SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

----------X

SPHINX INVESTMENT CORP.,

Plaintiff,

- v -

ALIKI PALIOU, ANDREAS NIKOLAOS MICHALOPOULOS, SYMEON PALIOS, GIANNAKIS (JOHN) EVANGELOU, ANTONIOS KARAVIAS, CHRISTOS GLAVANIS, REIDAR BREKKE, MANGO SHIPPING CORP., MITZELA CORP., and PERFORMANCE SHIPPING INC,

Defendants.

----------X

INDEX NO. 655326/2023

MOTION DATE 04/05/2024, 04/05/2024

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 30, 31, 32, 33, 34, 35, 42, 44, 45, 46
were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 36, 37, 38, 41, 43
were read on this motion to/for DISMISS.

Plaintiff Sphinx Investment Corp. (Sphinx) brings this action against defendants Performance Shipping Inc. (Performance or the Company), Symeon Palios, Giannakis (John) Evangelou, Antonios Karavias, Christo Glavanis, Reidar Brekke, Mango Shipping Corp. (Mango), Aliki Paliou, Andreas Nikolaos Michalopoulos, and Mitzela Corp. (collectively, defendants) asserting claims in connection with defendants' purported scheme to seize control of Performance at the expense of public holders of Performance's common shares. Now before the court are motions by defendants Performance, Palios, Evangelou, Karavias, Glavanis, and Brekke (the Company Defendants) (MS001) and defendants Mango, Paliou, Michalopoulos, and Mitzela (the Mango Defendants) (MS002) seeking dismissal of the Complaint pursuant to CPLR 3211(a)(1), (3), (7), and (8), and CPLR 327 (NYSCEF #s 8, 15). Sphinx opposes both motions. For the following reasons, both motions are granted.

Background[1]

Performance is a publicly traded, NYSE-listed entity incorporated in the Marshall Islands for the purpose of pursuing vessel acquisitions in the container-shipping industry ((NYSCEF # 1 – Complaint or compl ¶¶ 29, 32-33). Sphinx is a Marshall Islands entity and a shareholder in Performance (*see id.* ¶¶ 3, 19, 58). It currently holds approximately 9% of Performance's common shares (*id.* ¶¶ 3, 19). The present dispute concerns Sphynx's challenge to an alleged scheme to wrest control of Performance in favor of certain corporate insiders at the expense of the Company's common shareholders (*see id.* ¶¶ 1, 3, 58-70).

At the time of Performance's incorporation, non-party Diana Shipping held 55% of the company's shares (compl ¶ 33). Symeon Palios, a resident of Greece, was Diana Shipping's then-chairman and CEO of the Company (*see id.* ¶¶ 22, 33; NYSCEF # 1 at Summons). Between 2010 and 2019, Palios acquired a 47.8% beneficial ownership position in Performance's common shares, which he then transferred to Mango, a Marshall Islands corporation, in 2020 (compl ¶¶ 27, 34-35). That same year, Palios transferred his interest in Mango to his daughter Akili Paliou, also a resident of Greece, thereby giving her a 46.7% beneficial interest in Performance (*see id.* ¶ 3 and Summons).

Upon receiving a beneficial interest in Performance, Paliou was appointed to Performance's board of directors (the Board) and her husband, Andreas Nikolaos Michalopoulos, was made the Company's CEO (*see* compl ¶¶ 20-21, 37). The remainder of the Board in 2021 was comprised of (1) Evangelou, (2) Karavias, (3) Glavanis, (4) Brekke, and (5) Palios (collectively with Paliou and Michalopoulos, the Director Defendants) (*see id.* ¶¶ 22-26). On February 28, 2022, during Performance's annual meeting, the Board was reduced from seven to five members, Paliou was elected as chair of the Board, Evangelou and Glavanis opted not to stand for re-election, and Karavias and Brekke resigned (*id.* ¶ 50).

According to the Complaint, with the global shipping industry experiencing a downturn in 2020, the Director Defendants developed a purported scheme that would raise capital for Performance while preventing any dilution of Mango, Paliou, and Michalopoulos's interest (compl ¶¶ 1, 38-39). To do so, Performance offered holders of its common shares an opportunity to exchange their tradeable common shares for non-voting Series B Preferred Shares (the Exchange Offer) (*id.* ¶ 40). The Series B Preferred Shares would later become convertible into super-voting Series C Preferred Shares with various other preferential rights and powers, and, after a six-month waiting period, these Series C shares could then be converted back to common shares (*see id.* ¶¶ 40, 49).

[1] The following facts are drawn from the Complaint and its accompanying exhibits and are assumed true solely for purposes of resolving the motion.

Sphinx contends that the Exchange Offer presented ordinary shareholders with a "Hobson's choice" because they could either retain their tradeable common shares and be stripped of voting power, or they could preserve their dividend rights and voting power but lose the liquidity of holding common shares (see *id.* ¶ 42). Mango, however, did not face any such dilemma because it could use its insider ties to arrange for a private transaction to transition out of Series B Preferred Shares early and unlock liquidity from its Series C Preferred Shares (*id.* ¶ 43).

The Exchange Offer's offer period lasted from December 20, 2021, until January 21, 2022, and had a minimum tender offer condition of 2,033,091 common shares (compl ¶ 41; NYSCEF # 12 at 1). Mango agreed to tender its 2,352,047 common shares in exchange for Series B Preferred Shares, thus satisfying the Exchange Offer's minimum tender condition (*see id.* ¶ 41). Mitzela, a Marshall Islands entity owned by Michalopoulos that held common shares in the Company, also participated in the Exchange Offer (*id.* ¶ 21). All in all, approximately 90% of Series B Preferred Shares were issued to corporate insiders, with Mango's voting power increasing to 85% of Performance's voting stock and Mitzela's voting power increasing to 3.6% (*id.* ¶¶ 21, 47). On October 17, 2022, Performance entered into a stock purchase agreement with Mango under which, Sphinx alleges, Mango was given an exclusive opportunity to exchange its non-voting Series B Preferred Shares for Series C Preferred Shares ahead of the publicly advertised schedule (*id.* ¶ 43).

As relevant here, Sphinx alleges certain New York-related contacts associated with the Exchange Offer. For example: the Exchange Offer's offer period ended at 5:00 p.m. New York time; the Exchange Offer occurred through the Nasdaq in New York; defendants used various New York-based agents and firms to facilitate the offer; and Performance's stock ledger was maintained by a New York-based transfer agent (compl ¶ 46; NYSCEF # 12 at 1).

Following the Exchange Offer, Sphinx avers, Mango owned relatively few common shares (compl ¶ 51). Accordingly, Performance, using a New York-based investment bank as its placement agent pursuant to an agreement governed by New York law, conducted a series of common share issuances from May 2022 through March 2023 (*see id.* ¶¶ 51-53). These issuances further diluted the value and voting power of any outstanding, post-Exchange Offer common shares and further insulated the Mango Defendants from the costs normally borne by shareholders as part of a company's capital raise (*id.*)

A few months later, on August 7, 2023, Sphinx began purchasing shares of Performance, and by August 25, 2023, Sphinx had a beneficial ownership of over 9% of the Company's then-outstanding common shares (compl ¶ 58). Soon after, on August 31, 2023, Sphinx sent a letter to Performance's current Board challenging Performance's dual-class capital structure and the Exchange Offer, and, in turn, demanding that the Board implement certain remedial measures to ameliorate these purported issues (*id.* ¶¶ 59-61). On September 15, 2023, after some back-and-

forth correspondence with the Board, Sphinx delivered a notice of nomination of a candidate for election to the Board. Performance purportedly rejected delivery of a physical copy of the nomination notice (*see id.* ¶¶ 62-66). On October 11, 2023, Sphinx announced a cash tender offer by which it offered to buy all common shares of the Company at $3 per share (*id.* ¶ 67). On October 25, 2023, the Board recommended that shareholders reject the offer and not tender their common shares to Sphinx (*see id.* ¶¶ 68-70).

Two days later, on October 27, 2023, Sphinx commenced this action against defendants, asserting claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty, as well as seeking a declaration that the Series C Preferred Shares are void (compl ¶¶ 71-106). Defendants thereafter filed motions to dismiss the complaints on the grounds of lack of personal jurisdiction, forum non conveniens, and failure to state a claim (*see* NYSCEF #s 8, 15).

Legal Standards

CPLR 3211(a)(8) provides that a party may move to dismiss one or more causes of action on the ground that the court lacks personal jurisdiction over defendants (CPLR 3211 [a] [8]). On such a motion, the court is required to accept as true allegations set forth in the complaint and accord plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428 [1st Dept 2013]; *Whitcraft v Runyon*, 123 AD3d 811, 812 [2d Dept 2014]). Plaintiff nevertheless bears the "burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction" (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017]). Although a plaintiff need not conclusively establish that there is personal jurisdiction in defending against a motion to dismiss, he or she must make at least a "sufficient start" in demonstrating its existence (*see James v iFlex Inc.*, 185 AD3d 22, 29-30 [1st Dept 2020] [explaining that plaintiff "need only make a 'sufficient start' in demonstrating, prima facie, the existence of personal jurisdiction"]). Conclusory assertions of jurisdiction will not suffice (*see Gasarch*, 149 AD3d at 487 [rejecting "vague, conclusory and unsubstantiated" allegations offered to support long arm jurisdiction]).

Discussion

Defendants argue at the outset of their respective motions that the court lacks personal jurisdiction to hear Sphinx's claims (*see* NYSCEF # 14 – Company Defts MOL at 8-10; NYSCEF # 27 – Mango Defts MOL at 8-11). In particular, defendants contend that none of Sphinx's claims arise out of any of their contacts and transactions in New York (*see* Company Defts MOL at 8-10; Mango Defts MOL at 8-11). Sphinx counters that it has sufficiently established personal jurisdiction pursuant to CPLR 302(a)(1) (NYSCEF # 30 – Opp at 11-16). To support its position,

Sphinx points to various "contacts" by defendants that it contends were integral to defendants' scheme and the challenged transactions (*see id.* at 11-12).

Under CPLR 302(a)(1), a court may exercise jurisdiction over a non-domiciliary who "transacts any business within the state." The jurisdictional inquiry under CPLR 302(a)(1) involves a "two-pronged analysis" (*Bangladesh Bank v Rizal Commercial Banking Corp.*, 226 AD3d 60, 80 [1st Dept 2024]). First, courts must decide whether defendant "conducted sufficient activities to have transacted business in the state," and, if so, whether plaintiff's "claims [] arise from the transactions" (*see Al Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016]). "Both prongs must be met in order for personal jurisdiction to attach" (*Wilson v Dantas*, 128 AD3d 176, 182 [1st Dept 2015]).

Regarding the first prong, the defendant's activities in New York must be "purposeful" (*see Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 338 [2012]). 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 (NY), LLC v Natl. Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457 [1st Dept 2015]). This is ultimately an objective inquiry that requires courts to "closely examine the defendant's contacts for their quality" and assess whether "defendant has 'availed itself of the privilege of conducting activities within the forum state'" (*Bangladesh Bank*, 226 AD3d at 81, quoting *Al Rushaid*, 28 NY3d at 323 [alterations omitted]). The primary consideration is not the quantity but the quality of the contacts with New York (*see D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 298 [2017]; *Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]).

As for the second prong, courts must assess whether there is "an articulable nexus or substantial relationship between the business transaction and the claim asserted" (*Licci*, 20 NY3d at 339 [internal quotations omitted]). "At the very least, there must be 'a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim'" (*D & R Global Selections*, 29 NY3d at 299; *Matter of New York Asbestos Litig.*, 212 AD3d 584, 586 [1st Dept 2023] ["Although causation is not required, there must be at minimum, 'a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former'"]). This a "relatively permissive" inquiry that looks at whether "at least one element arises from the New York contacts" (*Licci*, 20 NY3d at 341). Nevertheless, courts will not find that personal jurisdiction exists "where the relationship between the claim and transaction is too attenuated" (*Johnson v Ward*, 4 NY3d 516, 520 [2005]).

Here, the crux of all of Sphinx's allegations is that defendants "orchestrated" a scheme to hand the Mango Defendants alleged *de jure* control of Performance, and they did so, in part, by "formulating," "effecting," and "approving" the Exchange Offer and subsequent dilution of common shares (*see* compl ¶¶ 1, 15-18, 39-40, 43-

45, 48, 51, 78, 82, 84, 88, 94, 98). Notably absent from the Complaint, however, is any indication that any these underlying orchestrations, formulations, and approvals giving rise to defendants' alleged breaches of fiduciary duty took place in New York. Rather, Sphinx points to a handful of New York-related contacts that it contends were "integral" to defendants' alleged scheme (Opp at 14). Those contacts include Performance's use of: (1) a New York-based investment firm as placement agent for the dilutive issuances pursuant to a placement agreement governed by New York law; (2) a New York-based law firm and information agent to coordinate the Exchange Offer, (3) New York time for setting a deadline of the Exchange Offer; (4) a New York-based transfer agent to maintain its stock ledger, and (5) the NASDAQ in New York for listing its shares (*see* compl ¶¶ 16, 29, 40, 44, 46, 52, 66).

These purported contacts fail to establish how, if at all, defendants transacted business in New York at the requisite level necessary to support a finding of personal jurisdiction. To the contrary, these New York-based contacts appear to be nothing more than mere "link[s] in the chain of causation" flowing from defendants' purported attempt to deliver *de jure* control of Performance to the Mango Defendants (*see Holzman v Guoqiang Xin*, 2015 WL 5544357, at *6 [SD NY, Sept. 18, 2015, No. 12-cv-8405 (AJN)] [concluding that the court lacked personal jurisdiction to hear claims challenging a $40 million misappropriation of funds that stemmed from a New York IPO]; *see also Talbot v Johnson Newspaper Corp.*, 123 AD2d 147, 149 [3d Dept 1987], *aff'd* 71 NY2d 827 [1988] ["A defendant may not be subject to personal jurisdiction under CPLR 302(a)(1) simply because her contact with New York was a link in the chain of events giving rise to the cause of action"]). Put differently, Sphinx has alleged nothing more than tangential, logistical activities in New York that do not support a conclusion that defendants availed themselves to the privilege of conducting business in New York, or articulate a nexus to Sphinx's fiduciary duty claims (*see Davis v Scottish Re Group Ltd.*, 2016 WL 3688466, at *3-4 [Sup Ct, NY County, July 11, 2016] [finding that plaintiff failed to establish that certain tender offers were considered New York transactions despite that defendant had "exploratory meetings" took place in New York, retained New York lawyers, financial advisors, and information agents for the tender offers, and funds for the tender offers flowed through banks located in New York]).

The court's reasoning in *Poms v Dominion Diamond Corp.* (2019 WL 2106090 [Sup Ct, NY County, May 15, 2019])—a case cited by defendants—is instructive. In *Poms*, plaintiff initiated a proposed class action lawsuit alleging claims related to a purportedly incomplete and materially misleading information circular, which had been prepared as part of shareholder vote on a proposed acquisition of defendant Dominion Diamond Corporation, a Canadian corporation with its principal place of business in Calgary (*id.* at *1). Like Sphinx, the plaintiff in *Poms* attempted to invoke the court's personal jurisdiction over defendants pursuant to CPLR 302(a)(1) by alleging that defendant Dominion's common stock was traded on the New York Stock Exchange, and that defendants (a) retained a New York-based law firm as legal counsel in connection with the proposed transaction, (b) designated New York

as a forum to bring claims under the transaction's relevant agreements, and (c) retained a New York-based firm to serve as a proxy solicitation agent (*id.* at *2).

The court ultimately rejected these bases for asserting jurisdiction (*id.* at *3). In so holding, the court concluded that the alleged connections between New York and plaintiff's claims were "at best tangential and insufficient to show the required 'affiliation between the forum and the underlying controversy'" (*id.* at *4, quoting *Bristol-Meyers Squibb Co. v Superior Ct. of California*, 582 US 255, 262 [2017]). As the court observed, the "center of gravity for the [p]roposed [t]ransaction was in Canada," and the "few, detached connections between [d]efendants and New York" were "not substantially related to [plaintiff's]" claim that defendants had issued inadequate and/or misleading disclosures (*id.*).

That is precisely the case here. As noted above, Sphinx's claims are tied to the corporate decision-making that allegedly resulted in the Mango Defendants obtaining *de jure* control of Performance. Although the Exchange Offer and subsequent share dilutions, as alleged, were the primary means by which defendants accomplished their goals, these transactions are only tenuously connected to New York by virtue of certain incidental, administrative contacts made by defendants to help facilitate them. Such contacts cannot, without more, be viewed as defendants purposefully projecting themselves into New York (*cf. Matter of Renren Inc.*, 67 Misc 3d 1219[A], at *13 [Sup Ct, NY County, 2020] [holding that defendants purposefully availed themselves to New York where "[n]early every aspect of the IPO and the Transaction are connected to New York" and the New York-based contacts "necessarily involved New York"]; *Sino Clean Energy Inc. v Little*, 35 Misc 3d 1226[A], at *9 [Sup Ct, NY County, 2012] [holding that the use of a New York brokerage house was "merely incidental to [defendant's] alleged short sale transactions[] and are no more sufficient to establish the requisite contacts with New York than the incidental use of bank accounts for dividend payments, stock transfer agents and stock registrars"]). To hold otherwise would be to greatly expand the scope of New York's long-arm jurisdiction beyond the bounds permitted under the CPLR. And at any rate, as explained above, even if they were considered purposeful, defendants' alleged contacts with the State have no meaningful bearing on a purported breach of fiduciary duty by any of defendants.

All told, Sphinx has failed to establish that the court can exercise long-arm personal jurisdiction over defendants pursuant to CPLR 302(a)(1). Accordingly, dismissal of its complaint is plainly warranted. Sphinx nevertheless contends that, in the event that personal jurisdiction is not evident, jurisdictional discovery, rather than dismissal, is the proper course of action (Opp at 16-17). The court disagrees.

CPLR 3211(d) provides that, "[s]hould it appear from affidavits submitted in opposition to a motion made under [CPLR 3211(a)(8)] that facts essential to justify opposition may exist but cannot then be stated," then the court may direct that the parties engage in jurisdictional discovery. To obtain jurisdictional discovery,

"plaintiff[] must demonstrate the possible existence of essential jurisdictional facts that are not yet known" (*Copp v Ramirez*, 62 AD3d 23, 31-32 [1st Dept 2009]). This requires that plaintiff "offer 'some tangible evidence which would constitute a 'sufficient start' in showing that jurisdiction could exist, thereby demonstrating that its assertion that a jurisdictional predicate exists is not frivolous'" (*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 354 [1st Dept 2004], quoting *Mandel v Busch Entertainment Corp.*, 215 AD2d 455, 455 [2d Dept 1995]).

Here, Sphinx fails to offer any tangible evidence constituting a sufficient start to establish that jurisdiction exists under CPLR 302(a)(1). Specifically, there is no indication in either the Complaint or Sphinx's opposition papers that the relevant company decisions perpetuating the scheme —or any other non-tangential aspects of the Exchange Offer and dilution of shares, for that matter—occurred in New York. Without such a showing, there is simply no basis to conclude that a non-frivolous jurisdictional predicate exists. In sum, defendants' motions to dismiss for lack of jurisdiction are granted. Given this conclusion, defendants' forum non conveniens argument is academic and will not be addressed.

Conclusion

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants Performance, Palios, Evangelou, Karavias, Glavanis, and Brekke for lack of personal jurisdiction (MS001) is granted and the Complaint is dismissed as against them; and it is further

ORDERED that the motion to dismiss by defendants Mango, Paliou, Michalopoulos, and Mitzela for lack of personal jurisdiction (MS002) is granted, and the Complaint is dismissed as against them; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that defendants are to serve a copy of this order together with a notice of entry upon plaintiff and the Clerk of the Court within 10 days of this order.

08/09/2024
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE