

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LISA, S.A.,)
a Panamanian Corporation,)
)
Plaintiff,)

v.)

C.A. No. 2571-VCL

JUAN JOSE GUTIERREZ MAYORGA,)
CAMPERO USA CORP., a Delaware)
Corporation, CAMPERO, INC., a)
Delaware Corporation, COMPARO)
INTERNATIONAL S.A., a Panamanian)
Corporation, CAMPERO)
INTERNATIONAL LTD., a Barbados)
Corporation,)
)
Defendants.)

MEMORANDUM OPINION AND ORDER

Submitted: March 16, 2009

Decided: June 22, 2009

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LAMB, Vice Chancellor.

This action, filed in 2006, relates to a 1992 sale of shares in a group of family-owned corporations organized under the laws of Guatemala and El Salvador. The plaintiff is a Panamanian corporation. The defendants are a Panamanian corporation, a Barbados corporation, and two Delaware corporations that were organized more than a decade after the alleged fraud. Also named as a defendant is a Guatemalan national and resident who is an officer and/or director of the corporate defendants.

In 2007, the court stayed this action in favor of related litigation pending in state and federal courts in Florida. When those actions were all dismissed, the defendants renewed their motions to dismiss this action on various grounds, most of which stem from the lack of connection between Delaware and the underlying claim of fraud. The court now concludes that Delaware courts lack personal jurisdiction over any of the defendants other than the two late-created Delaware entities. The court also concludes that a number of the counts in the complaint fail to state a claim upon which relief can be granted against either of those Delaware entities and that, in addition, all claims against them must be dismissed on grounds of *forum non conveniens*.

I.

A. The Parties

Plaintiff Lisa, S.A. is a corporation, organized under the laws of the Republic of Panama, which represents the interests of the family of Juan Arturo Gutierrez Strauss (the “Gutierrez Strauss family”).

Defendant Campero International S.A. (“Campero Panama”) is a corporation organized under the laws of the Republic of Panama. Campero Panama franchised the Pollo Campero chain of restaurants in the United States from 2001 to 2003.

Defendant Campero International, Ltd. (“Campero Barbados”) is a corporation organized under the laws of Barbados and a wholly owned subsidiary of Campero Panama.

Defendant Campero, Inc. (“Campero Delaware”) is a Delaware corporation and a wholly owned subsidiary of Campero Barbados.

Defendant Campero USA Corp. (“Campero USA”) is a Delaware corporation and a wholly owned subsidiary of Campero Delaware. Campero USA is the franchiser of Pollo Campero restaurants in the United States. Pollo Campero has franchises in California, New York, Illinois, Maryland, Texas, Virginia, and Washington, D.C.

Defendant Juan Jose Gutierrez Mayorga (“Juan Jose Gutierrez”) is an officer and/or director of all of the defendant corporations, and is President of Pollo Campero, S.A.

B. The Facts

The following facts are drawn from the well-pleaded allegations in the amended complaint, which the court assumes to be true for the purposes of the motion to dismiss.¹

1. Relevant Non-Parties

Pollo Campero, S.A. (“Pollo Campero Guatemala”) is a corporation organized under the laws of the Republic of Guatemala. Pollo Campero Guatemala is the originator of the Pollo Campero chicken restaurant concept. During the relevant period, Pollo Campero Guatemala owned the Pollo Campero name and recipes and operated Pollo Campero restaurants in Guatemala and elsewhere.

Avicola Salvadoreña, S.A. de CV (“Avicola”) is a corporation organized under the laws of the Republic of El Salvador. Avicola operates poultry production facilities in El Salvador.

Pollo Campero de El Salvador, S.A. de CV (“Pollo Campero El Salvador”) is a corporation organized under the laws of El Salvador. During the relevant

¹ When referring to allegations in the complaint, the term “complaint” will be used to include the amended complaint.

period, Pollo Campero El Salvador operated Pollo Campero restaurants in El Salvador.

Los Cedros, S.A. de CV (“Los Cedros”), Guayacan, S.A. de CV (“Guayacan”), and Forrajes Salvadoreños, S.A. de CV (“Forrajes”) are each corporations organized under the laws of the Republic of El Salvador and are affiliates of Avicola.

Collectively, Pollo Campero Guatemala, Avicola, Pollo Campero El Salvador, Los Cedros, Guayacan, and Forrajes comprise the “Campero Group.”

Inversiones Truchu, S.A. (“Truchu”) is a corporation, organized under the laws of the Republic of Panama, that represents the interests of the Bosch Gutierrez family, including Juan Luis Bosch Gutierrez, in holding the shares of the Campero Group and other related companies.

San Cristobal Corporation, Ltd. (“San Cristobal”) is a corporation, organized under the laws of the British Virgin Islands, that represents the interests of the Gutierrez Mayorga family, including Dionisio Gutierrez and Juan Jose Gutierrez, in holding the shares of the Campero Group and other related companies.

Villamorey, S.A. (“Villamorey”) is a corporation organized under the laws of the Republic of Panama. During the relevant period, Villamorey was owned in equal share by Lisa, Truchu, and San Cristobal, along with executives of the Campero Group who owned shares as part of a profit sharing plan.

La Braña S.A. (“La Braña”) is a corporation organized under the laws of the Republic of Panama. During the relevant period, La Braña purchased shares of the Campero Group from departing executives.

Since approximately 1982, the daily operations of the Campero Group have been controlled by Juan Luis Bosch, Dionisio Gutierrez, and Juan Jose Gutierrez, who has served as the chief executive officer of the Campero Group at all relevant times.

2. The Stock Sale

Before 1992, the Campero Group was owned by four corporations. Three of the corporations represent the interests of the three branches of the Gutierrez family: Lisa represents the Gutierrez Strauss family, Truchu represents the Bosch Gutierrez family including Juan Luis Bosch, and San Cristobal represents the Gutierrez Mayorga family including Dionisio Gutierrez and Juan Jose Gutierrez. The fourth stockholder of the Campero Group was Villamorey, a corporation formed to hold stocks for a profit sharing plan for Campero Group executives.²

Between 1987 and 1991, Juan Luis Bosch and Dionisio Gutierrez, acting on behalf of Juan Jose Gutierrez, provided Lisa with financial information showing the purported net profits of the Campero Group and other companies jointly owned

² The three branches of the Gutierrez family also owned equal shares in Villamorey, but the total percentage of their interest in Villamorey is unclear from the complaint.

by the three branches of the Gutierrez family (collectively with the Campero Group, the “Campero-Avicola Group”). Lisa alleges that the net profit information it was shown significantly and materially understated the actual net profits of the Campero-Avicola Group.

In 1991, Juan Luis Bosch and Dionisio Gutierrez made an initial offer to purchase Lisa’s shares in the Campero Group at a set multiple of its most recent earnings. On May 4, 1992, Juan Luis Bosch and Dionisio Gutierrez (acting as authorized agents for Juan Jose Gutierrez) sent Lisa a written offer containing the proposed terms for the purchase of Lisa’s stock in the Campero-Avicola Group for approximately \$86 million. In that letter, Juan Luis Bosch and Dionisio Gutierrez reiterated the allegedly significantly understated net profit reports for the entities.

During the period from May through November 1992, Dionisio Gutierrez and Juan Luis Bosch met and corresponded by mail on several occasions with representatives of Lisa, in an attempt to negotiate a sale of Lisa’s Campero-Avicola Group stock. Lisa alleges that throughout the course of these negotiations, Dionisio Gutierrez and Juan Luis Bosch continued to make intentional misrepresentations about the profits and financial statements of the Campero Group.

The parties were unable to agree on financing terms for a sale of Lisa's interest in the Campero-Avicola group. Juan Luis Bosch and Dionisio Gutierrez then turned their attention to Lisa's interest in just the Campero Group. Relying on the continuing misrepresentations of Juan Luis Bosch and Dionisio Gutierrez regarding the financial statements of the Campero Group, Lisa eventually agreed to sell its interest in the Campero Group to the Gutierrez Mayorga and Bosch Gutierrez families (through La Braña) for \$20.25 million. That transaction closed on November 26, 1992.

3. Lisa Discovers The Fraud

In or about December 1997, Lisa obtained copies of Campero Group financial statements that were substantially inconsistent with financial statements provided earlier. In or about April 1998, Lisa met with representatives of Dionisio Gutierrez, Juan Luis Bosch, and Juan Jose Gutierrez in an effort to resolve the discrepancies. In a subsequent meeting, also in or about 1998, Lisa learned from these representatives of a series of allegedly fraudulent transactions that affected the Campero Group's financial statements, including the net profit representations that had formed the basis of the negotiations over the purchase price of Lisa's stock. In particular, Lisa alleges that employees of the Campero Group had been instructed on a regular basis, since as early as 1987, to deliver live chickens and chicken byproducts to various poultry distributors in Guatemala for cash and

without invoices. These undocumented transactions could then be hidden from the financial records of the Campero Group in order to diminish the reported net profits of the corporation. The transactions allegedly took place at the instruction of Juan Luis Bosch and Dionisio Gutierrez. Lisa alleges a number of means by which these proceeds were then laundered, none of which are ultimately germane to this case.³

In 1998 and 1999, Lisa filed three different cases in Florida against various members of the Gutierrez Mayorga and Bosch Gutierrez families, as well as their privies and privies of the defendants before this court.⁴

4. The “Ongoing Conspiracy”

After Lisa filed the first of its Florida lawsuits,⁵ Juan Jose Gutierrez and other members of the Gutierrez Mayorga and Bosch Gutierrez families—dubbed by Lisa as the “Conspirators”—reorganized the Campero Group, allegedly to transfer property out of the reach of the Florida courts. Specifically, Lisa alleges that the Conspirators caused the Campero Group to transfer the U.S. rights to the Pollo

³ Although a judgment has been entered in one Bermuda case arising out of one of the alleged laundering schemes, it is not relevant to the matters presently before this court.

⁴ The plaintiff first filed *Lisa, S.A. v. Dionisio Gutierrez*, Case No. 98-27320 (11th Cir. Ct. Fla.). Later, the plaintiff filed *Lisa, S.A. v. Bosch Gutierrez, et al.*, Case No. 99-03519 CA 21 (11th Cir. Ct. Fla.) and *Lisa, S.A. v. Gutierrez Mayorga, et al.*, Civ. No. 02-21921 (S.D. Fla). All of these cases have been dismissed with prejudice for various reasons by the respective forum courts.

⁵ Lisa also filed numerous suits against various affiliates of the defendants (centering around the Avicola entities) in Guatemala starting in 1999.

Campero franchise into corporations not under the Campero Group's control (the various corporate defendants), but under the control of the Conspirators. Lisa alleges that these transfers were made for no consideration and that their purpose was to diminish or eliminate Lisa's ability to be made whole through recovery of damages or reinstatement as a stockholder of the Campero Group.

In the course of the allegedly illicit transfers, the defendants and the Conspirators first caused the right to franchise the Pollo Campero brand to be transferred to Campero Panama, a corporation formally unrelated to the Campero Group, in 2001. In July 2003, the defendants and the Conspirators caused Campero USA to be formed in Delaware as a subsidiary of Campero Panama. In September 2003, the defendants and the Conspirators caused Campero Delaware to be formed. The defendants and the Conspirators then transferred all existing U.S. franchises of Campero Panama to Campero USA, and transferred ownership of Campero USA to Campero Delaware. Campero USA has since continued to expand the Pollo Campero franchise in the United States.

C. Procedural History

Lisa filed its initial complaint in this court on November 22, 2006, more than 14 years after the allegedly fraudulent sale of stock. On December 22, 2006, Campero Delaware and Campero USA filed a motion to dismiss or stay on a variety of grounds. Four days later, Juan Jose Gutierrez and Campero Panama

joined in that motion⁶ and added as grounds supporting the motion to dismiss, with respect to themselves, the grounds of insufficient service of process and lack of personal jurisdiction.⁷ On January 18, 2007, Campero Barbados joined in Campero USA and Campero Delaware's motion to dismiss or stay, and also asserted grounds of insufficient service of process and lack of personal jurisdiction.

On April 20, 2007, before the motion to dismiss could be considered, Lisa amended its complaint. The amended complaint, like the original one, enumerates five counts: 1) conspiracy to defraud Lisa, 2) unjust enrichment, 3) breach of the defendants' fiduciary duty of loyalty to Lisa as a stockholder of the Campero Group, 4) sequestration of the capital stock of the Delaware entities in order to force the non-Delaware entities to appear, or, in the alternative, to be sold to satisfy any judgment awarded to Lisa, and 5) injunctive relief preventing the sale or transfer of any assets of the Delaware corporations except in the ordinary course, and prohibiting the sale or transfer of any of the defendants' interests in the Delaware entities until any judgment which may ultimately be rendered in this case is satisfied.

On May 4, 2007, the defendants filed a motion to dismiss or stay the case, on the grounds that 1) the complaint fails to state a claim upon which relief can be

⁶ Campero Barbados did not join in the motion at that time.

⁷ See Ct. Ch. R. 12(b)(2) & 12(b)(5).

granted,⁸ 2) the claims are time barred, 3) the complaint should be dismissed on the grounds of *forum non conveniens*,⁹ and 4) the court lacks personal jurisdiction as to Juan Jose Gutierrez, Campero Barbados, and Campero Panama.¹⁰ In the alternative, the defendants moved that the case be stayed in favor of the first-filed actions in Florida, which asserted essentially identical claims as in the instant case.¹¹ On October 29, 2007, the court granted the defendants' motion to stay the present action in favor of the Florida action and held the motion to dismiss in abeyance.

On November 12, 2008, the defendants filed a letter informing the court that the Florida action had been dismissed and that judgment had become final. The parties were allowed to supplement their briefs on the pending motion to dismiss. Supplemental oral argument was held on March 16, 2009.

II.

Nonresident defendants Juan Jose Gutierrez, Campero Panama, and Campero Barbados assert that this court lacks personal jurisdiction over them. Because a court lacking jurisdiction over a defendant is without power to consider

⁸ See Ct. Ch. R. 12(b)(6).

⁹ See Ct. Ch. R. 12(b)(3).

¹⁰ See Ct. Ch. R. 12(b)(2).

¹¹ See generally *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970).

a complaint on the merits,¹² the court must address the defendants’ jurisdictional objections before it can consider the remainder of their motion.¹³

When considering a motion to dismiss under Court of Chancery Rule 12(b)(2), “the plaintiff bears the burden of showing a basis for the court’s exercise of jurisdiction over the nonresident defendant.”¹⁴ All allegations of fact are presumed true unless contradicted by affidavit, and the court may look to pleadings, briefs, and affidavits to determine whether the plaintiff has met its burden of making a *prima facie* case establishing jurisdiction.¹⁵

In order to establish jurisdiction over the nonresident defendants, Lisa must satisfy a two-prong test.¹⁶ First, Lisa must show some statutory basis for the assertion of jurisdiction over the nonresident defendants.¹⁷ If the statutory basis requirement is met, Lisa must establish that the exercise of jurisdiction over the

¹² *Branson v. Exide Elecs. Corp.*, 624 A.2d 267, 269 (Del. 1993) (citing *Arrowsmith v. United Press Int’l*, 320 F.2d 219, 221 (2d Cir. 1963)). *But see Solomon v. Pathe Commc’ns Corp.*, 672 A.2d 35, 40 (Del. 1996) (affirming dismissal by the Court of Chancery of a complaint on the grounds that it failed to state a claim as to any defendant when only one of several defendants had raised objections to personal jurisdiction).

¹³ *Branson*, 624 A.2d at 267.

¹⁴ *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003); *see also Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984) (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178 (1936)) (holding that once a defendant objects to personal jurisdiction, the burden is “upon the plaintiff to make a specific showing that the Delaware court has jurisdiction”).

¹⁵ *Weygandt v. Weco, LLC*, 2009 WL 1351808, at *3 (Del. Ch. May 14, 2009) (citing *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 974 (Del. Ch. 2000)).

¹⁶ *Hercules Inc. v. Leu Trust and Banking (Bahamas) Ltd.*, 611 A.2d 476, 480 (Del. 1992) (citing *LaNuova D & B, S.p.A. v. Bowe Co., Inc.*, 513 A.2d 764, 768 (Del. 1986)).

¹⁷ *Id.*

nonresident defendants comports with the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.¹⁸

Lisa offers two statutory bases for its assertion of this court’s jurisdiction over the nonresident defendants.¹⁹ First, Lisa argues that Juan Jose Gutierrez is subject to jurisdiction in the courts of this state pursuant to 10 *Del. C.* § 3114 because he is being sued for his acts as a director and officer of the Delaware corporations. Second, Lisa argues that all of the nonresident defendants are subject to jurisdiction under the general long-arm statute, 10 *Del. C.* § 3104.

A. Section 3114

The nonresident defendants correctly assert that Section 3114 provides no support for Lisa’s claim of jurisdiction over them in this court. Section 3114 provides for personal jurisdiction over a nonresident director or officer of a Delaware corporation when sued for acts performed in his capacity as a director or officer.²⁰ More narrowly, however, “Delaware cases have consistently interpreted [Section 3114] as . . . [applying] only in connection with suits involving the

¹⁸ See U.S. CONST. amend XIV; *Waters v. Deutz Corp.*, 479 A.2d 273, 276 (Del. 1984).

¹⁹ As to Lisa’s request for jurisdictional discovery, it is denied. The plaintiff’s allegations of personal jurisdiction over the nonresident defendants is entirely frivolous, and the court will allow the plaintiff to waste no more time by pursuing needless jurisdictional discovery in a quixotic attempt to prove otherwise. See *Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1139 (Del. Ch. 2008).

²⁰ See 10 *Del. C.* § § 3114(a), (b); see also *Hana Ranch, Inc. v. Lent*, 424 A.2d 28, 30-31 (Del. Ch. 1980) (holding that application of § 3114 is “limit[ed] . . . [to] actions directed against a director [or officer] of a Delaware corporation for acts on his part performed only in his capacity as a director [or officer]”).

statutory and nonstatutory fiduciary duties of nonresident directors.”²¹ 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.²²

As the defendants point out, and Lisa does not contest, Lisa is not now, nor has it ever been, a stockholder of either of the Delaware corporations involved here.²³ Thus, at no time could Juan Jose Gutierrez, in his role as an officer or director of Campero USA or Campero Delaware, have been subject to any fiduciary duties running to Lisa.²⁴ Section 3114 therefore provides no support for

²¹ *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 96 (Del. 2007) (quoting DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 3-5[a] (2005)); see also *Pestolite, Inc. v. Cordura Corp.*, 449 A.2d 263, 267 (Del. Super. 1982) (“Delaware does not have a significant and substantial interest in overseeing each and every tort and contract claim that may be asserted against the directors of a Delaware corporation no matter where the contract was made or performed or the tort occurred.”).

²² See *Oryx Capital Corp. v. Phoenix Laser Sys., Inc.*, 1990 WL 58180, at *3 (Del. Super. Feb. 26, 1990); see also *Pestolite*, 449 A.2d at 266 (stating that “[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”) (emphasis added)).

²³ The only counter-arguments Lisa offers to the defendants’ objection to jurisdiction pursuant to § 3114 is that the numerous Delaware cases limiting § 3114(a) to fiduciary duty actions are wrongly decided, and § 3114(b) (which covers officers and was only enacted within the last several years) has not been and should not be so interpreted, despite the fact that subsections (a) and (b) are clearly *in pari materia*. Neither argument is persuasive.

²⁴ The defendants also correctly point out that the only fiduciary duty Lisa identifies as one Juan Jose Gutierrez could have owed it (based on the facts alleged) does not arise out of any Delaware corporation. Rather, it arises out of Juan Jose Gutierrez’s position with respect to Pollo Campero Guatemala, a Guatemalan corporation. Moreover, the allegation that Juan Jose Gutierrez was obligated, but failed, to ensure the fairness of a transaction between Campero Barbados and Campero USA fails, as it does not involve any duty owed to Lisa or to any corporation of which Lisa is now or ever has been a stockholder.

Lisa's argument that this court has jurisdiction over Juan Jose Gutierrez.

B. Section 3104

Lisa also argues that Section 3104 provides a basis for asserting long-arm jurisdiction over the nonresident defendants. This argument also fails.

Section 3104 is Delaware's general long-arm jurisdiction statute.²⁵ Lisa offers two different subsections, (c)(1) and (c)(3), as bases for its assertion of jurisdiction over the nonresident defendants.²⁶ Section 3104(c)(1) provides that the court "may exercise personal jurisdiction over any non-resident . . . who in person or through an agent . . . [t]ransacts any business or performs any character of work or service in the State." Section 3104(c)(3) provides that the court "may exercise personal jurisdiction over any non-resident . . . who in person or through an agent . . . [c]auses tortious injury in the State by an act or omission in this State."

1. Section 3104(c)(3)

Lisa points to two species of acts which it claims support jurisdiction over the nonresident defendants under Section 3104(c)(3). The first is the filing, through CT Corporation as agent for the defendants, of the certificate of

²⁵ The Delaware Supreme Court has stated that "10 *Del. C.* § 3104(c) is to be broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause." *Hercules*, 611 A.2d at 480 (citing *LaNuova D & B, S.p.A.*, 513 A.2d at 768).

²⁶ Because Lisa does not raise § 3104(c)(1) as a basis for jurisdiction until its brief in opposition (the amended complaint relies on (c)(3) and § 3114), strictly speaking its arguments based on § 3104(c)(1) are waived. *See Multi-Fineline Electronix, Inc. v. WBL Corp. Ltd.*, 2007 WL 431050, at *8 (Del. Ch. Feb. 2, 2007). Nevertheless, the court will briefly consider Lisa's arguments with regard to § 3104(c)(1) for the sake of thoroughness.

incorporation and other required filings with the Secretary of State of Delaware for each of Campero USA and Campero Delaware. The second is the operation of the Pollo Campero franchise licensing business by the Delaware entities. Neither is sufficient, alone or together, to confer on this court jurisdiction over the nonresident defendants.

The filing of various documents in Delaware could not have been the proximate cause of any tortious injury to Lisa, either here (where Lisa does not appear to have any interests to be injured) or elsewhere. The existence of the Delaware entities did not form an intrinsic part of the underlying alleged fraud—indeed it could not have, given that the fraud alleged was complete a full decade prior to the formation of the Delaware entities.

The argument as to the Pollo Campero franchise licensing business fails in the first instance because neither of the Delaware entities is now or ever has been operated out of Delaware. Thus, no conduct related to that operation occurred here. Moreover, no harm can be said to have been proximately caused to Lisa by the transfer to the Delaware entities of the franchising rights for Pollo Campero or the operation of that business by those entities. Rather, to the extent Lisa has suffered any harm at all with regard to the transfers of the Pollo Campero franchising rights, that harm was complete at the time the defendants caused the Campero Group (in which Lisa once had an interest) to transfer the Pollo Campero

franchise rights to Campero Panama (in which Lisa has never had an interest).

That transfer occurred not in Delaware but in Guatemala, at least two years before the Delaware entities were formed. Thus, any further transfers of those franchise rights from Campero Panama to the Delaware entities could not have been the proximate cause of any injury to Lisa, either in Delaware or elsewhere.

2. Section 3104(c)(1)

Lisa offers three bases for jurisdiction under Section 3104(c)(1): conspiracy, agency, and alter ego. With respect to Lisa's conspiracy (to defraud) theory of personal jurisdiction, it is a prerequisite that "first [the] plaintiff[] must show that a conspiracy to defraud existed, and under this court's rules, [it] must plead that fraud with particularity."²⁷ Moreover, to establish personal jurisdiction over the nonresident defendants, Lisa must offer particularized allegations that would lead to the reasonable inference that some co-conspirator (or its agent) engaged in conduct in Delaware in furtherance of the conspiracy.²⁸ Lisa fails to do so. The only conduct which Lisa claims occurred in Delaware is the incorporation of the Delaware defendants a decade after the alleged fraud was completed, and five years after Lisa alleges to have discovered the fraud, and the operation by those

²⁷ *Newspan, Inc. v. Hearthstone Funding Corp.*, 1994 WL 198721, at *8 (Del. Ch. May 10, 1994) (citing Ct. Ch. R. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.")).

²⁸ *See Istituto Bancario Italiano SpA v. Hunter Eng'g Co., Inc.*, 449 A.2d 210, 225 (Del. 1982).

entities of some business which initially belonged to the Campero Group. Lisa pleads no particularized allegations of fact in the complaint which would lead to a reasonable inference that any of the claimed actions took place in furtherance of a conspiracy to defraud it and not simply as a normal reorganization of the business concerns of the defendants.²⁹

Lisa's agency and alter-ego theories are equally unavailing. The former theory would attempt to assert jurisdiction over the nonresident defendants on the basis that they, either directly or through affiliates, owned a Delaware corporation, which is alleged to have acted as their agent through which they conducted business in Delaware.³⁰ The latter theory is narrower, requiring a showing akin to that required to pierce the corporate veil of the Delaware subsidiaries³¹—a showing which has not even been attempted by the plaintiff here. Either way, the only act alleged to have actually taken place in Delaware is the filing of certain incorporation and franchise tax documents with the Delaware Secretary of State. Thus, there is insufficient connection between the conduct or “business” which was transacted in Delaware and any alleged fraud or harm to Lisa to justify jurisdiction over the nonresident defendants.

²⁹ In this regard, the court specifically rejects Lisa's suggestion that, more than 10 years after it was allegedly defrauded by a foreign national corporation, in a foreign nation, the mere formation of a Delaware corporation by affiliates of the alleged tortfeasors is enough to draw the parties to the alleged fraud into a Delaware court.

³⁰ See *HMG/Courtland Props., Inc. v. Gray*, 729 A.2d 300, 307 (Del. Ch. 1999).

³¹ See *id.*

Because there is no statutory basis for this court to assert personal jurisdiction over the nonresident defendants, those defendants must be dismissed.

C. The Sequestration Count

Since the nonresident defendants will be dismissed from this suit, count IV of the amended complaint, for sequestration of the nonresident defendants' shares of the Delaware entities' stock, must be dismissed as well. As Lisa admits, 10 *Del. C.* § 366 provides no independent cause of action. Instead, Lisa merely asserts it as a means to ensure the appearance of the nonresident defendants. In a case where the court has valid jurisdiction over nonresident defendants, that would be an appropriate use of the court's power. However, where, as here, the court has no personal jurisdiction over the nonresident defendants, the exercise of the court's power over the property of the defendants which happens to be located in Delaware in order to compel their appearance is exactly the sort of *quasi in rem* exercise of jurisdiction which the Supreme Court of the United States forbade in *Shaffer v. Heitner*.³² Thus, count IV of the complaint must be dismissed.

III.

When considering a motion to dismiss a complaint for failure to state a claim, the court assumes as true all well pleaded allegations of fact in the

³² 433 U.S. 186 (1977).

complaint.³³ Although the court accepts as true “all facts of the pleadings and reasonable inferences to be drawn therefrom, . . . neither inferences nor conclusions of fact unsupported by allegations of specific facts . . . are accepted as true.”³⁴

The only defendants remaining after dismissing the nonresident defendants are the two Delaware corporations, Campero USA and Campero Delaware. Count III of the complaint alleges breach of the fiduciary duty of loyalty. However, the complaint raises no allegations that either of the Delaware entities owes or has ever owed any fiduciary obligation to Lisa. Nor does the complaint allege any facts from which an inference could reasonably arise that either Delaware entity has ever owed any fiduciary duty to Lisa. Therefore, count III of the amended complaint must be dismissed with prejudice as to the Delaware entities.

Count V of the complaint seeks injunctive relief. To the extent that count V seeks to freeze the shares of the Delaware entities owned by the nonresident defendants, it simply overlaps with count IV’s demand for sequestration, and must likewise be dismissed. To the extent that count V seeks to freeze the assets of the Delaware entities until such time as any judgment eventually rendered against those entities on the other claims has been satisfied, it does not actually raise a

³³ See *Grobow v. Perot*, 539 A.2d 180, 187 & n.6 (Del. 1988); Ct. Ch. R. 12(b)(6).

³⁴ *Id.*

claim at all.³⁵ Rather, it simply seeks a preliminary injunction preventing the dissipation of the Delaware defendants' assets. Therefore, it exists not as an independent claim for relief but as a provisional remedy which depends on a likelihood of success on counts I or II, for conspiracy to defraud and unjust enrichment respectively.³⁶

IV.

Finally, the defendants move to dismiss the remaining counts on *forum non conveniens* grounds.³⁷ “In order to dismiss [a plaintiff’s] complaint for *forum non conveniens*, the court must conclude, after a consideration of the relevant *Cryo-Maid* factors, that the procession of the litigation in the plaintiffs’ chosen forum would subject the defendants to ‘overwhelming hardship and inconvenience.’”³⁸ Thus, “[w]hile the [Delaware Supreme Court’s earlier

³⁵ *C.f. Philadelphia, B. & W. R. Co. v. Gatta*, 85 A. 721, 727 (Del. 1913) (“[A] plaintiff has a right to insert in his declaration any number of counts . . . provided that each count presents a separate and distinct cause of action.”); BLACK’S LAW DICTIONARY 375 (8th ed. 2004) (defining count as “[i]n a complaint or similar pleading, the statement of a distinct claim”).

³⁶ *See, e.g., Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987) (“A plaintiff seeking a preliminary injunction must demonstrate . . . that there is a reasonable probability of success on the merits . . .”); *see also Hollinger Inc. v. Hollinger Int’l, Inc.*, 858 A.2d 342, 392 (Del. Ch. 2004) (holding that if the petitioner for a preliminary injunction fails to make a sufficient merits showing, there is no need for the court to consider the other elements which must be satisfied to obtain preliminary injunctive relief).

³⁷ *See* Ct. Ch. R. 12(b)(3).

³⁸ *IM2 Merch. and Mfg., Inc. v. Tirex Corp.*, 2000 WL 1664168, at *1 (Del. Ch. Nov. 2, 2000) (citing *Gen. Foods Corp. v. Cryo-Maid*, 198 A.2d 681, 684 (Del. 1964), *overruled on unrelated grounds by Pepsico, Inc. v. Pepsi-Cola Bottling Co.*, 261 A.2d 520 (Del. 1969) and quoting *Ison v. E.I. DuPont De Nemours & Co.*, 729 A.2d 832, 838 (1999)).

jurisprudence] and the term ‘overwhelming hardship’ itself may suggest an insurmountable burden that can only be met if a defendant were to be rendered impecunious by the procession of litigation in Delaware, a more restrained meaning is at the essence of the standard. As the Supreme Court [more] recently pointed out in *Ison*, the overwhelming hardship standard is not intended to be ‘preclusive’ but is intended to be a stringent one that holds defendants who wish to deprive a plaintiff of its chosen forum to a fittingly high burden.”³⁹ This court is convinced that the defendants here have met this heavy burden.

The factors to consider in determining the appropriateness of Delaware as the venue for litigation are “(1) the relative ease of access to proof; (2) the availability of compulsory process for witnesses; (3) the possibility of a view of the premises; (4) whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction; (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and (6) all other practical problems that would make the trial of the case easy, expeditious and inexpensive.”⁴⁰ The court cannot

³⁹ *IM2 Merch.*, 2000 WL 166148, at *7 (citing *Ison*, 729 A.2d at 843).

⁴⁰ *IM2 Merch.*, 2000 WL 1664168, at *9 (quoting *Ison*, 729 A.2d at 838). “All but the fifth factor listed above were set forth in [*Cryo-Maid*]. 198 A.2d at 684. The fifth factor originated in [*Parvin v. Kaufinann*]. 236 A.2d 425, 427 (Del. 1967).” *IM2 Merch.*, 2000 WL 1664168, at *9 n.39. Nevertheless, all six factors are colloquially referred to as the *Cryo-Maid* factors.

give excessive weight to any one factor, but must instead weigh all of the relevant factors in light of the heavy burden the defendants bear.⁴¹

A. The Cryo-Maid Factors

1. The Relative Ease Of Access To Proof

In order to prevail on either of the remaining counts, Lisa will first have to prove the existence of the underlying fraud alleged to have occurred in Guatemala in 1992. Proof of this fraud will necessarily center around documents, files, and business records surrounding the operation of the Campero Group businesses, all of which are to be found in Guatemala, and virtually all of which will likely be in Spanish. None of the defendants has ever kept documents in Delaware, and none of the relevant documents are located in Delaware.

Moreover, none of the relevant witnesses who have knowledge as to Lisa's claims live in Delaware, or, indeed, in the United States. Rather, they reside primarily in Guatemala and speak Spanish.

Lisa asserts that a few potential witnesses and documents are found not in Guatemala but in Miami. This position is of little weight, given that two of the

⁴¹ *IM2 Merch.*, 2000 WL 1664168, at *8 (citing *Ison*, 729 A.2d at 838). Although the plaintiff's choice of forum is generally entitled to deference (increasing the burden borne by the defendants in the showing required to achieve a dismissal on venue grounds), "foreign plaintiffs . . . are routinely accorded far less deference in their choice of forum than are citizens or residents." *In re Nash v. McDonald's Corp.*, 1997 WL 528036, at *3 (Del. Super. Feb. 27, 1997); accord *Miller v. Phillips Petroleum Co. Norway*, 529 A.2d 263, 270 (Del. Super. 1987), *aff'd*, 537 A.2d 190 (Del. 1988).

three Florida actions instituted by Lisa for similar claims were dismissed by Florida courts (where those few documents and witnesses would be more available than they are here) on *forum non conveniens* grounds. As to this factor, the balance strongly favors the defendants.

2. The Availability Of Compulsory Process For Witnesses

This court has no power to compel witnesses from Guatemala to appear in Delaware, or even to compel witnesses in Guatemala to submit themselves to be deposed. And, although the two Delaware entities might be able to obtain the appearance of certain of their executives, this court is without power to compel those executives to appear. Moreover, the majority of the relevant witnesses with knowledge of Lisa's claims are not themselves executives of the Delaware entities. As to this factor, the balance strongly favors the defendants.

3. The Possibility Of The View Of The Premises

This factor is not particularly relevant in this case. Even if there is some value to a view of the operations of the businesses, they are all located in Guatemala. As to this factor, the balance is neutral.

4. Whether The Controversy Is Dependent On Delaware Law

Lisa does not dispute the defendants' contention that none of its claims are controlled by Delaware law. Moreover, Lisa essentially concedes that the relevant law for the underlying fraud, involving citizens of Guatemala and a transaction

which took place in Guatemala, is Guatemalan law.⁴² Delaware has no interest in the dispute between the parties, given that any alleged tortious conduct occurred in Guatemala, and to the degree that Lisa suffered any harm, that harm was suffered in Guatemala. As to this factor, the balance favors the defendants.

5. The Pendency Of Similar Actions In Other Jurisdictions

Since 1999, Lisa has filed numerous actions with respect to alleged fraudulent conduct involving the Avicola entities against various affiliates of the defendants in Guatemala, the current status of which actions is somewhat unclear.⁴³ What is clear from this course of conduct, however, is that there is no hardship to any of the parties to litigate in Guatemala rather than in this court. Lisa claims that Guatemalan courts are corrupt, and therefore it cannot obtain justice there. Lisa asserts that:

[E]ven defendants recognize the corruption inherent in the Guatemalan judicial system. In March 2006, Dionisio Gutierrez—a principal of the Campero Group and the brother of Juan Jose

⁴² Although the plaintiff argues weakly that some of alleged misrepresentations occurred in Miami and Toronto, it is clear that Guatemala has the strongest interest in the subject matter of the dispute. Moreover, the Florida courts, presented with the same arguments, chose to dismiss the Florida actions on *forum non conveniens* grounds.

⁴³ Escobar Aff. ¶ 35 (“During the pendency of the Florida litigation, Lisa and related entities filed hundreds of actions in Guatemala against a group of Guatemalan companies known as the Avicolos that are the subject of the 1999 Florida State Action and Related Florida Federal Action.”). The defendants also placed into the record affidavits of several of their attorneys from Guatemala regarding the extent of Lisa’s campaign of litigation there. The affidavit of Antonio Morales Velasco alone details 42 distinct cases filed by Lisa, and 2 cases filed by Talgon Development Corp. as “beneficiary of Lisa, S.A.’s shares,” in Guatemala between October 1999 and October 2001.

Gutierrez–hosted a television roundtable program on the inadequacies of the Guatemalan courts. Dionisio noted that “threats and crimes against officers of the court are the order of the day” and that “the people have very little confidence in the justice system.”⁴⁴

The entire focus of the discussion in the transcript of that program, however, appears to be about the failings of the criminal justice system and associated courts in Guatemala. Nowhere in the transcript is there any mention of the civil court system.

6. All Other Practical Problems That Would Make the Trial Of The Case Easy, Expeditious, And Inexpensive

This court can only obtain jurisdiction over some of the interested parties—in this case, the parties least connected to the actual dispute. It is therefore not possible for this court to do full and complete justice. On the other hand, the courts of Guatemala (where all of the defendants are either subject to jurisdiction or have agreed to waive jurisdictional objections) are capable of obtaining jurisdiction over all of the interested parties, and are therefore the only courts capable of granting complete relief to Lisa.

Where, as here, Delaware courts have jurisdiction over but a few of the interested parties, and there is a court in another jurisdiction capable of exercising

⁴⁴ Pl.’s Supp. Br. Opp’n 17. In support of its argument, Lisa provided to the court the transcript of that television roundtable. *See generally id.* Ex. G. Lisa does not point to anything in particular in the 31-page transcript, but apparently relies on its entire contents as proof of its contention.

jurisdiction over all of the interested parties, this court has dismissed the action for improper venue.⁴⁵

Weighing all of these factors, most of which militate strongly for the defendants' position, against the somewhat attenuated interest of a foreign plaintiff in obtaining a Delaware forum, the remaining counts must be dismissed on *forum non conveniens* grounds.⁴⁶

V.

For the foregoing reasons, the defendants' motion to dismiss is GRANTED.
IT IS SO ORDERED.

⁴⁵ See *Carbel v. Andreas Holdings Corp.*, 698 A.2d 375, 379 (Del. Ch. 1995); *Miller*, 529 A.2d at 270; *IM2 Merch.*, 2000 WL 1664168, at *11.

⁴⁶ Although the defendants also raise certain statute of limitations defenses in their motion to dismiss pursuant to Court of Chancery Rule 12(b)(6), the court specifically does not reach those issues here.