IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EBG HOLDINGS LLC, Plaintiff, v. VREDEZICHT'S GRAVENHAGE 109 B.V., and NIBC BANK N.V. f/k/a NIB CAPITAL BANK N.V., Defendants.	)	Civil Action No. 3184-VCP

MEMORANDUM OPINION

Submitted: March 19, 2008
Decided: September 2, 2008

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PARSONS, Vice Chancellor.

On August 27, 2007, Plaintiff, EBG Holdings LLC ("EBG"), filed its Verified Complaint (the "Complaint") against Defendants Vredezich's Gravenhage 109 B.V. ("VG 109") and NIBC Bank N.V. ("NIBC"), which is VG 109's parent corporation. In what is essentially a breach of contract action, the Complaint alleges VG 109 has failed to reimburse EBG for approximately $445,000 in payments related to withholding tax that EBG made on VG 109's behalf.

On October 19, 2007, VG 109 filed an answer denying liability and asserting several affirmative defenses, and NIBC moved to dismiss pursuant to Court of Chancery Rules 12(b)(2), (4), and (5) for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process. After briefing, this Court heard argument on NIBC's motion on March 19, 2008. At argument, NIBC indicated it was pursuing its motion under only Rule 12(b)(2).[1]

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[1] *See* Tr. at 3. Citations in this form ("Tr.") are to the transcript of argument held on March 19, 2008.

In its answering brief, EBG requested that the Court not only deny NIBC's motion, but also decide this action in EBG's favor on summary judgment. Even if EBG's request was procedurally proper, the existence of disputed issues of material fact would preclude such a judgment. *See Whittington v. Dragon Group, L.L.C.*, 2008 WL 2316305, at *3 (Del. Ch. June 6, 2008) (party seeking summary judgment must demonstrate that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law). At this early stage of the litigation, the parties dispute a number of material facts. The disputed facts include, among others, the duration and nature of VG 109's membership in EBG, how much tax VG 109 or its membership interest owed as a result of its membership in EBG, and whether VG 109 failed to pay the United States Internal Revenue Service the amount it owed during the relevant period. I, therefore, deny without prejudice EBG's request to have this matter considered on summary judgment.

Because I find that EBG has not made a sufficient showing for this Court to exercise personal jurisdiction over NIBC, I grant NIBC's motion to dismiss.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, EBG, is a Delaware limited liability company with its principal place of business in New York. EBG owns and operates eight power generation facilities and sells their energy to the New York and New England deregulated energy markets.[2]

Defendant VG 109 is a Dutch private limited liability company with its principal place of business in The Hague, and is a wholly-owned subsidiary of Defendant NIBC.[3] VG 109 was formed on July 12, 2001, as a special purpose entity. Its sole investments have been interests in six limited liability companies or limited partnerships involved in power plants in the United States. VG 109 has no employees or officers of its own, does not have letterhead or envelopes of its own, and has its documents signed by NIBC employees because NIBC serves as its managing director.[4] VG 109 and NIBC share the same business address.[5] VG 109 has separate capital in the amount of 20,000 euros.[6] Neither NIBC nor VG 109 has any officers, directors, or employees working in

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2 Compl. ¶ 10.

3 *Id.* ¶ 11; Van der Have Aff. ¶ 2. Van der Have is General Counsel of NIBC.

4 *See* Van der Have Aff. ¶¶ 12-14.

5 Ans. ¶ 23.

6 Van der Have Aff. ¶ 16. The minimum capital required under Dutch law is € 18,000. *Id.*

Delaware, advertises or solicits business in Delaware, or has any property or business office in Delaware.[7]

B. The Creation of EBG

EBG evolved out of a debt restructuring of the Exelon Corporation and its subsidiaries, Boston Generating, LLC ("Boston Generating") and Exelon New England Holdings, LLC ("Exelon New England) (together, the "Exelon Parties"), which was finalized on October 11, 2005 (the "Restructuring Plan").

Boston Generating owned four energy generating units in the Boston area with a capacity of approximately 3,000 MWs, and was a direct, wholly-owned subsidiary of Exelon New England.[8] NIBC was a Boston Generating debt holder, when Boston Generating defaulted on a $1 billion plus credit agreement.[9] Under the Restructuring Plan, a group of lenders to the Exelon Parties (the "Lender Group"), including NIBC, agreed to swap their debt for equity in Boston Generating.

On February 10, 2004, EBG was formed to manage the Boston Generating facilities.[10] EBG was structured to insulate the lenders from potential regulation as public utilities.[11] On March 19, 2004, Boston Generating, Exelon New England, and EBG

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7 *See id.* ¶¶ 4-7.

8 Pinckney Aff. Ex. E at 7, 17. Pinckney is Delaware counsel for EBG. *Id.* ¶ 1.

9 Pinckney Aff. Ex. E at 4.

10 Compl. ¶ 17.

11 *See* Pinckney Aff. Ex. E at 10, 12.

jointly applied to the Federal Energy Regulatory Commission ("FERC") for authorization to transfer the generating facilities from Exelon New England to EBG (the "Joint Application").[12] That application mentioned NIBC as one of eighteen lenders who ultimately might take an ownership interest, directly or indirectly, in EBG.[13]

By order dated May 10, 2004, FERC authorized the transfer to EBG.[14] As part of its authorization, however, FERC noted that as long as EBG remains a passive entity "the exact ownership and structure of EBG Holdings is not necessary for [its] prior approval [of the transfer of the power generating assets to EBG]."[15] Although the exact ownership structure of EBG was not material, FERC did order EBG to provide details of its "exact ownership structure" promptly after the Exelon Parties transferred their assets to EBG.[16] Neither VG 109 nor NIBC took any direct role in the filing of EBG's certificate of formation in February 2004, or EBG's later submissions to FERC.[17]

On May 24, 2004, Exelon turned over its ownership of Boston Generating to EBG. On that same date, VG 109, together with other Boston Generating lenders or their affiliates, entered into the Limited Liability Company Agreement of EBG (the "Original

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12 *See* Joint Application, *available at* Pinckney Aff. Ex. E.

13 *See id.* at 2.

14 *See* FERC Order ¶ 1, *available at* Pinckney Aff. Ex. F.

15 *Id.* ¶ 19.

16 *Id*.

17 *See* Suppl. Van der Have Aff. ¶¶ 4-5.

LLC Agreement").[18] VG 109, but not NIBC, signed the agreement. The signing took place in the Netherlands, and the signature pages were faxed to EBG's United States based counsel.[19] The agreement did list NIBC, however, as a "Designating Lender" affiliated with VG 109.[20] In addition, VG 109 is listed as having approximately a 4.5% interest in EBG.[21] Pursuant to the FERC Order, on June 7, 2004, EBG and certain of the Exelon Parties notified FERC of EBG's exact membership composition; they listed NIBC as a "Designating Lender" and VG 109 as the "Class A Member" affiliated with NIBC.[22]

On October 11, 2005, VG 109 and the other EBG members entered into an amended and restated LLC agreement (the "Amended LLC Agreement").[23] Certain Schedules to the Amended LLC Agreement list VG 109 as a member.[24] From October 11, 2005 to March 30, 2006, VG 109 was the record holder of 163,999 equity units representing approximately 2.5% of EBG's total equity for that period.[25] VG 109

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18 *See* Compl. ¶¶ 19. *See also* Pinckney Aff. Ex. G (Original LLC Agreement).

19 *See* Suppl. Van der Have Aff. ¶ 3.

20 *See* Original LLC Agreement at Schedule I ¶ 12.

21 *See id.* at Schedule II ¶ 13 (further identifying NIBC as a "Designating Lender").

22 *See* Letter from Counsel to Certain of the Exelon Parties to FERC, Attach. I at 1 (June 7, 2004), *available at* Pinckney Aff. Ex. C.

23 *See* Compl. Ex. A (Am. LLC Agreement).

24 *See* Am. LLC Agreement Schedules A-1 and A-2.

25 Compl. ¶ 58.

executed the Amended LLC Agreement in the Netherlands, and the signature pages were faxed to EBG's counsel in the United States.[26]

C. VG 109's Alleged Transfer of its Interest in EBG

Defendants deny VG 109 had any "economic membership interests" in EBG as of October 11, 2005, when it executed the Amended LLC Agreement.[27] Defendants, however, have not submitted *any* evidence documenting the alleged transfer of VG 109's interest in EBG to a third party.

According to a document submitted by EBG, sometime in March 2006, VG 109 executed an agreement entitled, "Assignment and Assumption" (the "Assignment"), under which it purported to transfer all of its 163,999 units in EBG to an unnamed "New York banking institution organized and existing under the laws of the state of Delaware."[28] While NIBC continues to contend that as of October 11, 2005, it had no

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[26] *See* Suppl. Van der Have Aff. ¶ 3.

[27] *See* VG 109 Ans. ¶¶ 5, 53. Economic interests in limited liability companies may be owned by persons who are not members. *See* ROBERT K. SYMONDS, JR. & MATTHEW J. O'TOOLE, SYMONDS & O'TOOLE ON DELAWARE LIMITED LIABILITY COMPANIES ("SYMONDS & O'TOOLE") § 1.04[C][2], at 1-20 (2007 ed.) (citing 6 *Del. C.* §§ 18-301(b)(1)-(2), 18-702(b)(1)). Accordingly, the significance of NIBC and VG 109's repeated assertions that one or both of them transferred the "economic interest" in EBG is unclear. Perhaps, they mean that they did not owe any taxes, because the assignment of the economic interest amounted to a delegation of the tax obligation. In any event, the facts related to the alleged transfer of VG 109's interest are in dispute, and NIBC has not shown how its version of the relevant facts supports its position on jurisdiction.

[28] *See* Assignment and Assumption Agreement, *available at* Pinckney Aff. Ex. I; s*ee also* Compl. ¶¶ 54-57 (alleging VG 109 attempted to transfer its interest in EBG

economic interest in EBG, its reply brief did not dispute the validity of the Assignment, and it failed to present any evidence that VG 109 transferred its interest in EBG earlier than March 2006. Furthermore, NIBC and VG 109 have admitted that VG 109 executed the Amended LLC Agreement on October 11, 2005. Drawing all inferences in favor of the nonmoving party, EBG, as I must on a Rule 12(b)(2) motion to dismiss, I find for purposes of NIBC's motion that VG 109 was a member of EBG at least as of October 11, 2005.

Under § 4.4 of the Amended LLC Agreement, which was in effect on October 11, 2005, EBG was authorized to treat record holders of EBG membership interests as the owners for all purposes. Section 4.4 states in pertinent part:

> Record Holders Except as may otherwise be required by applicable law, [EBG] shall be entitled to treat the record holder of Units as shown on its books as the owner of such Units for all purposes, including the payment of distributions and the Voting rights . . . regardless of any Transfer of such Units, and shall incur no liability for distributions of cash or other property made in good faith to such record holder until such Units have been Transferred on the books of [EBG] in accordance with the requirements of and in compliance with Article 12.

Article 12 of the Amended LLC Agreement delineates the process by which EBG members may directly or indirectly transfer their interest to other parties. At this preliminary stage, the record is inconclusive as to whether VG 109 properly transferred its interest in EBG to another party in accordance with the requirements of the Amended

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> sometime between October 11, 2005 and March 30, 2006, but that the alleged transfer was not properly effected pursuant to the Amended LLC Agreement).

LLC Agreement. Thus, drawing all inferences in favor of EBG for purposes of the pending motion, I assume that VG 109 continued to hold a membership interest in EBG until at least March 30, 2006.

D. EBG's Payment of VG 109's Withholding Taxes

The Amended LLC Agreement obliges members to reimburse EBG for any tax advances, together with interest, made on their behalf. The Agreement states in pertinent part:

> Tax Advances. To the extent the Company is required by applicable law to withhold or to make tax payments (including any interest or penalties thereon) on behalf of or with respect to any Member (e.g. backup withholding or withholding with respect to foreign investors) ("Tax Advances"), the Board may withhold such amounts and make such tax payments as so required. All Tax Advances made on behalf of a Member, plus interest . . . shall, at the option of the Board, (i) be promptly paid to the Company by the Member on whose behalf such Tax Advances were made (such payment not to constitute a Capital Contribution of such Member) or (ii) be repaid by reducing the amount of the current or next succeeding distribution or distributions . . . . Each Member hereby agrees to reimburse the Company and the Board for any liability with respect to Tax Advances required on behalf of or with respect to such Member.[29]

The taxable income allocated to VG 109 stemming from its EBG membership for the period October 11, 2005 to March 30, 2006, was $1,200,788.[30] The Complaint alleges VG 109 owes EBG a total of $444,611 -- $422,376 for the advancement of

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[29] Am. LLC Agreement § 11.4.

[30] Compl. ¶ 31.

federal withholding taxes paid to the IRS on VG 109's behalf, $8,655 as interest on foreign taxes, and $13,580 for tax advice related to those payments.[31]

E. EBG's Asserted Claims

In its Complaint, EBG asserts three separate claims: Count I requests specific performance of the Amended LLC Agreement; Count II requests a declaration that VG 109 was NIBC's alter ego; and Count III requests a declaration that VG 109's transfer of its economic interest in EBG was invalid.[32] In essence, this is a breach of contract action. EBG contends VG 109 and its alter ego NIBC breached the Amended LLC Agreement by (1) not reimbursing EBG for the tax withholding payments made on VG 109's behalf, and (2) improperly, and therefore ineffectively, attempting to transfer VG 109's interest in EBG to a third party.

II. ANALYSIS

EBG contends there are four bases for this Court to obtain personal jurisdiction over NIBC. The first two bases would subject NIBC directly to personal jurisdiction: (i) pursuant to Delaware's long-arm statute;[33] and (ii) under the terms of the LLC Agreement. The third and fourth bases would subject NIBC to personal jurisdiction

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31 *See* Compl. ¶¶ 35, 41, 46. In each instance, EBG claims that NIBC is liable for those sums "as VG 109's alter ego." *Id.* ¶¶ 39, 44, 48. EBG paid the withholding taxes totaling $422,376 in three installments: $185,445 on June 22, 2006; $29,632 on July 17, 2006; and $207,299 on January 16, 2007. *Id.* ¶ 35. The foreign tax interest was paid on January 16, 2007. *Id.* ¶ 41.

32 *Id.* ¶¶ 61-76.

33 *See* 10 *Del. C.* § 3104.

indirectly through VG 109: (iii) under the alter ego or veil piercing theories of jurisdiction; and (iv) under the agency theory of personal jurisdiction.[34]

A. Rule 12(b)(2) Standard

On a motion to dismiss under Rule 12(b)(2), the plaintiff has the burden to show a basis for the court's jurisdiction over the nonresident defendant.[35] Delaware courts apply a two-pronged analysis to this issue. "The court must first consider whether Delaware's Long Arm Statute is applicable, and next evaluate whether subjecting the nonresident to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment . . . ."[36] The court may consider the pleadings, affidavits, and any discovery of record.[37] If, as here, however, no evidentiary hearing has been held and discovery has not been

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[34] *See* PAB at 8. This citation is to Plaintiff EBG's answering brief in opposition to the motion to dismiss. Citations to defendant NIBC's opening and reply briefs are in the form "DOB" and "DRB," respectively, followed by the page reference.

[35] *Albert v. Alex. Brown Mgmt. Servs.*, 2005 WL 2130607, at *14 (Del. Ch. Aug. 26, 2005); *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005); *Hart Holding Co. v Drexel Burnham Lambert Inc.*, 593 A.2d 535, 539 (Del. Ch. 1991).

[36] *AeroGlobal Capital Mgmt.*, 871 A.2d at 438; *see also Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003) (citing *LaNuova D & B, S.p.A. v. Bowe Co.*, 513 A.2d 764, 768-69 (Del. 1986)).

[37] *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007); *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *5 (Del. Ch. July 14, 2008).

taken, plaintiffs need only make a *prima facie* showing of personal jurisdiction, and the record will be construed in the light most favorable to the plaintiff.[38]

B. May this Court Exercise Personal Jurisdiction over NIBC Directly?

I first address EBG's arguments that NIBC is subject directly to personal jurisdiction: (i) pursuant to Delaware's long-arm statute; and (ii) under the terms of the LLC Agreement.

1. May this Court exercise personal jurisdiction over NIBC pursuant to the long-arm statute?

EBG contends that, under § 3104(c)(1), "NIBC's single act of participating in the formation in Delaware of EBG to manage and hold the Lender Group interests in Boston Generating is sufficient under the circumstances of this case to confer personal jurisdiction over NIBC."[39]

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[38] *See Ryan*, 935 A.2d at 265; *Hart Holding*, 593 A.2d at 539 ("If the motion is decided on affidavits, the court should require only that plaintiff make out a prima facie case.") (citations omitted).

NIBC has not argued for a stricter standard of review. *Cf. Sprint Nextel*, 2008 WL 2737409, at *5; *Hart Holding*, 593 A.2d at 539 ("If . . . the motion is decided upon testimony, whether at trial or at a pre-trial evidentiary hearing, plaintiff must establish personal jurisdiction by a preponderance of the evidence."); *Sears, Roebuck & Co. v. Sears plc* (*Sears I*), 744 F. Supp. 1297, 1301 (D. Del. 1990) ("If the jurisdictional issue is raised after discovery, the plaintiff must allege specific facts supporting its position."). In this case, however, the movant, NIBC, presented evidence outside the Complaint in the form of affidavits, and EBG *elected* not to take any discovery. This circumstance, plus the fact that certain of EBG's theories of jurisdiction depend on allegations of fraud or other inequitable conduct, leads me to conclude that EBG must come forward with specific facts to support, at least, its averments of fraud and inequitable conduct in connection with its claims of jurisdiction.

[39] PAB at 11.

a. Standard

Delaware courts can exercise jurisdiction over foreign corporations if the plaintiff's cause of action arises from a jurisdictional act enumerated in the Delaware long-arm statute.[40] Delaware courts construe the long-arm statute broadly "to confer jurisdiction to the maximum extent possible under the Due Process Clause."[41] Nevertheless, our courts have been careful not to construe the statute so broadly as to "break[] the necessary connection between statutory words and common usage of the English language."[42]

EBG relies on § 3104(c)(1), which provides:

> 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 a personal representative, who in person or through an agent . . . [t]ransacts any business or performs any character of work or service in the State . . . .[43]

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40 *See* 10 *Del. C.* § 3104(c).

41 *Friedman v. Alcatel Alsthom*, 752 A.2d 544, 549 (Del. Ch. 1999) (quoting *Hercules, Inc. v. Leu Trust & Banking, Bah. Ltd.*, 611 A.2d 476, 480 (Del. 1992)); *LaNuova D & B, S.p.A. v. Bowe Co.*, 513 A.2d 764, 768 (Del. 1986).

42 *Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prods., Inc.*, 1991 WL 129174, at *2 (Del. Ch. July 10, 1991) (citing *Trans-Ams. Airlines, Inc. v. Kenton*, 491 A.2d 1139, 1142-43 (Del. 1985)); *see also Sprint Nextel*, 2008 WL 2737409, at *6; *Ramada Inns, Inc. v. Drinkhall*, 1984 WL 247023, at *2 (Del. Super. May 17, 1984) ("Where qualifying language is used, the Court should not ignore that language out of a desire to afford maximum jurisdictional coverage."); *Joint Stock Soc'y v. Heublein, Inc.*, 936 F. Supp. 177, 194 (D. Del. 1996).

43 10 *Del. C.* § 3104(c)(1). A finding that there is jurisdiction under any one of the provisions of the statute suffices to establish a statutory basis for personal

"Section 3104(c)(1) is a single act provision of the long-arm statute. As such, § 3104(c)(1) supplies a basis for personal jurisdiction 'only with respect to claims that have a nexus to such forum-related conduct.'"[44] Thus, the question here is whether NIBC transacted any business or performed any character of work or service in Delaware from which EBG's claim has arisen.

EBG alleges NIBC, through its subsidiary VG 109, breached a contract, the Amended LLC Agreement, to which VG 109 was a party. Because VG 109 and NIBC are both Dutch entities with little contact in Delaware, they would only be subject to this Court's specific personal jurisdiction as to claims arising out of business they conducted in Delaware. VG 109's amenability to suit for EBG's claim is not challenged; VG 109 consented to this Court's jurisdiction in the Amended LLC Agreement.[45] For this Court to obtain personal jurisdiction directly over NIBC, however, EBG must sufficiently plead that NIBC itself committed acts in Delaware. EBG claims that NIBC, as a member of the Lender Group, formed EBG or participated in the formation of EBG in Delaware.

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jurisdiction. *See Colonial Mortgage Servs. Co. v. Aerenson*, 603 F. Supp. 323, 326 (D. Del. 1985).

[44] *Cornerstone Techs. L.L.C. v. Conrad*, 2003 LEXIS 1787959, at *9 (Del. Ch. Mar. 31, 2003) (quoting WOLFE & PITTENGER § 3-5(a)(1)(i)); *see also LaNuova D & B*, 513 A.2d at 768 ("Where personal jurisdiction is asserted on a transactional basis, even a single transaction is sufficient if the claim has its origin in the asserted transaction.").

[45] Am. LLC Agreement § 16.8.

"As a general rule, ownership of stock in a Delaware corporation, without more, will not suffice to establish general *in personam* jurisdiction."[46] However, "the ownership of a Delaware subsidiary may constitute the transaction of business . . . where the underlying cause of action arises from the creation and operation of the Delaware subsidiary."[47]

In *Papendick v. Bosch*,[48] a German corporation (Bosch) formed a wholly owned Delaware subsidiary (RBNA) to serve as a vehicle to acquire the stock of another company. The plaintiff filed a breach of contract action in Delaware that arose out of that stock acquisition transaction. Bosch argued that because its sole Delaware contact was its "mere" ownership of RBNA stock, there was no basis for personal jurisdiction. The Supreme Court disagreed and held Delaware courts could exercise jurisdiction over Bosch, because the formation of RBNA was an integral part of the scheme of wrongdoing challenged in the complaint, and because in forming RBNA, Bosch had purposefully utilized the benefits and protections of Delaware law in connection with the challenged stock acquisition transaction.[49]

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46 *Gibralt Capital Corp. v. Smith*, 2001 WL 647837, at *5 (Del. Ch. May 8, 2001).

47 *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 439 (Del. 2005) (citing *Papendick v. Bosch*, 410 A.2d 148 (Del. 1979)); *see also Computer People, Inc. v. Best Int'l Group, Inc.*, 1999 WL 288119, at *8 (Del. Ch. Apr. 27, 1999).

48 410 A.2d 148 (Del. 1979).

49 *Id.* at 149-50.

Although *Papendick* was decided in the context of determining Constitutional due process, Delaware courts have invoked the *Papendick* rationale to hold that the incorporation and operation of a Delaware subsidiary constitutes the transaction of business in Delaware under § 3104(c)(1).[50] In *Cairns v. Gelmon*,[51] for example, this court concluded the incorporation of a subsidiary constituted a single act sufficient to satisfy the requirements of § 3104(c)(1) when that incorporation was central to plaintiffs' claims of wrongdoing.[52] There, the plaintiffs contended the defendants violated two letter agreements that allegedly provided for equal share ownership and board membership in a joint venture. The plaintiffs claimed the defendants' incorporation of a Delaware corporation, secret issuance of that corporation's stock to themselves, and stacking of the board were all part of a fraudulent scheme to cause plaintiffs to lose their right to share in the benefits of the joint venture. The court, citing *Papendick*, stated that "because the incorporation of [the joint venture subsidiary] in Delaware is central to [plaintiffs'] claims of wrongdoing, I conclude that in these specific circumstances that

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50 *See* WOLFE & PITTENGER §3.05[c][3], at 3-99; *see also Shamrock Holdings of Cal., Inc. v. Arenson*, 421 F. Supp. 2d 800, 804 (D. Del. 2006) ("A single act of incorporation in Delaware will suffice to confer personal jurisdiction over a nonresident defendant if such purposeful activity in Delaware is an integral component of the total transaction to which plaintiff's cause of action relates.").

51 1998 WL 276226 (Del. Ch. May 21, 1998).

52 *Id.* at *1-3.

single act suffices to constitute the 'transaction of business' in Delaware under 10 *Del. C.* § 3104(c)(1) and to satisfy the requirements of Due Process."[53]

Thus, under *Papendick* and its progeny, this Court would have jurisdiction over NIBC under § 3104(c)(1) if NIBC's actions in relation to the formation of EBG set "'in motion a series of events which form the basis for the cause of action before the court.'"[54]

b. Analysis

Plaintiff contends NIBC's participation in the formation of EBG is sufficient to confer personal jurisdiction and relies on two cases subsequent to *Papendick*, *Cairns* and *Shamrock Holdings*. In response, NIBC disputes its alleged participation in the formation of EBG, and whether EBG's cause of action arises from its formation.[55]

Plaintiff's argument that NIBC is subject to jurisdiction based on § 3104(c)(1) of Delaware's long-arm statute falls far short. Section 3104(c)(1) provides for jurisdiction based on "transacting business," but the only business EBG claims NIBC transacted in Delaware was "participating in the formation in Delaware of EBG."[56] NIBC's participation is simply too attenuated to subject it to personal jurisdiction in Delaware, especially since EBG has failed to demonstrate that EBG was NIBC's or VG 109's

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53 *Id*. at *3.

54 *Haisfield v. Cruver*, 1994 WL 497868, at *4 (Del. Ch. Aug. 25, 1994) (quoting *Sears, Roebuck & Co. v. Sears plc* (*Sears II*), 752 F. Supp. 1223, 1227 (D. Del. 1990), for its interpretation of the "arising from" language in § 3104(c)).

55 *See* DRB at 4-5, 8.

56 PAB at 11.

subsidiary, as that term is commonly understood, as opposed to a company in which VG 109 held only a minority interest.

EBG's reliance on *Cairns* is misplaced. The *Cairns* court did hold that the single act of forming a Delaware corporation sufficed to satisfy the "transaction of business" in Delaware under 10 *Del. C.* §3104(c)(1). Nevertheless, the court pointedly limited that holding to the "specific circumstances" in that case.[57] The circumstances in *Cairns* are quite different than those here, but EBG glosses over those differences and relies on a portion of the holding.

For example, the party resisting personal jurisdiction in *Cairns* had incorporated a Delaware entity which it then *controlled.* The party contesting jurisdiction had, among other things, altered the fundamental structure of the Delaware entity by nominating "four members of the board," instead of abiding by its prior agreement to nominate only one, and then "amended the certificate of incorporation to increase its authorized common stock."[58] Thus, the actions of the nonresident defendant in *Cairns* resulted in direct and fundamental changes to a Delaware entity.[59]

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57 *Cairns v. Gelmon*, 1998 WL 276226, at *1-3 (Del. Ch. May 21, 1998).

58 *Id.*

59 A similar distinction renders inapposite *Sample v. Morgan*, 935 A.2d 1046 (Del. Ch. 2007), which EBG also cites in support of its position. PAB at 11. In *Sample*, the party resisting jurisdiction was a law firm that had "themselves prepared and sent the Certificate [of Incorporation] Amendment to CSC in Delaware for filing with the Secretary of State." *Sample*, 935 A.2d at 1057. NIBC took no comparable action in this case.

Here, on the other hand, EBG has not alleged that NIBC, or even VG 109, exercised any control over EBG or that such control gave rise to its claim. Moreover, the alleged failure of a Dutch entity—through its Dutch subsidiary—to reimburse approximately $450,000 to EBG on an alleged obligation that arose more than two years after the signing of the Original LLC Agreement does not even approach effecting a direct and fundamental change to a Delaware entity.

In *Shamrock Holdings*, the defendants participated directly in the formation of two Delaware entities, one for the purpose of starting a home-building business, and the other to "obtain[] debt financing to support and grow [the first entity]'s operations and hold the stock in [the first entity]'s subsidiaries."[60] The plaintiff sought, among other things, a declaratory judgment that it had not breached the operating agreement executed in connection with the formation of the two Delaware entities. The court determined that, because the causes of action related directly to the formation of the Delaware entities, the court could assert jurisdiction over the nonresident defendants.[61]

In contrast, the record here does not show that NIBC formed EBG, or participated in the formation in a meaningful fashion. In fact, nothing in the record suggests that NIBC or VG 109 caused EBG to be formed as a Delaware LLC, as opposed to some

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60 *Shamrock Holdings*, 421 F. Supp. 2d at 804.

61 *Id.* ("Because the causes of action at issue in the suit arise from, and relate to, the incorporation and formation of [the two Delaware entities], the court agrees that defendants' participation in [their] incorporation . . . is sufficient to confer jurisdiction under § 3104(c)(1)."") (citing *Papendick*).

other type of entity. The formation of EBG stemmed from the Restructuring Plan that resulted from Boston Generating's financial difficulties. NIBC was one of eighteen lenders that agreed to exchange their debt interests for equity under the Restructuring Plan. The Complaint does not allege NIBC had a dominant or controlling position within the Lender Group. NIBC also is not alleged to have made any filing with the State of Delaware, nor is it alleged to have participated in the filing of the certificate of formation in February 2004.[62] I, therefore, consider this case distinguishable from *Shamrock*. More

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[62] NIBC contends that *Papendick* and its progeny are inapposite, because NIBC did not participate at all in the filing of EBG's certificate of formation in February 2004, and, therefore, cannot be said to have formed EBG. *See* DRB at 4. This contention raises questions about when exactly an LLC comes into existence under Delaware law, who can be said to have participated in the "formation," and the earliest date on which a member can be said to have "participated in the formation"—when the certificate of formation is filed, when the operating agreement comes into existence, or when the first member joins the LLC. Several sections of the Delaware Limited Liability Company Act arguably bear on this issue. *Compare* 6 *Del. C.* § 18-201(b) ("A limited liability company is formed at the time of the filing of the initial certificate of formation in the office of the Secretary of State . . . .") *with* 6 *Del. C.* § 18-101(6) (defining a limited liability company as a "limited liability company formed under the laws of Delaware and *having 1 or more members*") (emphasis added); 6 *Del. C.* § 18-301(b) (noting that a member is admitted after formation according to the operating agreement or the consent of the existing members); 6 *Del. C.* § 18-201(d) ("A limited liability company agreement shall be entered into or otherwise existing either before, after or at the time of the filing of a certificate of formation and, whether entered into or otherwise existing before, after or at the time of such filing, may be made effective as of the formation of the limited liability company or at such other time or date as provided in or reflected by the limited liability company agreement."). I need not determine exactly when EBG was formed for purposes of deciding the pending motion to dismiss, however. Rather, I assume without deciding, that NIBC's activities were sufficiently contemporaneous with and related to the formation of EBG that they conceivably could be viewed as part of EBG's formation. *Cf. Sternberg v. O'Neil*, 550 A.2d 1105, 1121 (Del. 1998) ("[T]he difference between creating a wholly owned subsidiary in Delaware and purchasing a Delaware

specifically, I am not persuaded that a minority member of a limited liability company with as small and indirect an ownership interest as that of NIBC would be subject to personal jurisdiction in Delaware in the absence of any facts suggesting NIBC participated in selecting Delaware as the state of EBG's formation, or otherwise actively participated in its formation, beyond taking an indirect interest in a minority membership.[63]

Moreover, EBG's citations to the FERC regulatory review process, where documents prepared by others listed NIBC as one of eighteen potential members of EBG, are not persuasive.[64] The FERC stated it was unconcerned with the particular ownership structure of EBG, and instead was more concerned that the Lender Group remain passive

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subsidiary is a distinction without significance, when the subsidiary is not thereafter reincorporated in another state.").

[63] Like this case, *Shamrock* did involve defendants who were minority investors in a Delaware entity. To the extent *Shamrock* might be read as inconsistent with the result in this case, I note that I do not view it as inconsistent and that, in any event, it is not binding precedent on this Court. The limited facts recited in the *Shamrock* opinion suggest the nonresident defendants in that case committed acts more important to jurisdiction than NIBC's limited involvement in EBG's formation. EBG did not provide any information as to the factual situation in *Shamrock*, beyond what is described in the opinion. Moreover, the investors in Shamrock over whom the court found it had personal jurisdiction evidently had parent entities that were not named defendants. Therefore, the *Shamrock* court had no reason to address issues of indirect jurisdiction over those parent entities akin to the issues presented here as to NIBC.

[64] PAB at 11; *see also* Pinckney Aff. Ex. E at 8.

investors with the actual operations of the power generating assets being conducted by those in the energy industry.[65]

EBG also asks this Court to focus on the "fraudulent structure" of the transaction in both its direct and indirect personal jurisdiction arguments.[66] Yet, EBG's reference to a "fraudulent structure" is too conclusory and bereft of supporting allegations of specific fact to warrant any serious consideration on NIBC's motion to dismiss. Although an act of concealment could amount to fraud, the structure of the transaction here was well known to EBG. Indeed, it can hardly be said that EBG was unaware that a special purpose entity like VG 109, not NIBC, would be the member.[67] Moreover, the Original and Amended LLC Agreements both specifically contemplate the exact situation at issue, *i.e.*, the alleged failure of a member to reimburse EBG for tax withholdings.[68] In this context, where EBG's pleadings and proofs generally fail to mention, much less satisfy, the elements of fraud, I find no basis to convert a claim for breach of a contractual promise into a claim for fraud. This is especially so here, because EBG has not pled

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65 The documents related to the FERC review do not indicate NIBC took a meaningful role in the formation of EBG. None of the documents were signed by NIBC, and there are no facts indicating that NIBC or VG 109 took any part in the drafting or delivery of them.

66 PAB at 12-13.

67 EBG explicitly admits as much in its FERC Application: "Applicants note that some of the current EBG Class A Members of record of EBG may assign or transfer their membership interests to affiliates or new entities prior to closing . . . ." Pinckney Aff. Ex. H at 12.

68 *See* Am. LLC Agreement § 11.4; Original LLC Agreement § 5.03.

specific facts indicating that NIBC or VG 109 had an intent to defraud when they took the actions which EBG contends give rise to personal jurisdiction over them.

The "fraudulent structure" argument is unconvincing for another reason, as well. Without some facts to support drawing a reasonable inference that NIBC purposefully used a "fraudulent structure" when EBG was formed, I cannot assign much significance for jurisdictional purposes to NIBC's use of a structure that involves a garden-variety subsidiary that has owned similar interests in the past, and is not alleged to be unlike those used by others in the Lender Group, to shield itself from recognized risks attendant to public utilities. I further note that EBG failed to allege any facts indicating that, when EBG was formed, NIBC or VG 109 had concerns about future tax liabilities.

For these reasons, I find that EBG has not alleged sufficient facts to support a reasonable inference that NIBC *caused* EBG to be formed in Delaware or otherwise engaged in purposeful activity in Delaware which was an integral component of a transaction to which EBG's cause of action relates. Thus, NIBC's own actions do not provide an adequate basis for subjecting it to personal jurisdiction in Delaware.

2. May this Court exercise personal jurisdiction over NIBC pursuant to the consent provision in the Amended LLC Agreement?

EBG's second argument for exercising personal jurisdiction directly over NIBC is that NIBC effectively consented to personal jurisdiction under the express terms of the Amended LLC Agreement.

a. Standard

"Because the defense of lack of personal jurisdiction is a personal right, 'it may be obviated by consent or otherwise waived.'"[69] "[C]onsent has been recognized as a basis for the exercise of general personal jurisdiction. In fact, a variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the Court."[70] Parties may, for example, "submit to a given court's jurisdiction by contractual consent,"[71] or "stipulate to personal jurisdiction."[72]

b. Analysis

At the outset, I reiterate that this suit concerns the alleged breach of a Delaware limited liability company's operating agreement. The Delaware LLC is a statutory creature, and the explicit policy of the Delaware Limited Liability Company Act is "to give the maximum effect . . . to the enforceability of limited liability company agreements."[73] Delaware courts have long recognized that the "basic approach" to the

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69 *Foster Wheeler Energy Co. v. Metallgesellschaft AG*, 1993 WL 669447, at *1 (D. Del. Jan. 4, 1993) (quoting *Gen. Contracting & Trading Co. v. Interpole, Inc.*, 940 F.2d 20, 22 (1st Cir. 1991)); *see also Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.*, 768 A.2d 983, 986-87 (Del. 2000).

70 *Sternberg v. O'Neil*, 550 A.2d 1105, 1109 (Del. 1988) (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)).

71 *Sternberg*, 550 A.2d at 1109 n.4 (citing *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964)).

72 *Id.* (citing *Petrowski v. Hawkeye-Sec. Ins. Co.*, 350 U.S. 495 (1956)).

73 6 *Del. C.* § 18-1101(b).

LLC "is to provide broad discretion in drafting" the agreement, as well as encouraging private ordering and customization.[74]

Here, both the original and the amended EBG operating agreements resulted from negotiations among sophisticated parties. If the parties to the Amended LLC Agreement had wished to subject certain nonsignatories, nonmembers, or nonparties to lawsuits brought by EBG or its members in Delaware courts to enforce the agreement, they easily could have agreed to that. In fact, the Amended LLC Agreement contains a consent provision applicable only to the parties to the Amended LLC Agreement. Section 16.8 states in pertinent part:

> Each party hereto hereby irrevocably consents and agrees, for the benefit of each party, that any legal action, suit or proceeding against it with respect to its obligations . . . arising out of . . . this Agreement . . . may be brought in [a Delaware court] . . . .[75]

The plain meaning of this provision would subject the parties that signed the Amended LLC Agreement to jurisdiction in Delaware. The term "party" is not defined in the Agreement, but it is reasonable to infer that it includes a "Member" as defined in the Agreement.[76] There is nothing to suggest the term "party" would include pre-EBG stakeholders of the Exelon Parties, such as a member of the Lender Group, like NIBC,

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74 *See Elf Atochem N.A., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999).

75 Am. LLC Agreement § 16.8.

76 "Member" is defined as "those entities admitted to the Company as Members in accordance with this agreement and listed on Schedule A-1." Am. LLC Agreement § 1.1.

which was neither a signatory nor a member as to either the Original or the Amended LLC Agreement.

EBG argues, however, that the consent reflected in Section 16.8 for a party, such as VG 109, should be construed to encompass their affiliates, such as NIBC, as well. To support its contention, EBG relies on another section of the Amended LLC Agreement, namely, the limited liability and indemnification provisions of Article 15. Section 15.1(a) states:

> *No* Member, its *Affiliates* or any of their respective officers, directors, trustees, employees, representatives, attorneys or agents (collectively, "Member Indemnified Parties", and each individually, a "Member Indemnified Party") *shall*, by virtue of such Member's status as a Member, *have any liability to any other Person under* the Certificate of Formation of the Company, *this Agreement* or any applicable law, *except liability to the Company* and the other Members *in respect of obligations expressly arising hereunder or expressly required by applicable law*.[77]

Article 15 goes on to indemnify a "Member Indemnified Party" in certain situations.[78] I read § 15.1(a)-(b) to be part of an indemnification provision under the Delaware Limited

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[77] Am. LLC Agreement § 15.1(a) (underlining in original, italics added). "Person" is defined as "natural person, corporation, partnership, limited liability company, firm, association, governmental authority or any other entity whether acting in an individual, fiduciary or other capacity." *Id.* at 12.

[78] *See id.* § 15.1(b).

Liability Company Act.[79] Nothing in the section suggests it relates to personal jurisdiction.

NIBC unquestionably qualifies as an Affiliate under the Amended LLC Agreement.[80] Thus, as a Member Indemnified Party, NIBC could invoke § 15.1 to obtain indemnification from EBG as to a lawsuit, not brought by EBG or a member of EBG, relating to VG 109's status as a member of EBG. EBG has failed to explain, however, how the application of this indemnification provision to NIBC supports its contention that NIBC has consented to submit to jurisdiction in Delaware. Indeed, I find that the parties to the Amended LLC Agreement, by expressly including Affiliates, like NIBC, within the ambit of § 15.1 relating to indemnification while referring only to parties in the jurisdiction provision, manifested an intent *not* to include Affiliates under § 16.8.

If the parties had intended the consent to jurisdiction provision to apply to both parties to the Amended LLC Agreement and their affiliates, they could have said so, just as they did in § 15.1. As the Delaware courts have often noted, "[c]ourts should be most chary about implying a contractual protection when the contract could easily have been

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79 *See* 6 *Del. C.* § 18-108 ("Subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever.").

80 The Agreement defines "Affiliate" as a "Person that directly, or indirectly . . . Controls . . . or who holds . . . twenty percent (20%) or more of the equity interest in the Person specified . . . ." Am. LLC Agreement § 1.1.

drafted to expressly provide for it."[81] Accordingly, I hold that NIBC did not consent, either directly or through VG 109, in the Amended LLC Agreement to the jurisdiction of this Court over it for a claim such as EBG has asserted.

C. May this Court Exercise Personal Jurisdiction over NIBC Indirectly?

Whereas the previous sections addressed grounds for asserting personal jurisdiction over NIBC directly, Delaware law also provides indirect bases under which a parent entity may be subject to jurisdiction through a subsidiary. EBG contends this Court may exercise personal jurisdiction over NIBC through VG 109 under two recognized theories of indirect personal jurisdiction: the agency theory and the alter ego theory.[82]

1. The agency theory and alter ego theories of personal jurisdiction

a. Standards

The agency and alter ego theories of indirect personal jurisdiction are similar in effect but different in scope.[83] The theories have at least three factors in common. The

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81 *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2008 WL 902406, at *7 n.56 (Del. Ch. Apr. 3, 2008) (quoting *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006)).

82 *See Sprint Nextel*, 2008 WL 2737409, at *10 (citing DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY ("WOLFE & PITTENGER") § 3.05[c], at 3-87 (2008 ed.)).

83 The Delaware Supreme Court explained the different scope of the agency theory of personal jurisdiction and the alter ego theory:

> These two methods for establishing jurisdiction involve showing either that the absent parent instigated the

first common factor is the attribution of the agent's or subsidiary's jurisdictional activities to its principal or parent. "The principles of agency allow a court to establish jurisdiction over the parent based upon its jurisdiction over a subsidiary."[84] This theory "involves a

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> subsidiary's local activities or that the absent parent and the subsidiary are in fact a single legal entity. . . . They are obviously similar in that both involve disregarding separate entity status and shifting responsibility for the subsidiary's actions onto the parent. The difference between [the agency] and [alter ego theories] lies in the extent of this shifting of responsibility. Under the [agency] theory, only the precise conduct shown to be instigated by the parent is attributed to the parent; the rest of the subsidiary's actions still pertain only to the subsidiary. The two corporations remain distinct entities. If [alter ego] is shown, however, all of the activities of the subsidiary are by definition activities of the parent. [The alter ego theory] requires a greater showing of interconnectedness than attribution, but once shown, its scope is broader. Under both theories, the parent is declared responsible for in-state activities of the subsidiary, but [under the agency theory] the responsibility results from causing a separate legal entity to act while [under the alter ego theory] there is no separate legal entity at all.

Sternberg v. O'Neil, 550 A.2d at 1125-26 n.45 (quoting Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies and Agency*, 74 CAL. L. REV. 1, 12 (1986)).

84 *Telcordia Techs., Inc. v. Alcatel S.A.*, 2005 WL 1268061, at *2 (D. Del. May 27, 2005); *see also* WOLFE & PITTENGER § 3.05[c][2], at 3-93 to 3-94 ("[T]he doctrine may provide a basis for attributing the jurisdictional contacts of a subsidiary corporation (the agent) to a nonresident parent corporation (the principal)."); *Outokumpu Eng'g Enters. v. Kvaerner Enviropower*, 685 A.2d 724, 729 (Del. Super. 1996).

The Delaware long-arm statute itself explicitly recognizes that the forum contacts of an agent may provide a basis for jurisdiction over the principal. The statute states that it provides jurisdiction "over any nonresident, or his personal representative, who in person *or through an agent*," commits one of the

straightforward examination of whether the out-of-state defendant conducted business satisfying § 3104 through an agent."[85] Similarly, although not identically, "[u]nder the alter ego theory of personal jurisdiction, 'the contacts of an entity with a particular forum can be attributed to another person or entity if the entity having the forum contacts is the mere alter ego of such other person or entity.'"[86] Unlike the agency theory, courts will ignore the corporate boundaries between parent and subsidiary on an alter ego theory only if fraud or inequity is shown.[87]

The second common factor is that a successful showing of alter ego or agency does not necessarily mean that the principal or parent is subject to jurisdiction. As theories of indirect jurisdiction, the underlying question on both theories is whether the subsidiary's actions satisfy § 3104 of the long-arm statute.[88] The third common factor is that both theories require a fact intensive inquiry.[89]

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enumerated acts that might support such jurisdiction. 10 *Del. C.* § 3104(c) (emphasis added).

85 *HMG/Courtland Props., Inc. v. Gray*, 729 A.2d 300, 307 (Del. Ch. 1999).

86 *Maloney-Refaie v. Bridge at Sch., Inc.*, 2008 WL 2679792, at *6 (Del. Ch. July 9, 2008) (quoting WOLFE & PITTENGER § 3-5[c][1]); *see also Sternberg v. O'Neil*, 550 A.2d 1105, 1126 n.45 (Del. 1988).

87 *Applied Biosys., Inc. v. Cruachem Ltd.*, 772 F. Supp. 1458, 1465-66 (D. Del. 1991) ("The agency theory, by contrast, examines the degree of control which the parent exercises over the subsidiary.").

88 For an analysis of the relationship between the agency theory and § 3104, see *Ace & Co. v. Balfour Beatty PLC*, 148 F. Supp. 2d 418, 425 (D. Del. 2001) ("The agency theory requires not only that the precise conduct shown to be instigated by the parent be attributable to the parent . . . , but also that such conduct satisfy § 3104(c)(1); *i.e.*, that the jurisdictional conduct take place in Delaware.");

For the agency theory, the factual inquiry includes whether: "(1) the agent ha[s] the power to act on behalf of the principal with respect to third parties; (2) the agent do[es] something at the behest of the principal and for his benefit; and (3) the principal ha[s] the right to control the conduct of the agent."[90] Thus, in the parent-subsidiary

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HMG/Courtland Props., Inc. v. Gray, 729 A.2d 300, 307 (Del. Ch. 1999) ("In circumstances where [the agency] test is satisfied as to a corporate parent and its subsidiary, the court does not ignore the separate existence of the companies, but only 'will consider the parent corporation responsible for the specific jurisdictional acts of the subsidiary.'") (citing *Applied Biosys.*, 772 F. Supp. at 1463).

For an analysis of the alter ego theory and § 3104, see *Gray*, 729 A.2d at 307-08 (extensive citations omitted); *see also Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251, at *3 (Del. Ch. Mar. 4, 2004). The court in *Gray* noted the following relationship between asserting jurisdiction under the alter ego theory and the requirements of § 3104:

> [T]he use of an alter ego test in these circumstances is also consistent with the express language of § 3104 because it is a way of examining whether an out-of-state resident has deployed "an agent" to conduct forum-directed activity. If the entity which has engaged in the direct activity in Delaware satisfying § 3104 is no more than the alter ego of an out-of-state defendant, it is fair to conclude that the alter ego acted as the out-of-state defendant's agent in conducting those activities, thus meeting the statutory criteria permitting service.

729 A.2d at 308.

89 *See Japan Petroleum Co. (Nig.) v. Ashland Oil Co.*, 456 F. Supp. 831, 840 (D. Del. 1978); *U.S. Bank Nat'l Ass'n v. U.S. Timberlands Klamath Falls, L.L.C.*, 2005 WL 2093694, at *1 (Del. Ch. Mar. 30, 2005).

90 *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 169 n.30 (Del. Ch. 2003) (citing *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 32012, at *4 (Del. Super. Mar. 30, 1988)); *see also Jackson Walker L.L.P. v. Spira Footwear, Inc.*, 2008 2008 WL 2487256, at *6-8 (Del. Ch. June 23, 2008); *Abex Inc. v. Koll Real Estate Group*, 1994 Del. Ch. LEXIS 213, at *40 (Dec. 22, 1994) ("Critical to an agency

context, the critical question is "whether the parent corporation dominates the activities of the subsidiary."[91]

"Among the specific factors relevant to this determination are the extent of overlap of officers and directors, methods of financing, the division of responsibility for day-to-day management, and the process by which each corporation obtains its business. No one factor is either necessary or determinative; rather it is the specific combination of elements which is significant."[92] Thus, a subsidiary is not an agent of its parent merely because the parent: holds a majority of the subsidiary's shares, shares officers and directors with the subsidiary, or finances the operations of the subsidiary.[93] "Under the agency theory of personal jurisdiction, only acts of the agent that are directed by the principal may serve as a basis to assert jurisdiction over the principal."[94]

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relationship is the power of the principal to direct and control the agent.") (citing *Billops v. Magness Constr. Co.*, 391 A.2d 196, 197-98 (Del. 1978)).

91 *Ashland Oil*, 456 F. Supp. at 841. "[T]he control must be actual, participatory, and total." *Id.* (citing *Krivo Indus. Supply Co. v. Nat'l Distilling & Chem. Corp.*, 483 F.2d 1098, 1105 (5th Cir. 1973)).

92 *Applied Biosys., Inc. v. Cruachem Ltd.*, 772 F. Supp. 1458, 1465-66 (D. Del. 1991) (citing *Ashland Oil*, 456 F. Supp. at 841); *see also Telcordia Techs., Inc. v. Alcatel S.A.*, 2005 WL 1268061, at *2 (D. Del. May 27, 2005).

93 *See Ashland Oil*, 456 F. Supp. at 841 (extensive citations omitted).

94 *Computer People, Inc. v. Best Int'l Group, Inc.*, 1999 WL 288119, at *8 (Del. Ch. Apr. 27, 1999).

For the alter ego theory, Delaware courts have "looked to the law of the entity in determining whether the entity's separate existence is to be disregarded."[95] While VG 109 is a Dutch limited liability company, neither side has discussed the relevant provisions of Dutch law, other than as they relate to the minimum capitalization requirements. Thus, the record does not reflect whether Dutch business law includes a concept similar to the alter ego theory. To the extent Dutch law may not recognize such a theory, NIBC has waived that defense. Nevertheless, in the limited instances where the parties have cited Dutch law, I have considered it; otherwise, I have applied Delaware law to the facts of this case.

In applying the alter ego theory of personal jurisdiction, Delaware courts typically focus on two critical elements:

> 1) that the out-of-state defendant over whom jurisdiction is sought has no real separate identity from a defendant over whom jurisdiction is clear based on actual domicile or satisfaction of Delaware's long-arm statute; and 2) the existence of acts in Delaware which can be fairly imputed to the out-of-state defendant and which satisfy the long-arm statute and/or federal due process requirements.[96]

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95 *HMG/Courtland Props., Inc. v. Gray*, 729 A.2d 300, 309 (Del. Ch. 1999) (referencing Connecticut corporations law) (citing *Hart Holding Co. v. Drexel Burnham Lambert, Inc.*, 1992 LEXIS WL 127567, at *4 (Del. Ch. May 28, 1992) (referencing California corporations law)).

96 *Gray*, 729 A.2d at 307-08 (extensive citations omitted); *see also Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251, at *3 (Del. Ch. Mar. 4, 2004).

In that regard, Delaware courts apply "the alter ego theory rather strictly, using an analysis similar to those used in determining whether to pierce the corporate veil."[97] Courts generally only disregard the corporate entity in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or equitable considerations among members of the corporation are involved.[98]

Some specific facts a court may consider when being asked to disregard the corporate form include: "(1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the dominant shareholder siphoned company funds; and (5) whether, in general, the company simply functioned as a facade for the dominant shareholder."[99] A decision to disregard the corporate entity generally results not from a single factor, but rather some combination of them, and "an overall element of injustice or unfairness must always be present, as well."[100]

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97 *Gray*, 729 A.2d at 307; *see also Ruggiero v. FuturaGene, plc*, 948 A.2d 1124, 1135 (Del. Ch. 2008); *Sears I*, 744 F. Supp. 1297, 1305 (D. Del. 1990) ("It is only the exceptional case where a court will disregard the corporate form . . . .").

98 *Pauley Petroleum, Inc. v. Cont'l Oil Co.*, 239 A.2d 629, 633 (Del. 1968).

99 *Id.* (citation omitted).

100 *Harco Nat'l Ins. Co.*, 1989 WL 110537, at *5 (Del. Ch. Sept. 19, 1989) (quoting *United States v. Golden Acres, Inc.*, 702 F. Supp. 1097, 1104 (D. Del. 1988)); *see also Mason v. Network of Wilmington, Inc.*, 2005 WL 1653954, at *3 (Del. Ch. July 1, 2005) ("Delaware Courts have built on this analysis and require an element of fraud to pierce the corporate veil.") (citing *Wallace ex rel. Cencom Cable Income Partners II, Inc. v. Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999) ("Effectively, the corporation must be a sham and exist for no other purpose than

b. Analysis

As for the agency theory, EBG contends VG 109 is an agent of NIBC because they share normal operating activities, management, and an office, and because, as VG 109's managing member, NIBC controlled its business activities and funding.[101] NIBC has not denied that VG 109 was its agent.[102] Thus, drawing all inferences in favor of EBG, I find, for purposes of determining NIBC's amenability to suit in Delaware, that VG 109 did act as NIBC's agent.

Turning to the alter ego theory, EBG makes several arguments in favor of ignoring the corporate form and treating VG 109 as NIBC's alter ego. Determining whether NIBC would be subject to personal jurisdiction under the alter ego theory involves two separate questions: (1) does VG 109 have a separate identity from NIBC, or is it merely its alter ego, and (2) whether there are Delaware acts of VG 109 that satisfy § 3104(c)(1) which could be imputed on alter ego grounds to NIBC. For the reasons discussed *infra*, I answer the second question in the negative; consequently, I need not decide the first question. Nonetheless, I note that, even drawing all inferences in EBG's favor, I doubt that EBG has met its burden of demonstrating that VG 109 is NIBC's alter ego for purposes of defeating NIBC's motion to dismiss.

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as a vehicle for fraud.")); *see also In re Sunstates Corp. S'holder Litig.*, 788 A.2d 530, 534 (Del. Ch. 2001) (quoting *Wallace*).

101 *See* PAB at 21.

102 *See* DRB at 16-17; Tr. at 11-12.

EBG makes the following arguments in favor of ignoring the corporate form: (1) "NIBC knowingly used VG109 as an instrument and means to attempt to shield itself from liability for tax obligations"; (2) "VG109 had insufficient capital to meet its tax obligations"; (3) VG 109 is NIBC's wholly owned subsidiary; (4) NIBC shares its principal Netherlands office with VG 109; (5) NIBC and VG 109 share management; (6) NIBC is VG 109's managing director; and (7) VG 109 allegedly transferred its interest in EBG for no consideration.[103]

With respect to NIBC's use of VG 109, EBG, however, has not made a sufficient showing of fraud or other inequity to justify a departure from the usual rule recognizing the corporate form. Even drawing all inferences in favor of EBG, it has not shown that NIBC's use of the corporate form for its VG 109 subsidiary constituted "a sham and exist[s] for no other purpose than as a vehicle for fraud."[104] To the contrary, NIBC has presented uncontroverted evidence that VG 109 pre-dated the formation of EBG and serves as a broader investment vehicle, which has held other assets besides the membership interests in EBG. In fact, VG 109 was formed as a special purpose entity in

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[103] PAB at 18-19. Because EBG has cited nothing in any affidavit or pleading to support its seventh factual allegation, regarding the absence of consideration for VG 109's transfer of its interest in EBG, I have disregarded that allegation as merely conclusory and unsupported by any specific facts. In that regard, EBG has failed to meet its burden of pleading the fraud element of alter ego jurisdiction with particularity. *See* Ct. Ch. R. 9(b) (requiring that circumstances constituting fraud be pled with particularity).

[104] *Wallace*, 752 A.2d at 1184.

July 2001, several years *before* the creation of EBG.[105] In addition, VG 109 has observed a number of corporate formalities. It has, for example, filed separate U.S. tax returns and maintains separate books and records.[106] Moreover, although VG 109 and NIBC's alleged breach of contract may be unjust or wrongful, the requisite element of fraud under the alter ego theory must come from an inequitable use of the corporate form itself as a sham, and not from the underlying claim.[107]

EBG's contention that NIBC's use of the corporate form to obtain limited liability itself supports asserting alter ego jurisdiction is also unconvincing. EBG relies on one paragraph in its complaint, "NIBC knowingly used VG109 as an instrument and means to attempt to shield itself from liability for tax obligations related to its ownership interest in EBG."[108] As previously discussed as to NIBC's direct amenability to jurisdiction, I find that statement wholly conclusory and otherwise unsupported by any specific facts in the Complaint. Without more, EBG has failed to plead facts sufficient to support a

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105 *See id.* ¶ 11.

106 *See* Van der Have Aff. ¶¶ 17, 19.

107 "Any breach of contract . . . is, in some sense, an injustice. Obviously this type of 'injustice' is not what is contemplated by the common law rule that piercing the corporate veil is appropriate only upon a showing of fraud or something like fraud. The underlying cause of action does not supply the necessary fraud or injustice. To hold otherwise would render the fraud or injustice element meaningless, and would sanction bootstrapping." *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268 (D. Del. 1989); *see also Sears I*, 744 F. Supp. 1297, 1305 (D. Del. 1990).

108 Compl. ¶ 26.

reasonable inference that NIBC's use of VG 109's limited liability status was fraudulent or inequitable.[109]

EBG also has not shown that VG 109's capitalization was so minimal as to prove that it was a sham entity. There is no evidence, for example, that capitalizations of similar firms exceeded that of VG 109.[110] Insolvency, in and of itself, does not justify piercing the corporate veil.[111] Additionally, the fact that VG 109 met and slightly exceeded the minimum capitalization required for such entities under Dutch law further undermines EBG's position.

The other facts cited by EBG in favor of disregarding VG 109's corporate form all relate to the close interrelationship between VG 109 and NIBC: they share offices, officers, and letterhead, and VG 109 is a wholly-owned subsidiary of NIBC, which is managed by NIBC. In the absence of fraud and inequity, however, these facts do not warrant disregarding the corporate form.

Nor would EBG's potential inability to sue NIBC in Delaware for the taxes due from VG 109 create the requisite inequity. Documents contemporaneous with the

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109 *See Anderson v. Abbott*, 321 U.S. 349, 361 (1944) ("Normally the corporation is an insulator from liability on claims of creditors. The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose.").

110 *See Mason v. Network of Wilmington*, 2005 WL 1653954, at *4 (Del. Ch. July 1, 2005) (merely stating that firm was insolvent did not show firm was under-capitalized; pertinent facts could have included a comparison of similar firms in the industry).

111 *See Mason*, 2005 WL 1653954, at *3.

formation of EBG show it was well known that the lenders, such as NIBC, might take an ownership interest in EBG indirectly through a subsidiary. The parties to the EBG operating agreement could have required a guaranty by any lender that elected to participate through a subsidiary, but they did not. Similarly, assuming EBG will be making future distributions, EBG could "be repaid by reducing the amount of the current or next succeeding distribution or distributions . . . ."[112] The record suggests this would be true even if VG 109 has transferred its economic interest to a third party.[113] Alternatively, EBG presumably could seek relief from NIBC and VG 109 in the Netherlands.[114]

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[112] Amended LLC Agreement § 11.4. The record does not indicate whether or not there have been or are likely to be any succeeding distributions.

[113] *See id.* § 4.4 ("[EBG] shall be entitled to treat the record holder of Units as shown on its books as the owner of such Units for all purposes, including the payment of distributions and the Voting rights . . . regardless of any Transfer of such Units . . . ."). The parties dispute the validity of the alleged transfer by VG 109. Assuming the transfer to a third party was valid, EBG has not shown why the transferee would not be liable for the alleged tax withholding, if the membership transfer was reflected on the books of EBG. If VG 109's alleged March 2006 transfer was valid, EBG does not address why the transferee would not be subject to the consent to jurisdiction provision in the Amended LLC Agreement, or even in the absence of the consent provision, why the alleged transferee would not be subject to personal jurisdiction as a "New York banking institution organized and existing under the laws of the state of Delaware." *See* Pinckney Aff. Ex. I at 1. On the other hand, assuming instead that the transfer was invalid, EBG omits any discussion of whether it could obtain a judgment against VG 109 and seek satisfaction, not only out of the 20,000 euros left in EBG, but also by pursuing the EBG units that remain assets of VG 109.

[114] With regard to any implied drafting chicanery on the part of NIBC with the intent to avoid jurisdiction anywhere, EBG offers no reason to question the competency or jurisdiction of the judicial system in the Netherlands, where both NIBC and

2. Did VG 109 commit jurisdictional acts in Delaware that can be imputed to NIBC?

Although I have found that VG 109 was an agent of NIBC for purposes of NIBC's 12(b)(2) motion to dismiss, the issue remains whether VG 109 committed any acts in relation to the formation of EBG that could be imputed to NIBC and support the exercise of personal jurisdiction over NIBC in Delaware under §3104. EBG contends "NIBC caused VG109 to enter into the [Amended LLC Agreement] in which VG109 not only consented to this Court's jurisdiction, but obligated itself to repay to EBG any tax advances made on its behalf."[115] NIBC responds that VG 109 committed no jurisdictional act in Delaware that could be imputed to NIBC to satisfy the requirements of § 3104(c), because VG 109 executed the Amended LLC Agreement in the Netherlands, and not in Delaware.[116]

To the extent EBG contends this Court should use the agency theory of jurisdiction to impute VG 109's contractual consent to personal jurisdiction over it in Delaware to NIBC, that argument is untenable. EBG has not cited any case that supports imputing a specific contractual obligation of an agent to a principal for purposes of

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VG 109 are domiciled, and where there exists a well-known history of commercial acumen, including securities markets that predate even London's. *See* John C. Coffee, *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 Y.L.J. 1, 9 (2001). Accordingly, to the extent EBG could be making an argument based on something akin to NIBC contriving "no other [available] forum," as suggested in *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977), the implication is unavailing.

115 PAB at 21.

116 *See* DRB at 16-17.

establishing personal jurisdiction over the principal. In this case, VG 109 admittedly is subject to this Court's jurisdiction by virtue of its consent reflected in the Amended LLC Agreement. To allow EBG to impute that contractual consent by VG 109 to NIBC would sanction bootstrapping and defeat the careful drafting of the consent provision of the Agreement, which only applies to the parties to the Agreement.[117] Because sophisticated parties negotiated the Original and Amended LLC Agreements, and included a consent to jurisdiction by the parties, but not their affiliates, I reject EBG's attempt to circumvent the parties' intention under the guise of an agency argument.

I next address whether VG 109 transacted any business in Delaware from which EBG's claims arose that would satisfy the requirements for personal jurisdiction under § 3104(c)(1) of the long-arm statute. Stated differently, if VG 109 had not consented to jurisdiction in Delaware for any alleged breach of the Amended LLC Agreement, would it still have been subject to jurisdiction in Delaware under § 3104. In analyzing this issue, I note that: EBG is a Delaware LLC; VG 109 is a Dutch entity; VG 109 signed the operative agreements in the Netherlands; VG 109 owns less than 3% of the interests in EBG;[118] VG 109 is not alleged to have exercised control over EBG or misused EBG in any way in terms of dealings with third parties; and the underlying dispute here concerns

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117 *See* discussion *supra* Part II.B.2.a-b.

118 As of May 24, 2004, EBG is listed as having approximately 4.5% of the membership interest. Original LLC Agreement at Schedule II. As of October 11, 2005, VG 109 is listed as having approximately 2.5% of the membership interest. Am. LLC Agreement at Schedule A-1.

whether, under the terms of the Amended LLC Agreement, EBG properly paid taxes due on behalf of VG 109, and whether VG 109 is obligated to reimburse EBG for those payments. Thus, the question reduces to whether a minority, passive investor in a Delaware LLC who allegedly breaches the LLC agreement in a manner that affects the rights of the LLC and its members *inter se* is subject to jurisdiction under Delaware's long-arm statute for the alleged breach. Without a showing that the investor in the LLC took some additional action from which the asserted cause of action arose to consciously take advantage of the laws of Delaware, I conclude the answer to that question is no. Therefore, even if all of the actions of VG 109 in this case related to the EBG Amended LLC Agreement were imputed to NIBC, those actions still would not provide a sufficient basis for subjecting NIBC to the jurisdiction of this Court.

The fact that VG 109 executed the Agreement in the Netherlands, not Delaware, is not dispositive. It is not necessary for the execution of an agreement actually to have taken place in Delaware for it to constitute the transaction of business.[119] VG 109's execution of the Amended LLC Agreement, as a fundamental governance document, conceivably could supply a basis for personal jurisdiction in this Court. Executing and then allegedly breaching an LLC agreement also presents interesting jurisdictional questions, because the LLC agreement is itself a conceptual hybrid. On the one hand, an

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[119] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 440 (Del. 2005) ("While evidence of physical presence may be helpful in determining a party's intent to transact business and to show the actual transaction of business in this State, . . . such evidence is not the sine qua non for jurisdiction under Delaware's Long Arm Statute.").

LLC agreement is similar to a certificate of incorporation, because it is a foundational document that controls the governance of the entity. In that sense, the LLC agreement relates to the very nature of the entity, and manipulation of its governance provisions could qualify as a jurisdictional act.[120] On the other hand, the Delaware Limited Liability Company Act and Delaware courts have emphasized the importance of freedom of contract when dealing with LLC agreements.[121] Not surprisingly, therefore, LLC agreements also may contain provisions that do not implicate the fundamental attributes and workings of a Delaware entity. Some provisions relate more to the respective rights and obligations of members of a particular LLC, and the alleged breach of those provisions by a minority member of an LLC may not satisfy § 3104(c)(1).

Here, the obligation to reimburse EBG for tax withholdings is a collateral provision that does not significantly affect the operation of EBG under Delaware law. Thus, the mere act of promising to reimburse EBG for tax withholdings in the Amended LLC Agreement, and then allegedly failing to perform on that promise in relation to a payment made by the LLC more than two years after the nonresident defendant joined the LLC would not provide an adequate basis for subjecting a party to personal jurisdiction, absent its consent.

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120 *See* discussion *supra* Part II.B.1.a-b (discussing how both the *Cairns* and *Papendick* opinions involved elements of control not present here).

121 *See* discussion *supra* Part II.B.2.a (discussing how freedom of contract predominates over statutory requirements when considering LLC agreement interpretation).

Papendick and its progeny stand for the proposition that a foreign corporation's ownership of a Delaware subsidiary may constitute the transaction of business under Delaware's long-arm statute where the underlying cause of action arises from the creation and operation of the Delaware subsidiary, because in that instance the foreign corporation availed itself of the benefits and protections of the laws of the State of Delaware. EBG, however, has made no showing that it was a subsidiary of either VG 109 or NIBC, as that term is commonly understood, as opposed to being merely a company in which VG 109 was a minority investor.[122]

Therefore, EBG has not shown how a foreign business entity's execution of a governance document like the Amended LLC Agreement would fall within the *Papendick* line of cases where the foreign entity holds less than 5% of the total membership interest. Moreover, there is nothing in the record to suggest VG 109 had any kind of controlling influence, operational or otherwise, over EBG. Because VG 109 committed no jurisdictional acts in Delaware, there are no contacts to impute to NIBC sufficient to subject it to jurisdiction in Delaware under either the agency or alter ego theory of jurisdiction.

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[122] *Cf. Gibralt Capital Corp. v. Smith*, 2001 WL 647837, at *5 (Del. Ch. May 8, 2001) ("As a general rule, ownership of stock in a Delaware corporation, without more, will not suffice to establish general *in personam* jurisdiction.").

III. CONCLUSION

For the reasons stated, I grant NIBC's motion to dismiss EBG's claims against NIBC for lack of personal jurisdiction.

IT IS SO ORDERED.