

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHRISTOPHER J. FEELEY, AK-FEEL, LLC, a)
Delaware limited liability company, and)
OCULUS CAPITAL GROUP, LLC, a Delaware)
limited liability company,)

Plaintiffs,)

v.)

C.A. No. 7304-VCL)

NHAOCG, LLC, a New York limited liability)
company, ANDREA AKEL, GEORGE AKEL,)
DAVID NEWMAN, and DANIEL HUGHES,)

Defendants.)

MEMORANDUM OPINION

Date Submitted: March 19, 2012

Date Decided: March 20, 2012

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Jason C. Jowers, Brett M. McCartney, MORRIS JAMES LLP, Wilmington, Delaware; Jeanette N. Simone, Albert J. Millus, Jr., HINMAN, HOWARD & KATTELL, LLP, Binghamton, New York; *Attorneys for Defendants NHAOCG, LLC, George Akel, David Newman, and Daniel Hughes.*

Michael W. McDermott, David B. Anthony, BERGER HARRIS, LLC, Wilmington, Delaware; *Attorneys for Defendant Andrea Akel.*

LASTER, Vice Chancellor.

This action principally challenges the purported removal of Ak-Feel, LLC, a Delaware limited liability company, as the sole managing member of Oculus Capital Group, LLC (“Oculus”), also a Delaware limited liability company. I have scheduled the control dispute for an expedited one-day trial.

All of the defendants other than Andrea Akel have moved to dismiss the action pursuant to Rule 12(b)(2) for lack of personal jurisdiction. As to the core control dispute, their motion misses the point. The Court of Chancery exercises *in rem* jurisdiction when determining who has authority to act as the managing member of a Delaware limited liability company.

But the plaintiffs did not limit themselves to the control dispute; rather, they asserted a total of eleven counts, many of them tort-based. As to these claims, Section 18-109(a) of the Delaware Limited Liability Company Act (the “LLC Act”) empowers this Court to exercise personal jurisdiction over defendant NHAOCG, LLC (“NHA”), a New York limited liability company, for purposes of the counts asserting breaches of duty to Oculus. Once jurisdictionally present in Delaware for these claims, NHA is subject to this Court’s jurisdiction for the other claims as well, all of which arise out of a common nucleus of operative fact and relate to actions NHA took purportedly on behalf of Oculus. The individual defendants, by contrast, have raised sufficient questions about the Court’s jurisdictional reach to warrant deferring a ruling on the motion pending jurisdictional discovery and further briefing. The motion to dismiss is therefore denied.

I. FACTUAL BACKGROUND

The facts for purposes of the motion are drawn from the well-pled allegations of the complaint and the documents it incorporates by reference. I also have considered the parties' jurisdictional affidavits. I have assumed that the operating agreement for Ak-Feel, LLC (the "Ak-Feel LLC Agreement") appears in the form submitted by Andrea Akel. Ironically, Akel's version makes the plaintiffs' claims stronger by eliminating an ambiguity in the version attached to the complaint. Both sides' written submissions support a preliminary conclusion that Akel successfully located the actual agreement.

A. The Parties' Business Relationship

Plaintiff Christopher J. Feeley has over twenty-five years experience in the real estate industry. In January 2010, Feeley and his analyst, Andrea Akel, embarked on a new business relationship with defendants David Newman, Daniel Hughes, and George Akel, Andrea's father. In simplified terms, the group anticipated that Feeley and Andrea Akel would locate promising real estate investments. If Newman, Hughes, and George Akel thought that an investment looked attractive, then they would provide financing. If outside financing were required, Feeley would raise it from other sources. Each investment would be pursued through a separate joint venture entity.

As the first step in implementing the new business relationship, Feeley and Andrea Akel formed Ak-Feel. Feeley received a 55% membership interest; Akel received a 45% membership interest. The Ak-Feel LLC Agreement designates Feeley as the Managing Member. Section 6.1 states:

[Ak-Feel] shall be managed by the Managing Member in accordance with, and subject to the terms of, this Agreement. Except as set forth in Section 6.2 of this Agreement, the Managing Member shall have full, exclusive and complete discretion, power and authority, subject in all cases to the other provisions of this Agreement and the requirements of applicable law, to manage, control, administer and operate the business and affairs of [Ak-Feel] for the purposes herein stated, to make decisions affecting such business and affairs of [Ak-Feel], and to act for and bind [Ak-Feel].

Section 7.1 reinforces the allocation of authority to the Managing Member by providing that “no Member shall have authority to act for [Ak-Feel] solely by virtue of being a Member, except as otherwise provided in this Agreement.”

As the second step in implementing the new business relationship, Ak-Feel and NHA formed Oculus. The three members of NHA are entities affiliated, respectively, with Newman, Hughes, and George Akel.

Ak-Feel and NHA each received a 50% membership interest in Oculus. Pursuant to Section 4.1 of the operating agreement governing Oculus (the “Oculus LLC Agreement”), Ak-Feel became the Managing Member. Section 4.1(a) granted the Managing Member

full, exclusive, and complete discretion, power, and authority, subject in all cases to the other provisions of this Agreement and the requirements of applicable law, to manage, control, administer, and operate the business and affairs of the Company for the purposes herein stated, and to make all decisions affecting such business and affairs

Ak-Feel only can be removed as Managing Member in two circumstances: (i) by the “prior unanimous consent of the Members” (§ 4.1(b)(ii)) and (ii) by NHA if Feeley no longer is an employee of Oculus, if Andrea Akel has been terminated for “Good Cause,”

or if Ak-Feel has defaulted in its obligations under the Oculus LLC Agreement and failed to cure the default within ten days after notice from NHA (§ 4.7).

As the third step in implementing the new business relationship, Oculus and Feeley entered into an employment agreement pursuant to which Feeley would serve as President and CEO of Oculus. The initial term of the agreement ran from January 15, 2010 through January 14, 2012, after which the agreement would extend “automatically for successive terms of One (1) year unless” Oculus or Feeley terminated the agreement by written notice at least sixty days before the expiration date.

B. The Defendants Attempt To Remove Feeley And Ak-Feel.

For reasons not relevant to the current motion, the relationship between Feeley and his business associates soured. By letter dated November 10, 2011 (the “Non-Renewal Letter”), NHA purported to give Feeley notice that Oculus “does not intend to renew the Employment Agreement between you and the Company, which will terminate on January 14, 2012.” Bizarrely, the Non-Renewal Letter stated that “[t]he termination of your Employment Agreement is not a termination of your employment with the Company and your employment with the Company shall continue after January 14, 2012.”

Newman signed the Non-Renewal Letter on behalf of Newman Holdings, LLC, in its capacity as a member of NHA. The Non-Renewal Letter did not explain how NHA could make the decision not to renew Feeley’s contract given that Oculus’s Managing Member had exclusive authority to act on behalf of Oculus and NHA was not Oculus’s Managing Member. The Non-Renewal Letter also did not address how Feeley could continue to be employed despite the termination of his employment agreement. To the

extent NHA sought to retain Feeley as an officer of Oculus, the Non-Renewal Letter failed to explain how NHA could do so, given that Section 4.1(c) of the Oculus LLC Agreement provides that only the Managing Member has authority to elect or appoint the President and other officers and designate their terms of office.

By letter dated February 23, 2012 (the “Termination Letter”), Newman purported to terminate Feeley’s employment with Oculus. The copy of the letter attached to the complaint is not signed, but the signature block provided for Newman to sign on behalf of NHA. In the Termination Letter, NHA advised Feeley that his employment with Oculus “is terminated effective immediately” and instructed Feeley to return his laptop, iPad, cellphone, keys, access cards, files, and records. The letter made other assertions on behalf of Oculus and stated that “the undersigned [Newman] will be your sole contact on any OCG or related entity matters.” Like the Non-Renewal Letter, the Termination Letter did not explain how NHA could act on behalf of Oculus.

By separate letter also dated February 23, 2012 (the “Manager Replacement Letter”), NHA’s counsel purportedly gave notice to Ak-Feel that NHA was exercising its right to remove Ak-Feel as Managing Member pursuant to Section 4.7 of the Oculus LLC Agreement. The Manager Replacement Letter stated: “[E]ffective March 4, 2012 (ten (10) days from the date hereof), Ak-Feel, LLC is removed as manager of Oculus Capital Group, LLC and replaced with NHA OCG, LLC.”

NHA immediately took steps to effectuate its claimed control over Oculus, including by contacting Oculus business partners and clients. The record contains a letter dated February 23, 2012, sent by Newman to Preiss Company, an Oculus client.

According to the signature block, Newman signed as a representative of NHA, which authorized the letter on behalf of Oculus. The letter stated:

It was good speaking with you earlier today. I enjoyed our discussion and look forward to personally working with you moving forward. Pursuant to our discussion, Christopher Feeley is no longer employed by or otherwise associated with, Oculus Capital Group, LLC or affiliated entities other than Ak-Feel, LLC. Effective immediately, he has no authority to represent Oculus Capital Group, LLC or any affiliated entities in any manner. . . . More immediately, please be advised that the managing member of [Oculus] is now NHA OCG, LLC, represented by myself, Jeff Smetana and Andrea Akel.

Newman thus represented that NHA already was acting as the Managing Member of Oculus.

C. The Delaware Litigation

Feeley disputed the validity of the Termination Letter and the Manager Replacement Letter, causing the defendants to backpedal. By letter dated March 2, 2012, NHA's counsel purported to "defer the removal of Ak-Feel, LLC until March 7, 2012."

On March 5, 2012, the plaintiffs filed this lawsuit and sought a temporary restraining order against the removal of Ak-Feel as Managing Member. Count I seeks to determine the validity of the purported removal of Ak-Feel as Managing Member and Feeley as President and CEO. Not content with this straightforward count, the plaintiffs added ten more:

- Count II asserts a claim for breach of the Oculus LLC Agreement against NHA.
- Count III asserts a claim for breach of the implied covenant of good faith and fair dealing against NHA.
- Count IV asserts a claim for breach of fiduciary duty against all defendants.

- Count V asserts a claim for unjust enrichment against all defendants.
- Count VI asserts a claim for civil conspiracy against all defendants.
- Count VII asserts a claim for tortious interference with Feeley’s employment agreement against all defendants.
- Count VIII asserts a claim for tortious interference with business relations and prospective economic advantage against all defendants.
- Count IX asserts a claim for deceptive trade practices under 6 *Del. C.* § 2532 against all defendants.
- Count X asserts a claim for misappropriation of trade secrets under 6 *Del. C.* §§ 2002 and 2003 against all defendants.
- Count XI asserts a claim for conversion against all defendants.

In each count, the plaintiffs seek both equitable and monetary relief.

On March 7, 2012, I entered a standstill order to preserve the status quo pending resolution of the control dispute. On March 8, the defendants moved to dismiss the complaint for lack of personal jurisdiction.

II. LEGAL ANALYSIS

“[T]he plaintiff bears the burden of showing a basis for the court’s exercise of jurisdiction over the nonresident defendant.” *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003). First, service of process must be authorized by statute. Second, the exercise of personal jurisdiction must comport with the due process clause of the Fourteenth Amendment. *HMG/Courtland Props., Inc. v. Gray*, 729 A.2d 300, 303 (Del. Ch. 1999).

The Oculus LLC Agreement does not contain a consent-to-jurisdiction provision, and the plaintiffs have not pointed to any jurisdictional ties that the defendants have to Delaware other than their actions with respect to Oculus in connection with the current

control dispute. The valid exercise of personal jurisdiction therefore turns on the implied consent provisions of the LLC Act.

A. Jurisdiction For Purposes Of Determining The Managing Member Of Oculus

Section 18-110 of the LLC Act grants this Court *in rem* jurisdiction to determine who validly holds office as a manager of a Delaware limited liability company. *See Genger v. TR Investors, LLC*, 26 A.3d 180, 199-200 (Del. 2011) (interpreting 8 *Del. C.* § 225, the corporate analog to 6 *Del. C.* § 18-110). Section 18-110(a) states, in pertinent part:

Upon application of any member or manager, the Court of Chancery may hear and determine the validity of any admission, election, appointment, removal, or resignation of a manager of a limited liability company, and the right of any person to become or continue to be a manager of a limited liability company, and, in case the right to serve as a manager is claimed by more than 1 person, may determine the person or persons entitled to serve as managers In any such application, the limited liability company shall be named as a party and service of copies of the application upon the registered agent of the limited liability company shall be deemed to be service upon the limited liability company and upon the person or persons whose right to serve as a manager is contested and upon the person or persons, if any, claiming to be a manager or claiming the right to be a manager.

6 *Del. C.* § 18-110(a). The defendants in such a proceeding appear before the Court “not individually, but rather, as respondents being invited to litigate their claims to the *res* (here, the disputed corporate office) or forever be barred from doing so.” *Genger*, 26 A.3d at 199-200.

Because a Section 18-110 proceeding affects the Delaware LLC and the office of managing member, it is not necessary for all claimants to the office to be subject to the Court’s *in personam* jurisdiction in order for the Court to make an authoritative

determination. *Haft v. Dart Gp. Corp.*, 1996 WL 255899, at *2 (Del. Ch. Apr. 26, 1996) (Allen, C.) (interpreting 8 *Del. C.* § 225). “What is necessary under our statute, and under the constitution, is that reasonable steps be taken to notify claimants to the office of the forthcoming adjudication and that they receive an opportunity to be heard.” *Id.* (citations omitted). A plaintiff therefore need not name a known claimant to office as a party defendant in order to ensure that the party receives actual notice of the claim and that the adjudication is binding. Nevertheless, it is prudent to do so. *Id.* “While these claimants are not personally subject to this court’s coercive jurisdiction in this case, they must realize, as they surely do, that *their failure to participate in this adjudication will not foreclose the authoritative adjudication in this proceeding of their claim of title.*” *Id.*

The complaint pleads a live dispute over (i) the validity of the removal of Ak-Feel as Managing Member of Oculus and (ii) the right of NHA to serve as Managing Member of Oculus. The plaintiffs prudently named NHA as a claimant to the office. In perhaps an overabundance of caution, the plaintiffs also named the other individual defendants. Each defendant has received actual notice of the claim. Regardless of whether or not they participate in this proceeding, this Court has the constitutional authority to determine whether Ak-Feel or NHA is the Managing Member of Oculus.

The defendants’ belated attempt to disavow challenging Ak-Feel’s status as Managing Member does not moot this action or prevent the necessary adjudication. The complaint pleads plainly, and the supporting exhibits demonstrate, that NHA purportedly took action on behalf of Oculus that NHA only could take if it claimed the authority of Managing Member. NHA did so when sending both the Non-Renewal Letter and the

Termination Letter. NHA then laid claim to Managing Member status directly in the Manager Replacement Letter and when communicating with Preiss and other Oculus clients. The defendants cannot now pretend that no dispute exists. *See Cornerstone Techs., LLC v. Conrad*, 2003 WL 1787959, at *10-11 (Del. Ch. Mar. 31, 2003). If they truly wish to concede that the dispute is moot, then the Court can and will enter judgment against them on the control issue. *See Infinity Investors Ltd. v. Takefman*, 2000 WL 130622, at *5 (Del. Ch. Jan. 28, 2000), *reconsideration denied*, 2000 WL 268302 (Del. Ch. Feb. 17, 2000).

B. Jurisdiction For Breach Of Fiduciary Duty

Section 18-109 of the LLC Act is an implied consent statute that empowers this Court to exercise personal jurisdiction over persons who serve as managers of an LLC for purposes of adjudicating claims for breaches of duty in that capacity involving or relating to the business of the LLC. Section 18-109(a) states, in pertinent part:

A manager . . . of a limited liability company may be served with process in the manner prescribed in this section in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited liability company or a violation by the manager . . . of a duty to the limited liability company, or any member of the limited liability company, whether or not the manager . . . is a manager . . . at the time suit is commenced. A manager's . . . serving as such constitutes such person's consent to the appointment of the registered agent of the limited liability company (or, if there is none, the Secretary of State) as such person's agent upon whom service of process may be made as provided in this section. . . . As used in this subsection (a) . . . the term "manager" refers (i) to a person who is a manager as defined in § 18-101(10) of this title and (ii) to a person, whether or not a member of a limited liability company, who, although not a manager as defined in § 18-101(10) of this title, participates materially in the management of the limited liability company; provided however, that the power to elect or otherwise select or to participate in the election or selection of a person to be a manager as defined in § 18-101(10)

of this title shall not, by itself, constitute participation in the management of the limited liability company.

6 *Del. C.* § 18-109(a). Section 18-101(10) defines the term “manager” as “a person who is named as a manager of a limited liability company in, or designated as a manager of a limited liability company pursuant to, a limited liability company agreement or similar instrument under which the limited liability company is formed.” 6 *Del. C.* § 18-110(10).

The complaint alleges that NHA participated materially in the management of Oculus by taking actions that fell within the exclusive authority of the Managing Member under the Oculus LLC Agreement. Confronted with this litigation and the jurisdictional reach of Section 18-109(a), NHA now argues that it merely exercised a “power to elect or otherwise select or to participate in the election or selection of a person to be a manager.” If NHA had asserted in a straightforward manner its right to remove Ak-Feel under Section 4.7 of the Oculus LLC Agreement, then NHA justifiably could assert that it did not participate in the management of Oculus by doing so. Of course, NHA did much more than invoke its right to remove Ak-Feel under Section 4.7. NHA purported to act on behalf of Oculus to “non-renew” Feeley’s employment agreement. NHA simultaneously purported to retain Feeley as an Oculus officer. NHA later purported to act on behalf of Oculus to terminate Feeley from his position as officer. The plain language of the Oculus LLC Agreement confers exclusive authority to take these actions on the Managing Member. NHA also communicated directly with Oculus clients and asserted that NHA in fact was acting as Oculus’s Managing Member. These actions satisfy the requirements of Section 18-109(a).

“[S]ervice under § 18-109 will be consistent with due process when the action relates to a violation by the manager of a fiduciary duty owed to the limited liability company.” *PT China LLC v. PT Korea LLC*, 2010 WL 761145, at *5 (Del. Ch. Feb. 26, 2010). Count IV alleges that NHA acted on behalf of Oculus and claimed the Managing Member mantle for disloyal and self-interested purposes rather than the best interests of Oculus. The allegation of disloyalty is hotly contested. For present purposes, however, the allegations are sufficient to establish personal jurisdiction over NHA. *See Assist Stock Mgmt. L.L.C. v. Rosheim*, 753 A.2d 974, 978 (Del. Ch. 2000).

Counts II and III assert parallel claims against NHA for breaches of contractual duties under the Oculus LLC Agreement. Count II invokes the actual terms of the Oculus LLC Agreement, and Count III invokes the implied covenant of good faith and fair dealing that inheres in the Oculus LLC Agreement. The jurisdictional scope of Section 18-109 extends, consistent with due process, to encompass an alleged violation by a manager of the express and implied contractual duties owed by the manager under the operative limited liability company agreement. *Id.* at 981.

Counts II, III, and IV also seek relief against the individual defendants. An authority that the parties did not mention, much less brief, holds that this Court can exercise personal jurisdiction over the flesh-and-blood individuals who control an entity that acts as a fiduciary for another Delaware entity, in that case as the general partner of a Delaware limited partnership. *See In re USACafes, L.P. Litig.*, 600 A.2d 43, 53 (Del. Ch. 1991). In *USACafes*, the Court of Chancery looked through a single entity—the corporate general partner—to assert personal jurisdiction over the individuals who served

as members of its board of directors for purposes of claims for breach of fiduciary duty to the limited partnership. *Id.* at 51-53. This case offers the additional nuance of both fiduciary and contractual duties. It also involves another layer of entities, because the three members of NHA are non-Delaware LLCs affiliated with, respectively, Newman, Hughes, and George Akel. Moreover, the defendants have asserted that Newman, Hughes, and George Akel are not the sole members of their entities.

The body of the complaint alleges in terms falling closer to the conclusory end of the spectrum that Newman, Hughes, and George Akel control NHA. Despite the abbreviated nature of the allegations, the overarching picture painted by the complaint makes it reasonably conceivable that the allegations of control are correct. Indeed, when considered together with the documents incorporated by reference, the allegations against Newman become quite strong. He authored and sent out on behalf of NHA and purportedly on behalf of Oculus the Non-Renewal Letter, the Termination Letter, and the Manager Replacement Letter. He also communicated with third parties and informed them that “the managing member of [Oculus] is now NHA OCG, LLC, represented by myself, Jeff Smetana and Andrea Akel.”

There are, however, good reasons to question the entity-piercing implications of *USACafes*. Applying the doctrine in this case also could require considering whether the *USACafes* doctrine also could encompass contractual-duty theories. Moreover, to apply the doctrine to the facts, the Court would need to look through not only NHA but also the member entities affiliated with Newman, Hughes, and George Akel. Assuming the continuing persuasiveness of *USACafes*, the allegations of control against Hughes and

George Akel are thin. It is also possible that the Court would not have to reach the *USACafes* issue, to the extent the individual defendants were shown to have “personally participated in the choice to invoke the laws of this state to govern the internal affairs of [the disputed] entities and the contractual duties running among their members.” *Cornerstone*, 2003 WL 1787959, at *2; *see id.* at *12-13.

Under the circumstances, it seems prudent to defer ruling on the motion to dismiss for lack of personal jurisdiction over the individual defendants pending jurisdictional discovery and further briefing. Because this Court indisputably has jurisdiction to decide the expedited control dispute and issue the requisite implementing orders, it is not necessary at this time to resolve the interesting personal jurisdiction questions that the individual defendants have raised. Those issues can be addressed in due course after the core control dispute has been resolved.

C. The Remaining Counts

Once a defendant is subject to personal jurisdiction under Section 18-109 as to certain claims, the Court may exercise personal jurisdiction over the defendant with respect to other sufficiently related claims. *Assist*, 753 A.2d at 981; *see Infinity Investors*, 2000 WL 130622, at *6 (“[O]nce jurisdiction is properly obtained over a non-resident director defendant pursuant to § 3114, such non-resident director is properly before the Court for any claims that are *sufficiently related to the cause of action* asserted against such directors in their capacity as directors.”). All of the counts of the complaint arise out of a common nucleus of operative fact and challenge under various theories the steps taken by NHA and the individual defendants to assert control over Oculus. Because this

Court has jurisdiction over NHA under Section 18-109 for purposes of Counts II-IV, I likewise can exercise jurisdiction over NHA for purposes of the remaining counts. Whether this Court can exercise jurisdiction over the individual defendants for Counts V-XI will turn on whether they are jurisdictionally present for purposes of Count IV.

III. CONCLUSION

The motion to dismiss for lack of personal jurisdiction is denied as irrelevant with respect to Count I and as unfounded with respect to NHA. The motion is denied without prejudice as to the individual defendants pending jurisdictional discovery and further briefing. **IT IS SO ORDERED.**