IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CORPORATE PROPERTY ASSOCIATES 14 INCORPORATED and CORPORATE PROPERTY ASSOCIATES 15 INCORPORATED,	)	
Plaintiffs,	)	
v.	)	C.A. No. 3231-VCS
CHR HOLDING CORPORATION, PLATINUM EQUITY CAPITAL PARTNERS, L.P., PLATINUM EQUITY CAPITAL PARTNERS-A, L.P., PLATINUM EQUITY PARTNERS-PF, L.P., PLATINUM CHROMIUM PRINCIPALS, LLC, PLATINUM EQUITY LLC, EVA M. KALAWSKI; and JACOB KOTZUBEI,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: January 28, 2008
Date Decided: April 10, 2008

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STRINE, Vice Chancellor.

I. Introduction

The maxim silence is golden is not simply a goad to good manners at the local movie theater, it is good advice in many realms of life. For example, those are truly words of wisdom when you are not under a duty to speak and someone asks you a question that potentially touches upon information that you would rather not divulge. Here, plaintiffs Corporate Property Associates 14 and Corporate Property Associates 15 (collectively "Corporate Property Associates") held warrants in defendant CHR Holding Corporation, a wholly owned subsidiary of defendant "Platinum."[1] Those warrants did not require CHR to give Corporate Property Associates advance notice of cash dividends and did not protect the value of the warrants from being diluted through the payment of cash dividends. As such, CHR and Platinum had both the ability and the incentive to reduce the value of Corporate Property Associates' warrants by issuing large cash dividends from CHR to Platinum. In 2006 and 2007, CHR recapitalized by undertaking two large debt issuances and using the proceeds of those debt issuances to pay two large cash dividends.

What distinguishes this case from the traditional situation where one sophisticated party utilizes favorable contractual terms that it bargained for and obtained from another sophisticated party is a single question. Or more precisely, the answer to that question. A few weeks before the second dividend was issued, in the context of valuing its warrants for financial reporting purposes, Corporate Property Associates asked CHR to "[d]iscuss

[1] Platinum encompasses defendants Platinum Equity Capital Partners, L.P.; Platinum Equity Capital Partners-A, L.P.; Platinum Equity Partners-PF, L.P.; Platinum Chromium Principals, LLC; and Platinum Equity LLC. Compl. ¶¶ 8, 10.

any significant changes/developments related to the business over the course of the past six months."[2] Rather than remaining silent, Jacob Kotzubei, a CHR officer responding on CHR's behalf, provided an answer that omitted any reference to the second dividend or related refinancing that Corporate Property Associates alleges that "CHR was in the process of finalizing," and in fact issued within three weeks.[3] Corporate Property Associates contends that had CHR given what Corporate Property Associates views as the complete answer to that question, Corporate Property Associates would have chosen to exercise its warrants before that dividend was issued.

Corporate Property Associates asserts that CHR, Platinum, Kotzubei, and Eva M. Kalawski, CHR's sole director, breached their fiduciary duties to Corporate Property Associates by not providing advance disclosure of the cash dividends. I dismiss those claims because warrantholders are not owed fiduciary duties. Likewise, I dismiss the claim that CHR breached its implied obligation of good faith and fair dealing in the warrants. It would be an error to imply an advance notice of cash dividends term in the warrant contracts because the sophisticated parties who negotiated those contracts included terms addressing similar issues and chose not to include a term addressing advance notice of cash dividends. On the other hand, I do not dismiss Corporate Property Associates' fraud and negligent misrepresentation claims against CHR and Platinum to the extent those claims relate to the second dividend. At the motion to dismiss stage, viewing the facts alleged in the complaint in the light most favorable to Corporate

[2] *Id.* ¶ 33.
[3] *Id.* ¶¶ 21, 28.

Property Associates, CHR's response to Corporate Property Associates' question about "any significant changes/developments" was misleadingly incomplete. I do, however, dismiss the fraud and negligent misrepresentation claims against Kotzubei because I have dismissed the fiduciary duty claim and therefore this court cannot exercise personal jurisdiction over Kotzubei under Delaware's director and officer consent statute, 10 *Del. C.* § 3114.

II. Factual Background[4]

A. Corporate Property Associates Acquires The Warrants

Corporate Property Associates held three warrants[5] (the "Warrants") allowing it to exercise each warrant in whole or in part for up to 50,000 shares of CHR Holding Corporation stock (150,000 in total) at an exercise price of $10 per share.[6] The Warrants were acquired by Corporate Property Associates in 2004 in return for executing an amendment to a commercial lease for the Dallas, Texas headquarters of Compucom Systems, Inc., an operating company that was being acquired by CHR. That lease amendment allowed Compucom to avoid default under the lease when it converted from a publicly held corporation into a wholly owned subsidiary of CHR.[7]

[4] These facts are drawn exclusively from the complaint and the documents it incorporates.
[5] There are three warrants because one of the warrants originally was held by Corporate Property Associates 12, which has since merged into Corporate Property Associates 14. *Id.* ¶¶ 3, 12.
[6] *Id.* ¶ 12.
[7] *Id.* ¶¶ 9-11.

B. CHR Issues The First Dividend

On October 9, 2006, CHR paid a $45 million cash dividend (the "First Dividend") to Platinum, its sole stockholder.[8] CHR declared the First Dividend without providing notice to Corporate Property Associates, its Warrantholder.[9] Corporate Property Associates alleges that if it had received prior notice of the First Dividend, it would have exercised the Warrants and earned $1,015,038 by receipt of dividends.[10] After Corporate Property Associates learned about the First Dividend, it demanded the right to participate in that dividend. In November 2006, Kotzubei responded on behalf of CHR and Platinum by requesting a purchase option for Compucom's headquarters and stated: "I am confident that if we can reach an agreement on [that] topic, we would treat you as if you had participated in the distribution we discussed."[11] Corporate Property Associates refused CHR's proposal.

C. Corporate Property Associates Sends A Questionnaire To CHR

In May 2007, Corporate Property Associates sought the information it needed to value the Warrants for public reporting purposes by sending a questionnaire to CHR (the "May Questionnaire").[12] The May Questionnaire contained seven questions, which were primarily backward looking.[13] The questions covered topics such as how many shares of common stock were outstanding on March 31, 2007 and whether CHR had paid any

[8] *Id.* ¶ 13.
[9] *Id.* ¶ 16.
[10] *Id.* ¶ 17.
[11] *Id.* ¶ 19.
[12] *Id.* ¶¶ 26-27.
[13] CHR Op. Br. Ex. 2.

dividends over the course of the previous year. One question asked CHR to "[d]iscuss any significant changes/developments related to the business over the course of the past six months."[14] When Kotzubei drafted CHR's response to the Questionnaire on May 7, 2007, he answered that question as follows:

> Compucom Systems, Inc. completed a refinancing by placing $175,000,000 million [sic] in bonds proceeds of which were used to repay $107,500,000 in existing indebtedness, pay a $45,000,000 dividend to its sole stockholder CHR Holding Corporation and provide working capital funds.[15]

Implicit in that answer was that the $45 million dividend was not a traditional dividend paid out of operating cash flow but rather a recapitalization.

D. CHR Issues The Second Dividend

Less than three weeks after CHR answered the May Questionnaire, CHR paid another large cash dividend, this time in the amount of $143 million, (the "Second Dividend") to its sole stockholder, Platinum.[16] As with the First Dividend, CHR did not provide advance notice of the Second Dividend to Corporate Property Associates. Corporate Property Associates alleges that at the time CHR answered the May Questionnaire, "CHR was in the process of finalizing a refinancing and capital restructuring in order to allow CHR to pay the $143 million dividend."[17] According to Corporate Property Associates, if it had known about the Second Dividend before the

[14] *Id.*; Compl ¶ 33.
[15] Compl. ¶ 33. Corporate Property Associates alleges that the answer was inaccurate because the $45 million dividend occurred more than six months before the date CHR answered the May Questionnaire. *Id.* ¶ 34. Corporate Property Associates does not, however, explain how that allegation is relevant to any of its claims.
[16] *Id.* ¶¶ 21, 23. The exact date the Second Dividend was paid is not stated in the complaint, but the general timeframe can be determined from the alleged facts that the record date for that dividend was May 17, 2007 and it had been paid by May 24, 2007.
[17] *Id.* ¶ 28.

May 17 record date for that dividend, it would have exercised the Warrants.[18] Corporate Property Associates also alleges that it justifiably relied on CHR's response to the May Questionnaire and its silence about the Second Dividend when it refrained from exercising the Warrants.[19] Corporate Property Associates contends that if it had exercised the Warrants before the record date for the Second Dividend, it would have earned $3,225,564.[20]

Less than two months after paying the Second Dividend, CHR notified Corporate Property Associates by letter that it had entered into a Plan of Merger pursuant to which CHR would be sold for $606,600,000 in cash, less certain specified adjustments.[21] That letter also informed Corporate Property Associates that CHR was exercising certain "drag along" rights contained in the Warrants to require Corporate Property Associates to exercise the Warrants and participate in the merger.[22] Corporate Property Associates alleges that had the First and Second Dividends not been issued and the corresponding debt not been incurred, it would have received materially greater merger consideration.[23] Comparing the total of the two dividends with the merger consideration supports that assertion — the amount paid out in the cash dividends was over thirty percent of the ultimate merger consideration.

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[18] *Id.* ¶ 36.
[19] *Id.* ¶ 38.
[20] *Id.* ¶ 37. In calculating this amount, Corporate Property Associates assumes that it would have paid the exercise price for the Warrants in connection with the First Dividend.
[21] *Id.* ¶ 41.
[22] *Id.*
[23] *Id.*

E. Corporate Property Associates Sues CHR Over The Dividends

On September 17, 2007, Corporate Property Associates filed suit in this court demanding damages, an order declaring the First and Second Dividends void, and rescission of those dividends. The complaint contains four counts. Count I alleges that CHR, Platinum, and Kotzubei committed fraud by making misrepresentations of material facts and omitting to disclose material facts that would have influenced Corporate Property Associates' decision to exercise the Warrants. Count II alleges negligent misrepresentation by the same defendants. Count III alleges a breach of the implied covenant of good faith and fair dealing in the Warrants by CHR. Count IV alleges that all the defendants owed a fiduciary duty to the holders of the Warrants and that the defendants breached that fiduciary duty.

III. Procedural Framework

The defendants have moved to dismiss the claims against them for failure to state a claim upon which relief may be granted. When addressing a motion to dismiss under Court of Chancery Rule 12(b)(6), I must assume the truthfulness of all well-pled facts in the complaint and draw all reasonable inferences in the light most favorable to Corporate Property Associates, the nonmoving party.[24] But conclusory allegations that are unsupported by facts contained in the amended complaint will not be accepted as true.[25] After evaluating the complaint in this manner, I must dismiss any claim that Corporate

[24] *E.g.*, *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).
[25] *E.g.*, *Hughes*, 897 A.2d at 168 (quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995)).

Property Associates would not be entitled to recover upon under any reasonable set of facts properly supported by the complaint.[26]

The defendants also moved to dismiss the complaint pursuant to Court of Chancery Rule 9(b). Rule 9(b) requires that circumstances constituting fraud be pled with particularity.

Defendants Kalawski and Kotzubei have also moved to dismiss the claims against them under Chancery Court Rule 12(b)(2) for lack of personal jurisdiction and under Rule 12(b)(5) for insufficient service of process.

IV. Legal Analysis

A. The Fiduciary Duty Claim

Corporate Property Associates' assertion that the defendants owed a fiduciary duty to the Warrantholders is contrary to settled Delaware law. As this court recently summarized in *Feldman v. Cutaia*, "[t]he Delaware Supreme Court has consistently held that directors do not owe fiduciary duties to future stockholders."[27] Warrantholders' "rights are wholly contractual."[28] Therefore, "[t]he exclusive rights and remedies of warrantholders must appear in the contractual provisions of the Warrants."[29]

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[26] *E.g.*, *Hughes*, 897 A.2d at 168 (quoting *Savor*, 812 A.2d at 896-97).
[27] 2006 WL 920420, at *6 n.37 (Del. Ch. Apr. 5, 2006).
[28] *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1263 (Del. 2004) (internal quotation omitted).
[29] *Id.*; *cf. North Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 99 (Del. 2007) ("While shareholders rely on directors acting as fiduciaries to protect their interests, creditors are afforded protection through contractual agreements, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law and other sources of creditor rights.").

In *Simons v. Gogan*, the Delaware Supreme Court held that "a convertible debenture represents a contractual entitlement to the repayment of a debt and does not represent an equitable interest in the issuing corporation necessary for the imposition of a trust relationship with concomitant fiduciary duties."[30] In so holding, the court rejected the argument that the "expectancy interest created by the conversion feature of the debenture" resulted in the imposition of fiduciary duties under Delaware law because "a mere expectancy interest does not create a fiduciary relationship."[31] Despite Corporate Property Associates' attempt to distinguish *Simons* because that opinion addressed convertible debentures as opposed to warrants, the same analysis applies — the convertibility of the warrants does not result in the imposition of fiduciary duties.[32] The Delaware Supreme Court validated the application of the *Simons* analysis to warrantholders in *Glinert v. Wickes* when, in affirming the Court of Chancery opinion in that case, it specifically noted that it did not approve of a portion of the Court of Chancery opinion that suggested that fiduciary duties might be owed to warrantholders.[33]

Corporate Property Associates contends that even if warrantholders are not owed a fiduciary duty, they are allowed to seek extra-contractual, equitable relief for special

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[30] 549 A.2d 300, 303 (Del. 1988).
[31] *Id.* at 304 (citing *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171 (Del. 1988)).
[32] *See Aspen Advisors*, 861 A.2d at 1263 ("Just like convertible debentures — the holders of which are also not stockholders — the 'convertibility feature' of warrants does not impart stockholder status unless and until the warrant is converted.") (citing *Simons*, 549 A.2d at 303).
[33] *Glinert v. Wickes Cos.*, 586 A.2d 1201, 1990 WL 254353, at *1 (Del. 1990) (TABLE) (citing *Simons*, 549 A.2d 300, and *Cont'l Airlines Corp. v. Am. Gen. Corp.*, 575 A.2d 1160 (Del. 1990)); *see also Cont'l Airlines*, 575 A.2d at 1168 ("We emphasize that this holding [giving a right to a warrantholder] *does not* rest on any notions of fiduciary duty. Rather, [the warrantholder's] right to the same fair price for its shares payable to other shareholders is based solely on its contractual rights . . . .") (emphasis in original).

circumstances affecting their rights as Warrantholders. They cite the following statement in *Harff v. Kerkorian* for that proposition:

> It is apparent that unless there are special circumstances which affect the rights of the debenture holders *as creditors* of the corporation, e.g., fraud, insolvency, or a violation of a statute, the rights of the debenture holders are confined to the terms of the Indenture Agreement pursuant to which the debentures were issued.[34]

But that statement does nothing to sustain Corporate Property Associates' fiduciary duty claims. That statement addressed debenture holders as creditors and not the convertible portion of debentures that can be analogized to warrants.[35] No issue of creditor rights is presented here.[36] Moreover, as then-Vice Chancellor, now-Justice Jacobs stated in *Continental Illinois National Bank & Trust Co. v. Hunt International Resources Corp.*, *Harff* does not preclude the dismissal of a fiduciary duty claim simply because a fraud claim is also alleged.[37] That is logical; all *Harff's* reference to fraud means is that a debenture holder may possess tort-based fraud claims in addition to contract claims.

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[34] *Harff v. Kerkorian*, 324 A.2d 215, 222 (Del. Ch. 1974) (emphasis added), *aff'd in part*, *rev'd in part*, 347 A.2d 133 (Del. 1975).

[35] *See* WILLIAM M. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2649.10 (2006) ("Convertible debentures exhibit characteristics of both debt and equity securities. The conversion right, although set forth in the debenture and the indenture, is separate and distinct from the debt evidenced by the debenture . . . .").

[36] In this regard, it is notable that recent decisions of the Delaware Supreme Court and this court have clarified the question of when creditors may seek to hold corporate directors accountable for the fiduciary duties the directors owe to the corporation, substantially narrowing the contexts and types of claims creditors may assert. *See Gheewalla*, 930 A.2d 92 (Del. 2007), *aff'g*, 2006 WL 2588971 (Del. Ch. Sept. 1, 2006); *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007) (TABLE).

[37] 1987 WL 55826, at *3-4 (Del. Ch. Feb. 27, 1987) ("As I read *Harff*, that case holds that (i) a debenture holder has no independent right to maintain a claim for breach of fiduciary duty, and (ii) in the absence of fraud, insolvency or a statutory violation, a debenture holder's rights are defined by the terms of the indenture. I therefore concur in the interpretation of *Harff* in *Norte & Co.*, *viz.*, that a debenture holder may not maintain a claim for breach of fiduciary duty (as

I dismiss Corporate Property Associates' fiduciary duty claims because fiduciary duties are not owed to warrantholders.

B. The Good Faith And Fair Dealing Claim

The implied covenant of good faith and fair dealing attaches to every contract and "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain."[38] "Thus, parties are liable for breaching the covenant when their conduct frustrates the 'overarching purpose' of the contract by taking advantage of their position to control implementation of the agreement's terms."[39] "Only when it is clear from the writing that the contracting parties would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter may a party invoke the covenant's protections."[40] In other words, the implied covenant of good faith and fair dealing should not be applied to give the plaintiffs contractual protections that "they failed to secure for themselves at the bargaining table."[41]

Corporate Property Associates alleges that CHR breached the implied covenant of good faith and fair dealing because CHR did not provide Corporate Property Associates with timely and accurate information that was material to Corporate Property Associates'

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distinguished from fraud) against the issuing corporation and its directors.") (internal citation omitted); *see also Norte & Co. v. Manor Healthcare Corp.*, 1985 WL 44684, at *5 (Del. Ch. Nov. 1, 1985) (refusing to interpret *Harff* as allowing a debenture holder to "maintain a breach of fiduciary duty claim, at least where it 'sounds in fraud'").

[38] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (internal quotation omitted).

[39] *Id.*

[40] *Id.*

[41] *Aspen Advisors*, 861 A.2d at 1260 (quoting *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d at 697, 707 (Del. Ch. 2004)).

decision of when, if ever, they should exercise the Warrants. Corporate Property Associates claims that the Warrants reflect "the parties' intention to cooperate in good faith to preserve and maximize [Corporate Property Associates'] economic interests in the Warrants, particularly upon the occurrence of a liquidity event."[42] They cite the provisions in the Warrants designed to protect the economic value of the Warrants in the case of stock dividends and liquidity events such as mergers.[43] The protection in the instance of proposed liquidity events includes a requirement that CHR provide notice to the Warrantholder of such events and even goes so far as to state that if necessary to consummate a liquidity event, the parties will work together in good faith to use means not provided for in the Warrants to balance the goals of "preserv[ing] for the [Warrantholder] the economic value of th[e] Warrant[s] while also ensuring that the Company has the maximum freedom to structure and consummate a Liquidity Event."[44] What Corporate Property Associates does not cite, however, is any provision in the Warrants that protects the economic value of the Warrants against cash dividends. Instead, Corporate Property Associates asks me to fill that gap using the implied covenant of good faith and fair dealing.

The problem with that argument is that a court cannot and should not use the implied covenant of good faith and fair dealing to fill a gap in a contract with an implied term unless it is clear from the contract that the parties would have agreed to that term had they thought to negotiate the matter. The protections that Corporate Property

[42] Corporate Property Associates Ans. Br. at 20.
[43] CHR Op. Br. Ex. 1 §§ 3.2, 4.
[44] *Id.* §§ 4.3, 4.4.

Associates cites in the contract convince me that the parties thought about and negotiated anti-dilution provisions. The parties agreed to protect the Warrants against dilution by stock dividend. They even created a broad gap-filling provision for liquidity events because they anticipated that the structure and exact details of such events are often difficult to predict in advance. Issuing cash dividends, however, is a simple and well-known dilution technique.[45] Sophisticated parties such as those involved in this transaction know that cash dividends are a dilution technique, that the only protection against dilution is contractual, and that there are methods for protecting themselves contractually.[46] Because the Warrants evidence negotiation over anti-dilution provisions and because issuing a cash dividend is a dilution event well-known by sophisticated parties such as those involved in this transaction, the only reasonable inference to be drawn from the Warrants' silence on this point is that the parties did not agree to protect

[45] *See Harff*, 324 A.2d at 222 ("[T]he legal payment of large cash dividends is a valid means by which a corporation can discourage convertible debenture holders from exercising their right to convert their debentures into common stock.").

[46] *See, e.g.*, Marcel Kahan, *Anti-Dilution Provisions in Convertible Securities*, 2 STAN. J.L. BUS. & FIN. 147, 148 (1995) ("The most direct method of transferring wealth from holders of convertible securities to shareholders is to reduce the price of the underlying common stock through a payout to the shareholders. Such a payout can be structured in three ways: a stock split, a dividend payment, or a share repurchase at a premium over the market price. Courts have held that protection against such measures is purely a matter of contract. Thus, absent adequate contractual protection, holders of convertible securities risk severe losses if the issuing company engages in equity-dilutive measures."); WILLIAM M. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2649.10 (2006) ("Since the holder of a [convertible] debenture has none of the rights of a shareholder, the value of this conversion privilege is subject to 'dilution,' or obliteration, by acts of the corporation that would keep the market price of the stock below the conversion figure. Accordingly, the indenture may contain an 'antidilution' provision designed to protect debenture holders from corporate attempts to minimize their investments. Generally, absent such contractual limitation on the corporation's activities, there is no common-law protection for the debenture holders from whatever steps the corporation might take that could result in the diminution in value or practical extinction of the conversion right.").

the Warrants against dilution by cash dividends.[47] Using the implied covenant of good faith and fair dealing to imply contractual protection from dilution by cash dividends "would be to grant [Corporate Property Associates], by judicial fiat, contractual provisions that they failed to secure for themselves at the bargaining table."[48] Therefore, I dismiss Corporate Property Associates' implied covenant of good faith and fair dealing claim.

C. The Fraud Claim

The elements of common law fraud are well-known.[49] A claim of common law fraud can arise from three types of conduct: (1) a representation of false statements as true; (2) active concealment of facts that prevents their discovery; or (3) remaining silent in the face of a duty to speak.[50] Here, Corporate Property Associates' fraud claim alleges active concealment and remaining silent in the face of a duty to speak.

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[47] *See Aspen Advisors*, 861 A.2d at 1260 (quoting *Aspen Advisors*, 843 A.2d at 707) ("When, as is the case here, the relevant contracts expressly grant the plaintiffs certain rights in the event of particular transactions (such as mergers and, if they had exercised their warrants, certain changes in control), the court cannot read the contracts as also including an implied covenant to grant the plaintiff additional unspecified rights in the event that other transactions are undertaken."); *see also Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006) ("[C]ourts should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it.").

[48] *Aspen Advisors*, 861 A.2d at 1260 (quoting *Aspen Advisors*, 843 A.2d at 707); *see also Lohnes v. Level 3 Commc'ns, Inc.*, 272 F.3d 49, 62 (1st Cir. 2001) ("[A] warrantholder's right to insist that the corporation maintain the integrity of the shares described in the warrant, if it exists at all, must be found in the text of the warrant itself. . . . Because the warrant contained no provision that even arguably required Level 3 to furnish individualized notice of the stock split to the appellant, the failure to give such notice could not constitute a breach of the implied duty of good faith and fair dealing.").

[49] *See, e.g.*, *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (listing the elements of a cause of action for common law fraud).

[50] *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 143 (Del. Ch. 2004) (citing *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983)).

1. Fraud By Silence In The Face Of A Duty To Speak

The law of fraud by silence in the face of a duty to speak reflects a policy determination that mere silence about facts material to another party is not fraud unless the party who remains silent has a duty to disclose those facts. In other words, there is no duty to speak absent special circumstances.[51] The duty to speak can arise from the relationship between the parties, such as where there is a fiduciary relationship between them.[52] As determined previously, that circumstance does not apply here. But another circumstance does. Although one can choose to remain silent, the choice to speak exposes the speaker to liability if his words are materially misleading. In other words, once a party chooses to speak, he can be held liable if he makes "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter."[53] This

[51] *See, e.g.*, *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *5 (Del. Ch. May 16, 2007) ("Delaware law generally does not impose a duty to speak.") (citing *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 150 (Del.1987)); *see also* RESTATEMENT (SECOND) OF TORTS § 551 cmt. a (1977) ("Unless he is under some one of the duties of disclosure stated in Subsection (2), one party to a business transaction is not liable to the other for harm caused by his failure to disclose to the other facts of which he knows the other is ignorant and which he further knows the other, if he knew of them, would regard as material in determining his course of action in the transaction in question.").

[52] *See, e.g.*, *MetCap Sec. LLC*, 2007 WL 1498989, at *5 ("Generally, a duty to disclose arises when there is a fiduciary or other similar relationship of trust between the parties or where the custom or course of dealing between the parties merits disclosure.").

[53] RESTATEMENT (SECOND) OF TORTS § 529 (1977); *see also Metro Commc'n Corp. BVI*, 854 A.2d at 154. As I have noted before, it is somewhat misleading to categorize this theory of fraud under the rubric of silence in the face of a duty to speak because a defendant cannot be liable for truly remaining silent — it only arises where the defendant makes an incomplete assertion. *Id.* at 155 n.76.

requirement is often described as the "duty to make a full and fair disclosure as to the matters about which [one] assumes to speak."[54]

Because I have already found that there was no duty to disclose the dividends in advance based on fiduciary duty or the warrant contracts themselves, the viability of Corporate Property Associates' fraud by nondisclosure claim depends on whether CHR had a duty to disclose information about the Second Dividend and related refinancing due to the requirement to make full and fair disclosure as to matters about which one undertakes to speak. Corporate Property Associates alleges that CHR's response to the May Questionnaire's prompt to "[d]iscuss any significant changes/developments related to the business over the course of the past six months" was misleadingly incomplete because it did not discuss the refinancing that "was in the process of being finalized" and the Second Dividend that "CHR had already proposed to pay."[55] CHR puts forth two reasons that it was not misleading for CHR's answer not to disclose anything about the Second Dividend and related refinancing. First, the Second Dividend and related refinancing were not finalized at the time CHR responded to the May Questionnaire. Second, the May Questionnaire was purely a backward-looking questionnaire for the purpose of valuing the warrants in Corporate Property Associates' financial statements.

The parties' contentions can be distilled to a dispute over the meaning of the phrase "significant changes/developments." A change is "the act, process, or result of

[54] *Lock v. Schreppler*, 426 A.2d 856, 860 (Del. Super. 1981), *superseded by statute on other grounds*.
[55] Compl. ¶¶ 33, 35.

altering or modifying,"[56] and a development is "a significant event, occurrence, or change" or "the act of developing," which means "bring[ing] from latency to or toward fulfillment."[57] What becomes clear in examining at the definitions of "change" and "development" is that those terms could plausibly be interpreted to encompass not only a final result but also the process of achieving that final result. Therefore, I cannot conclude that Corporate Property Associates has not pled a claim for fraud without making fine linguistic determinations that would be inappropriate at the pleading stage.

By alleging that CHR had "proposed to pay" the Second Dividend and that the refinancing was in the "process of being finalized," Corporate Property Associates has alleged that the issuance of a Second Dividend for $143 million just three weeks later and the resulting transformation of CHR's financial structure was a significant alteration or event that was far along in process at the time CHR answered the May Questionnaire. When asked about "any significant changes/developments related to the business over the course of the past six months," CHR could have remained silent. After all, CHR correctly contends that it did not have a contractual or fiduciary duty to disclose the requested information. But rather than choosing not to address Corporate Property Associates' inquiry, CHR answered the question without discussing the Second Dividend

[56] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 310 (4th ed. 2000); *see also* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 226 (1988) (defining change as "the act, process, or result of changing"); COMPACT OXFORD ENGLISH DICTIONARY (3d ed. 2005), *available at* http://www.askoxford.com/concise_oed/change? (defining change as "the action of changing" or "an instance of becoming different").

[57] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 496 (4th ed. 2000); *see also* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 347 (1988) (defining development as "the act, process, or result of developing"); COMPACT OXFORD ENGLISH DICTIONARY (3d ed. 2005), *available at* http://www.askoxford.com/concise_oed/development? (defining development as "a new product or idea" or "a new stage in a changing situation").

or the related refinancing. The logical inference from CHR's answer, which Corporate Property Associates has alleged that it relied on, is that there were no significant changes/developments occurring at CHR other than those that were disclosed. If what Corporate Property Associates alleges is true, that omission could support a claim of fraud by nondisclosure.

CHR argues that "[a] finding of fraudulent nondisclosure requires a failure of a disclosure of known facts . . . . [A] mere intention to perform an act in the future cannot be considered a 'known fact' because a party's intention to perform may never materialize into actual performance, and there is no obligation as to one's intention or expectation."[58] This argument fails because, viewing Corporate Property Associates' allegations under the liberal Rule 12(b) standard, the scope of its question included whether CHR was in the process of making any changes, which it alleges was a known fact at the time CHR answered the May Questionnaire.

It may be that discovery will reveal that CHR reasonably believed that the May Questionnaire was entirely backward-looking, that the Second Dividend was not under serious contemplation at the time it answered that Questionnaire, or that some exculpatory circumstances will be indisputably present. But, for now, there is a

[58] 37 AM. JUR. 2D *Fraud & Deceit* § 201 (2008). Moreover, the case underlying the source that CHR cites for this proposition is readily distinguishable from this case. *See Pospisil v. Pospisil*, 757 A.2d 655 (Conn. App. 2000). In that case, the alleged omission was the plaintiff's "harbored, but never disclosed, . . . intention to remarry at some point after the dissolution of her marriage." *Id.* at 658. Critically, the court observed that "[a]t no point during the dissolution proceedings, however, did the court or the defendant ever question the plaintiff about her intentions to remarry." *Id.* In contrast, the central allegation here is that Corporate Property Associates asked a question that plausibly included within its scope CHR's plan and progress in toward the Second Dividend.

reasonable inference that CHR was in the final throes of implementing a large dividend, knew that Corporate Property Associates would exercise its warrants promptly if told of that development, and consciously decided to omit that development from its response to the May Questionnaire. Regardless of the scienter requirement,[59] these circumstances state a claim for fraud in the face of a duty to speak.

2. Active Concealment

Corporate Property Associates also contends that its complaint states a claim under the so-called "active concealment" doctrine. That doctrine is often invoked by late-filing plaintiffs attempting to excuse their failure to file a claim within the statute of limitations.[60] To plead active concealment, a plaintiff must allege facts supporting an inference that the "defendant took some action affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraud claim, some artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry."[61]

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[59] In this regard, several plaintiff-friendly inferences that I must draw cut against the defendants. Platinum was in firm control of CHR and could effectively decide to pay the dividend so long as it could get financing. Given that CHR responded to the May Questionnaire a mere three weeks before Second Dividend was paid, it is fair to infer that the planning for the Second Dividend was well underway. As important, by the time CHR answered the May Questionnaire, it knew that Corporate Property Associates was interested in the question of dividends from its prior demand to participate in the First Dividend, raising an inference that CHR did not want to tip Corporate Property Associates that another dividend, especially one that was three times the amount of the First Dividend, was coming.

[60] *See, e.g.*, *Reed v. Delaware Trust Co.*, 1995 WL 317013, at *2 (Del. Ch. May 19, 1995) (explaining that active concealment tolls the running of "the statute of limitations period . . . until the plaintiff knew or had reason to know of the facts constituting the alleged wrong").

[61] *Metro Commc'n Corp. BVI*, 854 A.2d at 150 (quoting *Schreppler*, 426 A.2d at 860, and citing *Stephenson*, 462 A.2d at 1074, for its reference to *Schreppler* as addressing "concealment of material facts"); *see also* RESTATEMENT (SECOND) OF TORTS § 550 (1977) ("One party to a

In this context, I do not believe that the active concealment doctrine can be invoked to support a recovery unless Corporate Property Associates can show that CHR's response to the May Questionnaire was materially misleading because it was materially incomplete. That is, Corporate Property Associates can recover only if it shows that the May Questionnaire can be fairly read as calling for CHR to report on a large special dividend that CHR was well along in implementing, that it actually believed its May Questionnaire would cover and require CHR to provide a response regarding a dividend in planning, and that it relied upon the absence of disclosure in deciding not to exercise its Warrants. In other words, CHR can only be thought to have actively concealed the fact of a dividend if, in choosing to speak rather than remain silent, it gave a materially misleading answer upon which Corporate Property Associates relied to its detriment.[62] In fact, to invoke the active concealment doctrine, Corporate Property Associates will have to show that CHR acted with scienter, in the sense that its silence about the planned Second Dividend was "designed or intended to prevent" Corporate Property Associates from learning about the Second Dividend until after it was issued.[63] In this particular

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transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering."); 37 AM. JUR. 2D *Fraud and Deceit* § 203 (2008) ("An 'active concealment' is either a representation good as far as it goes, but accompanied by such a suppression of facts as to make it convey a misleading impression or an attempt by one party to draw the other's attention from a fact or to cover it from view.").

[62] *See Schreppler*, 426 A.2d at 861 (noting that active concealment, as form of common law fraud, requires "intentional deception of the plaintiff by the defendant, which the plaintiff relies upon to his detriment").

[63] *Metro Commc'n Corp. BVI*, 854 A.2d at 150. Scienter is, of course, a critical element of all manifestations of common law fraud. *Metro Commc'n Corp. BVI*, 854 A.2d at 143 ("[A]ll three types of fraud require a certain level of scienter on the part of the defendant; a misrepresentation

context, that may involve Corporate Property Associates proving that it relied on the CHR's decision to answer the May Questionnaire and accepted the information provided as materially complete and accurate, and that it would have pressed to learn more if CHR had stonewalled by refusing to answer the May Questionnaire.[64]

I am not persuaded that the active concealment theory of fraud as applied here is any different than the fraud by silence in the face of a duty speak theory based on CHR's duty to provide materially complete information once it voluntarily chose to speak in a situation when it could have remained silent. The parties have not dwelled on the prosciutto-thin distinctions between these theories, if there be any. At bottom, a fraud claim is stated and for present purposes, that is sufficient.

D. The Negligent Misrepresentation Claim

In addition to its fraud claim, Corporate Property Associates has asserted a negligent misrepresentation claim. "To successfully assert a claim for negligent misrepresentation [the plaintiff] must adequately plead that (1) the defendant had a pecuniary duty to provide accurate information, (2) the defendant supplied false

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must be made either knowingly, intentionally, or with reckless indifference to the truth.") (quoting *DRR, L.L.C. v. Sears, Roebuck & Co.*, 949 F. Supp. 1132, 1137 (D. Del. 1996)).

[64] The need to show that CHR's allegedly misleadingly incomplete answer dissuaded further investigation by Corporate Property Associates flows from the particular theory of active concealment that Corporate Property Associates contends applies in this case. One situation in which the active concealment doctrine is commonly applied is active concealment of a defect by, for example, painting over a defect or burying defective products in the middle of a pile. *See* RESTATEMENT (SECOND) OF TORTS § 550 cmt. a (1977). That application of the active concealment doctrine is not applicable here. Instead, the other situation in which active concealment is commonly applied is the relevant scenario. In that scenario, the defendant does or says something that "successfully prevents the plaintiff from making an investigation that he would otherwise have made, and which, if made, would have disclosed the facts; or . . . the defendant frustrates an investigation." *Id.* cmt. b.

information, (3) the defendant failed to exercise reasonable care in obtaining or communicating the information, and (4) the plaintiff suffered a pecuniary loss caused by justifiable reliance upon the false information."[65] Thus, a negligent misrepresentation claim, like an equitable fraud claim,[66] is in essence a fraud claim with a reduced state of mind requirement. Scienter is replaced by negligence, but the doctrine requires additional elements to compensate for this significant concession. The primary policy trade-off for the reduction in the state of mind required to recover is that the law pares down the class of potentially liable defendants to those with a pecuniary duty to provide accurate information.[67] It is therefore unsurprising that the parties' dispute over the negligent misrepresentation claim involves whether the pecuniary duty requirement is satisfied.[68]

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[65] *Steinman v. Levine*, 2002 WL 31761252, at *15 (Del. Ch. Nov. 27, 2002).

[66] *Mark Fox Group, Inc. v. E.I. duPont de Nemours & Co.*, 2003 WL 21524886, at *5 n.15 (Del. Ch. July 2, 2003) ("The count at issue was entitled 'equitable fraud,' but it is well known that such a term refers interchangeably to claims based on negligent or innocent misrepresentation.").

[67] RESTATEMENT (SECOND) OF TORTS § 552 cmt. c (1977); *see also id.* § 552(2) & cmt. a (limiting the scope of permissible plaintiffs to "the person or one of a limited group of persons for whose benefit and guidance [the information provider] intends to supply the information or knows that the recipient intends to supply it").

[68] At oral argument, it became clear that the parties had not focused on the question of how literally the words "false information" that are contained in both Delaware's and the Restatement's articulation of the negligent misrepresentation doctrine are to be taken. *See Steinman v. Levine*, 2002 WL 31761252, at *15 (Del. Ch. Nov. 27, 2002); RESTATEMENT (SECOND) OF TORTS § 552 (1977). To wit, does it apply to information that, while not literally false, is materially incomplete? One can conceive of a policy argument that the false information requirement should be read narrowly to capture only literally untrue statements, precisely because the negligent misrepresentation doctrine dilutes the scienter requirement to mere negligence. The doctrine of fraud by nondisclosure — which includes the scienter component of common law fraud — addresses those situations where liability for omissions would be desirable. *See* RESTATEMENT (SECOND) OF TORTS § 526 cmt. d (1977) ("The fact that the misrepresentation is one that a man of ordinary care and intelligence in the maker's situation would have recognized as false is not enough to impose liability upon the maker for a fraudulent misrepresentation under the rule stated in this Section, but it is evidence from which his lack of

The pecuniary duty requirement limits the reach of the negligent misrepresentation doctrine by making that doctrine only applicable in situations where the defendant makes a "representation in the course of a business or a transaction in which the defendant has a pecuniary interest."[69] In situations where the defendant information provider expects to profit from the course of conduct in which he provides the information, he can reasonably be expected to take reasonable care in providing that information. Likewise, imposing a duty of reasonable care on such an information provider is unlikely to discourage the information provider from supplying the information because he has economic incentive to do so. Thus, it makes sense that a bank has a pecuniary duty to provide accurate information to its account holders. From this, one can discern that the purpose of the

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honest belief may be inferred."). But given the lack of briefing, consideration of this question should be deferred to a later stage of this matter, which will proceed to discovery in any event.

[69] 26 RICHARD A. LORD, WILLISTON ON CONTRACTS § 69:28 (4th ed. 2003); *see also* RESTATEMENT (SECOND) OF TORTS § 552 cmt. c (1977) (stating liability for negligent misrepresentations "applies only when the defendant has a pecuniary interest in the transaction in which the information is given"). I acknowledge that dicta in footnotes in two recent decisions by this court described the pecuniary duty requirement as requiring "a particular duty to provide accurate information, based on the plaintiff[']s pecuniary interest in that information." *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 147 n.44 (Del. Ch. 2003); *see also Vague v. Bank One Corp.*, 2006 WL 290299, at *7 n.61 (Del. Ch. Feb. 1, 2006). That those decisions did not focus on which party's pecuniary interest was necessary to create a pecuniary duty in the context of commercial transactions is understandable — in the context of most commercial transactions, both parties have a pecuniary interest in the transaction. RESTATEMENT (SECOND) OF TORTS § 552 cmt. d (1977) ("The fact that the information is given in the course of the defendant's business, profession or employment is a sufficient indication that he has a pecuniary interest in it."); *see Vague*, 2006 WL 290299, at *7 n.61 ("[T]he full relationship between the Bank and Vague, one based on employment contract, the Bank's commitment to help in arranging an orderly departure, and the special assistance routinely provided by the Bank to senior executives, precludes, in equity, any effort by the Bank to avoid responsibility for any misrepresentations simply by claiming that Walker had not expressly informed Lindsay that Vague would be relying on the fruits of his conversation."). The usage in those decisions may also have been a way of saying that the plaintiffs were persons "for whose benefit and guidance" the defendants with a pecuniary interest intended to supply information, as contemplated by § 552 of the Restatement. RESTATEMENT (SECOND) OF TORTS § 552(2) (1977).

pecuniary duty requirement is to shield those who gratuitously provide information from liability under the negligent misrepresentation doctrine.[70] That makes sense because were it otherwise, this doctrine would chill the free provision of information because no rational person would gratuitously provide information given the risk that he could negligently mislead the other party and be subject to liability. In other words, the friendly passerby who is pretty sure but not absolutely certain how to direct you to the local stadium will still volunteer to help when you are lost and the concert starts in ten minutes because he is not deterred by the concern that he might misdirect you, cause you to miss *Tenth Avenue Freeze-Out*, and be liable for damages for trying to help.

Kotzubei, Platinum, and CHR deny that they had a pecuniary duty to provide accurate information in answering the May Questionnaire to Corporate Property Associates. But their argument is insubstantial because they communicated in a commercial context that clearly implicates the core purpose of the pecuniary interest doctrine. Kotzubei clearly had a pecuniary interest in the transaction because he was answering the May Questionnaire in the scope of his employment.[71] CHR and Platinum had a pecuniary interest in the transaction because it was given as part of a commercial relationship through which CHR and Platinum did receive and expected to continue receiving consideration. Among other things, CHR and Platinum received the lease amendment from Corporate Property Associates as part of their continuing relationship

[70] RESTATEMENT (SECOND) OF TORTS § 552 cmt. c (1977) ("If [the information giver] has no pecuniary interest and the information is given purely gratuitously, he is under no duty to exercise reasonable care and competence in giving it.").
[71] *See* RESTATEMENT (SECOND) OF TORTS § 552 cmt. d (1977).

and had expressed an interest in receiving an option to purchase Compucom's headquarters. Moreover, CHR and Platinum had a pecuniary interest in Corporate Property Associates' decision of whether or not to exercise the Warrants because that decision could materially affect CHR's capital structure.

As with the fraud claim, I do, however, dismiss the negligent misrepresentation claim with respect to the First Dividend because the negligent misrepresentation claim depends on CHR's response to the May Questionnaire and that response was made long after the First Dividend had been issued.

E. Personal Jurisdiction Over Kotzubei

Because I have dismissed the fiduciary duty claims against Kalawski and Kotzubei, the question of whether this court can exercise personal jurisdiction over the individual defendants for the remaining claims arises. The only potential claims remaining against an individual defendant are the fraud and negligent misrepresentation claims against Kotzubei. Corporate Property Associates alleges that this court has personal jurisdiction over Kotzubei under 10 *Del. C.* § 3114, Delaware's director and officer consent statute. Section 3114, despite its broad language, has been interpreted over the last quarter-century to be limited to granting personal jurisdiction only for claims against directors in their capacity as directors.[72] Moreover, case law has interpreted § 3114 as applying only in suits brought by a stockholder directly or by or on behalf of the corporation itself involving violations of the Delaware General Corporation Law (the

[72] *See, e.g.*, *Ryan v. Gifford*, 935 A.2d 258, 268-69 (Del. Ch. 2007); *Hana Ranch, Inc. v. Lent*, 424 A.2d 28, 30-31 (Del. Ch. 1980).

"DGCL"), the corporate charter and bylaws, and breaches of the fiduciary duties owed to the corporation and its stockholders (i.e., "Corporate Claims").[73] Those interpretations of the director consent subsection of § 3114 also apply to the officer consent subsection of § 3114.[74]

Corporate Property Associates contends that this court retains personal jurisdiction over Kotzubei under § 3114 despite my dismissal of the fiduciary duty claim. Corporate Property Associates argues that a recent case implied that if a complaint contained a plausible, but still dismissable, Corporate Claim against a director served under § 3114, other claims related to the facts giving rise to the unsuccessful Corporate Claim, if viable, could be prosecuted against the director in this court.[75] I do not read the thoughtful musings in the decision that way. And, even if they could be read that way, I would still hew to the long-established rule that § 3114 can sustain this court's exercise of personal jurisdiction over a non-resident director or officer only so long as the director or officer faces a non-dismissable Corporate Claim.[76] Were I to indulge Corporate Property

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[73] *See, e.g.*, *Canadian Commercial Workers Indus. Pension Plan v. Alden*, 2006 WL 456786, at *11 (Del. Ch. Feb. 22, 2006); *HMG/Courtland Properties, Inc. v. Gray*, 729 A.2d 300, 304-05 (Del. Ch. 1999).

[74] *Ryan*, 935 A.2d at 266.

[75] *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 2006 WL 2588971, at *7 (Del. Ch. Sept. 1, 2006) (suggesting that "although perhaps likely correct," a party's statement that "[w]hen a breach of fiduciary duty [claim] is *well pled*, this [c]ourt may join 'sufficiently related' causes of action" might "arguably also be viewed as overly-restrictive") (emphasis in original), *aff'd on other grounds*, 930 A.2d 92 (Del. 2007).

[76] Many decisions have held that once a viable Corporate Claim is pled against a director served under § 3114, the director must also defend claims related to the Corporate Claim in this court. *See, e.g.*, *Canadian Commercial Workers*, 2006 WL 456786, at *11; *Hovde Acquisition, LLC v. Thomas*, 2002 WL 1271681, at *4 n.16 (Del. Ch. June 5, 2002); *Manchester v. Narragansett Capital, Inc.*, 1989 WL 125190, at *7 (Del. Ch. Oct. 19, 1989). These decisions rest on the sensible idea that if the director is on notice that he may have to defend a Corporate Claim here,

Associates' argument, personal jurisdiction over Kotzubei would be predicated on the fraud and negligent misrepresentation claims alone.[77] Because personal jurisdiction over Kotzubei was based on § 3114 and I have dismissed the fiduciary duty claim against him,[78] I dismiss the remaining claims against him for lack of personal jurisdiction.

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it is not unfair for him to have to defend factually-related claims in addition to the Corporate Claim that justified service under § 3114 in the first instance. If, however, a plaintiff cannot even plead a non-dismissable Corporate Claim, it is unfair to allow the plaintiff to use the implied consent mechanism to obtain jurisdiction over the director. Section 3114 is an important statute with a well-understood purpose and its application is constitutionally sensitive. When its purpose is not implicated, it does not apply. By that restrained application, § 3114 will be a reliable vehicle for plaintiffs seeking to hold directors and officers accountable for Corporate Claims. When plaintiffs seek to press merely tort or contract claims against non-resident directors, they must do so using other statutes, such as Delaware's long-arm statute. *See* 10 *Del. C.* § 3104.

[77] Doing so would be particularly counterproductive here because Corporate Property Associates asserted fiduciary duty claims against Kotzubei that are contrary to well-settled law. Were I to accept Corporate Property Associates' argument that a plaintiff can use § 3114 simply by pleading non-viable fiduciary duty claims that go against settled Delaware law and thereby escape the need to satisfy the long-arm statute, I would create an incentive for plaintiffs to assert pretextual fiduciary duty claims.

[78] Corporate Property Associates also argued that this court could retain personal jurisdiction over Kotzubei based on its allegations that there were statutory violations in connection with both the First and Second Dividends. With respect to the First Dividend, Corporate Property Associates alleges that CHR violated Delaware law when it issued that dividend because CHR's sole director, Kalawski, never met or executed a consent nor set a record date for that dividend. Compl. ¶ 15. With respect to the Second Dividend, Corporate Property Associates contends that CHR violated § 213 of the DGCL by backdating the record date for the dividend because the record date was set as May 17, 2007, but the director consent declaring the dividend and setting the record date was not executed until May 18, 2007. Compl. ¶¶ 22-25. There are several problems with Corporate Property Associates' contention that § 3114 applies because of those alleged statutory violations. Most important, Corporate Property Associates did not bring any claims based on those alleged statutory violations, likely because it would not have standing to bring such claims and they would come after a third-party merger has ended CHR's existence. Moreover, Corporate Property Associates does not explain how those alleged statutory violations are relevant to Corporate Property Associates' claims that it was entitled to advance notice of the dividends. Finally, there is no allegation that Kotzubei, who was a CHR officer and not a director, had any role in the alleged statutory violations related to the issuance of the dividends.

V. Conclusion

For the foregoing reasons, the defendants' motion to dismiss is granted in part and denied in part. The parties shall submit a conforming order within ten days.