IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LECROY CORPORATION, a Delaware corporation, Plaintiff, v. MATTHEW HALLBERG, an individual, SERIALTEK, LLC, a Delaware limited liability company, and JOHN DOES 1-10, Defendants.	))))))))))))	Civil Action No. 4328-VCP

MEMORANDUM OPINION

Submitted: June 25, 2009
Decided: October 7, 2009

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PARSONS, Vice Chancellor.

This matter arises out of a dispute between two companies competing against one another in the protocol analyzer industry. Both companies are Delaware business entities, although neither has any operations here. One company is a well-established market leader in the industry, while the other is a recent start-up. The market leader accuses the start-up and one of the market leader's former employees of unfair competition based on the employee's having signed agreements with the market leader subjecting him to confidentiality and nonsolicitation obligations, and then having left to work for the start-up in circumstances that violated those agreements. Among other things, the employee allegedly provided the start-up with a version of the market leader's confidential software and assumed a position with the start-up similar to and directly competitive with his previous position with the market leader. The employee has never lived or worked in Delaware.

This matter is currently before me on a motion by Defendants to dismiss. The motion first seeks to dismiss the employee from this action for lack of personal jurisdiction. Second, the motion requests the dismissal of this action on *forum non conveniens* grounds. For the reasons discussed in this Memorandum Opinion, I grant the motion to dismiss for lack of personal jurisdiction and deny the motion to dismiss for *forum non conveniens*.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, LeCroy Corporation ("LeCroy"), is a Delaware corporation that maintains its principal place of business in New York. LeCroy also has offices and

operations in California, among other places. Nothing in the record suggests LeCroy has any operations in Delaware, or has any connection with Delaware other than being incorporated here. LeCroy is a well-established leader in the protocol analyzer market.

Defendant SerialTek, LLC ("SerialTek" or the "Company") is a Delaware limited liability company that maintains its principal place of business in California. SerialTek has no operations in Delaware, and has no connection with Delaware other than having been formed here under Delaware law. SerialTek is a start-up company which competes with LeCroy and others in the protocol analyzer market. Paul Mutschler, Rand Kriech and Dale Smith own SerialTek, but are not named as parties to this action.

Defendant Matthew Hallberg is an individual residing in California. Hallberg has never visited, worked in, or otherwise had any connection with Delaware.[1] He formerly worked for LeCroy marketing protocol analyzers, and presently works for SerialTek in much the same capacity.

B. Facts

LeCroy requires its employees and sales representatives to sign various documents reciting confidentiality, loyalty, and nonsolicitation obligations as a condition of employment (collectively, the "Employment Agreements").[2] The Employment Agreements include terms prohibiting LeCroy employees and sales representatives from

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[1] Hallberg Aff. ¶¶ 2-10.

[2] These facts are taken from the record, with inferences drawn in the "plaintiff-friendly manner" required in the procedural context of a motion to dismiss. *Sample v. Morgan,* 935 A.2d 1046, 1048 (Del. Ch. 2007).

(1) disclosing sensitive proprietary information, (2) soliciting employees or customers for a period of twelve months following termination, and (3) competing with LeCroy during the term of their employment. Mutschler and Hallberg both worked for LeCroy in California, and in 2006 both signed some version of the Employment Agreements.[3] Mutschler was Hallberg's supervisor at LeCroy and a mentor and friend, as well.[4]

On August 14, 2007, while Mutschler was still employed at LeCroy, he and Smith created a SerialTek predecessor in Colorado.[5] SerialTek originally was conceived as a new start-up company that would compete directly with LeCroy in the protocol analyzer market.[6] Mutschler and Smith discussed the formation of SerialTek with Kriech, a man they both had known in the protocol analyzer industry since 1999.[7] At the time of these

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[3] Kearnery Decl. ¶¶ 14, 23.

[4] Rostocki Aff. Ex. 2, Hallberg Dep., at 59-61.

[5] Docket Item ("D.I.") 34 Ex. N; Rostocki Aff. Ex. 1, Smith Dep., at 42-43. The Delaware entity now known as SerialTek is merely the latest in a string of several business entities having different names and different states of formation. *See infra* note 14. Importantly for the pending motion, these entities are only different on paper. Operationally, SerialTek is identical to all of its predecessor entities going back to the initial incorporation in Colorado. Although Defendants dispute this statement to some extent, LeCroy has alleged facts sufficient to support a reasonable inference to that effect. Accordingly, I accept that inference as true for purposes of Defendants' motion under 12(b)(2). This opinion will not refer to these predecessor entities by name, as they are operationally indistinguishable from SerialTek. Instead, SerialTek and all of its predecessor entities will be referred to collectively as "SerialTek."

[6] Smith Dep. at 134-37.

[7] *Id.* at 139-41.

discussions in 2007, Kriech was a LeCroy sales representative and also had signed a version of the Employment Agreements.[8]

After SerialTek was formed, Mutschler solicited several LeCroy engineers to join SerialTek.[9] These engineers had worked on LeCroy's protocol analyzer products, and as soon as they moved to SerialTek, they began to develop SerialTek's competing protocol analyzer product.[10]

Sometime after the initial formation of SerialTek, Mutschler provided his LeCroy Employment Agreement to Smith,[11] who became upset about the nonsolicitation provisions.[12] Thereafter, Mutschler dissolved the SerialTek Colorado entity, which had his name attached to it, and "laid off" all of its employees.[13] Over the following weekend, Smith and Kreich created a new SerialTek predecessor in Delaware and "rehired" all of the employees from the dissolved Colorado entity.[14]

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[8] *Id.*

[9] *Id.* at 251-54, 270-71.

[10] *Id.* at 46, 53.

[11] *Id.* at 214-15; Rostocki Aff. Ex. 10.

[12] Smith Dep. at 54-56, 214-15.

[13] D.I. 34 Ex. O.

[14] Smith Dep. at 37-38. The new Delaware entity initially was named Cordless Communications, LLC. Rostocki Aff. Ex. 11. The name later was changed to BusTek, LLC, and then again, on or about September 15, 2008, to SerialTek, LLC. *Id.* Ex. 12. Throughout this period, the nature of the Company's business remained the same. Smith Dep. at 37-39, 42-43.

According to LeCroy, SerialTek was incorporated in Delaware to eliminate any paper trail leading to Mutschler and to hide Mutschler's involvement from LeCroy in the hope of avoiding any problems regarding a possible violation of the LeCroy Employment Agreements.[15] Defendants deny any such purpose and cite certain evidence to support their position. In the context of the pending motion to dismiss, I must draw all reasonable inferences from the available evidence in favor of the nonmoving party, LeCroy. Although Plaintiff's version of the facts does not reflect the only inference that could be drawn from the evidence, it represents a reasonable inference. Therefore, I accept LeCroy's position as true for the limited purpose of the pending motion.[16]

Mutschler resigned from LeCroy on November 30, 2007 and renewed his ownership and investment in SerialTek in December 2007 through the Delaware entity.[17] Following his departure from LeCroy, Mutschler still maintained contact with Hallberg even though the two no longer worked together.[18] Through this relationship, Hallberg allegedly secretly transmitted confidential LeCroy information to Mutschler, who then

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15 Pl.'s Answering Br. at 11 n.11.

16 In connection with their Reply Brief, Defendants submitted an affidavit of Mutschler, one of the key actors in this litigation. I have reviewed the Mutschler Affidavit. Based on the relatively belated filing of that affidavit, and the fact that the Court, at Defendants' behest, limited Plaintiff to only two depositions (those of Smith, who appeared on behalf of SerialTek, and Hallberg) in responding to Defendants' Motion, I have afforded little weight to the Mutschler Affidavit for purposes of the pending Motion to Dismiss.

17 Mutschler Aff. ¶ 6.

18 Hallberg Dep. at 59, 199-200.

used it for SerialTek's benefit. In particular, in January 2008, Hallberg emailed Mutschler a confidential pre-release version of LeCroy's protocol analyzer software without LeCroy's permission.[19] Hallberg wrote: "Ssh . . . I did not send this to you and please do not send to anyone else. . . . I cannot send it to anyone else."[20] Mutschler responded: "No problem . . . mums the word . . . ."[21]

In November 2008, SerialTek publicly introduced its protocol analyzer product. LeCroy quickly identified SerialTek's protocol analyzer as competitive with its own protocol analyzers. LeCroy then gave Hallberg the responsibility of determining how LeCroy could best compete with the new SerialTek product. To this end, Hallberg took a number of actions, including conducting marketing studies and opposition research on SerialTek's product offerings.

Also in November 2008, at the same time Hallberg was tasked with helping LeCroy compete against SerialTek, Hallberg began actively seeking employment with SerialTek.[22] Employment discussions progressed, and on December 15, 2008, Hallberg accepted an employment offer from SerialTek.[23] Despite having agreed to join SerialTek, Hallberg stayed on at LeCroy for another two weeks so as not to miss out on a

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[19] *Id.* at 185-87.

[20] Rostocki Aff. Ex. 13.

[21] *Id.*

[22] Hallberg Dep. at 106-07.

[23] *Id.* at 213; Rostocki Aff. Ex 4.

large commission payment.[24] Notwithstanding the obvious conflict of interest, Hallberg kept his negotiations and signing with SerialTek a secret from LeCroy until the day he submitted his resignation, December 28, 2008.[25]

On or around January 15, 2009, Hallberg began work at SerialTek as its Product Marketing Manager.[26] Hallberg's new position at SerialTek was essentially identical to the role he played at LeCroy.[27] LeCroy alleges that Hallberg brought to his new position a wealth of knowledge about LeCroy's trade secrets and confidential information.[28] And, while it makes no specific allegation of improper disclosures by Hallberg, LeCroy does allege that Hallberg will inevitably disclose its trade secrets and confidential information because it will be impossible for him to be employed in the protocol analyzer industry without using such knowledge.[29]

C. Procedural History

On January 30, 2009, LeCroy filed its Complaint against Hallberg and SerialTek for, *inter alia,* breach of contract, tortious interference with contract, misappropriation of trade secrets, and unfair competition. LeCroy simultaneously filed a Motion for a

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24 Hallberg Dep. at 112-14.

25 *Id.*

26 *Id.* at 7-8, 222-23.

27 *Id.* at 156-61.

28 Pl.'s Answering Br. at 16-17.

29 Compl. ¶¶ 2, 4.

Preliminary Injunction and a Motion for Expedited Discovery and Trial Schedule (the "Motion for Expedited Proceedings").

On February 13, 2009, Hallberg and SerialTek filed their opposition to the Motion for Expedited Proceedings, together with a Motion to Dismiss, or in the Alternative to Stay (the "Motion to Dismiss") based primarily on of lack of personal jurisdiction over Hallberg and *forum non conveniens*. The parties later resolved the Motions for a Preliminary Injunction and for Expedited Proceedings by filing a stipulated Status Quo Order and an agreed Scheduling Order. They then briefed the Motion to Dismiss, and on June 25, 2009, I heard oral argument on that motion.

D. Parties' Contentions

Hallberg and SerialTek argue that Hallberg should be dismissed from this action pursuant to Court of Chancery Rule 12(b)(2) because there is no basis for personal jurisdiction over him. LeCroy responds that personal jurisdiction exists over Hallberg under the Delaware long arm statute,[30] and the conspiracy theory for asserting jurisdiction over a nonresident Defendant. Defendants counter that LeCroy has not established all the elements required to invoke the conspiracy theory of personal jurisdiction and has not met the requirements of either § 3104(c)(3) or the Due Process Clause.

Hallberg and SerialTek also argue that this Court should dismiss or, in the alternative, stay this action on the basis of *forum non conveniens*. In that regard,

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[30] Specifically, 10 *Del. C.* § 3104(c)(3).

Defendants contend that the factors identified as relevant under the doctrine of *forum non conveniens* in *General Foods Corp. v. Cryo-Maid, Inc.*[31] weigh overwhelmingly in favor of dismissing or staying this action. LeCroy urges the Court to deny Defendants' Motion to Dismiss on *forum non conveniens* grounds because Delaware is not an inconvenient forum for SerialTek. LeCroy contends that SerialTek, therefore, has not satisfied 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.

II. ANALYSIS

A. Motion to Dismiss for Lack of Personal Jurisdiction

In considering a motion to dismiss for lack of personal jurisdiction under Court of Chancery Rule 12(b)(2), I am not limited to the pleadings.[32] 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."[33] Still, "[i]n evaluating the record, I must draw reasonable inferences in favor of the plaintiff."[34]

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[31] 198 A.2d 681 (Del. 1964).

[32] *Sample v. Morgan,* 935 A.2d 1046, 1055 (Del. Ch. 2007).

[33] *Id.* at 1055-56 (quoting *Crescent/Mach I Partners, L.P. v. Turner,* 846 A.2d 963, 974 (Del. Ch. 2000)).

[34] *Id.* at 1056 (citing *Outokumpu Eng'g Enter., Inc.,* 685 A.2d 724, 727 (Del. Super. 1996)).

Delaware courts apply a two-step analysis to determine if personal jurisdiction exists over a nonresident defendant.[35] First, there must be a statutory basis for personal jurisdiction under Delaware's long arm statute.[36] Second, the court's exercise of personal jurisdiction over a nonresident defendant must comport with the Due Process Clause of the Fourteenth Amendment.[37] Plaintiffs often invoke the so-called "conspiracy theory" to establish personal jurisdiction over nonresident defendants. In doing so, they must still satisfy both of these requirements.[38] Under the conspiracy theory, "the acts of one conspirator that satisfy the long-arm statute can be attributed to the other conspirators."[39]

Turning to the first requirement for personal jurisdiction under *AeroGlobal*, Delaware's long arm statute provides 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:
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35 *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.,* 871 A.2d 428, 438 (Del. 2005).

36 *Id.*

37 *Id.*

38 *Am. Int'l Group, Inc. v. Greenberg,* 2009 WL 366613, at *34 (Del. Ch. Feb. 10, 2009).

39 *Id.*

> (3) Causes tortious injury in the State by an act or omission in this State . . . .[40]

"For jurisdictional purposes, conspirators are considered agents of each other when acting in furtherance of the conspiracy."[41]

Hallberg is a nonresident who has never been in or had any personal connection with Delaware. Therefore, the only possible basis for asserting personal jurisdiction over Hallberg under § 3104(c)(3) is to attribute to Hallberg the acts of his "agent," *i.e.*, SerialTek, Mutschler, or another alleged co-conspirator, under the conspiracy theory. SerialTek, as a Delaware company, is unquestionably properly before this Court. I therefore turn to the conspiracy theory test to determine whether the actions of SerialTek or another person may be attributed to Hallberg. As I next explain, the answer to that question is no.

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

> (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.[42]

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[40] 10 *Del. C.* § 3104(c)(3).

[41] *Am. Int'l Group*, 2009 WL 366613, at *34.

[42] *Istituto Bancario Italiano SpA v. Hunter Eng'g Co.,* 449 A.2d 210, 225 (Del. 1982).

This test "is very narrowly construed. Plaintiffs must assert specific factual evidence, not conclusory allegations, to show that the nonresident defendants were conspirators . . . ."[43] Thus, I must analyze each element of the five-part conspiracy theory test using the deferential factual standard of a motion to dismiss,[44] as limited by the more exacting factual requirements of the conspiracy theory.[45] For the reasons discussed below, I find that LeCroy has failed to make an adequate showing as to element (4). Elements (1), (2), (3), and (5) are closer calls. Because those elements are not the focus of this analysis, however, I assume, without deciding, that they are satisfied. In other words, the record presented by LeCroy on the Motion to Dismiss at least colorably supports the existence of all but the fourth element of the conspiracy test.

First, LeCroy arguably demonstrated that a conspiracy to defraud existed. LeCroy makes numerous specific factual assertions that SerialTek engaged in systematic and ongoing methods of unfair competition against LeCroy, including misappropriation of trade secrets, all while attempting to cover its tracks through a series of different corporate entities. The Delaware Supreme Court has held that misappropriation of

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[43] *Crescent/Mach I Partners, L.P. v. Turner,* 846 A.2d 963, 976 (Del. Ch. 2000).

[44] *Sample v. Morgan,* 935 A.2d 1046, 1055-56 (Del. Ch. 2007).

[45] *Crescent/Mach I Partners,* 846 A.2d at 976.

confidential information and concealment of such acts could constitute a conspiracy under this element of the *Istituto Bancario* test.[46]

Second, LeCroy plausibly asserts that Hallberg was a member of that conspiracy. LeCroy presented evidence, for example, that Hallberg disclosed LeCroy's confidential pre-release software to SerialTek through emails he exchanged with Mutschler.

Third, LeCroy adduced sufficient evidence to support a reasonable inference that a substantial act in furtherance of the conspiracy occurred in Delaware. LeCroy makes specific factual assertions that a SerialTek predecessor was dissolved in Colorado and incorporated in Delaware for the purpose of hiding Mutschler's SerialTek connections from LeCroy. SerialTek's incorporation in Delaware by Smith and Kriech fairly can be deemed a substantial act in furtherance of SerialTek's broader conspiracy to defraud LeCroy through unfair competition. In arguing to the contrary, Hallberg and SerialTek rely on *Computer People, Inc. v. Best Int'l Group, Inc.,*[47] for the proposition that incorporation in Delaware, without more, is not sufficient to satisfy this element of the conspiracy test. The situation in *Computer People*, however, differs markedly from the circumstances of this case in terms of the third conspiracy theory element. LeCroy made a stronger factual showing than the plaintiffs in *Computer People* that the formation of a business entity in Delaware constituted a substantial act in support of the alleged

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[46] *Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd.,* 611 A.2d 476, 483 (Del. 1992).

[47] 1999 WL 288119, at *8 (Del. Ch. Apr. 27, 1999).

conspiracy. For similar reasons, LeCroy has made a colorable showing as to the fifth element in that SerialTek's incorporation in Delaware was the direct and foreseeable result of SerialTek's conduct in furtherance of the conspiracy.

LeCroy's conspiracy theory argument comes unraveled, however, with the fourth element of the test, because LeCroy has not alleged specific facts sufficient to support a reasonable inference that Hallberg had reason to know of any act in or effect on Delaware.[48] LeCroy's broader argument is that SerialTek's formation in Delaware constitutes an act in Delaware, and SerialTek's unfair competition in Delaware constitutes an effect on Delaware in furtherance of the conspiracy. Under either of these arguments, if Hallberg is to be brought within this court's jurisdiction on a conspiracy theory, he must have had reason to know of SerialTek's formation in Delaware in the first place. For if Hallberg did not have reason to know of the formation of SerialTek under Delaware law, then by necessity he would not have reason to know of either the Delaware act or effect.

To satisfy this logical imperative, LeCroy makes two allegations as to why Hallberg had reason to know of SerialTek's formation in Delaware. LeCroy alleges first

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[48] LeCroy has not alleged that Hallberg had actual knowledge, *i.e.,* that Hallberg "knew," of any act in or effect on Delaware. Therefore, this portion of the analysis focuses entirely on whether Hallberg had "reason to know" of any such acts or effects. Defendants challenge the adequacy of a "reason to know" standard in this context under the Due Process Clause. Defs.' Reply Br. at 26. Because the Delaware Supreme Court articulated the applicable standard in terms of a "reason to know" standard in the *Istituto Bancario* case, I am bound to apply that formulation. *See Istituto Bancario*, 449 A.2d at 225. Accordingly, I reject this aspect of Defendants' argument.

that Hallberg is "computer savvy," and second, that he had reason to look closely at SerialTek because he was tasked with doing opposition research on it and was looking for employment at SerialTek at the relevant time. The combination of these things, LeCroy alleges, means that Hallberg should have come across information indicating that SerialTek was incorporated in Delaware.

LeCroy's argument on this point is unconvincing. LeCroy conclusorily alleges that Hallberg had reason to know of SerialTek's formation in Delaware but does not assert any specific facts to bolster this theory. It must be remembered that Hallberg was a marketer, not a lawyer. He had no reason to conduct any opposition research into SerialTek's *legal* filings to determine where it was formed. SerialTek's state of *legal* creation bears no apparent relation to Hallberg's study of its protocol analyzer products. Hallberg also presumably was not concerned with taxes, fiduciary duties, or corporate governance. His opposition research involved sales data, product specifications, and marketing studies. And, even if Hallberg was "computer savvy" and conducted an internet search on SerialTek, he would have had no reason to read any search entries relating to SerialTek's state of incorporation.

In sum, LeCroy makes no specific factual assertions that Hallberg had reason to know of SerialTek's formation in Delaware either through his opposition research on SerialTek or through search engine prowess. Therefore, LeCroy has not satisfied the fourth element of the conspiracy theory test and for that reason has not shown that Hallberg is subject to personal jurisdiction under the conspiracy theory and § 3104(c)(3).

There is a second and independent flaw in LeCroy's assertion of personal jurisdiction over Hallberg. As previously noted, LeCroy relies solely on § 3104(c)(3) of the Delaware long arm statute, which requires a showing of an act that "[c]auses tortious injury in the State by an act or omission in this State." Regarding the first requirement, Plaintiff contends that because LeCroy is a Delaware corporation the harm it suffered as a result of the alleged conspiracy occurred in Delaware. Defendants dispute that argument, asserting that because LeCroy has no physical presence in Delaware and the alleged misconduct does not involve the internal affairs of a Delaware business entity, the cases Plaintiff relies on to establish injury in Delaware do not apply. I find Defendant's argument more persuasive.

In *Iotex Communications, Inc. v. Defries*, the court stated:

> [A]s a general rule, in the case of Delaware corporations having no substantial physical presence in this State, an allegation that a civil conspiracy caused injury to the corporation by actions wholly outside this States [sic] will not satisfy the requirement found in the Supreme Court's opinion in *Istituto Bancario* of a substantial effect . . . in the forum state.[49]

This rule was modified slightly later when the court held in *Sample v. Morgan*: "When conspirators commit a *breach of fiduciary duty* against a Delaware corporation" that has no physical presence in Delaware, and that *breach of fiduciary duty* harms the company, then "it is fair to say that the entity was injured in its chosen home-Delaware."[50] Like the

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[49] 1998 WL 914265, at *8 (Del. Ch. Dec. 21, 1998).

[50] 935 A.2d 1046, 1057-58 (Del. Ch. 2007) (emphasis added).

plaintiffs in *Iotex* and *Sample*, LeCroy has no physical presence or operations in Delaware. Furthermore, LeCroy has not alleged any harm resulting from a breach of fiduciary duties based on Delaware corporate or LLC law. Therefore, this case falls into the *Iotex* category, and not the *Sample* category. Accordingly, LeCroy has not satisfied its burden for personal jurisdiction under § 3104(c)(3) of showing a tortuous injury in Delaware.[51]

The motion to dismiss Hallberg from this action under Rule 12(b)(2), therefore, will be granted.

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.[52]

Preliminarily, I note that this Delaware action is the first and only action filed relating to this matter. In considering a motion to dismiss for *forum non conveniens* where the Delaware action is the only action filed, Delaware courts follow the *Cryo-*

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[51] In a final argument on personal jurisdiction, LeCroy cites *AeroGlobal Capital Management., LLC v. Cirrus Industries., Inc.* for the proposition that "the ownership of a Delaware subsidiary may constitute the transacting of business under Delaware's Long Arm Statute where the underlying cause of action arises from the creation and operation of the Delaware subsidiary." *AeroGlobal*, 871 A.2d at 439. The "transacting of business" relates to personal jurisdiction under § 3104(c)(1), not (c)(3). As mentioned above, LeCroy has only asserted personal jurisdiction based upon § 3104(c)(3); hence, *AeroGlobal* is unavailing here.

[52] *Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P'ship,* 669 A.2d 104, 106 (Del. 1995).

Maid[53] line of cases.[54] Under our *Cryo-Maid* jurisprudence, a defendant seeking dismissal on *forum non conveniens* grounds must establish with particularity that it will suffer overwhelming hardship and inconvenience if required to litigate in Delaware.[55] "That standard imposes a 'heavy burden' that a defendant will meet 'only in a rare case.'"[56] "Because the defendant has the burden to demonstrate 'overwhelming hardship' . . . [the Delaware Supreme Court] has previously held that 'whether an alternate forum would be more convenient for the litigation, or perhaps a better location, is irrelevant.'"[57]

Delaware courts use the factors identified in *Cryo-Maid* and its progeny (the "*Cryo-Maid* factors" or "factors") in evaluating whether the defendant will face overwhelming hardship.[58] 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

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53 *General Foods Corp. v. Cryo-Maid, Inc.,* 198 A.2d 681 (Del. 1964).

54 *Chrysler,* 669 A.2d at 107.

55 *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC,* 859 A.2d 989, 998 (Del. 2004).

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

57 *Id.* (quoting *Mar-Land,* 777 A.2d at 779).

58 *Chrysler*, 669 A.2d at 107.

of litigation elsewhere, and (6) all other practical considerations.[59] 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.[60]

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

SerialTek's briefing on the *Cryo-Maid* factors suggests again and again that California would be a more appropriate and convenient forum than Delaware given California's central role in this litigation. As the Delaware Supreme Court has noted,[61] however, considerations of convenience do not drive the *Cryo-Maid* analysis, the central goal of which is to determine if the defendant faces overwhelming hardship and *in*convenience.

As to the first *Cryo-Maid* factor, the applicability of Delaware law, SerialTek argues that because Delaware law will not apply in this litigation, this factor weighs in

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59 *Taylor v. LSI Logic Corp.,* 689 A.2d 1196, 1198-99 (Del. 1997).

60 *Chrysler*, 669 A.2d at 108.

61 *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC,* 859 A.2d 989, 998 (Del. 2004).

favor of a finding of *forum non conveniens*. The fact that a Delaware court must apply another state's law, however, does not in and of itself create overwhelming hardship.[62] In fact, it is not unusual "for Delaware courts to deal with open questions of the law of sister states or of foreign countries."[63] Accordingly, this factor is neutral and neither favors nor disfavors this forum.

SerialTek 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 California and none is 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.'"[64] Similarly, modern methods of transportation lessen the Court's concern about the travel of witnesses who do not live in Delaware.[65] 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.

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

63 *Kolber*, 213 A.2d at 446.

64 *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)).

65 *Id.* at *6.

SerialTek 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 serve process on important potential witnesses, most, if not all, of whom reside in California. To prevail on this compulsory process factor, defendants must identify the inconvenienced witnesses and the specific substance of their testimony.[66] SerialTek has not done so here. Furthermore, to the extent that most of the witnesses SerialTek alluded to are SerialTek employees, "it must be presumed that they would be paid by [SerialTek] and consequently, are under [SerialTek's] control and would appear in . . . Delaware . . . at [SerialTek's] request. To the extent that these persons are fact witnesses, their testimony could be obtained by deposition."[67] Accordingly, this factor may slightly disfavor a Delaware forum, 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 motion to dismiss.

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

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[66] *Id.* at *6; *Monsanto Co. v. Aetna Cas. & Sur. Co.,* 559 A.2d 1301, 1308 (Del. Super. 1988).

[67] *HFTP Invs., LLC v. ARIAD Pharm., Inc.,* 752 A.2d 115, 123 (Del. Ch. 1999).

> 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.[68]

As in *Berger*, there is no other pending litigation between the parties here, and this case, likewise, is at an early, pre-discovery stage. Accordingly, this factor decisively favors respecting Plaintiff's choice of a Delaware forum.

SerialTek 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[,]"[69] disfavors this forum because SerialTek is a young start-up that will be forced to bear expensive cross-country litigation costs if the case remains in Delaware. SerialTek cites to *Aveta, Inc. v. Colon*[70] for the proposition that a court of equity must not ignore issues of fairness and should consider the relative size and resources of the defendants in the context of a *forum non conveniens* overwhelming hardship analysis.[71] The situation in *Aveta*, however, is readily distinguishable from the circumstances of this case in terms of the overwhelming hardship analysis. The plaintiff

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[68] *Berger,* 906 A.2d at 137.

[69] *Taylor v. LSI Logic Corp.,* 689 A.2d 1196, 1199 (Del. 1997).

[70] 942 A.2d 603 (Del. Ch. 2008).

[71] *Id.* at 612-13.

in *Aveta* was a sizable corporation that provided Medicare services, while the defendant was a primary care physician practicing in Puerto Rico, who previously had enrolled for the plaintiff's services, but then left to enroll with a competitor.[72] The defendant doctor intended to call numerous specifically identified witnesses, all from Puerto Rico, and a Delaware forum would have forced him, *as an individual*, to bear their travel and lodging expenses.[73] SerialTek is a Delaware business entity, and it competes aggressively with LeCroy in a relatively narrow segment of the electronics industry that evidently is potentially lucrative enough to attract other competitors as well, such as Finisar. Sophisticated persons such as SerialTek and its principal, Smith, should have anticipated a certain level of litigation expenses as a cost of doing business when they recruited several employees with technical expertise from one or more of their expected competitors. SerialTek also is in no position to complain about having to litigate in Delaware because both it and LeCroy were formed in Delaware. In these circumstances, the financial burdens SerialTek faces as a result of having to litigate in Delaware do not compare to the onerous financial burden faced by the defendant doctor in *Aveta*.

SerialTek's position on this *Cryo-Maid* factor is further undermined because it does not assert any facts with particularity suggesting that a Delaware forum will cause it overwhelming financial hardship. SerialTek's only citation on this point is to a short

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72 *Id.* at 605.

73 *Id.* at 611-12.

exchange in the Smith Deposition.[74] Smith conclusorily testified that SerialTek has limited resources and a cross-country trial would be expensive.[75] Defendants have not provided any firm numbers relating to SerialTek's size, its operating budgets, capitalization, or actual or projected revenues, or regarding the added expenses of litigating in Delaware.[76]

For these reasons, SerialTek's argument that it is a new company with limited financial resources is not enough, without more, to satisfy its heavy burden of demonstrating overwhelming hardship. Accordingly, the sixth *Cryo-Maid* factor, at best, weighs only slightly against a Delaware forum.

In sum, the *Cryo-Maid* factors are either neutral or only marginally favor a forum other than Delaware, while one factor decisively favors Delaware. Guided by this *Cryo-Maid* analysis, I conclude that SerialTek has not established with particularity that it will face overwhelming hardship and inconvenience if forced to litigate this case in Delaware. LeCroy's choice of this forum, therefore, must be respected. Accordingly, SerialTek's Motion to Dismiss on *forum non conveniens* grounds is denied.

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74 Defs.' Reply Br. 32.

75 Smith Dep. at 294-95.

76 *Id.*

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I grant the Motion to Dismiss the claims against Hallberg under Rule 12(b)(2) for lack of personal jurisdiction and deny the Motion to Dismiss the claims against SerialTek for *forum non conveniens*.

IT IS SO ORDERED.