

Davis v Scottish Re Group Ltd.
2016 NY Slip Op 31313(U)
July 11, 2016
Supreme Court, New York County
Docket Number: 654027/2013
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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PAUL DAVIS,

Plaintiff,

- against -

DECISION AND ORDER

SCOTTISH RE GROUP LIMITED; SCOTTISH RE,
(U.S.), INC.; SRGL ACQUISITION, LDC; BENTON,
STREET PARTNERS I, L.P.; BENTON STREET
PARTNERS II, L.P.; BENTON STREET PARTNERS
III, L.P.; MASSMUTUAL INSURANCE;
CERBERUS CAPITAL, LLC; JONATHAN
BLOOMER; BRETT ADAMCZYK; JAMES
BUTLER; JAMES CHAPMAN; THOMAS FINKE;
JEFFREY HUGHES; ROBERT JOYAL; LARRY
PORT; MICHAEL ROLLINGS; RAYMOND
WECHSLER; MEREDITH ALICIA RATAJCZAK;
MICHAEL STEVEN BAUMSTEIN; and DANIEL
RYAN ROTH,

Index No.: 654027/2013
Motion Sequence No.: 006

Defendants.

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O. PETER SHERWOOD, J.:

In motion sequence number 006, defendant Scottish Re Group Limited (“Scottish Re”) moves, pursuant to CPLR 3211 (a) (8), for dismissal of the first two causes of action against it for lack of personal jurisdiction.

Background

The court has discussed the underlying facts and allegations in a prior decision in this action (*see Davis v Scottish Re Group Ltd.*, 46 Misc 3d 1206[A], 2014 NY Slip Op 51898[U] [Sup Ct, NY County 2014] [Prior Decision], *affd as mod* 138 AD3d 230, [1st Dept 2016] [Appellate Decision]).

Summarizing, during the relevant time period, Davis, a resident of Mexico, held more than 2.4 million shares (representing approximately 48%) of the “Non-Cumulative Perpetual Preferred Shares” (“PPS”) of defendant Scottish Re, a Cayman Islands reinsurance company. The PPS were issued in 2005 via a public offering, and are governed by the terms of a Certificate of Designation dated June 28, 2005 (“COD”). Cayman Islands law governs the COD.

Davis also held more than 13 million shares (representing approximately 20%) of Scottish Re's common stock. In this action, Davis originally asserted direct and derivative causes of action against Scottish Re, its American operating subsidiary Scottish Re (U.S.), Inc. ("SRUS"), certain members of the board of directors of Scottish Re and SRUS, Massachusetts Mutual Life Insurance Company (s/h/a MassMutual Insurance) ("Mass Mutual"), Cerberus Capital Management, L.P. (s/h/a Cerberus Capital, LLC) ("Cerberus"), and various entities affiliated with MassMutual and Cerberus (collectively, the "Investors") (Appellate Decision, 138 AD3d at 233). Allegedly, the directors, "under the control of the Investors," directed Scottish Re to undertake (1) an undervalued cash-out merger ("Merger"), whereby the Investors acquired all of the outstanding common shares of Scottish Re, and (2) a "dividend strategy that benefitted the Investors and unfairly prejudiced the minority shareholders" (*id.*).

Scottish Re made two tender offers to PPS holders, including Davis. The first occurred in 2010 ("2010 Tender Offer"), when Scottish Re initiated a tender to repurchase the PPS at \$5 per share, rather than the contractual redemption price of \$25 per share. Scottish Re paid approximately \$1,000,000 for the repurchase of 4% of the outstanding PPS shares. Thereafter, Scottish Re redeemed these PPS shares, but not others, including those held by Davis (Prior Decision, 46 Misc 3d 1206[A], 2014 NY Slip Op[U], *4).

In early 2012, Scottish Re acquired 720,000 PPS at a purchase price of \$16.00 per share in a privately-negotiated transaction. Scottish Re then announced a cash tender offer to purchase all PPS at the same price ("2012 Tender Offer" and together with the 2010 Tender Offer "Tender Offers"). Scottish Re tendered approximately 804,000 shares of PPS. Scottish Re also acquired 4,400 shares of PPS in open market trades, at an average price of \$14.93 per share. Davis alleges that each of the Tender Offers violated the terms of the COD, he did not participate in any of the PPS tender offers, and he was not offered opportunities to do so (*id.*).

The complaint originally asserted 10 causes of action: (1) breach of contract against Scottish Re (one through three); (2) breach of fiduciary duty against the Scottish Re directors, the "Cerberus Defendants," and the "MassMutual Defendants" full question mark (four and six); (3) derivative actions for breach of fiduciary duty and waste against the Scottish Re directors, the SRUS directors, and the Cerberus and MassMutual Defendants (seven, nine, and ten); (4) aiding and abetting breach

of fiduciary duty against the Cerberus and MassMutual Defendants (eight); and (5) tortious interference with contract against the Cerberus and MassMutual Defendants (five). This court dismissed the third through tenth causes of action, and continued the motion as to the first and second causes of action against Scottish Re, pending the outcome of limited jurisdictional discovery. The court determined that, under the law of the Caymans Islands applicable to these claims under New York choice of law rules, Davis lacked standing to assert derivative claims. The third cause of action (breach of contract) and the fifth cause of action (tortious interference with contract) failed to state causes of action. Davis also did not validly state the breach of contract (claim 3) and tortious interference with contract causes of action were not validly stated.

As to the Tender Offers, in the Prior Decision, the court stated that Davis had not shown that the matters of which he complained arose out of any purposeful transaction of business in New York within the meaning of CPLR 302 (a) (1). The court declared, however, that Davis was entitled to conduct limited discovery pertaining to jurisdiction, and granted a continuance for that purpose. As for the Merger, the court determined that the “Amended and Restated Agreement and Plan of Merger,” dated as of April 15, 2011 (Merger Agreement) was governed by New York law, and that the ministerial act of completing the closing occurred in New York was sufficient to support the grant of a continuance to allow Davis to conduct jurisdictional discovery.¹

The parties have completed discovery as to jurisdiction, conducted over the course of a year. Scottish Re again seeks dismissal of the first two causes of action alleging beach of contract (the COD) for lack of personal jurisdiction. For the reasons discussed below, the motion is granted as to the First Cause of Action and denied as to the Second Cause of Action.

Discussion

Because Scottish Re is not incorporated in New York and does not maintain its principal place of business here, it is not amenable to general personal jurisdiction in this court under CPLR 301. To determine whether long-arm jurisdiction over it as a foreign corporation exists under CPLR 302 (a) (1), the court must decide: “(1) whether the defendant transacts any business in New York, and, if so, (2) whether the cause of action arises from such a business transaction” (*Licci v Lebanese*

¹ On appeal, the First Department affirmed the Prior Decision but modified the resulting order so as to allow Davis to replead in order to remedy certain pleading deficiencies in the fourth and the sixth causes of action.

Can. Bank, SAL, 20 NY3d 327, 334 [2012] [internal quotation marks and citations omitted]). As for the first prong, the activity in New York must be “purposeful” (*id.* at 338). Purposeful activities are defined as “those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws” (*C. Mahendra (N.Y.) LLC v Natl Gold & Diamond Ctr Inc*, 125 AD 3d 454, 457 [1st Dept 2015]). “Not all purposeful activity . . . constitutes a ‘transaction of business’ within the meaning of CPLR 302 (a) (1)” (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]). The activity must be essential to the formulation of a business relationship (*see Greco v Ulmer & Burne LLP*, 23 Misc 3d 875, 889 [Sup Ct Kings County 2009]). Although a telephone conference, along with other substantial New York activity may be sufficient to confer personal jurisdiction (*see Merrill Lynch, Pierce Fenner & Smith, Inc. v Glob. Strat Inc.*, 94 AD 3d 491, 492 [1st Dept 2012] *affd as mod*, 22 NY 3d 877 [2013] [holding that defendant’s active trading in personal holding company based in New York and telephone conference into the jurisdiction regarding trading activities made a *prima facie* showing of jurisdiction]), “meetings in the forum state that are *exploratory*, unproductive, or insubstantial are insufficient to the establish the requisite contacts with the state” (*Greco*, 23 Misc 3d at 889 [emphasis added]).

The assertion of personal jurisdiction must also be based on a defendant’s minimal contacts with New York to comport with due process (*see Wilson v Dantas*, 128 AD3d 176, 182 [1st Dept], *motion to dismiss appeal denied* 26 NY3d 1077 [2015], *rearg denied* 27 NY3d 951 [2016]). “This requires an examination of the quality and the nature of the defendant’s activity and a finding of some act by which the defendant purposefully avails itself of the privilege of conducting activities within [New York], thus invoking the benefits and protection of its laws” (*id.* [internal quotation marks and citation omitted]).

Relevant factors courts consider to determine whether an out-of-state defendant transacts business in New York include:

“(i) whether the defendant has an on-going contractual relationship with a New York corporation; (ii) whether the contract was negotiated or executed in New York and whether, after executing a contract with a New York business, the defendant has visited New York for the purpose of meeting with parties to the contract regarding the relationship; (iii) what the choice-of-law clause is in any such contract; and (iv) whether the contract requires franchisees to send notices and payments into the forum state or subjects them to supervision by the corporation in the forum state”

(*Sunward Elec. v McDonald*, 362 F3d 17, 22-23 [2d Cir 2004], quoting *Agency Rent A Car Sys., Inc. v Grand Rent A Car Corp.*, 98 F3d 25, 29 [2d Cir 1996]).

As for the second prong, “in light of all the circumstances, there must be an articulable nexus or substantial relationship between the business transaction and the claim asserted” (*Licci*, 20 NY3d at 339 [internal quotation marks and citations omitted]). However, the “inquiry under the statute is relatively permissive” and “causation is not required” (*id.*).

As the party seeking to assert jurisdiction, Davis has the burden to present sufficient facts to demonstrate that the court has jurisdiction over Scottish Re (*see Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 [1st Dept 2015]; *CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 471 [1st Dept 2011]). Davis has met his burden as to the second cause of action but not as to the first.

1. *The Tender Offers (first cause of action)*

Scottish Re is a Cayman Islands company whose business transactions that relate to the first cause of action took place in, or in some way involved, many jurisdictions, but, as for actual business activity, the Cayman Islands was not among them. Scottish Re states: that “the critical decisions by Scottish Re’s Board and members of its executive management occurred outside New York; specifically in North Carolina, Toronto, Bermuda, and Ireland” (Def. Reply Memo. at 14). Scottish Re also states that “the vast majority of the New York activity on which plaintiff relies was undertaken by third-parties, not Scottish Re” (*id.* at 1). Of course, a “vast majority” finding is not dispositive. “So long as a party avails itself of the benefits of the forum, has *sufficient minimum contacts with it*, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction” (*Wilson*, 128 AD3d at 186 [emphasis added]).

The gist of Scottish Re’s argument is that what matters is the COD, which was executed in 2005 under Cayman Islands law. The first and second causes of action are based on alleged breaches of that agreement, but there is no evidence that the COD was either negotiated or executed in New York. Scottish Re did not have any agents in New York regarding the COD and there is no evidence that any dividends paid to Davis pursuant to the COD were remitted in New York. Scottish Re also argues that Davis fails to satisfy the requisite “substantial relationship” test, in that all significant corporate acts underlying the first cause of action occurred outside New York. Specifically, (1) Scottish Re’s executive management discussed and formulated the Tender Offers outside New York;

(2) they approved the 2010 Tender Offer in Toronto; (3) Scottish Re convened a meeting in Bermuda during which its shareholders voted to approve the purchase of the PPS tendered for repurchase during the 2010 Tender Offer; and (4) Scottish Re held a meeting in Ireland, during which its shareholders voted by proxy to approve the 2012 Tender Offer.

Although Davis's rights may spring from the COD, it is through the Tender Offers and Merger that Scottish Re effectuated the alleged wrongs. Thus, finding jurisdiction here is not dependent solely upon the relation of the COD to New York. As noted above, if there is "an articulable nexus or substantial relationship between the business transaction and the claim asserted," the "arise from" requirement is satisfied (*see Licci*, 20 NY 3d at 339).

The transactions at issue were global in nature. Arguably, suit could have been brought in the Cayman Islands, Canada (Toronto), Bermuda, Ireland, or North Carolina. As discussed below, the situs of New York also played a role but that role does not reveal sufficient contacts with New York so as to make Scottish Re amenable to suit here.

The first cause of action alleges that Scottish Re breached the COD by purchasing and then redeeming some of its PPS through the Tender Offers and private transactions. In the Prior Decision, this court found that Davis adequately pled a claim for breach of contract. This court also held that Scottish Re's retention of counsel and other professionals with offices located in New York, without more, did not confer jurisdiction over Scottish Re. There was no indication in the record that Scottish Re was partial to having its counsel and financial advisors work out of New York, as opposed to any other jurisdiction. Davis had not shown that his claims arose out of any purposeful transaction of business in New York within the meaning of CPLR 302 (a) (1). However, the court granted Davis the right to conduct limited discovery addressed to the issue of jurisdiction. Having completed that discovery, Davis continues to rely primarily on the business activity of Scottish Re's agents in New York, which, as stated above, the court found to be insufficient.

Davis asserts that beginning in September 2009, Scottish Re's executive management attended nearly biweekly meetings in New York regarding the 2010 Tender Offer (*see Bolatti Aff.*, ¶¶ 6-8). More specifically, Davis contends that Scottish Re's Board conducted a meeting on October 8, 2009 "to discuss the repurchase of Company securities" (*see Bolatti Aff.*, ¶ 6, Ex. 5). However, tender offers are not mentioned in the meeting minutes relied on by plaintiff (Reply, at 11; exhibit

5, RW 718-23 to Bolatti Aff. [board meeting minutes]). Davis also states that a critical informative meeting attended by Scottish Re's top management, was held in New York on November 11, 2009 (*see* Bolatti Aff., ¶ 7, Ex. 7). The minutes of that meeting reveal that it was held by teleconference (*see id.*). Davis also alleges that the Tender Offers were discussed at Cerberus's New York Office in October and December of 2009 (*see* Bolatti Aff., ¶ 8, Exs. 1, 3). However, the evidence on which plaintiff relies, entries on an appointment calendar and a merger proxy, do not support plaintiff's assertion (*see* Reply, at 11-12). As to the alleged December 13, 2011 meeting at Cerberus' New York office to discuss the 2012 Tender Offer (Pl. Op. at 12; Bolatti Aff., ¶ 20), again, plaintiff's evidence is mainly calendar entries that do not clearly support that the second tender offer was discussed.

Generally, "exploratory meetings," as this and others appear to have been, are insufficient to establish jurisdiction (*see C-Life Group v Generra Co.*, 235 AD2d 267 [1st Dept 1997] ["parties' initial, exploratory 45-minute meeting in New York, leading to only a proposal that was itself subject to further negotiations over the phone, by mail, and in meetings outside of New York, was not a New York business transaction for purposes of CPLR 302 (a) (1)"]; *see also V Cars, LLC v Israel Corp.*, 902 F Supp 2d 349, 361 [SDNY 2012]). Although exploratory meetings are relevant for jurisdictional purposes, here plaintiff has not shown that purposeful activity concerning the Tender Offers occurred in New York sufficient to trigger New York jurisdiction (*see Arroyo v Mtn. School.*, 68 AD 3d 603, 604 [1st Dept 2009]).

There is no dispute that Scottish Re retained New York lawyers, financial advisors and an information agent for the Tender Offers (*see* Pl. Opp. at 5-6, 12). Scottish Re communicated often with legal advisors Dewey Dewey LeBaeuf LLP ("Dewey") and Cahill Gordon & Reindel ("Cahill") concerning the Tender Offer (*see id.* at 13). Nevertheless, plaintiff has not shown that it was essential to retain New York advisors for the Tender Offers, or that the fact that the advisors are located in New York is not incidental (*see Paine Webber Inc. v Westgate Group, Inc.*, 748 F Supp 115, 120 [SDNY 1990] ["desire to get a big "New York" Investment house is not a purposeful availment of New York as a forum just as 'Get me a New York lawyer,' without more, is not an invocation *in personam* jurisdiction in the forum state of the lawyer's practice"]). Moreover, Cahill

was retained by deal manager Merrill Lynch for the 2010 Tender Offer and by deal manager UBS for the 2012 Tender Offer, not Scottish Re² (*see* Reply Ancone Aff., Ex. 4).

Plaintiff also asserts that the funds relating to the Tender Offers flowed through banks located in New York, including the funds payable by Scottish Re to the tendering PPS Holders. Scottish Re also made wire transfers to pay the UBS, Dewey, and Cahill bills for the Tender Offers. Mere payment into a New York account does not provide a basis for New York jurisdiction (*see Pramer S.C.A. v Abaplus Intern. Corp.*, 76 AD 3d 89, 96 [1st Dept 2010]). The use of the DTCC, or DTC, located in New York, without more, does not establish contacts with New York for purposes of conferring jurisdiction (*see Sino Clean Energy Inc. v Little*, 35 Misc 3d 1266 (A) [Sup Ct 2012]). Nor can the conduct of Broadridge and D.F. King be imputed to Scottish Re, as they were engaged in the ministerial tasks of printing proxy cards and distributing the tender offer documents to PPS holders through the DTC.

Accordingly, plaintiff has not established that the Tender Offers were New York transactions under CPLR 302 (a) (1). As the first prong of the rule is not fulfilled, personal jurisdiction has not been shown as to the First Cause of Action and this claim must be dismissed.

2. *The Merger (second cause of action)*

The second cause of action alleges that Scottish Re breached the COD by distributing the Merger consideration to ordinary shareholders when no dividends had been paid to the PPS holders, including Davis. In the Prior Decision, the court determined that the second cause of action validly pleads a claim for breach of section 3 of the COD.

The complaint alleges that the directors “presented inaccurate and biased information to the minority shareholders to induce a favorable vote” (Complaint, ¶ 45), engaged in a “campaign of misinformation” (*id.*), and “deliberately intimidated the ordinary shareholders by repeatedly asserting that in the absence of the Merger, the ordinary shareholders would receive no compensation whatsoever for their shares” (*id.*, ¶ 54).

²Merrill Lynch and UBS, the dealer managers who provided material services to Scottish Re for the Tender Offers, were located in North Carolina and Connecticut, respectively (Bolatti Aff., Ex. 11, Ex. 149 at SRJ 4740, Ex. 151 at SRJ 5009, Ex. 156 at SRJ 5888: *see also* Reply Ancone Aff., Ex. 5 at 33:25-35:1).

As stated in the Prior Decision, on January 28, 2011, the Cerberus and MassMutual defendants proposed to acquire all outstanding Scottish Re ordinary shares in a merger transaction under Cayman Islands law for \$0.21 a share. After receiving the offer, the Scottish Re Board formed a special committee of directors (“Special Committee”) to review the offer. The Special Committee retained Cahill and Appleby Global to act as legal advisors, Houlihan Lokey in New York to act as financial advisor regarding the Merger and to render a fairness opinion (*see* Bolatti affirmation, ¶¶ 22-24, and exhibits thereto), and Merrill to assist in soliciting alternative proposals.

Here too, Scottish Re argues that it did not transact business in New York upon issuing the COD and in subsequently acting pursuant to that contract. In particular, (1) the COD was neither negotiated nor executed in New York, but instead was issued in the Cayman Islands by a Cayman Islands company; (2) Cayman Islands law governs its interpretation; and (3) to the extent that Scottish Re paid any dividends to Davis pursuant to the COD, there is no allegation (or evidence) that those dividends were paid in New York. Therefore, according to Scottish Re, the record establishes that Scottish Re did not transact business in New York for jurisdictional purposes.

As for the Merger, Scottish Re states that (1) the Investors, not Scottish Re, paid the Merger consideration; (2) the Investors retained Mellon Investor Services LLC, a New Jersey-based entity, as their paying agent, and wired the Merger consideration to a bank account with a Pennsylvania address; and (3) the court previously stated that the critical decisions by the Board and Scottish Re’s shareholders relating to the Merger occurred outside New York, thereby making the “center of gravity” outside New York.

Scottish Re argues further that Davis fails the “substantial relationship” test in that all of the operative acts underlying the second cause of action, relating to the formation, performance, or alleged breach of the COD, occurred outside New York. Specifically, (1) the Merger was accomplished pursuant to the Cayman Islands Companies law; (2) Scottish Re’s shareholders voted to approve the Merger during a meeting held in Bermuda; (3) the Investors, not Scottish Re, distributed the Merger consideration through Mellon, a New Jersey-based paying agent, to an account in Pennsylvania; and (4) the Merger became effective only after Scottish Re registered certain documents with the registrar in the Cayman Islands.

Moreover, evidence in the record supports Davis's assertions that New York played a substantial role, for jurisdictional purposes, in the transactions at issue. The Merger was partially negotiated in New York (*see* Bolatti affirmation, ¶ 35 and exhibits thereto). Scottish Re communicated to Schulte Roth & Zabel (Schulte), counsel for the Cerberus Defendants (as Investors) in New York, material comments to the draft Merger Agreement (Bolatti Aff., Ex 109 at 1362-1363). Although the Cerberus Defendants are no longer in the action, their New York activities are relevant to the court's consideration of the "totality of the circumstances and viewing the transaction as a whole" (*Wilson*, 128 AD3d at 184). As stated by the First Department in this case, "[p]laintiff alleges, inter alia, that the Directors, under the control of the Investors, directed Scottish Re to undertake an undervalued cash-out merger, in which the Investors acquired all of the outstanding common shares of Scottish Re, and a dividend strategy that benefitted the Investors and unfairly prejudiced the minority shareholders" (138 AD3d at 233).

Moreover, Scottish Re circulated to the Special Committee and New York counsel the Merger Agreement, subsequent event disclosures, and a revised press release, after review by its New York counsel, Dewey (*see* Bolatti Aff. Ex. 110 at JC 763 [April 11, 2011 email and attachments sent by Scottish Re's CFO], Ex. 111 at 964-967 [Schulte provided further revisions to the Merger Agreement and "Investor Disclosure Schedules"], Ex. 113 at 770-825 [Special Committee's New York counsel, Cahill, emailed execution copies of the Merger Agreement, Investors' Disclosure Schedules, and Articles of Association]). Much of the communications were conducted through emails and telephonic means. Technological advances in communication "enable a party to transact enormous volumes of business within a state without physically entering it" and "electronic and telephonic means" can be used as a means to project a presence into New York to conduct business transactions, thereby making that entity amenable to suit in New York (*see Deutsche Bank Sec., Inc.*, 7 NY3d at 71).

Importantly, Scottish Re executed the Merger Agreement agreeing to "irrevocably and unconditionally submit itself and its property to the exclusive jurisdiction [of] any state or Federal Court sitting in New York, New York, Borough of Manhattan in any proceeding arising out of or relating to this Agreement or the Agreements delivered in connection herewith or the transactions contemplated hereby" (Bolatti Aff., Ex. 114 [Merger Agreement, § 8.12.2]). Scottish Re also agreed

that: “this Agreement and all claims and causes of action arising out of, based upon, or related to this Agreement or the negotiation, execution or performance hereof, shall be governed by, and construed, interpreted and enforced in accordance with, the internal Laws of the State of New York” (*id.* at § 81.2.1]). That the parties selected New York law is a significant factor, because, “by so choosing,” Scottish Re “invoke[d] the benefits and protections of New York law” (*Sunward Elec.*, 362 F3d at 23).

Scottish Re again, contends that “plaintiff cannot rely on the . . . Merger Agreement; rather, his claims rest on an entirely separate contract – the COD. The alleged formation, performance, and breach of the operative contract did not take place in New York” (Reply at 6). However, the Merger Agreement is relevant, because it is part of a broader transaction that allegedly resulted in a breach of Scottish Re’s obligation to plaintiff (*see Wilson*, 128 AD3d at 182).

Accordingly, it is

ORDERED that the motion by Scottish Re Group Limited to dismiss the First and Second Causes of Action is **GRANTED** as to the First Cause of Action and **DENIED** as to the Second Cause of Action.

This constitutes the decision and order of the court.

DATED: July 11, 2016

ENTER,



O. PETER SHERWOOD

J.S.C.