

OCT 16 2017

ASST. CLERK OF COURTS  
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT  
OF THE  
REPUBLIC OF THE MARSHALL ISLANDS

ALICE WENHUI CHEE,	)	CIVIL ACTION NO. 2016-254
	)	
plaintiff,	)	
	)	
v.	)	
	)	
YE ZHANG, FLEET FREEMAN, and	)	<b>FINAL JUDGMENT GRANTING</b>
AMERICAN FRICTION RAW	)	<b>DEFENDANTS' MOTIONS TO DISMISS</b>
MATERIAL, INC.,	)	
	)	
defendants.	)	
	)	
	)	
	)	

TO:   Arsima A. Muller, counsel for plaintiff  
      David M. Strauss, counsel for defendants Zhang and American Friction  
      Philip A. Okney, counsel for defendant Freeman  
      Robert O'Connor, counsel for defendant Freeman  
      Melvin Narruhn, counsel for defendant Freeman

In December 2016, Plaintiff Alice Chee (“Chee”) filed suit against the following: (i) defendant Ye Zhang (“Zhang”), her estranged husband; (ii) defendant American Friction Raw Material, Inc. (“American Friction”), a nonresident domestic corporation Zhang had formed; and (iii) defendant Fleet Freeman (“Freeman”), the corporation’s attorney. Chee’s lawsuit is based upon Zhang’s failure to honor an agreement to transfer 40% of American Friction’s shares to her.

In July 2017, this Court heard oral arguments on the following motions: (1) Freeman’s Motion to Dismiss for Lack of Personal Jurisdiction, Failure to State a Claim and *Forum Non Conveniens* (“Freeman Motion”), and (2) Zhang and American Friction’s Motion to Dismiss

(“Zhang Motion”) (together “Motions”). This Court, having carefully considered the defendants’ Motions, the briefs filed by the parties and the arguments made and the authorities cited therein, the argument of counsel at the hearing, and being otherwise fully advised, hereby finds, concludes, and orders that the Motions are **GRANTED** and that this matter is **DISMISSED** for the reasons set forth below.

### **FINDINGS OF FACT**

All relevant facts are either alleged in the Complaint, the papers attached to and incorporated into the Complaint, or contained in the briefs.

1. Chee is a resident of Vancouver, British Columbia, Canada. Compl., ¶ 1.
2. Zhang is a resident of Vancouver, British Columbia, Canada. Compl., ¶ 2; Zhang Motion at 4.
3. Freeman is a resident of the State of South Carolina, United States of America. Compl., ¶ 3.
4. American Friction is a nonresident domestic corporation incorporated in the Republic of the Marshall Islands (“Republic”). Compl., ¶ 4.
5. None of the parties is a resident of the Marshall Islands, including American Friction, a nonresident domestic corporation not authorized to do business in the Republic and not alleged to have done so.
6. Chee and Zhang were married on January 12, 1995, in Guangzhou, China. Compl., ¶ 9.

7. In January of 1997, Chee and Zhang migrated from China to Canada. They lived in Montreal, Canada, from January 1997 to December 1997. They moved to Vancouver, Canada in January 1998. Compl., ¶ 10.

8. American Friction was formed on February 13, 1997. Compl., ¶ 12; Zhang Motion at 2. Zhang formed American Friction as a corporation with Freeman acting as the proxy and attorney representing the corporation. Compl., ¶ 12.

9. American Friction is the sole shareholder of Guangzhou Sunny Metal Inc., a company incorporated in China (“Guangzhou Sunny”), and 60% shareholder of Zhangjiagang Sunny Metal, Inc., a company incorporated in China (“Zhangjiagang Sunny”). Compl., ¶ 35.

10. On February 19, 1997, American Friction held its organizational meeting and elected Zhang as the sole director. On the same day, Zhang, as sole director, elected himself as the President, secretary, and treasurer of American Friction. American Friction also authorized 500 shares of no-par bearer stock and issued Certificate No. 1, dated February 19, 1997, for 500 shares to Zhang. Zhang signed Certificate No. 1 as both the president and secretary of American Friction. The original Certificate No. 1 remained in American Friction’s corporate record book. Compl., ¶ 13.

11. Article VI, Section 1 of American Friction’s bylaws state:

Certificates shall be signed by the president, managing director, or a vice-president, and by the secretary or an assistant secretary or the treasurer or an assistant treasurer. Zhang Motion at 2, n.1.

12. On November 18, 2005, at the request of Zhang, American Friction issued and delivered to Zhang bearer stock Certificate No. 2 for 300 shares and bearer stock Certificate No.

3 for 200 shares. Compl., ¶ 16; Zhang Motion at 2. At the time of this issuance of stock, Certificate No. 1 was canceled on American Friction's corporate records. Compl., ¶ 16.

13. Freeman amended American Friction's corporate records to reflect ownership in the names of Zhang, 300 shares, and Chee, 200 shares, as of November 2005. Compl., Ex. 2, ¶ 5.

14. On October 18, 2007, at Zhang's request, the original Certificate No. 1, which had previously been canceled, was delivered to Zhang. Compl., ¶ 17.

15. Bearer stock Certificate No. 2 and bearer stock Certificate No. 3 were mailed to Chee and Zhang's family home located at 1412 Minto Crescent, Vancouver, British Columbia, Canada sometime in 2007. Compl., ¶ 18; Zhang Motion at 2. Certificates No. 2 and No. 3 certify that "the Bearer hereof is the owner" of shares in American Friction. Compl., ¶ 18.

Attached to bearer stock Certificates No. 2 and No. 3 was a Certificate of Authenticity issued by Freeman. Compl., Ex. 4. The Certificate of Authenticity states as follows:

As Attorney and keeper of the corporate records, I hereby certify that the attached copies of Bearer Stock Certificate No. 2 delivered to Zhang Ye for 300 shares and Bearer Stock Certificate No. 3 delivered to Alice Wenhui Chee for 200 shares on November 18, 2005 were duly authorized and truly and accurately reflect the current record ownership of all of the authorized shares of American Friction Raw Material, Inc.

The Certificate of Authenticity was signed by Freeman, and sworn before a notary public, on November 27, 2007, or 2 years after the issuance of the bearer certificates. The Certificate of Authenticity did not specify that the bearer stock certificates required signatures by the president and secretary of American Friction in order to be valid, nor did it note the lack of signatures by the president and secretary. Compl., ¶ 19 and Ex. 4.

16. Chee maintains that she kept bearer stock Certificates No. 2 and 3, along with the Certificate of Authenticity, in her safe deposit box at HSBC Bank. Compl., ¶ 21.

17. On July 30, 2010, Chee was appointed as secretary for American Friction. Compl., ¶ 13 and Ex. 3. This appointment was reflected in the corporate records.

18. In 2014, Chee and Zhang began to live separate and apart. Chee continued to live in the family home. Compl., ¶ 26.

19. During the course of their separation, Chee and Zhang entered into the following agreements (collectively, the “Separation Agreements”):

- a. “Separation Agreement” dated April 1, 2014;
- b. “Asset Division Agreement (1)” dated May 11, 2014; and
- c. “Framework Agreement of Assets Division” dated December 4, 2014 (“Framework Agreement”).

Compl., 28.

20. In the Framework Agreement, Chee and Zhang sought to divide up shares to Guangzhou Sunny and Zhangjiagang Sunny. Compl., Ex. 6.

21. Paragraph 1 of the Framework Agreement provides:

The two parties hereby confirm that, no matter how the shares of the above companies are registered, both parties to this agreement are the actual controllers and equity owners of the entire shares of the above companies.

Compl., Ex. 5, ¶ 1.

22. Paragraph 5 of the Framework Agreement provides:

Both parties agree that, from the business assets, 100% equity of Zhangjiagang Xinli, Guangzhou Sunny and Guangzhou Xinni, as well as the entire intellectual property and intangible assets . . . related to the two companies, Zhangjiagang

Xinli and Guangzhou Sunny, will be regarded as one entity (hereinafter referred to as “company’s entire operation asset”) will be, in principal, divided equally by the two parties.

Compl., Ex. 5, ¶ 5.

23. Paragraph 6 of the Framework Agreement then provides:

Both parties agree to put 10% of the company’s entire operation asset that each receives, in a total of 20% of the company’s entire operation asset, into a trust fund, and will jointly assign Yongqiang LAN (male, born on October 4, 1967, ID No.: 620102196710045336) as the administrator. The sole beneficiaries of this fund are the daughters of the two parties: Silvia Zhang and Chloe Zhang. The detailed trust plan will be negotiated and settled by the two parties separately.

Compl., Ex. 5, ¶ 6.

24. Paragraph 7 of the Framework Agreement sets out the division plan for company’s entire operation asset as follows:

(1) Both parties agree that, no matter whom the company’s equity in the entire operation asset belongs to currently, 40% of the share of the company’s entire asset and all the related right and obligation will be owned and undertaken by the company established by Party A [Chee]. Change of the equity registration shall be completed within 60 days after this agreement is signed, which means that the company, which is established by Party A, will own 40% of the equity of Zhangjiangang Xinli, Guangzhou Sunny and Guangzhou Xinni respectively;

(2) Both parties agree that, no matter whom the company’s equity in the entire operation asset belongs to currently, 40% of the share of the company’s entire operation asset and all the related right and obligation will be owned and undertaken by the company established by Party B [Zhang]. Change of the equity registration shall be completed within 60 days after this agreement is signed, which means that the company, which is established by Party B, will own 40% of the equity of Zhangjiangang Xinli, Guangzhou Sunny and Guangzhou Xinni respectively;

(3) Both parties further agree that, no matter whom the company’s equity in the entire operation asset belongs to currently, 20% of the share of the company’s entire operation asset and all the related right and obligation shall be held by the trust fund co-founded by the two parties, and change of the equity registration shall be completed within 60 days after this agreement is signed. Silvia Zhang

and Chloe Zhang will be the sole beneficiaries of this part of the equity. That is the trust fund will hold 20% equity of Zhangjiangang Xinli, Guangzhou Sunny and Guangzhou Xinni, respectively.

Compl., Ex. 5, ¶ 7.

25. In or about August 2014, Chee commenced an action regarding the family matter in Guangzhou, China. In that case, Chee sought a divorce, custody of the children, and settlement of all matters relating to property division. Compl., ¶ 29.

26. On September 30, 2015, Zhang issued an Affidavit of Lost or Misplaced Share Certificates for American Friction. In his Affidavit, Zhang swears that “sometime between November of 2005 and the date of this affidavit, all certificates, being No. 1, No. 2, and No. 3 have been stolen or misplaced.” Compl., Ex. 5.

27. On November 16, 2015, Zhang filed a Notice of Family Claim in the Supreme Court of British Columbia, Vancouver Registry, seeking a divorce, division of property located in British Columbia, and guardianship and custody orders with respect to their daughter, Chloe. Compl., ¶ 31.

28. In or about August 2016, Chee filed an action in Zhangjiagang, China and an action in Guangzhou, China, with respect to corporate matters to oppose Zhang seeking ownership and control of the two Chinese companies controlled by American Friction referred to supra. Zhang Reply, Exs. 1a and 2a.

29. On October 5, 2016, Freeman issued his Affidavit. Compl., Ex. 2. In his Affidavit, Freeman attests that, based on the representations made by Zhang, and upon the request of Zhang, Freeman sent to Zhang the original of Certificate No. 4 reflecting no par 500 bearer shares of American Friction, canceled Certificates No. 2 and No. 3, and modified the

records of American Friction to reflect this change in shareholder information. Compl., Ex. 2, ¶ 7. In Freeman's Affidavit setting out the course of events, Freeman noted for the first time that bearer stock Certificates No. 2 and 3 were not signed. Freeman attested that American Friction's bylaws provide that the shares shall be signed by American Friction's president and secretary or treasurer, and further that the Republic's Business Corporations Act provides that shares shall be signed by officer(s) and/or a director of the company. *See id.*, ¶¶ 8, 9.

30. On or about December 23, 2016, the Guangzhou Court issued its ruling, wherein the Court rejected Chee's lawsuit against Guangzhou Sunny Metal. Zhang Reply, Ex. 1b. In reaching its decision, the Court noted that "it is still uncertain whether there is an investment relationship between the PLAINTIFF CHEE ALICE WENHUI and third party Friction Raw Material, Inc." Zhang Reply, Ex. 1b, at 7. Specifically, the Court noted that "[t]he shares of Friction Raw Material, Inc. held by CHEE ALICE WENHUI have not been certified by the competent government department or judiciary authority in the country or region where the company is registered." Zhang Reply, Ex. 1b, at 6. Chee has appealed the Guangzhou Court's decision. Zhang Reply, Ex. 1c.

31. On or about December 26, 2016, the Zhangjiagang Court issued its ruling, wherein the Court rejected Chee's lawsuit against Zhangjiagang Sunny Metal. Zhang Reply, Ex. 2b. In its decision, the Court noted that Chee's claims relating to the American Friction appointment letter was "beyond the scope of intervention by the power of the Court." Zhang Reply, Ex. 2b, at 4. Chee has appealed the Zhangjiagang Court's decision. Zhang Reply, Ex. 2c.

32. At the hearing on this matter, Chee's counsel informed the Court that Chee had voluntarily withdrawn her petition for divorce in Guangzhou, China. Chee's counsel also

informed the Court that the British Columbia court issued a final order granting the divorce on June 20, 2017. Zhang’s counsel informed the Court that the British Columbia Court had declared that its order was without prejudice to Zhang’s right to argue in China or British Columbia that the parties’ separation arguments are not valid and enforceable — i.e., property issues remain open in China and in Canada.

### CONCLUSIONS OF LAW

#### **A. MOTIONS’ FAILURE TO COMPLY WITH THE RULES**

1. As Chee argues, Marshall Islands Rules of Civil Procedure (“MIRCP”) Rule 7(b)(1)(F) specifies that a motion must, “if in writing, not exceed 15 pages, exclusive of attachments, unless otherwise authorized by court order.”

2. Both Motions exceed 15 pages, and no court order authorized the extra pages.

3. Both Motions are not in compliance with MIRCP Rule 7(b)(1)(F).

4. Accordingly, the Court, only considered the first 15 pages of each Motion less space for a signature block.

#### **B. PERSONAL JURISDICTION OVER DEFENDANTS FREEMAN AND ZHANG**

5. The defendants Freeman and Zhang have moved for dismissal under MIRCP Rule 12(b)(2) for lack of personal jurisdiction.

6. When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that the court has jurisdiction over the defendant. *See Pebble Beach Co. v. Caddy*, <sup>F.3d</sup> 453 ~~U.S.~~ 1151, 1154 (9th Cir. 2006). This demonstration requires that plaintiff “make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss.” *Id.*

7. In considering a motion to dismiss, courts assume the truth of the allegations contained in the complaint. *See Mann v. Brenner*, 375 Fed. App'x 232, 235 (3d Cir. 2010) (“the District Court must accept the plaintiff’s well-pleaded allegations as true . . .”) *citing Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “To withstand a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147 (3d Cir. 2010) (internal quotations omitted). Mere conclusory allegations and “threadbare recitals of the elements of a cause of action” are insufficient and support the dismissal of a complaint at an early stage. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (internal quotation omitted).

8. In order to establish personal jurisdiction over Freeman and Zhang, Chee must show the following: (1) that the Republic’s long-arm statute confers such jurisdiction; and (2) that the exercise of such jurisdiction is consistent with principles of due process, which courts have interpreted to mean that (i) a defendant “has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum,” (ii) “the claim arises out of or results from the defendant’s forum-related activities,” and (iii) “the exercise of jurisdiction is reasonable.” *Pebble Beach Co.*, <sup>F.3d</sup> 453 U.S. at 1154-1155.

**1. Personal Jurisdiction over Freeman**

**a. Chee’s Allegations of Jurisdiction Under Section 251(n) of the Judiciary Act Do Not Provide For Personal Jurisdiction Over Freeman**

8. Chee argues that long-arm statutory personal jurisdiction exists over Freeman by virtue of 27 MIRC § 251(n), which provides for jurisdiction over a person who “commits an act of commission or omission of deceit, fraud or misrepresentation which is intended to affect, and does affect persons in the Republic.”<sup>1</sup>

9. Because Chee is not an affected “person in the Republic,” she contends that the affected “person in the Republic” is American Friction, in that the composition of its ownership was changed.<sup>2</sup>

10. Even if American Friction is a “person in the Republic,” jurisdiction over Freeman under Section 251(n) does not exist, because none of the causes of action asserted against him in the Complaint are asserted by American Friction, or arise out of any injury done to American Friction. On the contrary, American Friction is named as a co-defendant with Freeman in the case. As the High Court held in *Yandal Investments Pty Ltd. v. White Rivers Gold Ltd.*, Civ. No. 2010-158 (High Ct., May 19, 2011), Section 251(n) does not provide a basis for personal jurisdiction under such circumstances.<sup>3</sup> Indeed, the “effect” on a nonresident corporation alleged to give rise to personal jurisdiction in *Yandal* (issuance of share certificates

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<sup>1</sup>See Chee’s Memorandum in Opposition to Freeman’s Motion at 5 (“[T]he Court has personal jurisdiction over Freeman pursuant to 27 MIRC § 251(n).”).

<sup>2</sup>See *id.* at 4-5.

<sup>3</sup>See *Yandal, supra*, slip op. at 4 (“Plaintiffs assert the acts of Defendant Mason affect WRG, a non-resident domestic corporation of the Republic, so as to bring him within the jurisdiction of the court. However, while the facts alleged in the complaint may support a claim of fraud, the persons affected by the fraud are plaintiffs. The plaintiffs are not residents of the Republic. WRG is one of the defendants alleged to have committed the fraud. Section 251(n) does not provide a basis for personal jurisdiction over defendant Mason.”).

in the corporation) is substantively indistinguishable from the “effect” alleged in this case (the cancellation and re-issuance of such shares).

11. Furthermore, even if the Court were persuaded (which it is not) that *Yandal* was wrongly decided, and that an effect on the ownership of the shares of a nonresident Marshall Islands corporation was sufficient, in and of itself, to provide Section 251(n) jurisdiction over a claim by a person other than the “affected” corporation, jurisdiction over Freeman still would not exist in this case, because the causes of action asserted against him do not arise out of the “effect” itself — i.e., the change in stock ownership — but rather out of representations he allegedly made regarding the ownership. Regardless of whether those representations were right or wrong, they did not and could not affect the actual ownership of the shares, and thus did not affect the corporation. They only affected Chee, who was not a person in the Republic. For all of these reasons, there is no statutory jurisdiction over Freeman under Section 251(n).

**b. Chee’s Claim of Jurisdiction Under Section 251(i) of the Judiciary Act Does Not Provide For Personal Jurisdiction Over Freeman**

12. At the hearing on the Motions, Chee suggested that Freeman functioned as the *de facto* “secretary” of American Friction, and that long-arm jurisdiction therefore existed pursuant to 27 MIRC § 251(i), which provides for personal jurisdiction over a person who “acts within the territorial limits of the Republic as director, manager, trustee or other officer of a corporation organized under the laws of the Republic.” This was a new theory of jurisdiction, not asserted either in the Complaint or in Chee’s brief, and mentioned only for the first time at the hearing. In any event, it is unavailing. Section 251(i) requires, as a prerequisite to jurisdiction, that Freeman not only have acted as secretary, but also that he have done so “within the territorial limits of the

Republic”; and it creates jurisdiction only as to causes of action “arising from” one of the jurisdiction-creating acts taken within the Republic. Acts involving stock in Marshall Islands corporations, when taken outside the territorial limits of the Republic, are not sufficient to meet this requirement, even when taken by a corporate officer or director. *See, e.g., Yandal, supra*, (holding that no personal jurisdiction arose over the director of a Marshall Islands by virtue of his having signed, outside the Marshall Islands, stock certificates of the corporation). There is no allegation that Freeman took any action of any kind in any capacity within the territorial limits of the Republic. The Court therefore finds that there is no statutory long-arm personal jurisdiction over Freeman under Section 251(i).

**c. Freeman Lacks Constitutionally Sufficient Minimum Contacts with the Republic.**

13. The due process standard for the exercise of personal jurisdiction is stated as follows:

For due process to be satisfied, a defendant, if not present in the forum, must have “minimum contacts” with the forum state such that the assertion of jurisdiction “does not offend traditional notions of fair play and substantial justice.”

*Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006) (*quoting International Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945)). The test for “minimum contacts” has three prongs:

“(i) a defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed itself of the privileges of conducting activities in the forum, (ii) the claim arises out of or results from the defendant’s forum-related activities, and (iii) the exercise of jurisdiction is reasonable.”

*Frontline LTD, v DBT Holdings, Inc., et al.*, Civ. No. 2017-092 (High Ct., June 7, 2017), slip op. at 16 (*quoting Pebble Beach, supra*, 453 F.3d at 1155) (internal punctuation omitted). “If any of

the three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law.” *Id.* (quoting *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995)) (emphasis added). Chee has not shown any of the three minimum contacts prongs to be met in this case.

14. The first and second prongs are not met, because Freeman has engaged in no forum-related activities. Like the defendant in *Frontline*, he does not reside in the Republic, nor has he undertaken any activity in the Republic related to this action. *Cf Frontline*, slip op. at 18. If a defendant is not conducting activities in the forum, the first and second prongs can be satisfied only if he has “purposefully directed’ his activities toward the forum.” *Pebble Beach*, *supra*, 453 F.3d at 1155. Purposeful direction is evaluated under the “effects test” articulated by the U.S. Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984).

To satisfy this test the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state.

*Pebble Beach*, *supra*, 453 F.3d at 1156 (internal quotation marks omitted). Freeman is not alleged to have taken any act expressly aimed at the Marshall Islands. On the contrary, the act for which Chee seeks to hold him liable — the issuance of an inaccurate Certification of Authenticity — was not expressly aimed at anyone or anywhere. The Certification is addressed, in practical effect, “to whom it may concern.” *See* Compl., Ex 4, p 3. In other words, there was no “individualized targeting” of the Marshall Islands. *See Pebble Beach*, *supra*, 453 F.3d at 1157 (“We stated that the ‘express aiming’ standard was satisfied when ‘individualized targeting was present.’”). The Certification is alleged to have been “mailed to Plaintiff and Zhang’s family

home located at 1412 Minto Crescent, Vancouver, British Columbia, Canada.” Compl., ¶¶ 18-19. To the extent it was aimed at any particular jurisdiction, therefore, it was aimed at Canada. Furthermore, not only the “brunt,” but the entirety, of any harm Freeman is alleged to have caused was suffered by Chee in Canada and/or in China, not in the Marshall Islands. Therefore, Freeman is not alleged to have engaged in any forum-directed activities for purposes of the “minimum contacts” test, and, since he did not engage in such activities in the first place, no claim arose from them. The first two elements of the due process test are thus not met.

15. Finally, the third prong of the due process test, the exercise of jurisdiction is reasonable, is not met. Freeman would be burdened by litigating in a relatively remote foreign forum, the Marshall Islands, when an alternative forum, British Columbia, is available. Exercising jurisdiction would not be reasonable under such circumstances. *Frontline*, slip op. at 18 (citing *FDIC v. British American Insurance Co.*, 828 F.2d 1439, 1444-45 (9th Cir. 1987)).

## **2. Personal Jurisdiction Over Zhang**

### **a. Chee’s Allegations of Jurisdiction Under Section 251(n) of the Judiciary Act Do Not Provide For Personal Jurisdiction Over Zhang**

16. As with respect to Freeman, Chee argues that long-arm statutory personal jurisdiction exists over Zhang by virtue of 27 MIRC § 251(n), which provides for jurisdiction over a person who “commits an act of commission or omission of deceit, fraud or misrepresentation which is intended to affect, and does affect persons in the Republic.”<sup>4</sup> Chee asserts that Zhang is subject to the court’s jurisdiction based on the allegation that, as the sole

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<sup>4</sup>See Chee ‘s Memorandum in Opposition to Defendants Ye Zhang and American Friction Raw Material, Inc. Motion to Dismiss, at 4 (“[T]he Court has personal jurisdiction over Defendant Zhang pursuant to 27 MIRC § 251(n).”).

shareholder, he “committed an act of deceit, fraud, or misrepresentation that affected American Friction and Plaintiff as its shareholder.” (Compl., ¶ 7.)

17. As noted above, because Chee is not an affected “person in the Republic,” she contends that the affected “person in the Republic” is American Friction, in that the composition of its ownership was changed.<sup>5</sup>

18. Even if American Friction is a “person in the Republic,” jurisdiction over Zhang under Section 251(n) does not exist, because none of the causes of action asserted against him in the Complaint are asserted by American Friction, or arise out of any injury done to American Friction. On the contrary, American Friction is named as a co-defendant with Zhang and Freeman in the case. As this court held in *Yandal*, Section 251(n) does not provide a basis for personal jurisdiction under such circumstances. *See* n. 3, *supra*. The “effect” on a nonresident corporation alleged to give rise to personal jurisdiction in *Yandal* (issuance of share certificates in the corporation) is substantively indistinguishable from the “effect” alleged in this case (the cancellation and re-issuance of such shares).

19. The current case is similar to *Yandal*. The facts presented require a finding that no stock was issued to Chee by Zhang or American Friction, thus precluding the argument that issuance of American Friction stock allows for personal jurisdiction over Zhang. Neither Zhang, nor any other officer or director of American Friction, signed the bearer Certificate Nos. 2 and 3 as required by the bylaws and Section 42(1) of the Business Corporations Act,<sup>6</sup> rendering both

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<sup>5</sup>*See* Chee ‘s Memorandum in Opposition to Defendants Ye Zhang and American Friction Raw Material, Inc. Motion to Dismiss, at 5.

<sup>6</sup>“(stock) Certificates shall be signed by an officer(s) and/or a director, however designated, of the corporation, and may be sealed with the seal of the corporation, if any, or a

certificates null. Accordingly, even if personal jurisdiction exists when a nonresident domestic corporation authorizes the distribution of stock, it would not exist here. For all of these reasons, there is no statutory jurisdiction over Zhang under Section 251(n).

**b. Chee's Claim of Jurisdiction Under Section 251(i) of the Judiciary Act Does Not Provide For Personal Jurisdiction Over Zhang**

20. The Judiciary Act contains an express provision for jurisdiction arising out of a defendant's role in a Marshall Islands corporation. Section 251(i) provides for civil jurisdiction over a person who "acts within the territorial limits of the Republic as director, manager, trustee or other officer of a corporation organized under the laws of the Republic." In Paragraph No. 7 of the Complaint under "Jurisdiction," Chee states that Zhang is the "sole shareholder" of American Friction.

21. Section 251(i) requires, as a prerequisite to jurisdiction, that Zhang not only have acted as director, manager, trustee or other officer of American Friction, but also that he have done so "within the territorial limits of the Republic." And, finally, it creates jurisdiction only "as to any cause of action arising from any of those matters" – *i.e.*, from one of the jurisdiction-creating acts taken within the Republic. Acts involving stock in Marshall Islands corporations, when taken outside the territorial limits of the Republic, are not sufficient to meet this requirement, even when taken by a corporate director. *See, e.g., Yandal, supra*, (no jurisdiction over director of a Marshall Islands corporation arose by virtue of his having signed, outside the Marshall Islands, stock certificates of the corporation). There is no allegation that Zhang took any action of any kind in any capacity (*i.e.*, as a shareholder or officer) within the territorial limits

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facsimile thereof."

of the Republic. The Court therefore finds that there is no statutory long-arm personal jurisdiction over Zhang under Section 251(i).

**c. Zhang Lacks Constitutionally Sufficient Minimum Contacts with the Republic**

22. As noted above with respect to Freeman, the due process standard for the exercise of personal jurisdiction is stated as follows:

For due process to be satisfied, a defendant, if not present in the forum, must have “minimum contacts” with the forum state such that the assertion of jurisdiction “does not offend traditional notions of fair play and substantial justice.”

*Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945)). The test for “minimum contacts” has three prongs:

“(i) a defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed itself of the privileges of conducting activities in the forum, (ii) the claim arises out of or results from the defendant’s forum-related activities, and (iii) the exercise of jurisdiction is reasonable.”

*Frontline*, *supra*, slip op. at 16 (quoting *Pebble Beach*, *supra*, 453 F.3d at 1155) (internal punctuation omitted). “If any of the three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law.” *Id.* (quoting *Omeluk*, *supra*, 52 F.3d at 270) (emphasis added). Chee has not shown any of the three minimum contacts prongs to be met in this case.

23. The first and second prongs are not met, because Zhang has engaged in no forum-related activities. Like the defendant in *Frontline*, he does not reside in the Republic, nor has he undertaken any activity in the Republic related to this action. *Cf. Frontline*, slip op. at 18. If a defendant is not conducting activities in the forum, the first and second prongs can be satisfied

only if he has “‘purposefully directed’ his activities toward the forum.” *Pebble Beach, supra*, 453 F.3d at 1155. Purposeful direction is evaluated under the “effects test” articulated by the U.S. Supreme Court in *Calder, supra*.

To satisfy this test the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state.

*Pebble Beach, supra*, 453 F.3d at 1156 (internal quotation marks omitted). Zhang is not alleged to have taken any act expressly aimed at the Marshall Islands. On the contrary, the act for which Chee seeks to hold him liable — for not following through on his agreement to give here 40% of the shares of American Friction by not signing the stock certificates — was not expressly aimed at the Marshall Islands. There was no “individualized targeting” of the Marshall Islands. *See Pebble Beach, supra*, at 1157 (“We stated that the ‘express aiming’ standard was satisfied when ‘individualized targeting was present.’”). The Stock Certificates are alleged to have been “mailed to Chee and Zhang’s family home located at 1412 Minto Crescent, Vancouver, British Columbia, Canada.” (Compl., ¶¶ 18-19. To the extent it was aimed at any particular jurisdiction, therefore, it was aimed at Canada. Furthermore, any harm Zhang is alleged to have caused was suffered by Chee in Canada and/or in China, not in the Marshall Islands. Therefore, Zhang is not alleged to have engaged in any forum-directed activities for purposes of the “minimum contacts” test, and, since he did not engage in such activities in the first place, no claim arose from them. The first two elements of the due process test are thus not met.

24. Finally, the third prong of the due process test, the exercise of jurisdiction is reasonable, is not met. Zhang would be burdened by litigating in a relatively remote foreign

forum, the Marshall Islands, when an alternative forum, China and/or Canada, is available. Exercising jurisdiction would not be reasonable under such circumstances. *Frontline*, at 18 (citing *FDIC v. British-American Insurance Co.*, 828 F.2d 1439, 1444-45 (9th Cir. 1987)).

## **C. FORUM NON CONVENIENS**

### **1. Legal Standard for *Forum Non Conveniens***

25. A party moving to dismiss on grounds of *forum non conveniens* must show: (1) the existence of an adequate alternative forum; and (2) that the balance of private and public interest factors weigh in favor of dismissal. *Piper Aircraft v. Reyno*, 454 U.S. 235, 238 (1981); *Creative Technology, Ltd., v. Aztech Syst. PTE Ltd.*, 61 F.3d 696, 703 (9th Cir. 1995). The weight of either the private interest factors or the public interest factors alone may be cause of dismissal. *BPA Int'l, Inc. v. Kingdom of Sweden*, 281 F. Supp. 2d at 85. (Emphasis added).

### **2. The Existence of an Adequate Alternative**

26. Ordinarily, a presumption is applied to the plaintiff's choice of forum. *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 795 (5<sup>th</sup> Cir. 2007). However, as in this case, a plaintiff's choice of forum is entitled to less deference when the plaintiff does not choose her own home forum. *See, e.g., Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007) ("When the plaintiff's choice is not its home forum, however, the presumption in the plaintiff's favor applies with less force, for the assumption that the chosen forum is appropriate is in such cases less reasonable.") (internal quotation marks omitted). Indeed, where the plaintiff has already chosen a different forum — as she has in this case — the policy of deference to that choice requires dismissal. *Lisa, S.A. v. Mayorga*, 993 A.2d 1042, 1047 (Del. 2010). Moreover, where the action in the subject forum is not the first filed, "the policy that favors strong deference

to a plaintiff's initial choice of forum requires the court freely to exercise its discretion in favor of staying or dismissing" the subsequent action. *Id.*, (emphasis in original).

27. The Marshall Islands is not Chee's home forum. And prior to the filing of the current matter by Chee, there were already four actions pending in other forums overseas implicating the central disputed question in this case, namely the lawful ownership of the 500 shares of American Friction. There were two divorce actions between Chee and Zhang — one in China, initiated by Chee, and another in Canada, initiated by Zhang. (Compl., ¶¶ 29 & 31). Since it is undisputed that all the shares of American Friction belong either to Chee, Zhang, or both of them in some combination, the ownership of the stock can be, or could have been, resolved in either of those cases as part of the property division incident to their divorce. In fact, they anticipated such a division in that context by preparing a marital property agreement. (Compl., ¶¶ 28, 36-44). The same question is also determinative in separate civil actions filed by Chee in China, opposing Zhang's control of two Chinese corporations owned in whole or in part by American Friction (Compl., ¶ 32), since, if Zhang does not lawfully own the stock he claims in American Friction, then neither could he lawfully control the other companies.

28. As to the tort claims, Chee can bring an action against Zhang and Freeman in British Columbia. Zhang resides in British Columbia and his fraudulent conduct allegedly occurred there, and Freeman sent his erroneous Certificate of Authentication to Chee and Zhang's home in British Columbia.

29. Chee has an adequate alternative jurisdiction for her claims in China and/or Canada.

## **2. Private Interests**

30. As to private interests, the most important factors when determining whether to grant a *forum non conveniens* fall into three categories: (i) relative ease of access to sources of proof; (ii) availability of witnesses; and (iii) all other practical factors favoring an expeditious and inexpensive trial. *Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764, 769-70 (9<sup>th</sup> Cir. 1991); *Creative Tech.*, 61 F.3d at 703.

31. In this case, there are no sources of proof in the Marshall Islands, no witnesses in the Marshall Islands, and no factors favoring an expeditious and inexpensive trial in the Marshall Islands. As noted above, this Court does not even have personal jurisdiction over the primary defendants, Zhang and Freeman. Chee and Zhang reside in British Columbia. Freeman resides in South Carolina. Guangzhou Sunny and Zhangjiagang Sunny are incorporated in China. The facts of this case revolve around acts done in China, British Columbia, Canada, and South Carolina, United States of America. The Marshall Islands is a remarkably inconvenient forum for this case and all parties compared to China and/or Canada.

## **3. Public Interests**

32. With respect to public interests, Chee has stressed the supposed importance of a Marshall Islands court deciding the issues under Marshall Islands law. However, the Marshall Islands has no particular interest in this matter. The only party to this lawsuit with any connection or relationship to the Marshall Islands is American Friction, and American Friction is not asking this Court to assert jurisdiction over anyone.

33. Nor does this case raise any special issues of Marshall Islands law. On the contrary, Marshall Islands law provides that familiar, broadly recognized principles of American

corporations law shall apply to nonresident corporations. *See* Section 13 of the Business Corporations Act 1990 (making Republic’s corporations law “uniform with the laws of the State of Delaware and other states of the United States of America with substantially similar legislative provisions” with respect to nonresident corporations). As to the tort claims, the Marshall Islands courts usually apply the Restatement (Second) of Torts, not any unique Marshall Islands tort law.

34. For all of these reasons, this Court exercises its discretion not to assume jurisdiction over this matter on the grounds of *forum non conveniens*.

**D. IMPROPER SERVICE, NEGLIGENT MISREPRESENTATION, BREACH OF FIDUCIARY DUTY, AND CRIMINAL CONSPIRACY**

35. As the Court does not have personal jurisdiction over Freeman and Zhang, and as the Court concludes it should not exercise jurisdiction over this matter on grounds of *forum non conveniens*, the Court need not address the issues of improper service, negligent misrepresentation, breach of fiduciary duty, and criminal conspiracy.

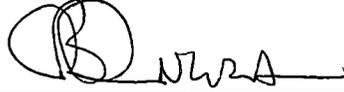
**LABELING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW**

To the extent that any of the foregoing Findings of Fact are more properly deemed to be Conclusions of Law, they are incorporated as Conclusions of Law. Should any of the foregoing Conclusions of Law be more properly deemed Findings of Fact, they are incorporated herein as Findings of Fact.

**DECISION AND ORDER**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED for the foregoing reasons that the Motions are **GRANTED** and that this matter is **DISMISSED**.

Entered: October 16, 2017.

A handwritten signature in black ink, appearing to read 'C. Ingram', written over a horizontal line.

Carl B. Ingram  
Chief Justice, High Court