

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CARLO VICHI, on behalf of himself and )  
derivatively on behalf of LG.PHILIPS )  
DISPLAYS FINANCE LLC, )

Plaintiff, )

v. )

Civil Action No. 2578-VCP

KONINKLIJKE PHILIPS ELECTRONICS )  
N.V., LG.PHILIPS DISPLAYS FINANCE )  
LLC, LG.PHILIPS DISPLAYS )  
INTERNATIONAL LTD., KIAM-KONG )  
HO, and PETER WARMERDAM, )

Defendants, )

and )

LG.PHILIPS DISPLAYS FINANCE LLC, )

Nominal Defendant. )

**OPINION**

Submitted: July 2, 2009  
Decided: December 1, 2009

Rolin P. Bissell, Esquire, Christian Douglas Wright, Esquire, Tammy L. Mercer, Esquire, YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; John E. Beerbower, Esquire, CRAVATH, SWAINE & MOORE, LLP, New York, New York; *Attorneys for Plaintiff*

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**PARSONS, Vice Chancellor.**

This matter arises out of a dispute between a Netherlands holding company and an Italian businessman over a loan transaction. The holding company, which controls a large, international business organization with hundreds of subsidiaries, is a participant in a joint venture with a South Korean company. The joint venture needed financing and approached the Italian businessman seeking a substantial loan. The businessman had longstanding business dealings with one of the holding company's subsidiaries, and agreed to make the loan. The joint venture organized a Delaware subsidiary to effectuate the loan transaction. Shortly thereafter, the joint venture went into bankruptcy and defaulted on the loan obligations. The Italian businessman filed this action to recover his resulting damages.

Plaintiff claims that he entered the loan transaction with the belief that, despite the nominal involvement of the foreign joint venture, the loan was done on behalf of and would be backed directly by the Netherlands holding company itself and the company would continue to back the joint venture. The holding company denies making any such guarantees or playing any role in the loan transaction, which it claims was organized entirely by the joint venture.

This matter is before me on motions by three of the Defendants to dismiss on several different grounds. First, Defendants seek to dismiss the holding company, one of its employees, and an employee of the joint venture for lack of personal jurisdiction. Second, Defendants request dismissal of this action on *forum non conveniens* grounds. Third, Defendants contend that certain counts of the complaint fail to state a claim for various reasons. Finally, Defendants have moved, in the alternative, for a stay of this

action pending resolution of the foreign joint venture's bankruptcy proceeding in the Netherlands.

For the reasons discussed in this Opinion, I grant the motions to dismiss for lack of personal jurisdiction as to all counts against the holding company's employee and the joint venture's employee, and deny the motion with respect to the holding company. I also grant the motions to dismiss certain counts against the holding company for failure to state a claim based on the inapplicability of an asserted statute, waiver, and lack of standing, but deny the motions to dismiss other counts as being time-barred, unsupported by the applicable law, or not pled with sufficient particularity. Finally, I deny the motion to dismiss the remaining counts against the holding company for *forum non conveniens* and the motion to stay this proceeding pending a Netherlands court's resolution of the joint venture's bankruptcy.

## **I. FACTUAL BACKGROUND**

### **A. The Parties**

Plaintiff, Carlo Vichi, is the managing shareholder and founder of Mivar di Carlo Vichi S.a.p.a., a large Italian company engaged in television sales and production. Vichi resides in Milan, Italy. Vichi purports to bring this action directly on behalf of himself and derivatively on behalf of nominal Defendant LG.Philips Displays Finance LLC ("Finance").

Defendant Koninklijke Philips Electronics N.V. ("Philips" or "Philips N.V.") is a corporation located in and organized under the laws of the Netherlands. Philips N.V. is a publicly listed holding company with few employees and no operations. Philips N.V. is

the parent of the Philips family of companies, which includes hundreds of subsidiaries worldwide operating in a diverse group of industries, ranging from electronics and lighting to healthcare.

Defendant Kiam-Kong Ho is a citizen of Singapore. In July 2002, he served as Vice President and Global Treasurer for LG.Philips Displays Holding B.V. (“LPD”), a joint venture between Philips and a South Korean company, LG Electronics (“LGE”). In connection with a financing transaction with Vichi, Ho signed notes issued in Delaware (“the Notes”) on behalf of Finance, an LPD subsidiary. Ho signed the notes in his capacity as an employee of another Defendant LPD subsidiary, LG.Philips Displays International Ltd. (“International”), which was the sole member and manager of Finance. Ho has never visited, worked in, or otherwise had any connection with Delaware.<sup>1</sup> He currently resides in China, where he is CFO of Philips China.

Defendant Peter Warmerdam is a citizen of the Netherlands. At all relevant times, Warmerdam has been Head of Corporate Treasury at Philips. He received communications regarding the Notes before their issuance, and attempted to renegotiate their terms with Vichi afterward. Warmerdam resides in the Netherlands and has never visited, worked in, or otherwise had any connection with Delaware.<sup>2</sup>

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<sup>1</sup> Ho Aff. ¶¶ 2-11.

<sup>2</sup> DiCamillo Aff. Ex. 26 at 6.

## B. Facts

The following summary of the relevant additional facts is drawn from the record, with inferences drawn in the “plaintiff-friendly manner” required in the procedural context of a motion to dismiss.<sup>3</sup>

In July 2002, Vichi, a longtime customer of Philips Italia,<sup>4</sup> made a 200 million Euro loan in the form of convertible Notes to Finance, a Delaware subsidiary of LPD. Finance was a single purpose LLC that had no assets or operations, and was organized solely to facilitate the Notes transaction. Finance is now defunct.

LPD was a joint venture between Philips and LG Electronics organized to operate aging cathode ray tube (“CRT”) television production facilities. Both parent companies contributed capital, assets, and employees to LPD, but Philips maintained a 50% plus-one-share controlling stake. Vichi alleges that Philips’ entire purpose in creating LPD was to shed unprofitable CRT television assets that rapidly were becoming obsolete with the widening use of flat-screen televisions.<sup>5</sup> Consistent with this purpose, according to Vichi, Philips never cared about the success of LPD and was only interested in extracting as much cash as possible from the joint venture.<sup>6</sup>

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<sup>3</sup> *Sample v. Morgan*, 935 A.2d 1046, 1048 (Del. Ch. 2007).

<sup>4</sup> As its name suggests, Philips Italia is an Italian subsidiary of Philips N.V.

<sup>5</sup> Pl.’s Second Am. Compl. ¶¶ 5-9.

<sup>6</sup> *Id.*

From its inception, LPD was seriously undercapitalized. In 2002 and again in 2004, LG and Philips made additional capital infusions into LPD totaling over 600 million Euro,<sup>7</sup> but LPD still faced extreme financial difficulty. Both parents also were looking for other sources of financing. In March 2002, Felice Albertazzi and Fabio Golinelli, two longtime Philips Italia employees seconded to LPD as sales representatives under a service level agreement,<sup>8</sup> approached Vichi as a possible lender. Through Philips Italia, Albertazzi and Golinelli had a longstanding business relationship with Vichi and they asked Vichi to make a short-term loan of 25 million Euro to LPD in the form of an advanced payment for supplies, as he often had done for Philips Italia.<sup>9</sup> Ho was then brought in on the negotiations,<sup>10</sup> and the possibility of a larger, longer-term loan from Vichi was floated.<sup>11</sup>

In early April 2002, Golinelli, Ho, and Vichi's advisor all met in Hong Kong to negotiate the larger investment by Vichi in LPD's corporate debt.<sup>12</sup> Negotiations proceeded slowly because the parents of LPD simultaneously were negotiating a large

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<sup>7</sup> Pl.'s Second Am. Compl. ¶¶ 41, 124; Philips' Reply Br. 17.

<sup>8</sup> Mercer Aff. Ex. 29.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; Mercer Aff. Ex. 5, Ho Dep., 71-72.

<sup>12</sup> Mercer Aff. Ex. 33 at D002532.

credit facility with a syndicate of banks to help fund the joint venture.<sup>13</sup> By June 2002, however, the negotiations with Vichi were nearing completion. On June 21, 2002, Ho sent Warmerdam a “heads up” email apprising him of the impending Notes transaction and its most basic terms.<sup>14</sup>

Vichi allegedly entered into the Notes transaction because he believed LPD was merely a nominal party to the deal, and Philips was the real party with whom he was dealing.<sup>15</sup> Based on decades of successful business dealings with Philips Italia, including successful loans, Vichi trusted Philips implicitly. Vichi claims to be an “old school” businessman whose faith in Philips ran so deep that he was willing to rely on oral promises, as opposed to written contracts.<sup>16</sup>

The oral representations on which Vichi claims he relied included allegedly explicit guarantees that (1) Philips would back the Notes and support LPD<sup>17</sup> and (2) he would rank *pari passu* with the bank syndicate in repayment priority.<sup>18</sup> Vichi also

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<sup>13</sup> Ho. Dep. 57.

<sup>14</sup> DiCamillo Aff. Ex 22.

<sup>15</sup> Pl.’s Second Am. Compl. ¶ 13; *see* Mercer Aff. Ex 29 at D002587.

<sup>16</sup> Mercer Aff. Ex. 29 at D002586.

<sup>17</sup> Pl.’s Second Am. Compl. ¶ 219.

<sup>18</sup> *Id.* ¶ 215.

insisted on a Put Option Agreement that would accelerate the Notes if Philips failed to maintain a controlling stake in LPD.<sup>19</sup>

The Notes transaction closed in July 2002. Vichi then had Finance's financial advisors prepare an Offering Circular, so that he could list the Notes for sale on the Luxembourg Exchange.<sup>20</sup> The Offering Circular, which was directed to prospective purchasers of the Notes from Vichi,<sup>21</sup> explicitly stated that Philips was not a party to or guarantor of the Notes.<sup>22</sup>

Just months after the issuance of the Notes, beginning in December 2002, Warmerdam began requesting that Vichi renegotiate the terms of the Notes to subordinate their repayment priority to the banks.<sup>23</sup> Vichi declined. Nevertheless, on March 11, 2004, Vichi received by fax a letter from LPD stating that the Notes effectively already were structurally subordinated to the Banks because they had guarantees from most of the subsidiaries of LPD, but Vichi did not.<sup>24</sup>

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<sup>19</sup> Mercer Aff. Ex. 62 at D001080.

<sup>20</sup> DiCamillo Aff. Ex. 27.

<sup>21</sup> *Id.* at 3.

<sup>22</sup> *Id.* at 11.

<sup>23</sup> Mercer Aff. Ex. 70.

<sup>24</sup> *Id.* at Ex. 17.

LPD eventually defaulted on the Notes and declared bankruptcy. LPD is now the subject of a bankruptcy proceeding pending before a court in the Netherlands. Vichi is a member of the creditors committee in that proceeding.

### **C. Procedural History**

On November 29, 2006, Vichi filed a complaint against Defendants, charging them with various counts of breach of contract, fraud, unjust enrichment, and breach of fiduciary duty. Following extensive and protracted jurisdictional discovery, Vichi filed an amended complaint.

On December 5, 2008, Philips, joined by Warmerdam, moved to dismiss the amended complaint based primarily on lack of personal jurisdiction, *forum non conveniens*, and failure to state a claim. Ho simultaneously filed a separate motion to dismiss (collectively, “Motions to Dismiss”) for lack of personal jurisdiction and failure to state a claim.

On May 22, 2009, after additional jurisdictional discovery, Vichi filed a second amended complaint (the “Complaint”). Philips, joined by Warmerdam,<sup>25</sup> and Ho then renewed their Motions to Dismiss largely on the same grounds as previously stated. After exhaustive and voluminous briefing by all parties on the successive Motions to Dismiss, I heard oral argument on those motions on July 2, 2009.

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<sup>25</sup> Because Warmerdam generally joined in the arguments of Philips pertaining to the Motions to Dismiss, I refer for convenience to Philips only in describing that Motion and their collective contentions.

In addition, on August 20, 2009, I entered a default judgment against International for over \$350 million plus post-judgment interest. Original counsel for Defendant International withdrew their appearance and International failed to retain new counsel within a reasonable time thereafter, despite being ordered to do so.<sup>26</sup>

#### **D. Parties' Contentions**

Philips, Warmerdam, and Ho each seek dismissal from this action pursuant to Court of Chancery Rule 12(b)(2), arguing that there is no basis for personal jurisdiction over any of them. Vichi responds that personal jurisdiction exists over all Defendants under various provisions of the Delaware long arm statute. Defendants counter that Vichi has not satisfied the requirements of either the long arm statute or the Due Process Clause.

Philips also seeks dismissal of this action on *forum non conveniens* grounds. In that regard, Philips contends that the factors identified as relevant under the doctrine of *forum non conveniens* in *General Foods Corp. v. Cryo-Maid, Inc.*<sup>27</sup> weigh overwhelmingly in favor of dismissing or staying this action. In response, Vichi urges the Court to deny this aspect of Philips' Motion to Dismiss because Delaware is not an inconvenient forum for Philips. Vichi contends that Philips, therefore, has not satisfied

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<sup>26</sup> See Docket No. 168. The parties advised the Court in January 2009 that International is in liquidation proceedings in Hong Kong for the benefit of its creditors. See Letter from Peter B. Ladig, former co-counsel for International, to Ct. (Jan. 15, 2009).

<sup>27</sup> 198 A.2d 681 (Del. 1964).

the extremely heavy burden of demonstrating overwhelming hardship based on the *Cryo-Maid* factors that is required to deprive a plaintiff of its chosen forum.

Philips and Ho also argue that the unjust enrichment, fraud, and breach of fiduciary duty counts of the Complaint should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim. Specifically, Defendants assert that these claims are time-barred by the statute of limitations and that Vichi, as a creditor, lacks standing to bring direct fiduciary duty claims.

Finally, Philips requests a stay of this proceeding pending the resolution of LPD's bankruptcy case in the Netherlands based on the alleged similarity of the two matters. Vichi resists a stay, contending that this action and the Netherlands bankruptcy case involve different defendants and different claims, and, therefore, are not substantially similar.

## II. ANALYSIS

### A. Motions to Dismiss for Lack of Personal Jurisdiction

In considering a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), I am not limited to the pleadings.<sup>28</sup> Rather, "I am permitted to rely upon the pleadings, . . . affidavits, and briefs of the parties in order to determine whether the defendants are subject to personal jurisdiction."<sup>29</sup> Still, "[i]n evaluating the record, I must

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<sup>28</sup> *Sample v. Morgan*, 935 A.2d 1046, 1055 (Del. Ch. 2007).

<sup>29</sup> *Id.* at 1055-56 (quoting *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 974 (Del. Ch. 2000)).

draw reasonable inferences in favor of the plaintiff.”<sup>30</sup> Where, as here, “jurisdictional discovery has been completed[,] . . . ‘the plaintiff must allege specific facts supporting its position.’”<sup>31</sup>

Delaware courts apply a two-step analysis to determine if personal jurisdiction exists over a nonresident defendant.<sup>32</sup> First, there must be a statutory basis for personal jurisdiction.<sup>33</sup> Second, the court’s exercise of personal jurisdiction over a nonresident defendant must comport with the Due Process Clause of the Fourteenth Amendment.<sup>34</sup>

### **1. Personal jurisdiction over Ho**

Vichi advances three statutory grounds for personal jurisdiction over Ho: 10 *Del. C.* § 3104(c)(1), 10 *Del. C.* § 3104(c)(3), and 6 *Del. C.* § 18-109. As I next explain, none of these statutory provisions provide a sufficient basis for subjecting Ho to personal jurisdiction in this Court.

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<sup>30</sup> *Id.* at 1056 (citing *Outokumpu Eng’g Enter., Inc. v. Kvaerner Enviropower, Inc.*, 685 A.2d 724, 727 (Del. Super. 1996)).

<sup>31</sup> *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical, Inc.*, 2004 WL 415251, at \*2 (Del. Ch. Mar. 4, 2004) (quoting *Sears, Roebuck & Co. v. Sears plc*, 744 F. Supp. 1297, 1301 (D. Del. 1990)).

<sup>32</sup> *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 438 (Del. 2005).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

**a. Sections 3104(c)(1) and (c)(3) of the long arm statute**

Vichi's first two arguments for personal jurisdiction over Ho rely on Sections 3104(c)(1) and (c)(3) of Delaware's long arm statute. Both of these provisions involve the exercise of specific, as opposed to general, jurisdiction.<sup>35</sup> A single act may establish specific jurisdiction under these sections, but such jurisdiction applies only to claims that arise out of the jurisdictional act.<sup>36</sup>

Vichi asserts only two jurisdictional acts in this matter: (1) the formation of Finance in Delaware and (2) alleged breaches of fiduciary duties that caused harm to Finance in Delaware. Vichi contends the formation of Finance in Delaware constitutes an act sufficient to satisfy the requirements of Section 3104(c)(1). The record contains no specific factual evidence, however, suggesting that Defendant Ho participated in the

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<sup>35</sup> *Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc.*, 1995 WL 694397, at \*10 (Del. Ch. Nov. 21, 1995).

<sup>36</sup> *Id.* Sections 3104(c)(1) and (c)(3) provide in pertinent part:

(c) As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or his personal representative, who in person or through an agent:

(1) Transacts any business or performs any character of work or service in the State . . . .

\* \* \* \*

(3) Causes tortious injury in the State by an act or omission in this State . . . .

10 *Del. C.* §§ 3104(c)(1) and (c)(3).

formation of Finance. Implicitly recognizing that fact, Vichi attempts to attribute the acts of others relating to the formation to Ho under the so-called “conspiracy theory” of jurisdiction. A plaintiff who invokes the conspiracy theory to establish personal jurisdiction over a nonresident defendant still must satisfy both of the *AeroGlobal* requirements mentioned previously, *i.e.*, a statutory basis for jurisdiction and compliance with the Due Process Clause.<sup>37</sup> Under the conspiracy theory, “the acts of one conspirator that satisfy the long-arm statute can be attributed to the other conspirators.”<sup>38</sup>

To establish personal jurisdiction over Ho under Section 3104(c)(1), Vichi must adduce specific facts that support a finding that Ho has transacted business or performed some work or service in Delaware from which Vichi’s claims against Ho arose. Ho, a nonresident, has never been in or had any personal connection with Delaware. Although, in his capacity as an employee of International, Ho participated in some of the negotiations regarding the Notes transactions and actually signed the Notes, he did not participate in the formation of Finance in Delaware. Whether that activity can be attributed to Ho depends on whether Vichi properly has invoked the conspiracy theory of jurisdiction.

The conspiracy theory of personal jurisdiction requires a plaintiff to satisfy a five-part test by showing that:

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<sup>37</sup> *Am. Int’l Group, Inc. v. Greenberg*, 2009 WL 366613, at \*34 (Del. Ch. Feb. 10, 2009).

<sup>38</sup> *Id.*

(1) a conspiracy [to defraud] existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.<sup>39</sup>

This test “is very narrowly construed. Plaintiffs must assert specific factual evidence, not conclusory allegations, to show that the nonresident defendants were conspirators . . . .”<sup>40</sup>

Thus, I must analyze the elements of the five-part conspiracy theory test using the deferential factual standard of a motion to dismiss,<sup>41</sup> as limited by the more exacting factual requirements of the conspiracy theory.<sup>42</sup>

In terms of the claims against Ho, Vichi has not asserted specific facts to make a prima facie showing as to at least two of the five elements of the conspiracy theory test. Vichi’s entire argument in this regard is the following short paragraph in his answering brief:

[I]n this case, the formation of Finance in Delaware was integral to, and a substantial step in, the scheme to extract money from Mr. Vichi. All defendants knew that the

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<sup>39</sup> *Istituto Bancario Italiano SpA v. Hunter Eng’g Co.*, 449 A.2d 210, 225 (Del. 1982).

<sup>40</sup> *Crescent/Mach I P’rs, L.P. v. Turner*, 846 A.2d 963, 976 (Del. Ch. 2000).

<sup>41</sup> *Sample v. Morgan*, 935 A.2d 1046, 1055-56 (Del. Ch. 2007).

<sup>42</sup> *Crescent/Mach I P’rs*, 846 A.2d at 976. The fact that Vichi has had the benefit of jurisdictional discovery also requires me to use a more exacting factual standard. *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical, Inc.*, 2004 WL 415251, at \*2 (Del. Ch. Mar. 4, 2004).

formation was necessary for the Delaware Notes to be issued to Mr. Vichi. There is evidence that Philips, LPD and [International] had agreements to provide services to each other and, as the Amended Complaint alleges, acted in concert to defraud Mr. Vichi. Therefore, Section 3104(c)(1) provides specific jurisdiction over all defendants who participated in the conspiracy to defraud Mr. Vichi.<sup>43</sup>

The paragraph contains no citations to the factual record whatsoever. Indeed, the only citation at all is to a conclusory allegation in the Amended Complaint that lacks any specific facts.<sup>44</sup>

Regarding the requirements of the conspiracy theory, Vichi first has failed to show that Ho was a member of the alleged conspiracy. In the only sentence in the above quoted paragraph even dealing with Ho, Vichi avers that “[a]ll defendants knew that the formation [of Finance] was necessary for the Delaware Notes to be issued to Mr. Vichi.”<sup>45</sup> This lone sentence does not allege any specific facts as to how Ho was a member of a conspiracy. The fact that Ho, as an employee of Defendant International, may have participated in the negotiation of the Notes transaction and been a party to certain emails that mentioned the formation of Finance does not support a reasonable

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<sup>43</sup> Pl.’s Ans. Br. in Opp’n to Ho’s Mot. to Dismiss Pl.’s Am. Compl. (“Pl.’s Ans. Br. to Ho’s Mot.”) 4 (citations omitted).

<sup>44</sup> *Id.* (citing Pl.’s Am. Compl. ¶ 201).

<sup>45</sup> *Id.*

inference that he, personally, was a member of the alleged conspiracy.<sup>46</sup> The strict requirements of the conspiracy test demand more.

Vichi also has failed to demonstrate another requirement of the conspiracy test -- *i.e.*, that Ho knew or had reason to know of any act in or effect on Delaware. Ho was involved in the negotiation of the Notes and signed them, but Vichi has not alleged any facts indicating that Ho knew or had reason to know that his actions were part of anything other than a legitimate business transaction on behalf of his employer. In other words, while Ho arguably was responsible for an act in or effect on Delaware, Vichi has not shown that Ho had any idea that these acts or effects were *fraudulent*. Absent such a showing, Ho could be drawn unwittingly within the ambit of the greater conspiracy Vichi alleges. The knowledge requirement of the conspiracy theory test requires knowledge not only of acts or effects, but also of the wrongful nature of those acts or effects. Vichi has not made such a showing; thus, he has failed to satisfy the strict requirements of the conspiracy theory's knowledge requirement. Personal jurisdiction over Ho under § 3104(c)(1) is therefore improper.<sup>47</sup>

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<sup>46</sup> The record suggests that the relevant actions taken by Ho were done in his capacity as an employee of International or LPD. *See infra* Part II.A.1.b.

<sup>47</sup> It is not clear whether Vichi relies on the conspiracy theory of jurisdiction with respect to Section 3104(c)(3), as well. For purposes of this opinion, I have assumed he does not. To the extent Vichi does rely on a conspiracy theory, his argument fails for the same reasons stated previously in terms of the absence of a showing that (1) Ho was a member of the alleged conspiracy or (2) he knew of the alleged fraud.

There is yet another independent ground on which Vichi is unable to satisfy the requirements for personal jurisdiction under § 3104(c)(1) -- the unrelatedness of his claims to the specific jurisdictional acts he alleges. This ground is equally fatal to Vichi's attempt to satisfy § 3104(c)(3). Accordingly, on this point, I address both of these statutory grounds for jurisdiction together.

As mentioned above, Vichi asserts only two jurisdictional acts in this matter: (1) the formation of Finance in Delaware and (2) alleged breaches of fiduciary duties that caused Finance harm in Delaware. Yet, none of the claims asserted against Ho arise out of these jurisdictional acts. Count IV for breach of an implied or oral contract, Count VI for fraud, Count VII for deceit by a third party and bad faith during negotiations, and Count VIII for violation of the Delaware Securities Act all relate to the Notes transaction between Finance and Vichi, not to the formation of Finance in Delaware. Counts IX and XI are founded upon alleged breaches of fiduciary duty resulting in harm to *Finance*, yet those claims only seek relief for Vichi personally.<sup>48</sup> Accordingly, this Court may not assert personal jurisdiction over Ho pursuant to either § 3104(c)(1) or (c)(3), because the formation of Finance in Delaware and the alleged breaches of fiduciary duties owed to Finance provide no basis for specific jurisdiction over Ho as to any of the claims asserted against him.

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<sup>48</sup> See discussion *infra* Part II.D. While Count XI asserts a Dutch law fiduciary duty breach that, in theory, may allow Vichi to recover personally, Vichi has not alleged that he was harmed in Delaware. Again, Vichi has alleged only that Finance was harmed in Delaware. Vichi's personal fiduciary duty claim in Count XI, therefore, bears no relation to Delaware.

**b. Section 18-109 of the LLC Act**

Vichi further asserts that this Court can exercise personal jurisdiction over Ho pursuant to 6 *Del. C.* § 18-109. Often called an “implied consent” statute, § 18-109 establishes personal jurisdiction over the managers of a Delaware LLC “in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited liability company . . . .”<sup>49</sup> The statute only applies to ‘managers’ of an LLC, which are defined as either a manager appointed pursuant to the operative LLC agreements or a “person who participates materially in the management of the limited liability company.”<sup>50</sup>

Ho was not appointed as a manager of Finance pursuant to Finance’s LLC agreement. In fact, the sole member and manager of Finance under that agreement is International. Consequently, to invoke § 18-109, Vichi must assert that Ho participated materially in Finance’s management. Vichi’s allegations of Ho’s material participation are based on assertions that Ho (1) had a direct role in the formation of Finance and (2) executed certain documents relating to the issuance of the Notes on behalf of Finance.

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<sup>49</sup> 6 *Del. C.* § 18-109(a). This section also provides personal jurisdiction over a manager for claims of “a violation by the manager . . . of a [fiduciary] duty to the limited liability company . . . .” *Id.* As explained above, however, Vichi’s fiduciary duty counts against Ho all assert claims for breaches of fiduciary duties allegedly owed to *Vichi*, not to “the limited liability company,” *i.e.*, Finance. Accordingly, this portion of the personal jurisdiction analysis will focus entirely on counts invoking § 18-109 for actions involving or relating to the business of Finance. This analysis, therefore, does not address the fiduciary claims against Ho in Counts IX and XI.

<sup>50</sup> 6 *Del. C.* §§ 18-109(a), 18-101(10).

Neither of these assertions, however, alleges that Ho was acting in anything other than his capacity as a representative of International, his formal employer at the time and Finance’s manager. Nothing in the record suggests that Ho had any ownership share in Finance, or a personal stake in the Notes transaction. In other words, Vichi does not allege any benefit to Ho from the formation of Finance or the Notes transaction. Nor has Vichi alleged any other specific facts from which the Court reasonably could infer that Ho personally participated materially in the management of Finance, rather than simply at the direction of and as a representative for International and ultimately its parent, LPD. Ho, therefore, is not a ‘manager’ of an LLC within the meaning of § 18-109, and the statute provides no basis for exercising personal jurisdiction over Ho.

There is an additional flaw to Vichi’s assertion of personal jurisdiction over Ho pursuant to §18-109 in that Vichi’s suit does not involve or relate to the business of Finance, a necessary predicate to jurisdiction under that statute. An action involves or relates to the business of an LLC if: “(1) the allegations against [the manager] focus centrally on his rights, duties and obligations as a manager of a Delaware LLC; (2) the resolution of this matter is inextricably bound up in Delaware law; and (3) Delaware has a strong interest in providing a forum for disputes relating to the ability of managers of an LLC formed under its law to properly discharge their respective managerial functions.”<sup>51</sup> Applying this test, a Delaware court exercised § 18-109 personal jurisdiction in a case

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<sup>51</sup> *Assist Stock Mgmt. LLC v. Rosheim*, 753 A.2d 974, 981 (Del. Ch. 2000) (citations omitted).

involving a dispute between two managers over their respective responsibilities in governing their organization.<sup>52</sup> A Delaware court also exercised §18-109 personal jurisdiction in a case involving both the disputed firing of a CEO and questions about equity ownership in an LLC arising out of disputed managerial acts.<sup>53</sup> These examples show that Delaware courts interpret the “rights, duties and obligations as a manager of a Delaware LLC” to refer to rights, duties, and obligations a manager owes to his organization.

As discussed previously in the context of §§ 3104(c)(1) and (c)(3), all of the counts that Vichi asserts against Ho relate to the Notes transaction between Finance and Vichi or to breaches of fiduciary duties allegedly owed to Vichi personally. None of these counts relate to the rights, duties and responsibilities Ho owes *to Finance*, or in any other way to the internal business affairs of Finance or to the running of Finance’s day-to-day operations. Accordingly, none of the counts Vichi asserts against Ho involve or relate to the business of Finance. Thus, § 18-109 provides no basis for personal jurisdiction over Ho.

In sum, none of the grounds Vichi asserts for personal jurisdiction over Ho apply to Counts IV, VI, VII, VIII, IX and XI of the Complaint. Therefore, I grant Ho’s motion to dismiss these counts for lack of personal jurisdiction pursuant to Rule 12(b)(2).

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<sup>52</sup> *Id.* at 980-81.

<sup>53</sup> *Cornerstone Tech., LLC v. Conrad*, 2003 WL 1787959, at \*12 (Del. Ch. Mar. 31, 2003).

## 2. Personal jurisdiction over Philips

Vichi asserts general jurisdiction over Philips pursuant to 10 *Del. C.* § 3104(c)(4) and specific jurisdiction under both Sections 3104(c)(1) and (c)(3). For the reasons explained below, Vichi has satisfied his burden as to § 3104(c)(1). Vichi’s ability to establish personal jurisdiction under either § 3104(c)(3) or (c)(4), as well, is questionable,<sup>54</sup> but I need not consider those sections in depth because (c)(1) is independently satisfied.

Section 3104(c)(1) allows for personal jurisdiction over a nonresident defendant who in person or through an agent “[t]ransacts any business or performs any character of work or service in the State.”<sup>55</sup> A single act of incorporation in Delaware, if done as part of a wrongful scheme, will suffice to confer personal jurisdiction over the nonresident

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<sup>54</sup> Section 3104(c)(4) provides for general jurisdiction where a plaintiff can demonstrate that the defendant had a persistent, continuous pattern of contacts with Delaware. *Computer People, Inc. v. Best Int’l Group, Inc.*, 1999 WL 288119, at \*5 (Del. Ch. Apr. 27, 1999). Vichi attempts to demonstrate such contacts by lumping Philips N.V. into a generic “single-Philips organization” and stating that this one organization carries out business in Delaware through its subsidiaries or agents. It is undisputed that Philips N.V. has no physical presence in Delaware, and undisputed as a legal matter that the mere presence of subsidiaries or agents in Delaware is not sufficient to support personal jurisdiction over the parent or principal. *See, e.g., Sternberg v. O’Neil*, 550 A.2d 1105, 1119-120 (Del. 1988) (subsidiary status alone is not enough to establish jurisdiction over parent); *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at \*11 (Del. Ch. July 14, 2008) (only acts of the agent that are directed by principal can serve as basis for jurisdiction). Because Vichi does not appear to have alleged anything more, he probably has not satisfied the requirements of § 3104(c)(4).

<sup>55</sup> 10 *Del. C.* § 3104(c)(1).

defendants responsible for the scheme.<sup>56</sup> Furthermore, under the apparent agency theory, the jurisdictional acts of an apparent agent can be attributed to the principal if (1) the principal held the agent out as its agent and (2) the plaintiff reasonably relied on this representation.<sup>57</sup> That is to say, if the apparent agency test is satisfied, Philips may be held responsible in a jurisdictional sense for a wrongful incorporation conducted by its agents.

Turning first to the act of organizing Finance in Delaware, Vichi has pled specific facts that support a reasonable inference that this organization was part of a larger wrongful scheme by Philips to extract money from Vichi. Accepting the facts alleged by Vichi and reasonable inferences from them as true, LPD was never properly capitalized, and Philips had to make large additional capital infusions and seek additional financing for it. Philips and its subsidiaries had a longstanding relationship with Vichi, and turned to Vichi for this financing. One of the steps taken to facilitate completion of the Notes transaction with Vichi was the organization of Finance in Delaware as a special purpose vehicle. Vichi has made a plausible showing that Philips never intended Vichi's money to stay with LPD and, instead, used the Notes proceeds to offset Philips' expenses in the floundering joint venture, and that Philips knew that, due to LPD's financial troubles, there was never a realistic possibility that Vichi would be repaid.

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<sup>56</sup> *Papendick v. Bosch*, 410 A.2d 148, 152 (Del. 1979).

<sup>57</sup> *E.I. du Pont de Nemours & Co., Inc. v. Rhodia Fiber & Resin Intermediates, S.A.S.*, 197 F.R.D. 112, 122 (D. Del. 2000).

Turning next to the conduct of Philips' apparent agents, Vichi has pled specific facts sufficient to support a reasonable inference that the apparent agency test is satisfied with regard to the organization of Finance by Albertazzi, Golinelli, and Ho.

As to the first requirement for an apparent agency, Philips enabled Albertazzi, Golinelli, and Ho to hold themselves out as Philips' agents during the period leading up to Finance's organization. Albertazzi told Vichi's principal negotiator in the Notes transaction that he was "still 100% Philips."<sup>58</sup> Vichi previously had loaned money to Philips Italia through Albertazzi and Golinelli on several occasions. While Golinelli was apparently part of LPD, he worked out of Philips Italia's offices and had a Philips email address.<sup>59</sup> Ho worked for Philips immediately before and after his tenure at LPD.<sup>60</sup> In addition, after the Notes transaction, Warmerdam, Philips N.V.'s treasurer, approached Vichi about renegotiating the terms of the Notes. Warmerdam's active role in the renegotiations with Vichi admittedly did not begin until after the Notes transaction. Nevertheless, his actions support Vichi's allegation that Philips was involved in the disputed transaction throughout.

To rebut Vichi's assertions of apparent agency, Philips objects that there is no "evidence to suggest that Philips N.V. held out Messrs. Ho, Albertazzi or Golinelli as its

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<sup>58</sup> Pl.'s Second Am. Compl. ¶ 55.

<sup>59</sup> Mercer Aff. Ex. 31.

<sup>60</sup> Ho Dep. at 6-8.

representatives . . . .”<sup>61</sup> But, Philips’ objection is unpersuasive. While Vichi has not alleged any instance where Philips explicitly held out these specific individuals as its agents, Vichi adduced extensive specific evidence that Philips held itself out to the world as “One Philips.” In its own annual reports, Philips characterizes itself as “a single, focused and clearly identifiable company”<sup>62</sup> and says that it has “a mindset and a way of working . . . [that] leverag[es] our competencies and resources across [the company].”<sup>63</sup> Philips establishes managerial relationships according to product line and geographical region, without regard to formal legal structures.<sup>64</sup> Philips’ officers are trained and incentivized to put the good of Philips, as a whole, ahead of the good of the subsidiary.<sup>65</sup> Further, in an implicit recognition of the apparent success of the “One Philips” marketing campaign, LPD’s General Counsel noted that “[t]he inclusion of ‘Philips’ in the LG.Philips Displays [or LPD] name supports the JV’s business, but is also perceived as an ongoing (moral) link with Philips.”<sup>66</sup>

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<sup>61</sup> Philips’ Reply Br. in Supp. of its Mot. to Dismiss Pl.’s Am. Compl. (“Philips’ Reply Br.”) 18.

<sup>62</sup> 2003 Philips Mgmt. Report 10 (2004), [http://www.philips.com/shared/assets/Downloadablefile/Management\\_Report\\_AR03-2811.pdf](http://www.philips.com/shared/assets/Downloadablefile/Management_Report_AR03-2811.pdf). The language quoted in the text was cited in Vichi’s Answering Brief in Opposition to Philips’ and Warmerdam’s Motion to Dismiss the Amended Complaint, but appears to have been inadvertently omitted from Exhibit 75 to the Mercer Affidavit.

<sup>63</sup> Mercer Aff. Ex. 76, 2005 Philips Annual Report 14 (2006).

<sup>64</sup> Ho Dep. 26-27.

<sup>65</sup> *Id.* at 36-37.

<sup>66</sup> Mercer Aff. Ex. 19 at PNV000157.

Albertazzi, Golinelli, and Ho all were held out as agents of Philips subsidiaries or Philips' joint venture LPD. The facts alleged support an inference that, through its "One Philips" marketing campaign and the use of representatives familiar to a substantial prospective investor, namely, Vichi, Philips actively sought to blur the legal distinctions among the various parts of its organization such that Vichi would perceive an agent of Philips Italia and LPD, for example, as working on behalf of Philips N.V. These facts, coupled with Warmerdam's direct involvement after the Notes transaction, create a reasonable inference that Philips held out these individuals as its agents during the formation of Finance and negotiation of the Notes transaction. Hence, Vichi has satisfied the first requirement of the apparent agency test.

The second requirement of that test also is satisfied because Vichi reasonably relied on the representations that Albertazzi, Golinelli, and Ho all worked for Philips. Vichi alleges the only reason he entered into the Notes transaction was because he believed he was dealing with Philips, his longstanding and trusted business partner, not LPD. Consistent with his belief that Philips was backing LPD and the Notes, Vichi specifically insisted on a Put Option Agreement that accelerated the Notes in the event that Philips no longer had a controlling interest in LPD.

In sum, Vichi has alleged sufficient facts to make a prima facie showing that Finance was organized as part of a wrongful scheme on the part of Philips and certain of its affiliates. Vichi also has satisfied the apparent agency test, thus allowing Philips to be held directly responsible for the actions of its agents in relation to the wrongful

organization of Finance. Therefore, Section 3104(c)(1) provides a statutory basis for this Court to exercise personal jurisdiction over Philips in this action.

In disputing the existence of jurisdiction under an agency theory, Philips contends that Vichi failed to make the requisite showing that Philips “instigated” the formation of Finance in Delaware.<sup>67</sup> Vichi’s evidence, however, supports an inference that Philips did instigate the effort to acquire a large loan from Vichi. Toward that end, Philips and its agents sought to accommodate certain tax concerns voiced by Vichi. In so doing, Philips, through LPD, ultimately agreed with Vichi to cause the formation of Finance in Delaware so that Finance could issue the Notes reflecting the loan. Drawing all reasonable inferences in Vichi’s favor, I find that Vichi has made a prima facie showing that Philips instigated the actions of its agents that led to the formation of Finance in Delaware.

As to the second step of the personal jurisdiction analysis, I further conclude that subjecting Philips to personal jurisdiction in this Court comports with due process. To satisfy due process, the exercise of personal jurisdiction must comport with traditional notions of fair play and substantial justice.<sup>68</sup> To meet this standard, the “defendant’s conduct and connection with the forum state should be such that he can reasonably anticipate being haled into court in the nonresident forum.”<sup>69</sup> “A basic tenet of the due

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<sup>67</sup> Philips’ Reply Br. 16 (citing *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at \*11 (Del. Ch. July 14, 2008)).

<sup>68</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985).

<sup>69</sup> *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 330 (Del. Ch. 2003).

process analysis of a court's exercise of personal jurisdiction is whether the party 'purposefully availed' itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."<sup>70</sup>

Philips "purposefully availed" itself of the privilege and protections of Delaware's laws when, through its agents, Philips organized Finance in Delaware. Furthermore, because a single act of incorporation in Delaware, if done as part of a wrongful scheme, will suffice to confer personal jurisdiction over the nonresident defendants responsible for the scheme,<sup>71</sup> Philips reasonably could have anticipated being haled into court in this forum when it organized Finance in Delaware to effectuate a 200 million Euro loan from Vichi. Accordingly, the exercise of personal jurisdiction over Philips comports with traditional notions of fair play and substantial justice, and, therefore, does not offend the Due Process Clause.

Vichi has shown that the exercise of personal jurisdiction over Philips has a statutory basis and comports with due process. Accordingly, Philips' Motion to Dismiss under Rule 12(b)(2) is denied.

### **3. Personal jurisdiction over Warmerdam**

Even though Vichi has met his burden of demonstrating long arm jurisdiction over Philips, he has not alleged specific facts sufficient to support personal jurisdiction over Warmerdam. Vichi alleges only two ways in which Warmerdam is related to the dispute

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<sup>70</sup> *Id.* at 330 n.46.

<sup>71</sup> *See Papendick v. Bosch*, 410 A.2d 148, 152 (Del. 1979).

underlying this action, and neither suggests any connection between Warmerdam and the sale of the Notes in Delaware, the only jurisdictional act alleged by Vichi as to Warmerdam. Such a connection between Warmerdam and the alleged jurisdictional act is a necessary predicate for this Court's exercise of personal jurisdiction over him.<sup>72</sup> Indeed, Vichi's allegations as to the actions of Warmerdam are so facially deficient under the long arm statute that they warrant only brief discussion.

Vichi first alleges that Warmerdam "was involved in communications related to the issuance of the Delaware Notes."<sup>73</sup> Yet, the "communications" to which Vichi refers was a single email from Ho to Warmerdam informing Warmerdam of the impending Notes transaction and describing its terms in a most general way. The email to Warmerdam, which Philips characterized as a "heads up" in its brief, is dated June 21, 2002, and indicates that it was written so that "Philips Corporate Communications [w]ould not be caught out with any surprises."<sup>74</sup> Warmerdam was not asked to, nor did he, respond in any way to this email. The receipt of a single "heads up" email cannot and does not establish any connection between Warmerdam and Delaware for personal jurisdiction purposes.

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<sup>72</sup> *Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc.*, 1995 WL 694397, at \*10 (Del. Ch. Nov. 21, 1995).

<sup>73</sup> Pl.'s Second Am. Compl. ¶ 24.

<sup>74</sup> DiCamillo Aff. Ex. 22.

Vichi's second allegation of wrongdoing by Warmerdam pertains to his involvement in the "renegotiation of the terms and conditions of the Delaware Notes."<sup>75</sup> This allegation exposes an inherent temporal flaw in Vichi's Complaint: Warmerdam's alleged wrongdoing occurred after the sale of the Notes and during a renegotiation, but all of the counts against Warmerdam seek redress for action that occurred before the Notes were issued. Count IV states that "Finance benefited from those representations when Mr. Vichi purchased the Delaware notes from Finance."<sup>76</sup> Count VII states that "[a]bsent the misrepresentations . . . Mr. Vichi would not have purchased the Delaware Notes."<sup>77</sup> Count VIII avers that "Defendants made untrue statements of material fact . . . in connection with the sale of securities"<sup>78</sup> and that Vichi relied on these misrepresentations "in deciding to purchase the Delaware Notes . . . ."<sup>79</sup> Vichi has not provided any explanation of how Warmerdam's actions after the sale of the Notes in Delaware could supply a retroactive basis for the exercise of personal jurisdiction for claims based on actions before the sale. Accordingly, Warmerdam's Motion to Dismiss the claims against him pursuant to Rule 12(b)(2) is granted.

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<sup>75</sup> Pl.'s Second Am. Compl. ¶ 24.

<sup>76</sup> *Id.* ¶ 176.

<sup>77</sup> *Id.* ¶ 208.

<sup>78</sup> *Id.* ¶ 214.

<sup>79</sup> *Id.* ¶ 221.

## B. Motion to Dismiss for *Forum Non Conveniens*

The doctrine of *forum non conveniens* empowers a court to decline to hear a case, despite having jurisdiction, where the plaintiff's choice of forum would vex, oppress, or harass the defendant through undue inconvenience, expense, or other hardship.<sup>80</sup>

Preliminarily, I note that this Delaware action is the first and only action filed as to the claims asserted in this matter.<sup>81</sup> In considering a motion to dismiss for *forum non conveniens* where the Delaware action is the only action filed, Delaware courts follow the *Cryo-Maid* line of cases.<sup>82</sup> Under our *Cryo-Maid* jurisprudence, a defendant seeking dismissal on *forum non conveniens* grounds must establish with particularity that it will be subject to overwhelming hardship and inconvenience if required to litigate in Delaware.<sup>83</sup> “That standard imposes a ‘heavy burden’ that a defendant will meet ‘only in a rare case.’”<sup>84</sup> “Because the defendant has the burden to demonstrate ‘overwhelming hardship’ . . . [the Delaware Supreme Court] has previously held that ‘whether an

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<sup>80</sup> *Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P'ship*, 669 A.2d 104, 106 (Del. 1995).

<sup>81</sup> The LPD bankruptcy proceeding currently pending in the Netherlands does not involve the same claims or issues as this matter for purposes of a *forum non conveniens* analysis.

<sup>82</sup> *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964); *Chrysler*, 669 A.2d at 107.

<sup>83</sup> *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 998 (Del. 2004).

<sup>84</sup> *Id.* (quoting *Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P.*, 777 A.2d 774, 778 (Del. 2001)).

alternate forum would be more convenient for the litigation, or perhaps a better location, is irrelevant.”<sup>85</sup>

Delaware courts use the factors identified in *Cryo-Maid* and its progeny (the “*Cryo-Maid* factors” or “factors”) in evaluating whether a defendant will face overwhelming hardship.<sup>86</sup> Those six factors are: (1) the applicability of Delaware law, (2) the relative ease of access to proof, (3) the availability of compulsory process for witnesses, (4) the possibility of a view of the premises, (5) the pendency or nonpendency of litigation elsewhere, and (6) all other practical considerations.<sup>87</sup> The Supreme Court has explained the role of the *Cryo-Maid* factors as follows:

Those factors provide the framework for an analysis of hardship and inconvenience. They do not, of themselves, establish anything. Thus it does not matter whether only one of the *Cryo-Maid* factors favors the defendant or all of them do. The issue is whether any or all of the *Cryo-Maid* factors establish that the defendant will suffer overwhelming hardship and inconvenience if forced to litigate in Delaware. Absent such a showing, plaintiff’s choice of forum must be respected.<sup>88</sup>

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<sup>85</sup> *Id.* (quoting *Mar-Land*, 777 A.2d at 779).

<sup>86</sup> *Chrysler*, 669 A.2d at 107.

<sup>87</sup> *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1198-99 (Del. 1997).

<sup>88</sup> *Chrysler*, 669 A.2d at 108.

I turn, therefore, to the *Cryo-Maid* factors to determine if Philips has established that it will face overwhelming hardship and inconvenience if forced to litigate this case in Delaware.<sup>89</sup> As I next explain, Philips has not satisfied this burden.

Philips' briefing on the *Cryo-Maid* factors suggests that either Italy or the Netherlands would be a more appropriate and convenient forum than Delaware based on their central roles in the underlying dispute. Considerations of convenience, however, do not drive the *Cryo-Maid* analysis, the central goal of which is to determine if the defendant faces overwhelming hardship and inconvenience.<sup>90</sup>

As to the first *Cryo-Maid* factor, the applicability of Delaware law, Philips argues that it favors a finding of *forum non conveniens* because Delaware law will not apply in this litigation. But, the fact that a Delaware court must apply another jurisdiction's law does not, in and of itself, create overwhelming hardship.<sup>91</sup> In fact, it is not unusual "for Delaware courts to deal with open questions of the law of sister states or of foreign countries."<sup>92</sup> Accordingly, this factor neither favors nor disfavors this forum.

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<sup>89</sup> Warmerdam joined Philips in moving to dismiss for *forum non conveniens*. Having already decided to dismiss Warmerdam from this action for lack of personal jurisdiction, however, I have not included him in this portion of the analysis.

<sup>90</sup> *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 998 (Del. 2004).

<sup>91</sup> *Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 137 (Del. 2006); *Kolber v. Holyoke Shares, Inc.*, 213 A.2d 444, 446 (Del. 1965).

<sup>92</sup> *Kolber*, 213 A.2d at 446.

Philips contends that the second *Cryo-Maid* factor, the relative ease of access to proof, favors a finding of overwhelming hardship and inconvenience because most of the relevant documents and witnesses to this litigation are in Italy and the Netherlands, and none are in Delaware. Yet, as this Court has stated repeatedly, “the potential inconvenience of having to transport documents is slight because, as then Vice Chancellor, now Chief Justice Steele observed, “[m]odern methods of information transfer render concerns about transmission of documents virtually irrelevant.”<sup>93</sup> Similarly, modern methods of transportation lessen the Court’s concern about the travel of witnesses who do not live in Delaware.<sup>94</sup> Accordingly, this factor provides little, if any, support for a finding that it would cause overwhelming hardship and inconvenience to litigate this case in Delaware.

Philips similarly argues that the third *Cryo-Maid* factor, the availability of compulsory process for witnesses, disfavors this forum because this Court will not be able to compel the appearance of important potential witnesses, all of whom reside outside of Delaware. To prevail on this factor, Defendants must identify the inconvenienced witnesses and the specific substance of their testimony.<sup>95</sup> Philips has not provided such specificity here, instead saying merely that the “relevant testimony [of its

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<sup>93</sup> *Rapoport v. Litig. Trust of MPID Inc.*, 2005 WL 5755438, at \*5 (Del. Ch. Nov. 23, 2005) (quoting *Asten v. Wagner*, 1997 WL 634330, at \*3 (Del. Ch. Oct. 3, 1997)).

<sup>94</sup> *Id.* at \*6.

<sup>95</sup> *Id.*; *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 559 A.2d 1301, 1308 (Del. Super. 1988).

witnesses] is obvious from the factual recitation in [its] brief.”<sup>96</sup> Furthermore, to the extent that several of the nonparty witnesses Philips alludes to are either employees of Philips or its subsidiaries, “it must be presumed that they would be paid by [Philips or its subsidiaries] and consequently, are under [Philips’] control and would appear in . . . Delaware . . . at [Philips’] request. To the extent that these persons are fact witnesses, their testimony could be obtained by deposition.”<sup>97</sup> Finally, “where, as here, ‘there is no single forum or locality in which the bulk of the witnesses . . . is located . . . the location of witnesses . . . [does] not weigh in favor of one forum or the other.’”<sup>98</sup> Accordingly, this factor may disfavor a Delaware forum slightly, but it does not demonstrate overwhelming hardship and inconvenience.

The fourth *Cryo-Maid* factor is the possibility of a view of the premises. Neither side relied on this factor in their briefs, and it does not appear relevant to the pending Motions to Dismiss.

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<sup>96</sup> Philips’ Reply Br. 25-26 n.19.

<sup>97</sup> *HFTP Invs., LLC v. ARIAD Pharm., Inc.*, 752 A.2d 115, 123 (Del. Ch. 1999). Philips correctly points out that in some cases it may be necessary to pursue discovery from the nonparty witnesses under the Hague Convention, which can be costly and time-consuming. The dismissal of Ho and Warmerdam conceivably could accentuate that problem. Nevertheless, because those two witnesses, as well as Albertazzi and Golinelli, have been and may continue to be affiliated with the Philips organization, it seems unlikely that Philips would suffer overwhelming hardship due to any need to resort to the Hague Convention. Indeed, that possibility is likely to cause more problems for Vichi than Philips.

<sup>98</sup> *Rapoport*, 2005 WL 3277911, at \*6 (quoting Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 5-2 (2005)).

The fifth *Cryo-Maid* factor, the pendency or nonpendency of litigation elsewhere, presents serious difficulties for Philips. The Supreme Court recently noted in the *Berger* case that:

The absence of another pending litigation weighs significantly against granting a *forum non conveniens* motion. Indeed, we are aware of no case where this Court has upheld a *forum non conveniens* dismissal under similar facts [*i.e.*, involving litigation at an early, pre-discovery stage that is pending only in Delaware]. Although the absence of pending litigation may not be dispositive, it is a significant factor that may be overcome only in the most compelling circumstances.<sup>99</sup>

As in *Berger*, there is no other pending litigation between the parties here and this case is at an early stage pre-dating any discovery on the merits. Philips contends that the LPD bankruptcy case in the Netherlands is similar to this litigation, but I disagree. The parties in and the nature of the Netherlands bankruptcy proceeding differ substantially from this action. The LPD bankruptcy case does not involve any of the Defendants named in this litigation, or any of the claims made here, such as breach or contract, fraud, and unjust enrichment.<sup>100</sup> Although the case before me and the LPD bankruptcy both stem from the

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<sup>99</sup> *Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 137 (Del. 2006).

<sup>100</sup> The debtor in the Netherlands, LPD, is not a party to this action. Vichi, on the other hand, is a member of the creditors' committee in the Netherlands. There is no evidence, however, that Vichi is pursuing the claims he has asserted here in the Netherlands. The fact that Vichi might recover some portion of his investment in the Notes through the bankruptcy proceeding may diminish his damages, but it is not likely to extinguish the claims pending before this Court.

downfall of the same business entity, LPD, the similarity does not extend much further. Accordingly, this factor strongly favors respecting Vichi's choice of a Delaware forum.

Philips argues that the sixth and final *Cryo-Maid* factor, the catchall encompassing "all other practical problems that would make the trial of the case easy, expeditious, and inexpensive[,]”<sup>101</sup> weighs against this forum. Philips makes no specific argument on this point, but cites generally to *Windt v. QWEST Communications International, Inc.*, a recent District of New Jersey decision granting dismissal on *forum non conveniens* grounds of a suit brought by a Dutch bankruptcy trustee alleging fraud.<sup>102</sup> *Windt* is unavailing, however, because the court analyzed that situation under the federal *forum non conveniens* standard, which differs from the Delaware standard. The court granted a dismissal in *Windt* based in part on the federal law precept that “a foreign plaintiff's choice [of forum] deserves less deference.”<sup>103</sup> The Delaware Supreme Court, however, has specifically rejected that proposition to the extent it might be construed to mean that something less than a showing of overwhelming hardship would suffice to overcome the deference accorded a plaintiff's choice of forum.<sup>104</sup> Accordingly, the sixth *Cryo-Maid* factor, at best, weighs only slightly against a Delaware forum.

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<sup>101</sup> *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1199 (Del. 1997).

<sup>102</sup> 544 F. Supp. 2d 409 (D.N.J. 2008).

<sup>103</sup> *Id.* at 416 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981)).

<sup>104</sup> *Warburg, Pincus Ventures, L.P. v. Schrappner*, 774 A.2d 264, 268-69 (Del. 2001).

In sum, most of the *Cryo-Maid* factors are either neutral or only marginally favor a forum other than Delaware and one factor strongly, perhaps even decisively, favors Delaware. Guided by this *Cryo-Maid* analysis, I conclude that Philips has not established with particularity that it will face overwhelming hardship and inconvenience if forced to litigate this case in Delaware. This dispute involves hundreds of millions of dollars, with parties and potential witnesses from all over the world, and that the moving Defendant is an extremely large corporation that operates throughout the world, as well as the United States. In this context, the possibility that a handful of executives might need to fly to Delaware for a few days of trial, assuming the case goes to trial, or Defendant might incur some additional expense in litigating Vichi's claims hardly constitute overwhelming hardship. Vichi's choice of this forum, therefore, must be respected. Accordingly, Philips' Motion to Dismiss on *forum non conveniens* grounds is denied.

### **C. Motion to Dismiss on Statute of Limitations Grounds**

Philips seeks dismissal of Vichi's claims for unjust enrichment, fraud, and breach of fiduciary duty as time-barred by the applicable Delaware statute of limitations.<sup>105</sup> As I recently stated in another case:

The statute of limitations is an affirmative defense that normally is raised in an answer. A party seeking judgment on a statute of limitations defense generally does so by way of a summary judgment motion or a motion for judgment on the pleadings. Nevertheless, motions to dismiss have been

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<sup>105</sup> Warmerdam and Ho joined in this aspect of the Motions to Dismiss as well, but their dismissal for lack of personal jurisdiction, discussed previously, makes it unnecessary to include them in this portion of the analysis.

granted on the ground that a plaintiff's claims are barred by operation of the statute of limitations.<sup>106</sup>

Delaware law sets a three year statute of limitations for claims for unjust enrichment (Count II), fraud (Counts VI and VIII), and breach of fiduciary duty (Counts IX and X).<sup>107</sup> Furthermore, the Delaware Borrowing Statute states:

Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action.<sup>108</sup>

Therefore, I assume that Vichi's Italian statutory law claim sounding in fraud (Count VII) and Dutch law claim for breach of fiduciary duty (Count XI) are also subject to Delaware's three year statute of limitations, because none of the parties suggested that Italian or Dutch law would have subjected either of those claims to a shorter time limit.

The method for analyzing a motion to dismiss on statute of limitations grounds is as follows:

When a complaint asserts a cause of action that on its face accrued outside the statute of limitations . . . the plaintiff has the burden of pleading facts leading to a reasonable inference that one of the tolling doctrines adopted by Delaware courts applies. Thus, at the motion to dismiss stage this Court conducts a three part analysis to determine whether a claim is time-barred. From the pleadings, the Court determines (1) the

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<sup>106</sup> *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at \*14 (Del. Ch. Dec. 23, 2008) (citations omitted).

<sup>107</sup> 10 *Del. C.* § 8106(a).

<sup>108</sup> 10 *Del. C.* § 8121.

date of accrual of the cause of action based on the allegations, (2) if the plaintiff has pleaded facts sufficient to create a reasonable inference that the statute of limitations has been tolled, and (3) assuming a tolling exception has been pleaded adequately, when the plaintiff was on inquiry notice of a claim based on the allegations.<sup>109</sup>

In terms of the first of these steps, “[the Supreme] Court has repeatedly held that a cause of action ‘accrues’ under Section 8106 at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action.”<sup>110</sup> Examining the relevant wrongful acts generally, the alleged fraud and breaches of fiduciary duty consist of inducing Vichi to buy the Notes, and Philip’s unjust enrichment allegedly resulted from obtaining the Notes proceeds based on misrepresentations. Therefore, these alleged wrongful acts all occurred no later than the date on which Vichi actually purchased the Notes, July 9, 2002, and Vichi’s claims accrued on or before that date.

Determining whether Vichi’s claims are time-barred, therefore, first involves the question: Did Vichi file his claims within the three year statutory period? The answer plainly is no. Vichi filed his original complaint on November 29, 2006, fully four years, four months, and twenty days after the claims accrued. Hence, Vichi’s “complaint asserts a cause of action that on its face accrued outside the statute of limitations,” and Vichi bears the burden to show why the statute of limitations should be tolled or otherwise

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<sup>109</sup> *Winner Acceptance*, 2008 WL 5352063, at \*14 (citations omitted).

<sup>110</sup> *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).

should not apply.<sup>111</sup> Vichi makes several arguments in this vein, but only one is convincing.

Vichi first argues that laches, not the statute of limitations, is the appropriate affirmative defense here. As the Supreme Court has observed, however, “[a]bsent some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period.”<sup>112</sup> Furthermore, this court has stated that:

When exercising ancillary jurisdiction over legal claims . . . this Court will apply the applicable statute of limitations found at law. In addition, because equity follows the law, this Court looks to analogous statutes of limitations and gives those statutes appropriate weight when evaluating causes of action that invoke the Court’s concurrent jurisdiction or involve an equitable claim bearing a close resemblance to a legal claim. Thus, this Court has held that a three year statute of limitations applies either directly or analogously to a breach of fiduciary duty claim.<sup>113</sup>

Like Vichi’s breach of fiduciary duty claims, his fraud and unjust enrichment claims are “equitable claim[s] bearing a close resemblance to . . . legal claim[s].”<sup>114</sup> Consequently,

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<sup>111</sup> See *Winner Acceptance*, 2008 WL 5352063, at \*14.

<sup>112</sup> *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996).

<sup>113</sup> *Stevanov v. O’Connor*, 2009 WL 1059640, at \*7 (Del. Ch. Apr. 21, 2009) (citations omitted).

<sup>114</sup> *Id.*

those claims presumptively are subject to the statute of limitations, and mere invocation of laches terminology will not render them timely.<sup>115</sup>

Vichi next argues that rather than the three year statute of limitations of 10 *Del. C.* § 8106, “the six year limitations period of 10 *Del. C.* § 8109 should be the guide for all counts, because this action ‘arises from a promissory note.’”<sup>116</sup> Again, Vichi’s argument is unpersuasive. Although there is no binding authority interpreting § 8109, two cases are instructive. In the first, the United States District Court for the District of Delaware held that “[i]n order to be entitled to the six year statute of limitations in 10 *Del.C.* § 8109 . . . [the promissory note] must in itself establish the plaintiff’s claim or cause of action.”<sup>117</sup> In the second case, the Superior Court held that the predecessor to § 8109, which contained identical language, only applied “to suits arising from the obligations directly created by the instruments themselves . . . .”<sup>118</sup> I concur with the reasoning in these cases and adopt it here. Applying those holdings, I find that Vichi’s claims may relate in a general way to the Notes transaction, but that none of his unjust enrichment, fraud, or breach of fiduciary duty claims *arises directly* from the obligations of the Notes. As discussed previously, these claims necessarily stem from action that occurred *before* the

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<sup>115</sup> The relevant claims for breaches of fiduciary duty at issue here involve claims under both Delaware and Dutch law; likewise, Vichi has asserted fraud claims under both Delaware and Italian law.

<sup>116</sup> Pl.’s Ans. Br. to Ho’s Mot. 8.

<sup>117</sup> *Fineberg v. Credit Int’l Bancshares, Ltd.*, 857 F. Supp. 338, 351 (D. Del. 1994).

<sup>118</sup> *Security Storage Co. v. Equitable Sec. Trust Co.*, 147 A.2d 507, 511 (Del. Super. 1958).

Notes were issued. Therefore, they could not possibly “arise directly” from the yet-to-be-issued Notes. Claims that may arise from the *negotiation* of the Notes are not the same as claims that arise from the “obligations” of the Notes themselves. Thus, I consider the six year statute of limitations provided by § 8109 inapplicable to the claims at issue here, and hold, instead, that those claims are subject to the three year limitations period under § 8106.

Vichi next argues for a tolling of the three year statute of limitations. As discussed above, the burden is on Vichi to show a basis for tolling the limitations period.<sup>119</sup> The Delaware courts recognize three doctrines that may toll the statute of limitations: (1) inherently unknowable injuries, (2) fraudulent concealment, and (3) equitable tolling following a breach of fiduciary duties.<sup>120</sup>

According to Vichi, all three tolling doctrines apply to this case. Because Vichi has presented sufficient facts to support a reasonable inference that his injuries were inherently unknowable, I hold that he may invoke tolling on that basis. Vichi may have a more difficult time establishing fraudulent concealment or equitable tolling,<sup>121</sup> but a

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<sup>119</sup> *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at \*14 (Del. Ch. Dec. 23, 2008).

<sup>120</sup> *Id.* at \*15.

<sup>121</sup> For example, Vichi probably cannot plead equitable tolling due to breach of fiduciary duty because, as discussed below, he has not adequately pled a breach of fiduciary duty in this matter.

detailed analysis of those points is unnecessary as he has pleaded an independent ground for tolling in this case.

Under all three tolling doctrines, the statute begins to run “upon the discovery of facts constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of such facts.”<sup>122</sup> Inquiry notice does not require the plaintiff to have actual knowledge of the wrong, but merely an objective awareness of the facts giving rise to the wrong.<sup>123</sup>

To determine when Vichi had at least inquiry notice here I look to his own Complaint, which he summarized in his brief as follows: “[t]he two main allegations at issue are the assurances [1] that Mr. Vichi as noteholder, and the banks would rank *pari passu* in the event of default and [2] that Philips would back the Notes and support LPD.”<sup>124</sup>

The first of these allegations is addressed in both the Offering Circular for the Notes and the 2001 Annual Accounts of LPD, both of which Vichi had access to by

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<sup>122</sup> *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (internal quotation marks omitted) (emphasis in original).

<sup>123</sup> *In re Dean Witter P’ship Litig.*, 1998 WL 442459, at \*6 (Del. Ch. July 17, 1998), *aff’d*, 725 A.2d 441 (Del. 1999).

<sup>124</sup> Pl.’s Ans. Br. to Ho’s Mot. 10. These two broad allegations of wrongdoing form the basis of Vichi’s specific claims for unjust enrichment, fraud, and breach of fiduciary duty.

March 2003.<sup>125</sup> These documents explain explicitly that LPD's bank facility agreement had been breached and amended.<sup>126</sup> The bank facility agreement governed repayment priority, and the disclosure of its breach and subsequent modification should have caused Vichi to inquire further into his repayment priority in relation to the banks. Had Vichi conducted such an inquiry, he would have discovered that he did not, in fact, rank *pari passu* with the banks. Vichi, therefore, had inquiry notice of this broad allegation of wrongdoing no later than March 2003.

Vichi has alleged, however, sufficient facts to support an inference that the second of his broad allegations of wrongdoing, that Philips would back the Notes and support LPD, was not discoverable by Vichi until at least 2004.

Philips contends, contrary to Vichi's assertions, that the Offering Circular expressly disclosed this alleged wrongdoing when it stated that "[n]either Philips nor LGE is a party or a guarantor to the notes."<sup>127</sup> Philips, however, misconstrues the nature of the misrepresentations Vichi claims were made to him. Vichi claims that Philips

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<sup>125</sup> Vichi obtained a copy of the Offering Circular sometime in March 2003. Pl.'s Second Am. Compl. ¶ 93. LPD's 2001 Annual Accounts were deposited with the Dutch Chamber of Commerce on March 12, 2003. *Id.* ¶ 95. An ordinarily prudent person, let alone a sophisticated investor like Vichi who had a great deal of money invested with LPD, would have been aware of the information in the 2001 Annual Accounts from the day those accounts were made public.

<sup>126</sup> DiCamillo Aff. Ex. 27 at 53-54.

<sup>127</sup> *Id.* at 11.

stated it would support LPD as an entity, thus allowing LPD to repay the Notes, not that Philips necessarily guaranteed the Notes themselves.

A 12(b)(6) motion to dismiss shall not be granted unless a court can determine with reasonable certainty that the nonmoving party could not prevail on any set of facts reasonably inferable from the pleadings.<sup>128</sup> “The court must assume the truthfulness of the well-pleaded allegations and must afford the nonmoving party ‘the benefit of all reasonable inferences.’”<sup>129</sup> In this case, Vichi could prove from the facts alleged that he did not consider the statement in the Offering Circular that Philips was not guaranteeing the Notes themselves to be inconsistent with his understanding that Philips had undertaken to support LPD. Therefore, the Offering Circular might not have put Vichi on inquiry notice as to Philips’ lack of commitment to support LPD.

I must next determine whether, at some later time, Vichi was on inquiry notice of his claims based on the facts presented. To this end, I look to Vichi’s Complaint, which in a section entitled “Assurances Philips Would Support LPD,” states that LPD made repeated and ongoing assurances that Philips would support it through a series of large equity injections and additional funds.<sup>130</sup> Furthermore, Vichi claims that he “reasonably

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<sup>128</sup> *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at \*6 (Del. Ch. Dec. 23, 2008).

<sup>129</sup> *Id.* (quoting *In re Primedia, Inc. Deriv. Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006)).

<sup>130</sup> Pl.’s Second Am. Compl. ¶¶ 91-106. The Offering Circular stated that LPD expected a \$250 million equity injection from its parents and the “shareholders [Philips and LGE] . . . have agreed in principle to provide additional funding.” *Id.* ¶ 94. The 2001 Annual Accounts state that LPD received a 285 million Euro

understood” the additional funding and equity injections would come “from the Parents, the source of all additional funding that had occurred to that point.”<sup>131</sup>

Giving Vichi “the benefit of all reasonable inferences,” I find that these assurances could have instilled in Vichi a reasonable belief that Philips was, in fact, backing LPD such that LPD could repay the Notes. Vichi’s alleged injuries, therefore, may have been inherently unknowable as long as he reasonably believed that LPD would satisfy its obligations on the Notes. LPD’s 2003 Annual Accounts, which contained the most recent of these assurances, was deposited with the Dutch Chamber of Commerce on December 7, 2004. Thus, Vichi may be able to prove that the statute of limitations is tolled until at least that date. As Vichi filed his initial complaint on November 29, 2006, he would be well within the three year statutory period. Philips’ motion to dismiss the counts against it as time-barred is therefore denied.

#### **D. Motion to Dismiss Fraud Claims**

Philips next seeks dismissal of the fraud claims against it, Counts VI, VII, and VIII of the Complaint, pursuant to Rule 12(b)(6) for failure to plead with sufficient particularity. To make out a claim for fraud, a plaintiff must, among other things,

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equity injection from its parents and that “[m]anagement believes that sufficient funding will continue to be available to enable [it] to operate as a going concern.” *Id.* ¶ 95. LPD’s 2002 Annual Accounts stated that a “refinancing arrangement . . . is under discussion with its parents . . . .” *Id.* ¶ 98. The 2003 Annual Accounts stated that LPD’s parents would provide \$500 million in additional equity to reduce its outstanding debt. *Id.* ¶ 104.

<sup>131</sup> *Id.* ¶ 106.

identify with particularity the person making the misrepresentation.<sup>132</sup> Philips' only argument on this aspect of its motion is that none of the people whom Vichi identifies as responsible for misrepresentations, namely Albertazzi, Ho, and Golinelli, are Philips N.V. employees, and, therefore, Philips N.V. cannot be held responsible for their fraud.

Where there is an agency or apparent agency relationship, however, the principle may be found liable for the fraudulent acts of its agent.<sup>133</sup> As discussed above in Part II.A.2, an agency relationship appeared to exist between Philips and Albertazzi, Ho, and Golinelli. Therefore, Philips may be held liable for their alleged fraud. Because Vichi has sufficiently identified Philips' agents responsible for the alleged fraud, I deny Philips' motion to dismiss the fraud claims for lack of particularity.

#### **E. Motion to Dismiss Delaware Securities Act Claims**

Philips asserts that the Count VIII of the Complaint, alleging violation of Sections 7323(a)(2) and 7303 of the Delaware Securities Act,<sup>134</sup> should be dismissed under Rule 12(b)(6) because the Act does not apply in the circumstances of this case.

As an initial matter, I agree with Philips that the § 7303 claim must be dismissed. The only remedies available under § 7303 are injunctive relief and criminal penalties.<sup>135</sup> Citing a recent amendment to § 7322, the penalties provision for § 7303 violations, that

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<sup>132</sup> *Metro Commc'ns Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 144 (Del. Ch. 2004).

<sup>133</sup> *Sandvik AB v. Advent Int'l Corp.*, 83 F. Supp. 2d 442, 448 (D. Del. 1999).

<sup>134</sup> 6 *Del. C.* §§ 7303 and 7323(a)(2).

<sup>135</sup> 6 *Del. C.* §§ 7320, 7322.

authorizes “restitution to any investor,”<sup>136</sup> Vichi contends he is entitled to seek damages as relief in this matter. I disagree. The restitution provision was added to a section entitled “Criminal Penalties.”<sup>137</sup> Restitution, therefore, merely represents one type of *criminal* penalty, and is only available in *criminal* cases. This is not a criminal matter; hence, Vichi cannot rely on § 7303 and its attendant criminal penalty provisions to support a claim of damages as “restitution.” As Vichi seeks no other relief in Count VIII beyond restitution, his claim against Philips under § 7303 must be dismissed.

Furthermore, the Delaware Securities Act as a whole, including Sections 7303 and 7323(a)(2), does not apply to this matter. The Act only applies where there is a sufficient nexus between Delaware and the transaction at issue.<sup>138</sup> In *Singer v. Magnavox*, the Supreme Court noted that there is “a presumption that a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted.”<sup>139</sup> The Court also stated that “we do not read the [Delaware Securities] Act as an attempt to introduce Delaware commercial law into the internal affairs of corporations merely because they are chartered here.”<sup>140</sup> *Singer* involved a shareholder challenge to the merger of a

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<sup>136</sup> Pl.’s Ans. Br. to Ho’s Mot. 18 (citing *id.* § 7322).

<sup>137</sup> 6 *Del. C.* § 7322.

<sup>138</sup> See *Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701, 705 (Del. 1983). See also *Dofflemeyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372, 377 (D. Del. 1983).

<sup>139</sup> *Singer v. Magnavox Co.*, 380 A.2d at 981.

<sup>140</sup> *Id.*

Delaware corporation.<sup>141</sup> The plaintiff shareholders were not Delaware residents and their votes on the merger were not solicited in Delaware. The merger contract was not negotiated in Delaware, and the sale was not consummated in Delaware.<sup>142</sup> Although the company had been incorporated in Delaware and the merger vote took place there, the Court found that those actions in Delaware, without more, were not sufficient to bring the dispute within the ambit of the Delaware Securities Act.<sup>143</sup>

In *Dofflemeyer v. W.F. Hall Printing Co.*, the United States District Court for the District of Delaware applied the *Singer* holding to a case involving a nearly identical contested merger with out-of-state plaintiffs, in which the negotiations, solicitations, *vote*, and sale all occurred outside Delaware.<sup>144</sup> There, the court found the Delaware connection even more tenuous than in *Singer* due to the out-of-state vote and, therefore, held the Delaware Securities Act inapplicable.<sup>145</sup>

Like the transaction at issue in *Dofflemeyer*, this case involves even less of a Delaware connection than *Singer*. Neither Vichi nor Philips is a Delaware resident, and the solicitation, negotiation, and closing of the Notes transaction all took place outside of Delaware. While *Singer* involved a merger vote in Delaware in addition to a Delaware

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<sup>141</sup> *Id.* at 971.

<sup>142</sup> *Id.* at 981.

<sup>143</sup> *Id.* at 982.

<sup>144</sup> 558 F. Supp. 372, 377 (D. Del. 1983).

<sup>145</sup> *Id.*

corporation, the only Delaware connection in this matter is the Delaware organization of Finance. Such a tenuous connection with Delaware is not enough to bring the Notes transaction within the scope of the Delaware Securities Act.<sup>146</sup> Thus, Philips' motion to dismiss Count VIII pursuant to Rule 12(b)(6) for failure to state a claim under the Act is granted.

#### F. Motion to Dismiss Veil Piercing Claims

In Counts III and VIII of the Complaint, Vichi requests the Court to pierce the corporate veil and hold Philips responsible for Finance's actions.<sup>147</sup> Philips has moved to dismiss these veil piercing claims primarily on the ground that Vichi has not alleged sufficient facts to meet the very difficult test required to pierce the veils of both Finance and LPD.<sup>148</sup> Vichi did not respond to this argument in his subsequent briefing or at oral argument.<sup>149</sup> "It is settled Delaware law that a party waives an argument by not including

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<sup>146</sup> Vichi disputes this conclusion based on the decision in *Kronenberg v. Katz*, 872 A.2d 568 (Del. Ch. 2004). See Pl.'s Ans. Br. to Ho's Mot. 17-18. Vichi's reliance on *Kronenberg*, however, is misplaced. The portion of that opinion cited by Vichi discusses a choice of law analysis in connection with a contract dispute. In contrast, Philips' motion does not involve a choice of law question and raises issues more analogous to those addressed in *Singer* and *Dofflemeyer* than in *Kronenberg*.

<sup>147</sup> Pl.'s Second Am. Compl. ¶¶ 170, 211.

<sup>148</sup> Philips' Opening Br. in Supp. of its Mot. to Dismiss Pl.'s Am. Compl. 33, 45.

<sup>149</sup> Vichi did not mention veil piercing at all in his answering brief. Vichi did, at least, mention veil piercing in his later reply regarding the Second Amended Complaint, Pl.'s Reply to Defs. Philips and Warmerdam's Resp. to Pl.'s Second Am. Compl. ("Pl.'s Reply") 3, and at oral argument, Tr. 57, 59, 67, but in neither instance did he respond to Philips' motion to dismiss. In his reply and again at oral argument, Vichi alleged that it was *possible* to pierce LPD's veil even though

it in its brief.”<sup>150</sup> Vichi, therefore, has waived his veil piercing claims, and Counts III and VIII<sup>151</sup> are dismissed pursuant to Rule 12(b)(6).

**G. Motion to Dismiss Fiduciary Duty Claims Asserted  
under Delaware Law**

Even if Vichi’s claims for breach of fiduciary duty against Ho were not dismissed for lack of personal jurisdiction, they still would be subject to dismissal for failure to state a claim. To withstand Ho’s and Philips’ Rule 12(b)(6) Motions to Dismiss, Vichi must demonstrate that the fiduciary claims set forth in Counts IX and X are cognizable under Delaware law.<sup>152</sup> For the reasons stated below, Vichi has not met this burden.

The Supreme Court has held unequivocally that “[t]he creditors of a Delaware corporation that is either insolvent or in the zone of insolvency have no right, as a matter

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it was a joint venture between Philips and LGE. Fairly read, however, Philips’ motion did not rest on the impossibility of piercing the veil of a joint venture. To pierce the veil of the joint venture, Vichi still would have to satisfy Delaware’s strict veil piercing test. Philips’ motion is based on the premise that, whether Vichi seeks to go behind a joint venture or not, he cannot meet this rigorous piercing test. Vichi never addressed this argument. In addition, while Vichi’s reply and oral argument may have mentioned piercing the veil of LPD, he never addressed Philip’s contention that Vichi also must pierce the veil of Finance.

<sup>150</sup> *Emerald P’rs v. Berlin*, 2003 WL 21003437, at \*43 (Del. Ch. Apr. 28, 2003), *aff’d*, 840 A.2d 641 (Del. 2003); *see also Hokanson v. Petty*, 2008 WL 5169633, at \*6 n.22 (Del. Ch. Dec. 10, 2008).

<sup>151</sup> As discussed *supra* Part II.E, I also dismissed Count VIII based on the independent ground of the inapplicability of the Delaware Securities Act.

<sup>152</sup> *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 98-99 (Del. 2007).

of law, to assert direct claims for breach of fiduciary duty . . . .”<sup>153</sup> Furthermore, “case law governing [standing for] corporate derivative suits is equally applicable to suits on behalf of an LLC.”<sup>154</sup> Therefore, following the reasoning in *Gheewalla*, creditors of an LLC that is either insolvent or in the zone of insolvency cannot, as a matter of law, bring a direct suit for breach of fiduciary duty. Accordingly, if Vichi’s claims are, in fact, direct, then they must fail.

The test for determining whether a suit is derivative or direct turns “*solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing [creditors], individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the [creditors], individually)?”<sup>155</sup> Vichi’s Complaint provides the answer to these questions. Count IX states that “Mr. Ho, as the officer of an insolvent corporation, breached his fiduciary duty *to Mr. Vichi* as creditor”<sup>156</sup> and that “*Mr. Vichi has suffered* damages in an amount in excess of \$200 million.”<sup>157</sup> Vichi’s Prayer for Relief then demands that he receive, among other things, damages for the value of the Notes, as well as interest, costs, and attorneys’ fees.<sup>158</sup> By Vichi’s own words, therefore,

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<sup>153</sup> *Id.* at 103.

<sup>154</sup> *VGS, Inc. v. Castiel*, 2003 WL 723285, at \*11 (Del. Ch. Feb. 28, 2003).

<sup>155</sup> *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (emphasis in original).

<sup>156</sup> Pl.’s Second Am. Compl. ¶ 230 (emphasis added).

<sup>157</sup> *Id.* ¶ 231 (emphasis added).

<sup>158</sup> *Id.* at 46-47.

he is the one who suffered the harm and he would receive the benefit of any remedy. Accordingly, under the *Tooley* test, Count IX is direct, not derivative. By extension of *Gheewalla*, however, Vichi, as a creditor of an LLC, is barred as a matter of law from bringing such a direct claim for breach of fiduciary duty. Thus, were Ho not already dismissed from this action for lack of personal jurisdiction, I would grant Ho's Motion to Dismiss Count IX pursuant to Rule 12(b)(6).

Count X of Vichi's Complaint alleges that Philips aided and abetted Ho's breach of fiduciary duty. One cannot aid and abet a breach of fiduciary duty, however, where no duty has been breached in the first place.<sup>159</sup> Because Vichi failed to state a cognizable claim for breach of fiduciary duty in Count IX, his claim in Count X for aiding and abetting such a breach must fail, as well. Therefore, I also grant Philips' Motion to Dismiss Count X pursuant to Rule 12(b)(6).

#### **H. Motion to Dismiss Dutch Law Fiduciary Duty Claims**

In his Second Amended Complaint, Vichi adds Philips as a defendant in Count XI, a claim for breach of fiduciary duty under Dutch law. Philips contends that this claim should be dismissed because Vichi cannot demonstrate that Philips exercised control over LPD, a necessary predicate for the Dutch law claim, due to LGE's equal share in the control of the joint venture.<sup>160</sup> Vichi counters that the joint venture structure does not shield Philips from liability because both parents could be held liable "[i]f Philips and

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<sup>159</sup> See *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 120 (Del. Ch. 1999).

<sup>160</sup> Philips' Resp. to Pl.'s Second Am. Compl. 6-7.

LG[E] jointly determined and directed the relevant actions of LPD.”<sup>161</sup> Further, Vichi’s Complaint alleges that Philips caused LPD to obtain a very large loan from Vichi when it was aware of LPD’s precarious financial situation<sup>162</sup> and that Philips is liable for the acts of its agents where they acted in the scope of their employment in carrying out the acts that harmed Vichi.<sup>163</sup>

For the reasons discussed *supra* Part II.A.2, as to the basis for personal jurisdiction over Philips in this action, I find after drawing all reasonable inferences in Vichi’s favor, as required on a motion to dismiss under Rule 12(b)(6), that Vichi has alleged facts that, if proven, could support a claim against Philips for breach of fiduciary duty under Dutch law. In that regard, I further conclude that Vichi conceivably could prove from the facts alleged in the Complaint that Philips acted as a *de facto* director of LPD, notwithstanding LPD’s joint venture structure. In that context, Philips arguably owed a fiduciary duty to Vichi under Dutch law as a creditor of LPD. I, therefore, deny Philips’ Motion to Dismiss Count XI for failure to state a claim.

### **I. Motion to Stay this Proceeding**

Finally, Philips argues that this Court should stay this proceeding pending the resolution of LPD’s Netherlands bankruptcy. It is well settled in Delaware that:

[w]hen similar actions between the same parties involving the same issues are filed in separate jurisdictions the court in

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<sup>161</sup> Pl.’s Reply 3.

<sup>162</sup> Pl.’s Second Am. Compl. ¶¶ 238, 240, 241.

<sup>163</sup> *Id.* ¶ 239.

which either of said actions is filed may in the exercise of its discretion hold that action in abeyance to abide the outcome of the action pending in the other court.<sup>164</sup>

As discussed above in the *forum non conveniens* analysis, however, this action and the LPD bankruptcy proceeding are not similar. Both actions involve different defendants and different claims. Depending on the outcome of the LPD bankruptcy, Vichi may recover some portion of the amount due him under the Notes. Any such recovery probably will reduce the amount of damages suffered by Vichi, but in all likelihood it would not vitiate his claims in this action. Therefore, finding no persuasive grounds for staying this action, I deny Philips' request for a stay.

### III. CONCLUSION

For the reasons stated in this Opinion, I grant the Motions to Dismiss all claims against Warmerdam and Ho under Rule 12(b)(2) for lack of personal jurisdiction, but deny the Motion as to Philips. I also grant the Motions to Dismiss Counts III, VIII, and X against Philips under Rule 12(b)(6) for failure to state a claim, but I deny the Motions to Dismiss the remaining claims against Philips, *i.e.*, Counts IV, V, VI, VII, and XI, for failure to state a claim and for *forum non conveniens*. Finally, I deny Philips' motion to stay pending the outcome of the LPD bankruptcy proceeding in the Netherlands.

**IT IS SO ORDERED.**

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<sup>164</sup> *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 683 (Del. 1964), *overruled on other grounds by PepsiCo, Inc. v. Pepsi-Cola Bottling Co.*, 261 A.2d 520 (Del. 1969).