IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JERRY C. GOULD, SR., JERRY C. GOULD, JR. as Members of and Derivatively on behalf of GOULD'S ELECTRIC OF ILLINOIS, LLC A Delaware Limited Liability Company,	)	
Petitioners,	)	
v.	)	Civil Action No. 3332-VCP
JAY STEPHEN GOULD and ANDREW CLARK GOULD, as Members of Gould's Electric of Illinois, LLC	)	
Respondents.	)	

MEMORANDUM OPINION

Submitted: September 23, 2010
Decided: January 7, 2011

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Collins J. Seitz, Jr., Esquire, CONNOLLY BOVE LODGE & HUTZ, LLP, Wilmington, Delaware; *Trustee.*

PARSONS, Vice Chancellor.

This case originates out of an action for dissolution of a business, Gould's Electric of Illinois, LLC ("GEI" or the "Company"), which is a Delaware limited liability company owned by two brothers, Jerry C. Gould, Sr. ("Jerry) and Jay S. Gould ("Jay"), and their respective sons, Jerry C. Gould, Jr. ("J.C.") and Andrew C. Gould ("Andrew"). As a result of a dispute about their respective ownership interests, the parties were unable to operate the business in a productive manner. Ultimately, they stipulated to the dissolution of GEI, and to facilitate the dissolution, the Court appointed a trustee (the "Trustee") to settle outstanding claims, collect outstanding debts, and pay the remaining proceeds to the parties in accordance with their ownership percentages.

As part of winding up the affairs of GEI, the Trustee conducted an auction to sell off the remaining assets of the dissolving entity and Jay was the winning bidder. Jay and Andrew (together the "Respondents") allege that at about the time the sale of GEI's assets closed, Jerry and J.C. (together the "Petitioners") forcibly removed a significant amount of property purchased by Jay for use by a new company he formed, Gould Motor Technologies, Inc. ("GMT"). Respondents allege that Petitioners committed a number of wrongs and have filed a Motion to Amend the Counterclaim and to Add New Parties and a Third Party Complaint (the "Motion to Amend" or the "Motion"). In it, they seek to redress the allegedly impermissible actions taken by adding additional counterclaims against Petitioners and a third party complaint against Gould's Electric Motor Repair, Inc. ("GEMR"), a company controlled by Jerry. Respondents also seek to bring claims for conversion of property belonging to GMT and conspiracy. Respondents further urge

the Court to reject the Trustee's plan to distribute the proceeds from the sale of GEI and the winding up of its affairs until the new claims are resolved.[1]

For the reasons stated in this Memorandum Opinion, I conclude that Petitioners will suffer little prejudice if the new counterclaims and third party complaint are added and the interests of justice weigh in favor of Respondents. Therefore, I grant Respondents' Motion to Amend. I also will defer final consideration of the Trustee's plan until further proceedings are conducted on the new counterclaims and third party complaint.

I. BACKGROUND

A. Facts

Petitioners, Jerry and J.C., and Respondents, Jay and Andrew, all are members of GEI, which began its operations in or around 2005. The parties also are involved in a few other companies in the same line of business.

In 1976, the brothers Jerry and Jay founded a West Virginia company to provide various services to national mining operations, including electric motor and repair

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[1] Resp'ts' Jay S. Gould and Andrew C. Gould's Reply in Further Support of Their Mot. To Amend the Countercl. and to Add New Parties and a Third Party Compl. ("Respondents' Reply Brief" or "RRB") 2. The other papers filed with respect to the Motion to Amend are the Motion itself, cited as "Resp'ts' Mot." and Petitioners' Opposition, cited as "Pet'rs' Opp'n.

services to companies operating large electrical industrial machinery.[2] That company is now known as CWV, Inc. Jerry and Jay own 51% and 49%, respectively, of the authorized and outstanding stock in CWV, which is a holding company for other businesses operated by the brothers, including GEMR. Jerry and Jay also entered into a Buy-Sell Agreement, which allowed Jay to purchase an additional 2% of CWV in the event that Jerry predeceased him, on the condition that Jay's estate would transfer 1% back to Jerry's family upon Jay's death. In a lawsuit currently pending in West Virginia, Jerry has purported to exercise an option to purchase Jay's minority interest in CWV. The court process for appraisal and purchase of the minority shares of the holding company is pending.[3]

In 2004, Jerry and Jay decided to establish an operational business base in Illinois. They purchased property in West Frankfort, Illinois for the purpose of conducting those operations. The property is held by another company they formed on a 50-50 basis, Gould's of Illinois, LLC ("GOI"). In August of 2004, Jay filed a certificate of formation for GEI with the Delaware Secretary of State. The brothers agreed that each of them, with their sons, would own fifty percent of GEI; specifically, Jerry and Jay would each

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2 Compl. ¶ 10. For the most part, the facts recited herein are undisputed; to the extent they may be in dispute, citations to a pleading reflecting the alleged fact are indicated.

3 Docket Item ("D.I.") 24, Feb. 25, 2009 Trustee Status Report, 4.

own 40% and each of their sons would own 10%.[4] GEI was funded with contributions from GOI and GEMR. An operating agreement was drafted reflecting the referenced equal ownership stakes of Jerry with J.C. and Jay with Andrew, but it was never signed.

In April 2006, Petitioners claim that Jay approached Jerry and requested that Jay (along with Andrew) be permitted to own 51% of GEI, rather than the 50% previously agreed upon. Jerry allegedly responded that he would consider such a request, but only in the context of a global revision to the Buy-Sell Agreement. The parties never agreed on such a revision and Jay now refuses to acknowledge the previously agreed upon equal ownership structure of GEI as reflected in the unsigned operating agreement.[5] Jay also filed a K-1 representing a 51% ownership stake in GEI.[6]

This dispute over ownership led to further disputes regarding the operation of GEI. For example, Jerry and J.C. allege that Jay has refused to pay CWV invoices as they became due and owing in the ordinary course of business. They also allege that Jay directed that GEI's largest vendor, GEMR, not be paid. In that regard, I note that GEI and GEMR had an oral consignment agreement whereby, among other things, if GEI sold a GEMR motor whose core GEI had rebuilt, GEI would give GEMR 25% of the customer's purchase price and GEI would retain the other 75%. As part of any sale by

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4 Compl. ¶ 14. Largely for tax reasons, the agreement later was amended so that Jerry and Jay each owned 39% while Andrew and J.C. owned 11% of GEI. *Id.* ¶ 18.

5 *Id.* ¶ 21.

6 *Id.* ¶ 25.

GEI, its customer generally would provide to GEI its non-working motor, referred to as the replacement core. GEI would retain the replacement core and refurbish it for future resale to the same or another customer.[7]

Additional problems arose in terms of the handling of GEI's bank accounts. Jerry and J.C., as members of GEI and authorized drawers on the GEI bank account, issued checks to satisfy GEI's debts to GEMR.[8] Petitioners claim that Jay then withdrew all remaining funds from GEI's operating account and placed them in an account over which Jay had sole and exclusive control.[9]

The parties were unable to overcome the problems they encountered in running GEI. As described in more detail in Part I.B *infra*, this resulted first in Jerry and J.C. commencing this action, individually and derivatively on behalf of GEI, against Jay and Andrew for a declaration that each side, collectively, owns 50% of GEI and certain related relief. Jay and Andrew, as Respondents, filed an Answer and Counterclaim that sought, among other things, the dissolution of GEI on the ground that it no longer was reasonably practicable to carry on the business of the Company in conformity with its limited liability agreement. Thereafter, the parties agreed to dissolve GEI and seek distribution of its assets among its four members. In October 2008, pursuant to a stipulation of the parties, I appointed the Trustee to oversee the dissolution of GEI. The

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7 RRB 4-5.

8 Compl. ¶ 23.

9 *Id*. ¶ 24.

Order stated that the Trustee was to "consider and actively pursue an option for such winding up and distribution for the purpose of maximizing value for the members of GEI."[10] On August 20, 2009, I approved a proposal by the Trustee that outlined the process through which GEI would be sold via an auction.[11]

On November 20, 2009, the Trustee determined that Jay won the auction with a bid of $700,000. Section 6.8 of the related Business and Asset Purchase Agreement for GEI (the "APA") between Jay and GEI provides that:

> Any legal suit, action or proceeding brought by Seller or Buyer, *or any of their respective affiliates, arising out of or based upon this Agreement*, shall be instituted in the courts of the State of Delaware (collectively, the "Courts"), and the Seller and Buyer (on its behalf and on behalf of such affiliates) waive any objection which it may now or hereafter have to the laying of venue of any such suit, action or proceeding.[12]

Closing originally was scheduled for mid-December 2009, but later was extended until early January 2010.

The oral consignment agreement between GEI and GEMR was important to GEI because it gave GEI a steady supply of motors, allowing it to immediately replace motors for its customers. To preserve that capability post-closing and avoid an interruption in its motor supply that would put GEI and its Buyer, GMT, at risk of losing customers in need of immediate service, Jay, as the Buyer, entered into an Addendum to the Purchase

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[10] D.I. 22, Oct. 10, 2008 Stip. and Order Appointing Trustee, ¶ 12.

[11] D.I. 37.

[12] D.I. 34 Ex. B, APA, § 6.8 (emphasis added).

Agreement with the Trustee on behalf of GEI or the Seller on January 4, 2010, which detailed procedures for an orderly transition of GEMR motor cores from GEI back to GEMR.[13] At closing, Jay was to take title to all of the motors listed in Addendum Exhibit A; the motors to which GEMR claimed ownership were listed in Exhibit B.[14]

The Addendum contained additional provisions regarding some of the motors. Section 3.A of the Addendum states that certain "Essential Motors" were retained, at that time, on consignment by GEI customers and could not be returned immediately to GEMR without interrupting service and possibly causing safety concerns for those customers. The Addendum provided that the Consignment Agreement would continue in effect for these motors until they were returned by the customers. Section 3.B identifies certain GEMR motors as essential to GEI's inventory and states that the Buyer would retain them for a limited period of 60 days after the closing. The Buyer granted GEMR a security interest in these motors and the Addendum specified that they would be subject to the Consignment Agreement during that 60 day period. Lastly, Section 3.C stated that the remaining GEMR motors would be "available for immediate pickup by GEMR post-Closing with the scheduling of the pickup to be arranged by the Trustee."[15] The Trustee also agreed to be at GEI's place of business on the morning of January 6, 2010 to

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13 RRB 6.

14 *Id.* Exs. A, B.

15 *See* Motion to Amend Ex. A, proposed Ans. and Am. Countercl. of Resp'ts. Jay S. Gould and Andrew C. Gould and Third Party Compl. of Jay S. Gould and Gould Motor Technologies, Inc. ("Proposed Ans. and Am. Countercl."), Ex. 3, § 3.C.

supervise the orderly pickup of the motor cores to which GEMR was entitled to immediate possession.[16]

On January 4, 2010, the Trustee notified Jerry and J.C. of the Addendum.[17] Petitioners evidently disagreed with the actions the Trustee took on behalf of GEI. As described next, however, they resorted to self-help rather than challenge the Trustee's decision in this Court.

At approximately the same time as Jay wired the $700,000 to the Trustee on the morning of January 5, 2010, Jerry, J.C., and Jack Holcomb, GEMR's shop foreman, arrived at GEI's shop building and sought to pick up GEMR's motors. They proceeded forcibly to remove two tractor trailers full of motors.[18] Jerry and J.C. returned the next day to remove additional motors but were prevented by Jay, his employees, and the police, who said no motors could be removed without a court order. Jerry then sought and obtained a restraining order in Franklin County, Illinois, preventing the sale, and seeking the return, of GEMR motors allegedly still in GEI's possession. Before a hearing for a preliminary injunction was conducted in that action, the parties resolved their dispute by scheduling two pickups of GEMR motors.[19]

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16 RRB 7.

17 Proposed Ans. and Countercl. ¶ 150.

18 *Id*. ¶ 168.

19 *Id*. ¶¶ 172-78.

Respondents claim Petitioners wrongfully took eighteen motors that Section 3.B of the Addendum to the APA identifies as "essential" to GEI's continued functioning. In order to avoid customer defections, Respondents allege that they mitigated their damages by obtaining replacements for those motors. Additionally, Respondents contend that twenty-nine of the motors taken were refurbished by GEI and claim they are owed compensation for performing this work in the form of a true-up.

On May 16, 2010, GEMR sued GEI over the motor core dispute in two separate actions in West Virginia. The Trustee agreed to a proposed settlement of these lawsuits on behalf of GEI and recommended that this Court approve it because of the "cost to litigate the West Virginia Litigations, the difficulty in proving GEI's offset claims, and the limited funds remaining from the sale of GEI."[20] Respondents, Jay and Andrew, objected to that settlement, and this Court declined to approve the settlement in an Order entered on November 30, 2010.

In the same Order, I reserved decision on Respondents' pending Motion to Amend. That Motion seeks to add claims against Jerry, J.C., and GEMR based on their seizure of various motor cores and the resulting damages.

B. Procedural History

On November 8, 2007, Petitioners Jerry and J.C. Gould, as members of and derivatively on behalf of GEI, filed a Complaint against Jay and Andrew, as members of

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[20] D.I. 48, Final Report and Recommendation of the Trustee for GEI ("Trustee Report"), 7.

GEI, seeking injunctive relief requiring the return of all member-controlled funds removed by Jay to a bank account that he alone controlled, prohibiting any member from removing any funds from a member-controlled account for any reason other than the payment of business invoices and expenses in the ordinary course of business, and requiring GEI to pay ordinary course business expenses as they accrue. The Complaint also requested a declaration as to the relative ownership rights of Jerry, Jay, J.C., and Andrew in GEI.

On January 17, 2008, Respondents filed their Answer and Counter-Claim seeking, among other things, the dissolution of GEI and the appointment of a Trustee to oversee the orderly winding up of its affairs. On or about September 3, 2008, Petitioners responded to the Counter-Claim and agreed that GEI should be dissolved.

On October 10, 2008, the Court approved a Stipulation and Order Appointing Trustee (the "Order of Appointment" or "Order"), naming Collins J. Seitz, Jr., Esquire, as the Trustee to oversee the orderly liquidation of GEI. The Order of Appointment empowered the Trustee with full control and dominion over GEI, including its operations and management. The Order further authorized the Trustee to endeavor to obtain the best cash price obtainable in the marketplace for GEI or its assets. In that regard, the Trustee could consider a number of options, including "an auction(s) and sale to a Member, a third party or combination of parties of the assets of GEI either as a complete unit or in separate parts of one or more assets and distribution of proceeds after payment of GEI's

liabilities."[21] Interim actions taken by the Trustee were to be reviewed on an abuse of discretion basis.

On August 20, 2009, the Court granted a Proposed Order Confirming Trustee's Report and Proposal for the Sale of GEI and Disposition of Ancillary Matters (the "Trustee's Proposal" or the "Proposal"). The Trustee's Proposal provided for the hiring of a third party, Sunbelt of Mid America, to conduct an auction for GEI. As part of the auction procedures outlined in the Proposal, Jerry and Jay were to meet on August 28, 2009 in an effort to clear up any disputes regarding whether GEI or GEMR owned specific motor cores. Any further dispute was to be resolved by the Trustee's representative, subject only to abuse of discretion review as an interim action under § 10 of the Order of Appointment. The Proposal also stated that any fiduciary duty claims concerning objections to the Trustee's Report were preserved and would be resolved first by the Trustee under § 13 of the Order.[22]

In preparation for the sale of GEI's business and assets to Jay, as the winning bidder, the Trustee sent a letter to the parties on December 15, 2009 in an effort to resolve a dispute regarding motors and motor cores owned by GEMR but that were in the possession of GEI through the consignment agreement. The letter outlined three different types of treatment for the various motors and motor cores involved: (1) GEMR would retrieve all non-consignment motors and motor cores that it owned from GEI's

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21 Order of Appointment ¶ 4(d).

22 Trustee's Proposal ¶ 15.

warehouses in Illinois and Kentucky on December 17, 2009; (2) for GEMR motors on consignment with GEI customers, GEI's employees would retrieve all non-essential motors and make them available for transfer to GEMR on December 17, 2009; and (3) essential motors on consignment from GEMR would remain with the customer and GEMR would be entitled to the resulting motor core and payment by GEI in the same manner it always had.[23] Respondents promptly objected to the Trustee's December 15 proposed interim action on the basis that GEI had significantly refurbished a number of the motors the Trustee proposed to turn over to GEMR.[24] On December 17, I denied the request of Respondents for injunctive relief based on these objections.

In the January 4, 2010 Addendum to the APA, the Trustee agreed that certain motors and equipment that were essential to the continued uninterrupted operation of GEI would remain with GMT, the Buyer entity, at closing. The Addendum also provided for reasonable timeframes for the supervised return of the remaining motors held on oral consignment from GEMR.

On March 22, 2010, Respondents filed their Motion to Amend. In it, they sought to add counterclaims for conversion, breach of fiduciary duty, and conspiracy and a third-party complaint against GEMR. Respondents later dropped the claim for breach of fiduciary duty. Among other things, the new counterclaims alleged that by removing

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[23] D.I. 38 Ex. D, Trustee's Dec. 15, 2009 Letter Response to Issues Raised Regarding GEMR's Retrieval of its Motor Cores from GEI, 4.

[24] D.I. 38, Resp'ts' Dec. 17 Letter of Objection to Trustee's Proposed Course of Action.

motors and motor cores from GEI's facility around the time of the closing of the APA, Jerry and J.C. violated this Court's Orders vesting the Trustee with the power to dispose of GEI's assets.

On March 25, 2010, the Trustee filed his recommendation for the resolution of certain claims raised by the parties. On June 21, Petitioners filed their Opposition to Respondents' Motion to Amend. The Trustee issued his Final Report and Recommendation on July 2, 2010. Respondents objected to that Report on July 22, to which the Trustee responded on August 20. On September 23, 2010, I heard argument on both the Motion to Amend and Respondents' Objections to the Trustee's Report. By Order dated November 30, I granted several, but not all, of the recommendations in the Trustee's Report and reserved decision on the Motion to Amend. This Memorandum Opinion reflects my ruling on that Motion.

C. Parties' Contentions

Respondents argue that this Court is the proper venue in which to hear the dispute relating to the actions taken by Jerry, J.C., and GEMR regarding the motor cores in the possession of GMT because it arises out of actions that were taken pursuant to the Trustee's plan for liquidating GEI. But for the Trustee's plan, they argue, Jerry and J.C. never would have taken the motors in the manner they did. Moreover, they argue that, without the relief sought in their Motion to Amend, Jerry and J.C. will be unjustly enriched. Not only will they receive their proportionate share of the inflated proceeds from the liquidation of GEI and sale of its assets to Jay (because Jay's bid was premised on the notion that certain motors would remain with GMT, at least temporarily), they also

will benefit improperly from motor cores rightly belonging to GMT, the successor to GEI.

Petitioners oppose the Motion to Amend for several reasons within the general rubric of futility. They first assert that the Court lacks personal jurisdiction over GEMR, Jerry, and J.C. Next, they contend that venue is inappropriate in Delaware and that Illinois would be a more appropriate venue because most of the actions regarding the seizure of the disputed motors took place there. Finally, they argue that the proposed new claims are futile because the issues either have been addressed by the Court or the Trustee or have no merit as a matter of law.

II. ANALYSIS

A. Standard for a Motion to Amend

Motions for leave to amend are governed by Court of Chancery Rule 15. Rule 15(a) provides, in pertinent part, that where, as here, a responsive pleading has been filed, a party may amend its pleading "only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires."[25] Courts have interpreted this provision to allow for liberal amendment in the interest of resolving cases on the merits.[26] "A motion to amend may be denied, however, if the amendment would be futile, in the sense that the legal insufficiency of the amendment is obvious on its

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[25] Ct. Ch. R. 15(a).

[26] *See, e.g.*, *Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2008 WL 2133417, at *7 (Del. Ch. May 21, 2008), *aff'd*, 962 A.2d 916 (Del. 2008) (TABLE) (citations omitted); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *3 (Del. Ch. Oct. 19, 2006).

face."[27] That is, the motion may be denied if the proposed amendment would immediately fall to a Rule 12(b)(6) motion to dismiss.[28] Moreover, leave to amend should be denied if there is a showing of substantial prejudice, bad faith, dilatory motive, or repeated failures to cure by prior amendment.[29] Ultimately, a motion for leave to amend is left to the sound discretion of the trial court.[30]

B. Futility

1. Personal jurisdiction

Petitioners assert that this Court lacks personal jurisdiction over the Amended Counterclaim Defendants, Jerry and J.C., and the Third Party Defendant, GEMR. As the analysis of personal jurisdiction in connection with a motion to amend is similar to that required pursuant to a motion to dismiss under Rule 12(b)(2), the party asserting jurisdiction bears the burden of showing a basis for the court's exercise of jurisdiction

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27 *NACCO Indus., Inc. v. Applica Inc.*, 2008 WL 2082145, at *1 (Del. Ch. May 7, 2008).

28 *See St. James Recreation, LLC v. Rieger Opportunity P'rs, LLC*, 2003 WL 22659875, at *5 (Del. Ch. Nov. 5, 2003).

29 *See, e.g., Nat'l Installment Ins. Servs., Inc.*, 2008 WL 2133417, at *7; *Crowley*, 2006 WL 3095952, at *3; *NACCO Indus., Inc*, 2008 WL 2082145, at *1.

30 *See, e.g., Nat'l Installment Ins. Servs., Inc*., 2008 WL 2133417, at *7 (citing *Bokat v. Getty Oil Co.*, 262 A.2d 246, 251 (Del. 1970)); *NACCO Indus., Inc.*, 2008 WL 2082145, at *1.

over the nonresident party.[31] The court generally conducts a two-step analysis: (1) it must determine whether service of process on the nonresident is authorized by statute; and (2) whether the exercise of jurisdiction is consistent with due process.[32] This Court may exercise "personal jurisdiction over a nonresident defendant so long as there are 'minimum contacts' between the defendant and the forum."[33] The minimum contacts analysis protects a defendant against the burden of litigating in a distant forum and guarantees that "the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[34] Moreover, "it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[35]

As a preliminary matter, I find that exercising jurisdiction over Jerry and J.C. is proper because each "has abandoned a solely defensive posture and become an actor in

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31 *In re Silver Leaf, L.L.C.*, 2004 WL 1517127, at *2 (Del. Ch. June 29, 2004) (citing *Steinman v. Levine*, 2002 WL 31761252, at *8 (Del. Ch. Nov. 27, 2002), *aff'd*, 822 A.2d 397 (Del. 2003)).

32 *Silver Leaf*, 2004 WL 1517127, at *2.

33 *Id.* (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

34 *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

35 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (This "purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or the 'unilateral activity of another third party or a third person'").

the cause."[36] Petitioners, Jerry and J.C., commenced this action and later stipulated to the dissolution of GEI and the Order of Appointment for the Trustee to oversee the winding down of GEI. Because Petitioners actively sought relief from this Court in that regard, they have waived their personal jurisdiction defense or consented to the exercise of jurisdiction over them as to actions they took relating to the dissolution of GEI.

Furthermore, even if Petitioners had not waived their personal jurisdiction defense, the exercise of personal jurisdiction over both Petitioners and Third Party Defendant GEMR is proper here. Delaware's long-arm statute, 10 *Del. C.* § 3104(c)(1), provides for jurisdiction over "any person . . . who in person or through an agent . . . [t]ransacts any business or performs any character of work or service in the State." Jerry and J.C. have transacted business in Delaware by, for example, filing this action, which may constitute "transacting business" within § 3104(c)(1).[37] Even where a nonresident defendant has transacted business in Delaware, however, the exercise of personal jurisdiction over that person is proper only if the claims in question have "arisen" from that transaction of business.[38]

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36 *Bigelow/Diversified Secondary P'ship Fund 1990 v. Damson/Birtcher P'rs*, 2001 WL 1641239, at *6 (Del. Ch. Dec. 4, 2001).

37 *See Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *8 (Del. Ch. July 14, 2008); *Mobil Oil Corp. v. Advanced Envtl. Recycling Tech., Inc.*, 833 F. Supp. 437, 443-44 (D. Del. 1993).

38 *Sprint Nextel*, 2008 WL 2737409, at *36-43.

Petitioners argue that "the proposed amendment alleges claims for activities unrelated to the dissolution of GEI."[39] I disagree. The actions taken by Jerry and J.C. with regard to the motor cores now at the center of this dispute related directly to the dissolution process: had GEI not been dissolved (and, more precisely, sold to Jay), it is unlikely the motor cores would have been removed forcibly, as they were. In addition, the business decision made by Petitioners in connection with this action, presumably to protect their investments in GEI and GEMR, precipitated the dissolution proceeding and the sale of GEI's business by the Trustee. The dispute over the motor cores developed, in part, in the negotiations surrounding that sale and, ultimately, led to the Trustee's agreement, on behalf of GEI, to the Addendum to the APA on January 4, 2010. The Trustee notified Jerry and J.C.'s representatives of that Addendum the same day. Petitioners, however, evidently disagreed with the Trustee's actions and allegedly decided to take matters into their own hands on January 5 by removing the motor cores from GEI's premises. In doing so, according to Respondents, Petitioners wrongfully interfered with the Court-approved sale of GEI. Accordingly, based on the allegations in the proposed Amended Counterclaim, I conclude that Petitioners, Jerry and J.C., have transacted business within Delaware related to the dissolution and thus purposely availed themselves of this Court and the laws of Delaware. Therefore, the exercise of personal jurisdiction over them appears to be proper and provides no basis for concluding that the Amended Counterclaim would be futile.

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[39] Pet'rs' Opp'n 14.

Petitioners further argue that this Court lacks personal jurisdiction over the Third Party Defendant, GEMR. They note that GEMR is a West Virginia corporation, does not transact any business in Delaware, and pointedly has ceased all operations in Delaware. Respondents, by contrast, allege that personal jurisdiction properly can be exercised over GEMR because it is a party to a conspiracy with Jerry and J.C. to use the dissolution process and GEMR's consignment relationship with GEI to defraud Jay.[40] Under the conspiracy theory of jurisdiction, the fact that GEMR, itself, may not have taken any action that warrants the exercise of personal jurisdiction over it in Delaware is not necessarily dispositive. Rather, GEMR still may be subject to jurisdiction here, because if it is found to be a member of the alleged conspiracy, the Delaware-related actions of the other co-conspirators may be attributed to it.[41]

To justify the exercise of personal jurisdiction over an alleged conspirator who is not present in Delaware, a claimant must show that:

> (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act

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[40] Although a question conceivably could be raised about the ability of a business entity to conspire with its controlling stockholders, courts in this state have recognized that it might be possible, for example, for a parent to conspire with a subsidiary. *Allied Capital Corp. v. G-C Sun Hldgs.*, 910 A.2d 1020, 1036 (Del. Ch. 2006). Thus, at this preliminary stage, I am unwilling to foreclose the possibility that an entity, such as GEMR, could enter into a conspiracy with its controlling shareholders.

[41] *Istituto Bancario Italiano SpA v. Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982).

> in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.[42]

In this case, Respondents have alleged facts that, if true, plausibly support their claim that a conspiracy existed between Jerry, J.C., and GEMR to defraud Jay by using the dissolution process to obtain proceeds from the sale of GEI in excess of those rightfully attributable to Jerry and J.C.'s ownership stake in GEI. Specifically, Respondents allege that Petitioners interfered, after the fact, with the Trustee's actions to assure potential bidders that certain motors and motor cores on consignment from GEMR to GEI would remain in GEI's possession and custody for at least some time past closing to enable the Buyer to effect an orderly transition of GEI's business. Jay allegedly relied on the Consignment Agreement being extended in a limited manner when he agreed to pay $700,000 in the APA. Respondents allege that, thereafter, Petitioners, on behalf of themselves and GEMR, sought to extract additional value from GEI by prematurely collecting the GEMR motors on consignment.

Respondents have alleged at least three actions taken in the state of Delaware or outside of Delaware that had a substantial effect in the state that plausibly further the

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[42] *Id.* at 225. Delaware courts have interpreted the first element broadly, *e.g.*, such that the existence of a conspiracy to defraud includes conspiracies to commit other wrongs, as well, such as torts or breaches of fiduciary duty. *See Benihana of Tokyo, Inc. v. Benihana, Inc.*, 2005 WL 583828, at *6 (Del. Ch. Feb. 4, 2005) (citing *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 977 (Del. Ch. Sept. 29, 2000). Thus, a conspiracy wrongfully to convert property of GEI arguably would satisfy that element.

alleged conspiracy to defraud Jay and obtain proceeds from the dissolution of GEI in excess of Petitioners' ownership percentages. First, Jerry and J.C. filed this action in this Court and participated in the dissolution proceedings; indeed, they stipulated to the dissolution. Second, Jerry and J.C. forcibly removed motors and motor cores from GEI's facilities in direct contravention, according to Respondents, of the Court's Orders, the Trustee's Plan, and the Addendum to the APA entered into by the Trustee. Third, GEMR, presumably at the behest of Jerry or J.C. or both, brought suit in West Virginia to pursue their claims regarding the dispute over the motor cores.

Petitioners' contested removal of the motor cores from GEI in Illinois in contravention of the operative Orders in this action arguably also would support the exercise of jurisdiction over GEMR under the agency theory of jurisdiction. Under that theory, a parent corporation (in essence a principal) could be subject to personal jurisdiction in a foreign forum if its subsidiaries (or agents) act on the parent's behalf or at the parent's direction.[43] By commencing this action in Delaware and stipulating to the dissolution of GEI, Petitioners intentionally set in process the actions that led to the appointment of the Trustee and his sale of GEI. Beginning on January 5, 2010, however, they allegedly wrongfully interfered with that sale. It is reasonable to infer from the allegations in Respondents' proposed amended pleadings that Jerry and J.C. took the actions on January 5 on behalf and for the benefit of GEMR; therefore, may have been acting as GEMR's agents. As previously discussed, Petitioners' actions in removing the

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[43] *Sprint Nextel*, 2008 WL 2737409, at *11-12.

motor cores support this Court's exercise of personal jurisdiction over Jerry and J.C.; therefore, under the agency theory, they also support asserting jurisdiction over GEMR.

While only Petitioners' filing of this litigation and their later stipulation to the dissolution of GEI actually took place in Delaware, the other two actions had a substantial effect in Delaware in furtherance of the alleged conspiracy. For example, they undercut the authority and actions taken by the Trustee appointed by this Court to wind up GEI's affairs and sell its assets. GEMR also had reason to know that the challenged actions had taken place and were in furtherance of the alleged conspiracy and that those acts and resultant effects were a direct and foreseeable result of the conduct in furtherance of the conspiracy. Thus, the proposed Amended Counterclaim and Third Party Complaint supports a reasonable inference that GEMR conspired with Jerry and J.C., in their capacities as members of GEI, and with those individuals and Jack Holcomb, as owners and management of GEMR, forcibly to remove the motor cores from GEI and thereby interfere with the implementation of the Trustee's sale of GEI's business to Jay and his new company, GMT.

Lastly, exercising personal jurisdiction over Jerry, J.C., and GEMR comports with due process. Jerry and J.C. either consented to personal jurisdiction in this Court or have waived any challenge to such jurisdiction. As to GEMR, under Delaware's long-arm statute, it is subject to jurisdiction here under both a conspiracy theory and an agency theory. Under the former, GEMR plausibly is a defendant who participated in a conspiracy with knowledge of its acts in or effects in Delaware and thereby purposely availed itself of the privilege of conducting activities in this state. As discussed *supra*,

Respondents have pled sufficient facts to support their claim that GEMR was a knowing and willing participant in a conspiracy to defraud Jay through the dissolution and winding up of GEI. The same is true as to the actions Jerry and J.C. allegedly took as agents of GEMR, thereby giving rise to the proposed new claims. In both cases, GEMR could be said to have fairly invoked the benefits and burdens of its laws.[44] Therefore, the exercise of personal jurisdiction over GEMR also meets the requirements of due process.

2. Forum non conveniens and forum selection

Under 10 *Del. C.* § 3104(l), "[i]n any cause of action arising from any of the acts enumerated in this section, the court may provide for a stay or dismissal of the action if the court finds, in the interest of justice, that the action should be heard in another forum." Moreover, a party claiming *forum non conveniens* must show that the party resisting litigation in Delaware would suffer "overwhelming hardship" if required to proceed in this jurisdiction.[45] In assessing whether "overwhelming hardship" is present, courts consider factors such as: (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; (5) the

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44 *See Chase Bank USA N.A. v. Hess Kennedy Chartered LLC*, 589 F. Supp. 2d 490, 501 (D. Del. 2008) (applying the conspiracy theory).

45 *See, e.g., Ison v. E.I. duPont de Nemours & Co., Inc.*, 729 A.2d 832, 837-38 (Del. 1999); *Chrysler First Bus. Credit Corp. v. 1500 Locus Ltd., P'ship*, 669 A.2d 104, 105 (Del. 1995).

pendency or non-pendency of other similar actions in another jurisdiction; and (6) all other practical problems associated with making any trial expeditious and inexpensive.[46]

Petitioners argue that Illinois is the most appropriate forum and that they and GEMR would suffer overwhelming hardship and unfair prejudice if they had to litigate the contested claims in Delaware. They also contend that Respondents' allegations do not trigger the application of Delaware law and that critical witnesses are located in other states. Further, Petitioners and GEMR claim that their due process rights would be violated and that litigating in Delaware would force them simultaneously to defend against similar claims in two separate jurisdictions. These arguments are unpersuasive, especially because Jerry and J.C. filed this action in the first place and GEMR is owned and managed by Jerry.

The first factor, the relative ease of access to proof, does little to support Petitioners' argument. What transpired on the morning that Jerry and J.C. removed the motors and motor cores appears largely undisputed. Rather, the disagreement centers on whether Jerry and J.C. lawfully were permitted to take such action. For similar reasons, the second and third factors, the availability of compulsory process for witnesses and the possibility of a view of the premises, fail to support Petitioners' claim that Delaware is an overwhelmingly inconvenient forum.[47] Two of the key Petitioner witnesses, Jerry and

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46 *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964), *rev'd on other grounds sub nom. Pepsico, Inc., v. Pepsi-Cola Bottling Co. of Asbury Park*, 261 A.2d 520, 521 (Del. 1969).

47 There is likely no need for the Court to view the premises.

J.C., already are parties to this suit. In addition, the Trustee is likely to have relevant information and he is located in Delaware. Accordingly, it is unlikely that there will be a need for compulsory process for more than a couple of secondary witnesses, and their depositions should be sufficient in the circumstances of this case.

The fourth factor, whether the controversy is dependent upon the application of Delaware law, weighs against a finding of *forum non conveniens*. While some aspects of claims relating to the allegedly tortious conduct of Jerry and J.C. may not involve Delaware law, Respondents' claims depend, at least in part, on whether the actions of Jerry, J.C, and GEMR violate this Court's Orders or the agreements entered into by the Trustee on behalf of GEI relating to its dissolution and sale. The latter questions are likely to turn on the application of Delaware law. Therefore, this Court has a strong interest in resolving the claims Respondents seek to assert in their Motion to Amend.

The fifth factor, whether there are similar actions pending in another jurisdiction, also is implicated in this case because of the pending suits in Illinois and West Virginia. Currently, there are two suits pending in Illinois: in one GEMR was granted a restraining order permitting it to collect the motors and cores from Jay and GMT, while the other involves GOI and issues relating to its real estate and possible dissolution. Only the first of those suits pertains to the claims at issue in the Motion to Amend, and there is no evidence that suit has progressed much beyond the pleadings stage. In addition, GEMR has asserted certain claims against GEI in continuing litigation in West Virginia—the

settlement of which was rejected in the November 30 Order of this Court.[48] The issues remaining in Respondents' proposed Amended Counterclaim and Third Party Complaint are relatively narrow and relate to matters central to the winding up of GEI, which has long been the subject matter of this action. In these circumstances, this Court is uniquely well-positioned to handle the dispute as to the allegedly wrongful removal of the motor cores because of its familiarity with this case and the potential necessity of evaluating those actions in light of this Court's Orders or the agreements of the Trustee.

Lastly, the sixth factor, whether there are other practical problems associated with making any trial expeditious and inexpensive, is not at issue here. Therefore, Petitioners have failed to demonstrate overwhelming hardship and I reject their argument that the Motion to Amend should be denied as futile on *forum non conveniens* grounds.

3. Are Respondents' proposed new claims otherwise futile?

Petitioners additionally suggest that the Trustee already has declined to pursue certain of the claims Respondents seek to add. That may have been true as to the breach of fiduciary duties claims, but Respondents no longer seek to add those claims.[49] It also is not clear that any of the remaining issues have been decided by this Court. Moreover, the Trustee's Report states that the "trustee takes no position on Jay Gould's new direct

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48 D.I. 59.

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claims against GEMR, Jerry Gould, and J.C. Gould."[50] Thus, there is no impediment to this Court reviewing the proposed new claims.

Petitioners also assert that the Motion should be denied because the new legal claims are of the sort that traditionally are excluded from dissolution actions, citing *Short v. McNatt*.[51] Yet, in that same case, Chancellor Allen adjudicated the additional claims before him. Here, I am not dealing with claims that arose before the petition for dissolution (such as a mismanagement claim). Rather, the claims Respondents seek to add involve actions allegedly taken in connection with or, depending on your viewpoint, in contravention of the dissolution process itself. Furthermore, I agree with Respondents that the Court should consider attempting to resolve the new claims before authorizing the Trustee to distribute additional funds to the parties. Therefore, I find that the unique facts and circumstances surrounding the claims at issue on the pending Motion warrant including them in this dissolution action.

In summary, I am not persuaded that Respondents' proposed amendment is futile. Petitioners also have not shown that they would suffer significant prejudice if the Motion is granted. Therefore, based on the arguments presented and the broad discretion granted

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[50] Trustee's Report 9. The extent to which the Trustee should be involved in resolving any of the new claims remains an open question. The Trustee recommends that he not be involved due to the dwindling assets of GEI. I will give that recommendation careful consideration as this action proceeds.

[51] 1991 WL 85839, at *656 (Del. Ch. May 20, 1991).

to the Court under Rule 15(a), I find that the interests of justice weigh in favor of granting Respondents' Motion.

III. CONCLUSION

For the reasons stated, Respondents' Motion to Amend is granted.

IT IS SO ORDERED.