong sufficient to allow the Court to assert jurisdiction for all of the alleged conduct that indisputably occurred prior to the effective date.

II. EVEN IF 10 DEL. C. § 3114 COULD BE APPLIED TO MS. JEWELS IN THIS CASE, THAT APPLICATION WOULD VIOLATE THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

Plaintiff fails to directly address Ms. Jewels’ arguments that application of 10 Del. C. § 3114 under the current circumstances would violate the Due Process clause of the United States Constitution because Ms. Jewels was under no notice at the time of her alleged conduct that she could be haled into a Delaware court for that conduct. Instead, what Plaintiff argues is that because this Court has jurisdiction over Ms. Jewels’ alleged conduct that occurred after January 1, 2004, it also can assert jurisdiction over her, consistent with the Due Process clause, for her alleged conduct that occurred prior to that date. Answering Brief at p. 41-42. Plaintiff’s blatant

attempt to bootstrap its end-run around 10 Del. C. § 3114 cannot be allowed because it essentially results in a retroactive application of 10 Del. C. § 3114, as amended, which would be inconsistent with the Due Process clause. *See CRI Liquidating REIT, Inc. v. A.F. Evans Co., Inc.*, 730 A.2d 1244, 1246 (Del. Ch. 1997) (noting that retrospective application of an implied consent statute would pose Due Process concerns because the defendants were not on notice, at the time of the alleged acts, that they could be haled into court for such actions).³

III. PLAINTIFF HAS FAILED TO MAKE A PRIMA FACIE CASE THAT PERSONAL JURISDICTION IS PROPER UNDER ANY OTHER DELAWARE STATUTE.

It is well-established that the Plaintiff bears the burden of providing this Court with a basis for the exercise of personal jurisdiction. *E.g., Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003). In a footnote in his Answering Brief, *see* Answering Brief, at p. 39 n.15, Plaintiff suggests that personal jurisdiction over Ms. Jewels may “likely” be proper under 10 Del. C. § 3104(c)(4), which is Delaware’s long-arm statute, and makes a bald request for “discovery in the event this Court deems § 3114 not to confer jurisdiction.” But the Complaint does not allege any facts that would make out a *prima facie* case that 10 Del. C.

³ The cases Plaintiff cites in support of this improper bootstrapping argument are inapplicable to the Due Process analysis that is required with respect to the current matter. The Court in *Canadian Commercial Workers Industry Pension Plan v. Case Financial, Inc.*, No 1184-N, 2006 WL 456786 (Del. Ch. Feb. 22, 2006) did not examine whether the retroactive application of 10 Del. C. § 3114 to an officer’s conduct that allegedly occurred prior to January 1, 2004 was consistent with the Due Process clause. All that the *Canadian Commercial* court held was that a director of a Delaware corporation could be subjected to personal jurisdiction for each claim that arose from the same exact transaction once it was established that 10 Del. C. § 3114 applied to at least one of those claims. The court in *Infinity Investors Ltd. v. Takefman*, No. 17347, 2000 WL 130622 (Del. Ch. Jan. 28, 2000) faced similar facts as the court in *Canadian Commercial*, but the *Infinity* court did not engage in any Due Process clause analysis whatsoever, so its holding provides little support for Plaintiff’s arguments on this point.

§ 3104(c)(4) would apply to Ms. Jewels. Given this complete failure to make any allegation or argument that would support his conclusion, Plaintiff is not entitled to proceed -- never mind conduct discovery -- on this issue.

With this desperate plea made only in a footnote, Plaintiff is essentially requesting this Court to make an unprecedented expansion of Delaware personal jurisdiction based solely on the supposed merits of his claims. Plaintiff has neither properly alleged nor sufficiently demonstrated any purported wrongdoing, and so his self-serving comments about the merits carry no weight. Moreover, the fact that Ms. Jewels is a named defendant in four other derivative actions in the state of Massachusetts, *see* Opening Brief, at p. 1, that are all substantively identical to the current matter means that this Court need not engage in an unprecedented and unwarranted expansion of Delaware personal jurisdiction law in order to preserve claims against an individual that otherwise would not survive because of the jurisdiction issue.

IV. PLAINTIFF'S ARGUMENTS ON DEMAND FUTILITY, STANDING, THE FAILURE TO STATE A CLAIM, AND UNTIMELINESS OF THE CLAIMS ALSO FAIL.

For the reasons set forth in the Barrows Reply Brief, Plaintiff's arguments with respect to demand futility (Section IV.B), the lack of standing (Section IV.F), the failure to state a claim issue (Section IV.C), and the untimeliness of his claims (Section IV.E) also fail. Because the arguments and reasoning in the Barrows Reply Brief apply equally to Ms. Jewels, she respectfully incorporates them by reference into this brief rather than burdening the Court with repetition.

CONCLUSION

For the reasons set forth above, and for those set forth in Ms. Jewels' opening brief, Ms. Jewels' Motion to Dismiss should be granted with prejudice.

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February 6, 2007



CERTIFICATE OF SERVICE

I, William O. LaMotte, III, Esquire, hereby certify that copies of **DEFENDANT FRANCES M. JEWELS' REPLY BRIEF IN FURTHER SUPPORT OF HER MOTION TO DISMISS THE AMENDED COMPLAINT** were served on February 6, 2007 as follows:

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