

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

IN RE: SILVER LEAF, L.L.C.,                     )  
a Delaware Limited Liability Company        )        C.A. No. 20611

***MEMORANDUM OPINION***

**Submitted: April 20, 2004**

**Decided: June 29, 2004**

Bruce E. Jameson, Esquire, J. Clayton Athey, Esquire, PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware, *Attorneys for Petitioner/Counterclaim Defendant, USIS International Capital Corporation and Counterclaim Defendant, Mark Lavi.*

Charles J. Brown, III, Esquire, ELZUFON AUSTIN REARDON TARLOFF & MONDELL, P.A., Wilmington, Delaware; John Fialcowitz, Esquire, Rita M. Jennings, Esquire, LOWENSTEIN SANDLER PC, Roseland, New Jersey, *Attorneys for Respondents/Counterclaim Plaintiffs, Syndi Romanoff, David Romanoff, Yehuda Segal and Silver Leaf, LLC.*

LAMB, Vice Chancellor.

## I.

This action arises out of a dispute between the three members of an LLC formed for the purpose of entering into a license to market and sell french fry vending machines. The LLC eventually lost its license and as a result the members are engaged in litigation. The manager of the LLC and two of its members filed suit in the Superior Court of New Jersey against the third member, a Delaware corporation and its sole stockholder asserting claims for breach of contract, breach of fiduciary duty and tortious interference.

In response, the corporate defendant in the New Jersey action filed in this court a petition for judicial dissolution of the LLC. It then joined its sole stockholder in asking the New Jersey Superior Court to dismiss the action without prejudice so that the entire dispute could be resolved in Delaware. The motion to dismiss the New Jersey action was granted. The defendants in this action then answered the petition and counterclaimed, raising, in essence, the same claims previously alleged in New Jersey. In order to bring before this court all of the claims that had been asserted in New Jersey, the counterclaims name the sole stockholder of the corporate member as an additional counterclaim defendant.

That individual responded to the counterclaims with a motion to dismiss asserting a lack of personal jurisdiction, a defense not raised by him in the New Jersey action. The question presented is whether this court should entertain that

defense or, instead, find that the individual's conduct in securing a dismissal of the New Jersey Superior Court action estops him from asserting a lack of personal jurisdiction here.

## **II.**

In April 2001, Syndi Romanoff, Yehuda Segal and USIS formed Silver Leaf, LLC, a Delaware limited liability company. USIS, an Illinois corporation engaged in day trading corporate securities, owns a 50% equity interest in Silver Leaf. USIS is wholly owned by Mark Lavi, who also serves as its sole director and president. Syndi Romanoff and Yehuda Segal own the remaining interest in Silver Leaf, 30% and 20% respectively. David Romanoff is the manager of Silver Leaf.

In February 2002, Silver Leaf entered into an agreement with Tasty Fries, Inc. for the exclusive license to sell, market, sublicense and distribute Tasty Fries' patented french fry vending machines. Silver Leaf later ordered ten thousand Tasty Fries machines and arranged to pay for the machines in installments. Over the next few months, the relationship between Silver Leaf and Tasty Fries deteriorated as Tasty Fries prematurely demanded payment for the machines or assurances from Silver Leaf as to its financial condition.

As relations between Tasty Fries and Silver Leaf deteriorated, Lavi represented to Tasty Fries and other third parties that he was the manager of Silver Leaf and, over the objections of the other Silver Leaf members and its manager,

conducted business in that capacity.<sup>1</sup> No machines were ever delivered, and Tasty Fries eventually terminated its agreement with Silver Leaf. The parties dispute the reason for the termination of the license agreement.

Silver Leaf, Syndi Romanoff, David Romanoff and Yehuda Segal began litigation in the New Jersey Superior Court relating to the management of Silver Leaf and the events leading up to the termination of its contract with Tasty Fries. In August 2003, Silver Leaf, Syndi Romanoff, David Romanoff and Yehuda Segal filed an action in the New Jersey Superior Court against Lavi and USIS alleging that Lavi conspired with Edward Kelly, Tasty Fries' president and CEO, to terminate Silver Leaf's agreement with Tasty Fries and to misappropriate Silver Leaf's exclusive license with Tasty Fries.<sup>2</sup>

On October 17, 2003, USIS filed this petition for judicial dissolution of Silver Leaf pursuant to 6 *Del. C.* § 18-802. USIS and Lavi moved to dismiss the New Jersey action arguing that the entire dispute could be and should be resolved in Delaware. Lavi obtained dismissal of the New Jersey action because he

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<sup>1</sup> Lavi sent letters in April 2002 to third parties declaring himself the manager of Silver Leaf. *See* Aff. of David Romanoff Related to Ans. Br. of Resp'ts/Countercl. Pls. In Opp'n to Countercl. Def. Mark Lavi's Mot. to Dismiss, at Ex. F (Memorandum from Mark Lavi to Fred Zemel (April 10, 2002)); Ex. G (Letters to the Ashwood Group, LLC, SAI Marketing, the DMG Group and Tasty Fries (April 15, 2002)).

<sup>2</sup> Silver Leaf also filed suit in New Jersey Superior Court against Tasty Fries for breach of contract and tortious interference. Silver Leaf's action against Tasty Fries was removed to the United States District Court for the District of New Jersey. In July 2003, the federal district court action was stayed pending resolution of whether Silver Leaf has authority to bring suit against Tasty Fries.

represented that the Delaware Court of Chancery had exclusive jurisdiction over disputes between the members and that Delaware was an available forum to hear all of the claims then pending in New Jersey. Lavi argued that “New Jersey’s judicial resources should not be wasted on several complicated matters when, in one case in Delaware, all issues can, and hopefully will be resolved.”<sup>3</sup> Based on Lavi’s representation that the Delaware Court of Chancery was the appropriate forum to resolve all of the disputes among the members of Silver Leaf, the New Jersey court dismissed the action pending before it.<sup>4</sup>

Silver Leaf, Syndi Romanoff, Yehuda Segal and David Romanoff, filed a response to the petition for dissolution on November 24, 2003, asserting counterclaims against both USIS and Lavi.<sup>5</sup> On December 19, 2003, USIS answered the counterclaims and Lavi filed a motion to dismiss for lack of personal jurisdiction. The court heard argument on counterclaim-defendant Lavi’s motion to dismiss on April 20, 2004.

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<sup>3</sup> Letter to the Honorable Miriam Span in Reply to Pls.’ Opp’n to Defs.’ Mot. to Dismiss in *Romanoff, et al. v. Lavi, et al.*, Docket No. C-115-03 (Nov. 3, 2003), in Cert. of John Fialcowitz Related to Ans. Br. of Resp’ts/Countercl. Pls. In Opp’n to Countercl. Def. Mark Lavi’s Mot. to Dismiss (“Fialcowitz Cert.”), at Ex. A.

<sup>4</sup> In granting the motion to dismiss, Judge Miriam Span of the New Jersey Superior Court stated: “Well, I agree there should be one jurisdiction. In this case, I agree it should be Delaware . . . . So the instant matter should be litigated as a whole in the Delaware Chancery Court.” Tr. of Lavi’s Mot. to Dismiss on November 7, 2003, in *Fialcowitz Cert.*, at Ex. B.

<sup>5</sup> Respondents counterclaim that Lavi and USIS breached the operating agreement of Silver Leaf in several respects, breached their fiduciary duties and usurped a corporate opportunity, and tortiously interfered in Silver Leaf’s contract with Tasty Fries. Respondents further counterclaim that Lavi should be personally responsible for USIS’s liabilities. They also plead demand futility in their counterclaim.

### III.

In a motion to dismiss challenging personal jurisdiction pursuant to Court of Chancery Rule 12(b)(2), the party asserting jurisdiction bears the burden of showing a basis for the court's exercise of jurisdiction over the nonresident party.<sup>6</sup> In general, the court will conduct a two-step analysis: first determining whether service of process on the nonresident is authorized by statute; and, second, deciding whether the exercise of jurisdiction is consistent with due process.<sup>7</sup>

The court need not address the merits of the motion to dismiss because, as a threshold matter, the doctrine of judicial estoppel bars Lavi's assertion that this court lacks personal jurisdiction. "Judicial estoppel prevents a litigant from advancing an argument that contradicts a position previously taken by that same litigant, and that [a court] was persuaded to accept as the basis for its ruling."<sup>8</sup> Judicial estoppel is an equitable doctrine designed to protect the integrity of the judicial process by "prohibiting parties from deliberately changing positions according to the exigencies of the moment."<sup>9</sup> The court concludes that Lavi should

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<sup>6</sup> See *Steinman v. Levine*, 2002 WL 31761252, at \*8 (Del. Ch. Nov. 27, 2002), *aff'd*, 822 A.2d 397 (Del. 2003).

<sup>7</sup> *Id.*

<sup>8</sup> *Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 409352, at \*3 (Del. Ch. July 13, 1998).

<sup>9</sup> *New Hampshire v. Maine*, 532 U.S. 742, 743 (2001). See 28 AM. JUR. 2D *Estoppel and Waiver* § 74 (2003) "Although additional considerations may inform the doctrine's application in specific factual contexts, several factors typically inform the decision whether to apply the doctrine of judicial estoppel in a particular case: whether the party's later position is 'clearly inconsistent' with its earlier position, whether the party has succeeded in persuading a court to accept that party's earlier position, so that

be judicially estopped from arguing before this court that it lacks personal jurisdiction over him when the New Jersey court accepted and relied upon Lavi's representation that the full dispute would be litigated in this court.

Moreover, the exercise of personal jurisdiction over Lavi is consistent with due process in the circumstances presented. A state court may exercise personal jurisdiction over a nonresident defendant so long as there are "minimum contacts" between the defendant and the forum.<sup>10</sup> 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."<sup>11</sup> "[I]t 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."<sup>12</sup>

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judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled, and whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Donald J. Wolfe, Jr. and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, §11-1[c] (2003) (listing similar factors).

<sup>10</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The court considers the conduct of the defendant and the connections among the defendant, the forum and the litigation in determining whether the nonresident defendant has "minimum contacts" with the forum state. *Id.*

<sup>11</sup> *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980).

<sup>12</sup> *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 party or a third person'" (citations omitted)).

Exercising jurisdiction over Lavi would not offend traditional notions of fairness<sup>13</sup> and Lavi could reasonably anticipate being haled into court in Delaware since Lavi himself is responsible for the connection with Delaware.<sup>14</sup> First, Lavi undoubtedly authorized and directed the filing in Delaware of USIS’s petition for dissolution of Silver Leaf.<sup>15</sup> He then successfully argued before the New Jersey Superior Court that Delaware is the most appropriate forum to fully resolve the claims then pending in the New Jersey litigation, including claims against him personally. Thus, it is his own conduct that makes it necessary and appropriate to exercise jurisdiction over him in this forum, and not some fortuitous or attenuated contact with this State.<sup>16</sup>

Furthermore, since the counterclaims focus on Lavi’s actions in holding himself out to be the manager of Silver Leaf, Delaware is the appropriate forum to resolve the counterclaims. Delaware “has a strong interest in resolving disputes regarding the internal affairs of LLCs formed under its laws.”<sup>17</sup> By declaring

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<sup>13</sup> *Int’l Shoe Co.*, 326 U.S. at 316.

<sup>14</sup> *See Burger King*, 471 U.S. at 472 (“Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a ‘substantial connection’ with the forum state.”) (citation omitted).

<sup>15</sup> *Mobil Oil Corp. v. Advanced Env’tl. Recycling Techs., Inc.*, 833 F. Supp 437, 446 (D. Del. 1993).

<sup>16</sup> *See id.*

<sup>17</sup> *Cornerstone Techs. LLC v. Conrad*, 2003 WL 1787959, at \*13 (Del. Ch. Mar. 21, 2003). *See Assist Stock Mgmt. v. Rosheim*, 753 A.2d 974, 981 (Del. Ch. 2000) (“Delaware has a strong interest in providing a forum for disputes relating to the ability of managers of an LLC formed under its law to properly discharge their respective managerial functions.”).



himself to be the manager of Silver Leaf, he impliedly consented to “adjudicate disputes so inherently intertwined with that fiduciary position.”<sup>18</sup> Therefore, jurisdiction over Lavi is consistent with the due process requirements of fairness and justice.<sup>19</sup>

For the foregoing reasons, Lavi’s motion to dismiss is DENIED. IT IS SO ORDERED.

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<sup>18</sup> *Assist Stock Mgmt.*, 753 A.2d at 981.

<sup>19</sup> Service of process is not at issue since counsel for Lavi stated at oral argument that, if the court determined that jurisdiction was appropriate, he would waive any technical difficulties in service of process.