IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

THE CHASE MANHATTAN BANK, as Collateral Agent,	:	
Plaintiff,	:	
v.	:	C. A. No. 00-564-RRM (JJF)(MPT)
IRIDIUM AFRICA CORPORATION; et al.,	:	
Defendants.	:	

ORDER GRANTING DEFENDANT STET- SOCIETA FINANZIARIA TELEFONICA PER AZIONI'S RENEWED MOTION TO DISMISS

As more fully detailed in the court's order of September 28, 2001, this suit is a contract action brought by Chase Manhattan Bank against the members of Iridium, LLC to enforce the Reserve Capital Call obligations of the members, as detailed in the Iridium LLC Agreement (the "LLC Agreement"). Chase alleges that Iridium granted it the right to the Reserve Capital Call obligations of Iridium members as a security for an $800 million loan extended by Chase in 1998 to Iridium's wholly-owned subsidiary, Iridium Operating, LLC ("Operating"). Chase asserts that defendant Stet-Societa Finanziaria Telefonica per Azioni ("Stet") is one of Iridium's members and is liable to the extent of its Reserve Capital Call obligation, $7,498,125, plus interest.

On February 27, 2001, Stet brought a motion to dismiss Chase's action, arguing that the court lacked personal jurisdiction over it. Stet's motion contained two basic arguments. One, Stet argued it was an Italian corporation and lacked sufficient minimum contacts with Delaware to be subject to jurisdiction under Delaware's long-arm

statute, 10 Del. C. § 3104, and principles of due process. See International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). Two, Stet recognized that while Section 11.04 of the LLC Agreement contains a clause by which its members consent to the jurisdiction of this court, it contended it was not bound by this consent because it transferred its interest in Iridium on October 16, 1996 to its wholly-owned subsidiary, Iridium Italia, S.p.A.

In an order dated September 28, 2001, Judge McKelvie denied Stet's motion to dismiss. See Chase v. Iridium Africa Corp., C.A. No. 00-564-RRM (D. Del. September 28, 2001) (D.I. 461) (the "Order"). The court agreed with Stet that, setting aside its purported membership in Iridium, there were not sufficient contacts between Stet and Delaware on which to base personal jurisdiction under Delaware's long-arm statute or the due process clause. Id. at 9-12. Further, the court agreed with Stet that, if it validly transferred its interest in Iridium in 1996, its onetime membership in Iridium and attendant consent to this court's jurisdiction did not exist in perpetuity. Id. at 9-10. The court found that Stet's membership in Iridium, if it ended in October 1996, was not a sufficient basis on which to find personal jurisdiction on claims relating to loans not incurred by Iridium until 1997 and 1998. Id. The court did find, however, that "whether Stet transferred its interest to Iridium Italia [was] an issue of fact in dispute." Id. at 14. Thus, it denied Stet's motion and permitted further discovery on the nature of Stet's involvement with Iridium. The court invited Stet to renew its motion to dismiss following discovery. Id. at 14-15. On January 8, 2002, Stet filed a renewed motion to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(2). This is the court's decision on that motion.

I. Discussion

Because most facts relating to the motion are explained in the court's September 28, 2001 Order, the court will not exhaustively recite them again here.

As Judge McKelvie noted in his September 28, 2001 order, Chase has the burden to establish that this court has personal jurisdiction over Stet. See Order at 12. "When a defendant raises the defense of the court's lack of personal jurisdiction, the burden falls upon the plaintiff to come forward with sufficient facts to establish that jurisdiction is proper." Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992). The evidentiary showing necessary to establish a prima facie case that personal jurisdiction exists depends on the stage of the proceeding. While Chase may rely on the factual allegations of the complaint prior to discovery, after the parties have taken discovery Chase must support its allegation of jurisdiction "through sworn affidavits or other competent evidence." Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 66 n.9 (3d Cir. 1984). In resolving fact questions presented by the evidence, "courts reviewing a motion to dismiss a case for lack of in personam jurisdiction must accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff." Cartaret Sav. Bank FA v. Shushan, 954 F.2d 141, 142 n.1 (3d Cir. 1992). Thus, the standard for evaluating contested facts on a motion to dismiss is similar to the standard for granting summary judgment or directed verdicts. See United Elec. Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 987 F.2d 39, 43 (1st Cir. 1993) ("in determining whether the prima facie demonstration [of personal jurisdiction] has been made, the district court is not acting as a factfinder; rather, it accepts properly supported proffers of evidence by a plaintiff as true and makes its

ruling as a matter of law"); Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983) ("In ruling on a jurisdictional motion involving factual issues which also go to the merits, the trial court should employ the standard applicable to a motion for summary judgment, as a resolution of the jurisdictional facts is akin to a decision on the merits."); Cable/Home Communication Corp. v. Network Prods., Inc., 902 F.2d 829, 855 (11th Cir. 1990) (noting that a plaintiff must present sufficient evidence to defeat a motion for directed verdict to demonstrate personal jurisdiction over a defendant).

Chase presents four arguments in support of jurisdiction. Chase argues: (i) Stet transacts business in Delaware and therefore has sufficient minimum contacts, apart from its membership in Iridium, on which to base jurisdiction; (ii) regardless of whether Stet transferred its interests in Iridium to Iridium Italia, Stet remains bound to its Reserve Capital Call obligation; (iii) Stet did not validly transfer its interest in Iridium and remains bound by the consent to jurisdictions contained in the LLC Agreement; and (iv) Stet is obligated to Chase under the doctrines of acquiescence, ratification, and estoppel because it knew Chase was relying on it as a member of Iridium to extend credit to Iridium. The court will address these arguments in turn.

II. Does this court have personal jurisdiction over Stet regardless of whether Stet validly transferred its interest in Iridium?

In its answering brief, Chase argues that, regardless of whether Stet transferred its interest in Iridium, "Stet's activities with regard to Iridium LLC are sufficient to establish that it 'transacted business' in Delaware" and is therefore subject to jurisdiction under Delaware's long-arm statute. See Chase's Ans. Br. at 14. Because Judge McKelvie rejected this proposition in his September 28, 2001 Order and Chase has

submitted no new argument or facts on the subject, the court will reject Chase's argument again.

Chase's argument that Stet "transacted business" in Delaware is premised on its position that Stet can be subject to jurisdiction in this case because it was involved in the operation of Iridium, a Delaware LLC, in 1996. Chase uses the phrase "transacted business," in the past tense, because that was the phrase used by the court in the September 28, 2001 Order to describe Stet's 1996 contacts with Delaware. Order at 9. The court stated that, assuming Stet effectively transferred its interest in Iridium in October 1996, "the most that can be said is that Stet 'transacted business' in Delaware during 1996." Id. The court went on to note, however, that an entity does not become forever subject to the jurisdiction of a court simply because it once, in the past, had sufficient contacts with that state. Id. 9-10; LaNuova D & B S.p.A. v. Bowe Co., 513 A.2d 764, 768 (Del. 1986) (holding the "transacts business" clause of Delaware's long-arm statute "may supply the jurisdictional basis for suit only with respect to claims which have a nexus to the designated conduct"). Rather, the Delaware long-arm statute uses the phrase "transacts business," in the present tense, to describe the contacts necessary for personal jurisdiction. See 10 Del. C. § 3104(c)(1). Because the court found that, assuming Stet effectively transferred its membership in Iridium in 1996, Stet's previous membership in Iridium was two years before Iridium (and its members) incurred the liabilities now at issue, it rejected Chase's suggestion that Stet "transacts business" in Delaware. Therefore, the court refused Chase's suggestion that jurisdiction in the case can be based solely upon Stet's former membership in a Delaware LLC.

In its briefing on the renewed motion, Chase has failed to produce any more evidence that Stet has had any contact with Delaware since withdrawing from Iridium in 1996 (assuming Stet's withdrawal from Iridium was valid). Absent further evidentiary support, the court continues to hold that Stet's contacts with Delaware in 1996 are by themselves an insufficient basis on which to exercise jurisdiction in Chase's suit.

III. Does Stet continue to be bound by the Reserve Capital Call obligation despite the purported transfer of its interest in Iridium?

Chase argues that the issue of whether Stet validly transferred its interests is a "red herring" because, even if it did, the forum selection clause in the LLC Agreement "irrevocably binds Stet." The forum selection clause in Section 11.04 of the LLC Agreement states, in relevant part, that:

> Any suit, action or proceeding against any party with respect to this Agreement may be brought in a court of the United States sitting the State of Delaware . . . and each party hereby irrevocably waives, to the fullest extent permitted by law, any objection that it may have, whether now or in the future, to the laying of venue in, or to the jurisdiction of, any and each of such courts for the purposes of such suit, action, proceeding or judgment . . . .

Chase argues that Stet, by being a party to the Iridium LLC agreement in 1996, waived its right to contest the jurisdiction of this court. See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 11 (1972) (forum selection clause in which the parties consent to jurisdiction should be given effect). Because Stet has argued to the court that it transferred its interests in Iridium and is therefore no longer bound by the forum-selection clause, Chase has also argued that Section 11.04 remains binding on Stet even after such a transfer. For support for this argument, Chase turns to Section 6.04 of the LLC Agreement, which states:

> No Transfer shall relieve a party hereto of its contractual obligations under this Agreement . . . unless the relief of such obligations is approved by the holders of at least 66 2/3% of the then outstanding Class 1 Interests . . .

According to Chase, while the holders of 66 2/3% of the Class 1 Interests voted to approve Stet's transfer to Iridium Italia, they never voted to relieve Stet of its contractual obligations, including the Reserve Capital Call. Thus, Stet remains bound by its contractual obligations, including the jurisdictional waiver, even if it did transfer its interest in Iridium.

Stet presents a number of arguments in response. Stet's primary argument is that even if Chase is correct that two-thirds of Iridium's members never approved relieving Stet of its obligations, Section 6.04 stands only for the proposition that Stet remains bound to the obligations of the LLC Agreement as that agreement existed in 1996. One of those obligations is the consent to jurisdiction provision of Section 11.04. But because Section 11.04 is limited to suits "against any party with respect to this Agreement," Stet argues that the consent to jurisdiction to which it remains bound extends only to suits relating to the 1996 version of the LLC Agreement. Because the 1996 LLC Agreement contained only basic Reserve Capital Call obligations and contained no mention of Chase or the secured credit that Chase would later provide, Stet maintains that its consent to jurisdiction, even if it survives the transfer of its interests, does not include suits on obligations of Iridium members created after October 1996.

The court agrees with Stet that Section 11.04's language limiting the jurisdictional waiver for suits "with respect to this Agreement" includes only the 1996 version of the LLC Agreement and not obligations arising thereafter, such as the assignment of the

Reserve Capital Call to Chase in 1998. Were the court to accept Chase's position that the consent to jurisdiction continues in perpetuity, the result would be that Iridium could make Stet liable for any obligation of its members, based solely on its onetime membership in Iridium, merely by amending the LLC Agreement. No reasonable party would agree to such a wide jurisdictional waiver.

Moreover, the court notes that Stet could make a strong argument that Iridium's members approved the relief of Stet's contractual obligations under Section 6.04 when they approved the transfer of Stet's interest at the October 16, 1996 Board of Directors and Members meeting. While the court need not resolve this question, it is worth noting that Chase's proposed construction of Section 6.04 would require two separate approvals of a transfer of interest – both the typical approval required by Section 6.07 and another approval expressly relieving Stet of its obligations. Because reasonable parties would most likely think the latter approval was subsumed in the former (assuming it received the requisite two-thirds vote), it is difficult to understand why Chase's requirement of a separate approval serves a purpose.

In sum, the court concludes that, assuming Stet validly transferred its interests to Iridium Italia in 1996, Stet's consent jurisdiction in the 1996 LLC Agreement did not extend to obligations of members that were created only after Stet left Iridium. Therefore, the court cannot exercise jurisdiction over Stet based on this consent if Stet validly withdrew from Iridium.

IV. Was the alleged transfer of Stet's interest in Iridium to Iridium Italia effective?

Chase argues that this court may exercise jurisdiction over Stet because Stet

remains bound to the consent to jurisdiction contained in the LLC Agreement. Although Stet argues that it transferred its interest in Stet to Iridium Italia, Judge McKelvie found in his September 28, 2001 Order that, taking all Chase's proffered evidence as true and drawing all reasonable inferences in its favor, Chase had presented a sufficient factual basis for its assertion that Stet's transfer of its interest was ineffective. The court relied on two facts in finding that Chase had made the factual showing sufficient to avoid granting Chase's motion to dismiss. One, the record contains a "Transfer Acknowledgment" that purports to condition the transfer of interest from Stet to Iridium Italia on its execution. The Transfer Acknowledgment is signed by a representative of Iridium, but not by Iridium Italia. Two, the 1998 version of the LLC Agreement lists both Stet and Iridium Italia at various locations within the document. Based on these facts, the court found that Chase had sufficiently supported its assertion that Stet remained bound to the LLC Agreement, but suggested that Stet might renew its motion following discovery.

Now that discovery has been completed, Stet renews its argument that the factual record establishes that it transferred its interest to Iridium Italia and is no longer a member of Iridium. Stet looks to the following facts: (i) Iridium's Board and membership approved the substitution of Iridium Italia for Stet on October 16, 1996; (ii) the transfer of interest did occur on November 4, 1996; (iii) Iridium Italia executed a counterpart of the LLC Agreement on or about November 4, 1996; and (iv) Stet has held no interest in Iridium after November 4, 1996. Stet has produced a litany of evidentiary support for each of these propositions, including; (i) the minutes of the October 16, 1996 Board of Directors and members meeting; (ii) a letter to Iridium Italia from Robert N.

Beury Jr., Deputy General Counsel of Iridium, dated October 21, 1996, confirming that the Board and members approved the resolution of transfer on October 16, 1996; (iii) deposition testimony of F. Thomas Tuttle, General Counsel of Iridium, and Robert Beury confirming the transfer to Iridium Italia; (iv) a copy of Iridium Italia's Class 1 Interests of Iridium; and (v) a counterpart of the LLC Agreement signed by Iridium Italia. Furthermore, Stet has produced various Iridium documents dated after November 4, 1996 that list Iridium Italia, and not Stet, as a holder of Iridium Class 1 interests.

On the subject of the Transfer Acknowledgment, Stet admits that it cannot produce an Acknowledgment signed by Guiseppe Morganti, who was the authorized representative to Iridium of both Stet and Iridium Italia. However, Stet argues that this is of no consequence. First, neither the LLC Agreement nor the Board's approval of the transfer required the execution of a Transfer Acknowledgment. Second, the Transfer Acknowledgment states that "upon execution of the attached signature page which shall be inserted in the LLC Agreement, Iridium Italia S.p.A. shall be substituted for STET as a member of the company . . . ." While there is no signed copy of the Acknowledgment itself, there is a signature page in the LLC Agreement bearing the signature of Morganti[1] on behalf of Iridium Italia and bearing the date of the transfer, November 4, 1996.

The court agrees with Stet that the lack of a signature on the Transfer Acknowledgment is of no consequence. It is not required by any other document and appears to be only a superfluous formality. Morganti's signature of the LLC Agreement

[1]The signature page does not contain actual signatures, but rather the symbol "/s/," followed by the name and title of the representative. Based upon the court's review of Iridium's records, this appears to be the convention of Iridium's corporate records.

is sufficient to establish that Iridium Italia became a member of Iridium on the specified date, November 4, 1996.

Chase also points to several Iridium documents that continued to list Stet as a member after 1996. The court does not find these documents persuasive. Many of the documents are either marketing and promotional materials or informal internal memoranda. In contrast, the minutes of every Board of Directors meeting after November 1996 mention Iridium Italia, and not Stet, as its member. Furthermore, while post-1996 versions of the LLC Agreement continue to contain a signature page for Stet, they also show that Iridium Italia has executed the Agreement and is a member of Iridium.

Based on these facts, the court finds that Stet has shown that it did validly transfer its interests to Iridium Italia. The evidence submitted to the court overwhelmingly establishes such a transfer. Most important among this evidence are the Board and membership's approval of the transfer and Iridium Italia's actual possession of Class 1 Interests in its name. Moreover, the evidence relied upon by Chase that the transfer is invalid is unconvincing. First, the Transfer Acknowledgment is of little significance because it is not required by the LLC Agreement. Second, Chase has not explained why it is of any import to the validity of the transfer that various Iridium documents continued to mention Stet. Neither of these facts create a genuine issue that Stet's transfer of its interest in Iridium to Iridium Italia was ineffective. Viewing all the evidence in the light most favorable to Chase, the court finds that no reasonable jury could conclude, by a preponderance of the evidence, that Stet's transfer of its interest to Iridium Italia was ineffective. Therefore, the court finds that because Stet is

no longer a member of Iridium and bound by the consent to jurisdiction in the LLC Agreement, it cannot exercise jurisdiction over Stet based upon that consent.

V. Has Stet consented to jurisdiction under the doctrines of acquiescence, ratification, or estoppel?

Finally, Chase argues that even if Stet withdrew from Iridium in 1996, it can be subject to jurisdiction in this court based on the doctrines of acquiescence, ratification, or estoppel. Chase contends that because Guiseppe Morganti was the Iridium representative for both Stet and Iridium Italia and because he knew that Stet's name remained in the LLC Agreement and on Iridium documents, Stet is bound by those representations by Iridium and should be estopped from arguing that the court lacks jurisdiction over it. Chase purports to finds support for this argument in Delaware law.

Stet notes that in Morganti's affidavit, he states that he represented Stet prior to the transfer of interest and Iridium Italia afterwards. Thus, after November 4, 1996, Morganti's presence at Iridium Board meetings demonstrates the involvement of Iridium Italia and not Stet, as confirmed by the number of references to Morganti as the Iridium Italia representative in Board minutes. Because Morganti only held himself out as the representative of Iridium Italia, his presence could not have induced Chase to think that Stet remained involved in Iridium. Nor does his presence demonstrate any representation by Stet to Chase that it remained involved in Iridium. Therefore, Stet argues both that there were no representations by Stet of its continued membership in Iridium on which to find that it ratified its membership, and any silence by it cannot be taken as a knowing acquiescence.

The court agrees with Stet that personal jurisdiction cannot be established based solely on Stet's alleged acquiescence in, or ratification of, Iridium's actions. In the cases cited by Chase, the court found that a stockholder had acquiesced in or ratified a corporate action by failing to object to or vote against the action. See, e.g., Bay Newfoundland Co. v. Wilson & Co., 37 A.2d 59, 63 (Del. 1944) (in light of shareholder's knowledge of recapitalization, its failure to vote against it was acquiescence); Trounstine v. Remington Brand, Inc., 194 A. 95, 99 (Del. Ch. 1937) (under the doctrine of acquiescence, shareholder cannot complain about the conversion of his shares after accepting the benefit of that conversion). Those cases are distinguishable because it was not contested in those matters that the party was indeed a shareholder in the company and therefore had a duty to act to protect their rights. In contrast, because Stet withdrew from Iridium in 1996, its silence or acceptance of Iridium's actions after that withdraw cannot be said to have any meaning at all. Moreover, Chase was well aware that Iridium Italia, and not Stet, was a member of Iridium, for Chase listed Iridium Italia, and not Stet, as a member of Iridium on the Security Agreement. Therefore, the court concludes that Stet's failure to object to purported representations made by Iridium to third parties such as Chase cannot be the basis for finding Stet ratified or acquisced in those representations. The court will not exercise jurisdiction on this basis.

VI. Conclusion

The court finds that Chase cannot carry its burden to show that the court may exercise personal jurisdiction over Stet. While the court denied Stet's earlier motion to dismiss for lack of personal jurisdiction, the parties have since developed a more

complete record. The resulting evidence establishes that Stet has had no contact with Delaware since it transferred its interest in Iridium to Iridium Italia in October 1996. Furthermore, Stet has neither ratified nor acquiesced in alleged representations by Iridium that Stet remained a member. For these reasons, the court finds that Stet is entitled to the dismissal of this action against it.

For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendant Stet-Societa Finanziaria Telefonica per Azioni's renewed motion to dismiss (D.I. 558) is granted.

Mary Pat Thynge
UNITED STATES MAGISTRATE JUDGE

Dated: April 5, 2002