IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BENIHANA OF TOKYO, INC., individually and on behalf of BENIHANA, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 550-N
BENIHANA, INC., JOHN E. ABDO, NORMAN BECKER, DARWIN DORNBUSH, MAX PINE, YOSHIHIRO SANO, JOEL SCHWARTZ, ROBERT B. STURGES, TAKANORI YOSHIMOTO, and BFC FINANCIAL CORPORATION,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: October 4, 2004
Decided: February 4, 2005
Revised: February 28, 2005

C. Barr Flinn, Esquire, Richard H. Morse, Esquire, Danielle Gibbs, Esquire, Glenn C. Mandalas, Esquire, YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware, *Attorneys for Plaintiff*

Gregory V. Varallo, Esquire, C. Malcolm Cochran, IV, Esquire, Lisa M. Zwally, Esquire, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; C. Thomas Tew, Esquire, Dennis Nowak, Esquire, TEW CARDENAS, LLP, Miami, Florida; *Attorneys for Defendants Benihana, Inc., Norman Becker, Darwin Dornbush, Max Pine, Yoshihiro Sano, Joel Schwartz, Robert B. Sturges and Takanori Yoshimoto*

John G. Harris, Esquire, REED SMITH LLP, Wilmington, Delaware; Alan K. Cotler, Esquire, REED SMITH LLP, Philadelphia, Pennsylvania; Alan H. Fein, Esquire, STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A., Miami, Florida; *Attorneys for Defendant BFC Financial Corporation*

PARSONS, Vice Chancellor.

Plaintiff, Benihana of Tokyo, Inc. ("BOT"), seeks a declaratory judgment that the agreement between Defendants Benihana Inc. ("Benihana") and BFC Financial Corporation ("BFC") to issue $20 million of Benihana convertible preferred stock (the "BFC Transaction") violates Benihana's certificate of incorporation. BOT also seeks rescission of the BFC Transaction because: (1) eight of Benihana's nine directors, namely, John E. Abdo, Norman Becker, Darwin Dornbush, Max Pine, Yoshihiro Sano, Joel Schwartz, Robert B. Sturges and Takanori Yoshimoto (collectively, "Director Defendants") breached their fiduciary duties in approving the BFC Transaction; (2) the BFC Transaction had an improper purpose to dilute BOT's interest in Benihana and entrench certain Director Defendants; (3) the BFC Transaction should receive entire fairness review and does not pass muster under that standard; and (4) BFC aided and abetted the Director Defendants in their actions.

BFC, Benihana and the Director Defendants filed several motions to dismiss. The Court previously ruled upon certain of those motions. This Memorandum Opinion addresses Defendants' argument that there is no basis for personal jurisdiction over BFC, among other things.

For the reasons stated below, the Court denies the motions of BFC and the other Defendants to dismiss as to BFC under Chancery Court Rule 12(b)(2) for lack of personal jurisdiction and Rule 12(b)(5) for insufficient service of process, and as to all remaining Defendants under Rule 19 for failure to join an indispensable party. The Court reserves decision regarding whether certain of the claims alleged by BOT are derivative in nature under Rule 23.1.

I. FACTS[1]

A. Background

BOT was founded by Rocky Aoki in 1963. It is a New York corporation with its principal place of business in New York. BOT owns and operates Benihana restaurants outside the continental United States and owns intellectual property interests in the Benihana name and trademarks. Nominal Defendant Benihana was founded by Rocky Aoki in 1995 and is a Delaware corporation with its principal place of business in Florida. Benihana operates and franchises Benihana restaurants within the continental United States. BOT has been the controlling stockholder of Benihana since its incorporation.

While Rocky Aoki is not a party to this case, his involvement in BOT and Benihana is key to understanding the genesis of the present battle for control of Benihana. For a number of years, Rocky Aoki owned 100% of BOT and indirectly controlled Benihana through BOT. During this time and for more than 30 years, Defendant Dornbush served as personal attorney and advisor to Rocky Aoki and his family. Upon Dornbush's advisement, Rocky Aoki put his 100% ownership interest of BOT into the Benihana Protective Trust (the "Trust") in or about 1998, around the time he pleaded guilty to insider trading charges in a matter unrelated to Benihana. An alleged purpose of the Trust was to avoid regulatory problems that might arise with Benihana's

[1] The facts recited herein are derived from all well pled allegations of the Amended Verified Complaint filed October 8, 2004, and from the affidavits filed in connection with Defendants' motions.

liquor licenses if Rocky Aoki continued to be a substantial owner of Benihana after his conviction.

B. The Parties

Plaintiff, BOT, is now wholly-owned by the Trust. The trustees of the Trust are Rocky Aoki's three children, Kana Aoki Nootenboom, Kyle Aoki and Kevin Aoki, and, until recently, Defendant Dornbush. The directors of BOT are Kana Nootenboom, Defendant Dornbush, and until recently, Kevin Aoki and Defendant Yoshimoto.

Defendant Benihana has two classes of common stock outstanding, common stock ("Common Stock") and Class A common stock. There are 3,018,979 shares of Common Stock issued and outstanding that possess full voting rights. Each share of Common Stock entitles its holder to one vote. There are 6,134,225 shares of Class A common stock issued and outstanding. Every ten shares of Class A common stock entitle their holder to one vote. BOT owns 50.9%, or 1,535,668 shares, of Benihana's Common Stock and 2%, or 116,754 shares, of Benihana's Class A common stock.

Since June 2003, Benihana has had a nine member board of directors (the "Benihana Board"). Defendants Abdo, Becker, Dornbush, Pine, Sano, Schwartz, Sturges and Yoshimoto are all directors of Benihana.[2] The Benihana Board is classified; the holders of Class A common stock elect three directors, and the holders of Common Stock elect six directors. One third of the directors, including one member elected by Class A common stockholders, are elected each year.

[2] The only Benihana director not named as a defendant in this action is Kevin Aoki, who also serves as a director of Plaintiff BOT.

Defendant BFC Financial Corporation is a Florida corporation with its principal place of business in Florida. BFC is a holding company for various investments, including a 55% controlling ownership interest in Levitt Corporation, which in turn has a 37% ownership interest in Bluegreen Corporation. Defendant Abdo, who is a director of Benihana, is vice chairman of BFC's board of directors and a large stockholder of BFC. Abdo is also president of Levitt Corporation and vice chairman of the boards of directors of both Levitt and Bluegreen.

Defendant Dornbush is a director and corporate secretary of Benihana and, in effect, acts as its general counsel. He is a senior partner at a fourteen member law firm that provides legal services to Benihana. Dornbush served as counsel to Benihana in the BFC Transaction. Together with Abdo, Dornbush serves as a director on Levitt Corporation's board of directors. Dornbush also served as a director of BOT and a trustee of the Trust. Rocky Aoki's children, some of whom serve as trustees of the Trust and directors of BOT, claim that, until recently, they deferred to Dornbush in the management of the Trust and BOT because of his close relationship with their father.

Defendant Schwartz is a director of Benihana as well as its president and chief executive officer. Thus, Schwartz receives a significant portion of his income from his salary, bonuses and options in Benihana. Schwartz is also a partner in the Dorsan Group, a financial consulting firm whose other partners include Defendants Dornbush and Sano.

Defendant Yoshimoto works for Benihana as Executive Vice President of Restaurant Operations. His position is subordinate to Dornbush and Schwartz.

In addition to being a director of Benihana, Defendant Becker is a director of Bluegreen Corporation along with Abdo.

C. Emerging Discord Between the Aoki Family and the Benihana Board

In early 2003, the Benihana Board, including Dornbush, added two additional directors without advising Rocky Aoki in advance. The new directors were Sturges and Sano, both of whom were described by Dornbush as friends of Schwartz. Displeased, Rocky Aoki advised Dornbush that he intended to reevaluate issues concerning the Trust and requested Dornbush's "cooperation" in managing the Trust. At or about this time, Rocky Aoki retained counsel other than Dornbush to advise him with regard to the Trust. Rocky Aoki's children also retained counsel other than Dornbush to advise them regarding their positions with the Trust as well as their positions as directors of BOT and Benihana.

In June 2003, Rocky Aoki wrote to Dornbush to express his disappointment with the Benihana Board for not consulting him before adding Sano and Sturges, and to suggest other candidates that he believed were more appropriate. Rocky Aoki even suggested that Dornbush and Yoshimoto resign as directors of Benihana since Dornbush had stated that the rationale for expanding the Benihana Board was a concern over the number of inside directors. At about the same time, Rocky Aoki, who has health concerns, prepared a new will under which the Trust would distribute all of BOT's stock to his new wife, 25% passing to her in fee simple and 75% passing to her in the form of a life estate with the remainder to his children. Thus, upon Rocky Aoki's death, complete control of BOT and indirect control of Benihana, would pass to his new wife, Keiko

Aoki. Rocky Aoki's new attorneys forwarded this new will to Dornbush's firm to obtain an opinion as to its validity. BOT claims that Dornbush, without Rocky Aoki's consent, communicated the contents of the new will to members of the Benihana Board, including Schwartz, and expressed concern that Keiko Aoki could exercise BOT's control over Benihana.

BOT alleges that the Director Defendants feared that BOT might exercise control over Benihana independently of their wishes. BOT also avers that Dornbush and Abdo worked together to convince Kevin Aoki to induce BOT to sell its controlling interest in Benihana to Abdo, or an entity Abdo owned, or to grant Abdo an option to that effect. BOT further contends that Abdo told Kevin Aoki that, if the option were granted to him, Abdo would ensure Kevin's bright future at Benihana. Kevin Aoki did not agree to any of these overtures.

D. The BFC Transaction

BOT alleges that when Dornbush and Abdo's plan to induce BOT to sell its controlling interest in Benihana to Abdo failed, members of the Benihana Board turned to the BFC Transaction to entrench themselves as directors and dilute BOT's voting power. BOT claims that the development and structuring of the BFC Transaction involved several breaches of fiduciary duties on the part of the Director Defendants. Abdo was present, as a director of Benihana, at meetings at which Benihana's investment bankers, Morgan Joseph, and Benihana's management discussed matters relating to the potential issuance of convertible preferred stock. Such discussions included the likelihood that Benihana could obtain, or might have to give up, certain terms during negotiation. Abdo,

however, also served as BFC's representative in the negotiation of the terms of the BFC Transaction's stock purchase agreement ("Stock Purchase Agreement"). In fact, during the negotiations, BOT claims that Abdo personally requested several changes to Morgan Joseph's proposed term sheet. Pursuant to Abdo's requests, Benihana modified the term sheet to grant BFC the following rights, among others: (1) the preemptive right to purchase a proportional amount of any new voting securities issued by Benihana;[3] (2) the right to require Benihana to draw down the second tranche of convertible preferred stock; (3) the right to require Benihana to redeem the full $20 million of convertible preferred stock at any time after 10 years; and (4) a reduction from four to two in the number of consecutive quarters of missed dividend payments required before BFC would be granted an additional director.

At a May 6, 2004 board meeting, the Benihana Board voted to approve the BFC Transaction. BOT alleges that Abdo, Dornbush and Schwartz committed material frauds and illicitly manipulated the process by which the Benihana Board approved the BFC Transaction. BOT claims that until the May 6th board meeting Abdo, Dornbush and Schwartz failed to disclose the interest of Abdo or BFC in purchasing Benihana stock. Moreover, BOT alleges that Abdo, Dornbush or Schwartz falsely informed the Benihana Board that Abdo had not been involved in any negotiation of the term sheet, that BFC had accepted the terms as proposed by Morgan Joseph, that there had been no significant negotiation of the term sheet, and that the final term sheet that the Benihana Board was

[3] BOT alleges that the Director Defendants acted contrary to Benihana's certificate of incorporation in authorizing such preemptive rights.

asked to approve was better for Benihana than the term sheet proposed by Morgan Joseph. Additionally, BOT claims that Schwartz and Dornbush failed to disclose to the Benihana Board that BOT had proposed that it purchase some or all of the convertible preferred stock instead of, or in addition to, BFC.

Under the terms of the Stock Purchase Agreement approved by the Benihana Board, Benihana agreed to issue 800,000 shares to BFC for $20 million, half of the shares were to be issued immediately and half were to be issued in one to three years. Among other things, the Stock Purchase Agreement gives BFC: (1) the ability to immediately vote on all matters, including elections of directors, with the voting power associated with the amount of Common Stock into which their preferred stock may be convertible,[4] even if such stock has not yet been converted; (2) in the event that Abdo is no longer a director of Benihana, the right to independently elect one director; (3) the right to elect another director if Benihana does not pay dividends on the preferred stock for two consecutive quarters; and (4) preemptive rights to purchase any additional equity securities issued by Benihana. Benihana previously had authorized three classes of preferred stock (Series A, A-1 and A-2). None of those classes, however, carries with it the right to a directorship, voting rights or preemptive rights such as those found in the Stock Purchase Agreement.

On June 8, 2004, Schwartz executed the Stock Purchase Agreement on behalf of Benihana, and Abdo executed it on behalf of BFC. As required by Section 4(l) of the

[4] At that point in time, the 800,000 shares to be issued to BFC would have converted into 1.1 million shares of Benihana's Common Stock.

Agreement, the Certificate of Designations, Preferences and Rights of Series B Convertible Preferred Stock of Benihana ("Certificate of Designations") was filed with the Delaware Secretary of State on June 29, 2004. The effect of these actions was to reduce BOT's voting interest from 50.9% to 42.5% immediately, and to 36.5% as early as July 2005, while delivering to BFC an immediate 16.5% voting interest in Benihana that might increase to 28.3%.

II. PROCEDURAL HISTORY

Plaintiff BOT filed its Complaint on July 2, 2004, along with motions for expedited proceedings and for preliminary injunction or expedited trial. The Court granted in part the request for expedited proceedings and the parties stipulated to a schedule that provided for trial in early November 2004.

Both Benihana and BFC filed motions to dismiss in July 2004.[5] The Court heard argument on those motions on October 4, 2004, and requested supplemental briefing. An Amended Complaint was filed October 8, 2004. Shortly thereafter, both BFC and the other Defendants moved to dismiss the Amended Complaint.

The Court previously denied the motions to dismiss the Amended Complaint based on Chancery Court Rule 15(aaa) and under Rules 9(b) and 12(b)(6) for failure to plead fraud with particularity. The Court rendered the latter ruling on the record at the end of trial on November 15, 2004, and reserved decision on the other aspects of

[5] On July 30, 2004, BOT filed a motion pursuant to 10 *Del. C.* § 365 for an order directing Defendant BFC to appear in this Court under § 365. The parties addressed this motion in the course of their briefing on the motions to dismiss.

Defendants' motions. This memorandum opinion addresses the remaining grounds for the motions to dismiss including: (1) dismissal under Rule 12(b)(2) for lack of personal jurisdiction over BFC; (2) dismissal under Rule 12(b)(5) for insufficient service of process on BFC; (3) dismissal under Rule 19 for failure to join an indispensable party; and (4) dismissal pursuant to Rule 23.1 because the claims alleged are not derivative in nature.[6]

III. ANALYSIS

On a motion to dismiss based on a lack of personal jurisdiction under Chancery Court Rule 12(b)(2), plaintiff must present a "*prima facie* case establishing jurisdiction over a nonresident."[7] The court, however, must view all factual inferences in a light most favorable to the plaintiff.[8]

Delaware courts apply a two-step analysis to determine whether the exercise of personal jurisdiction over a nonresident is appropriate.[9] First, the court must determine

---

[6] The Court will decide these motions based on the pleadings, affidavits, briefs of the parties and oral argument of counsel. I have not considered any trial testimony in conjunction with the motions to dismiss.

[7] *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 974 (Del. Ch. 2000).

[8] *Outokumpu Eng'g Enter., Inc. v. Kvaerner EnviroPower, Inc.*, 685 A.2d 724, 727 (Del. Super. 1996) (citing *Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984)). BFC correctly argues that the Court *may* consider evidence extrinsic to the complaint. *See, e.g., Hart Holding Co. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 538-39 (Del. 1991).

[9] *See Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd.*, 611 A.2d 476, 480 (Del. 1992); *Chandler v. Ciccoricco*, 2003 WL 21040185, at *8 (Del. Ch. May 5, 2003).

whether "Delaware statutory law offers a means of exercising personal jurisdiction."[10] In this case, BOT argues that the Court may assert personal jurisdiction over BFC under Delaware's long-arm statute, 10 *Del. C.* § 3104(c)(1). Section 3104(c) is "broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause."[11] BOT further argues that Delaware's property attachment statute, 10 *Del. C.* § 365, provides an additional statutory basis for jurisdiction over BFC. Second, after establishing a statutory basis for jurisdiction, the court must determine "whether subjecting the nonresident defendant to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment."[12]

A. Step 1 - Statutory Basis for Jurisdiction

Delaware's long-arm statute states, 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 a personal representative, who in person or *through an agent*:
>
> (1) Transacts any business or performs any character of work or service in the State . . . .[13]

---

10 *Hart Holding Co. v. Drexel Burnham Lambert Inc.*, 1992 WL 127567, at *2 (Del. Ch. May 28, 1992).

11 *Hercules,* 611 A.2d at 480. *See also Chandler*, 2003 WL 21040185, at *8.

12 *Hercules*, 611 A.2d at 481. *See generally Int'l Shoe Co. v. State of Wash.*, 326 U.S. 310 (1945) (discussing minimum contacts required under the Due Process Clause).

13 10 *Del. C.* § 3104(c)(1) (emphasis added).

A single act is sufficient to constitute "transacting business" under § 3104(c)(1).[14] The plaintiff's cause of action, however, "must have a nexus with the forum-related contact; that is the claim must arise from at least one act that legally constitutes the transacting of business in Delaware."[15]

In this case, it is not alleged that BFC took action in Delaware. Rather, it is alleged that BFC caused Benihana to take action in Delaware *on BFC's behalf*. Therefore, BOT contends that BFC may be deemed to have transacted business "through an agent" in Delaware. Specifically, BOT argues that jurisdiction exists over BFC under the conspiracy theory of jurisdiction articulated by the Delaware Supreme Court in *Istituto Bancario Italiano SpA v. Hunter Eng'g, Co*.[16] In *Istituto*, the Court held that:

> [A] conspirator who is absent from the forum state is subject to the jurisdiction of the court, assuming he is properly served under state law, if the plaintiff can make a factual 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

---

14 *Outokumpu*, 685 A.2d at 728.

15 *RJ Assoc., Inc. v. Health Payors' Org. Ltd. P'ship*, 1999 WL 550350, at *4 (Del. Ch. July 16, 1999).

16 449 A.2d 210 (Del. 1982). The "conspiracy theory" of jurisdiction is not an independent jurisdictional basis. Rather, it is more aptly described as a "shorthand reference to an analytical framework where a defendant's conduct that either occurred or had a substantial effect in Delaware is attributed to a defendant who would not otherwise be amenable to jurisdiction in Delaware." *Crescent*, 846 A.2d at 976 (quoting *Computer People*, 1999 WL 288119, at *13-14).

> in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.[17]

Defendants argue that BOT's Amended Complaint does not sufficiently allege a conspiracy to defraud under the five-prong test fashioned in *Istituto*. The Amended Complaint, however, alleges that Abdo, Schwartz, Dornbush and possibly other Benihana Board members "conceived of, and are now pursuing, a plan to eliminate BOT's control of Benihana, and give themselves substantial voting power" in order to "entrench themselves in their positions as directors and/or managers."[18] BOT further alleges that, "[a]s a part of this plan," Abdo and Dornbush tried to convince Kevin Aoki to cooperate in efforts to induce BOT to sell its interest in Benihana to Abdo.[19] When such efforts proved futile, BOT alleges that Abdo and Dornbush, together with Schwartz and possibly other Director Defendants, committed "material frauds . . . and other illicit manipulation of the Benihana Board" in connection with the BFC Transaction.[20]

I find the factual circumstances alleged by BOT similar to several cases in which Delaware courts have upheld personal jurisdiction on a conspiracy theory. For example, this case is strikingly similar to the situation in *Crescent/Mach I Partners v. Turner.*[21] In that case, the court found that an alleged "conspiracy in which the non-Delaware

---

17 *Istituto*, 449 A.2d at 225.

18 Am. Compl. ¶ 6.

19 *Id.* ¶¶ 7, 31.

20 *Id.* ¶ 47.

21 846 A.2d 963 (Del. Ch. 2000).

defendant entities participated designed to facilitate a breach of fiduciary duties owed to minority stockholders in a Delaware corporation. . . . satisf[ied] the five part test necessary to invoke this Court's jurisdiction under a 'conspiracy theory,'" though there was "no specific allegation that Turner's affiliates agreed to conspire 'to defraud' minority stockholders of any consideration."[22] The case *sub judice* is also remarkably similar to the *Chandler* case, where the court found that a complaint that alleged "concerted activity to entrench certain conspirators in office at a Delaware corporation . . . through an improper stock issuance" satisfied plaintiff's prima facie burden to show a conspiracy to defraud.[23] Yet another instructive case is *Gibralt,* where the court found a complaint that alleged that "a conspiracy existed to obtain majority control of Drummond by amending Drummond's charter to authorize the creation of new preferred stock, [f]iling the certificate of designation in Delaware, and then issuing the preferred stock to MFC" gave rise to jurisdiction under the conspiracy theory.[24]

I am not persuaded by Defendants' argument that BOT has not alleged a conspiracy to defraud. BFC argues that the contents of books, dated May 6th and given to the Benihana Board sometime before their vote on the BFC Transaction (the "Board Book"), are

> plainly at odds with the allegations contained in the Amended Complaint, including but not limited to, the allegations

---

22 *Crescent*, 846 A.2d at 977.

23 *Chandler*, 2003 WL 21040185, at *8.

24 *Gibralt Capital Corp. v. Smith*, 2001 WL 647837, at *6 (Del. Ch. May 9, 2001).

> contending that certain defendants failed to disclose (i) BFC's desire to acquire Benihana Stock; (ii) certain defendants' true motivation regarding the BFC Transaction; (iii) defendant Abdo's involvement in negotiations of the terms of the BFC Transaction; and (iv) changes between the transaction as originally proposed by Morgan Joseph and its ultimate form.[25]

"When, as in this case, there is evidentiary uncertainty, 'all factual inferences are viewed in the light most favorable to the plaintiff.'"[26] BOT's allegations specifically note that "Abdo, Dornbush, Schwartz, Joseph and possibly others failed to disclose to the Benihana Board until *on or about May 6, 2004* that Abdo and BFC had an interest in purchasing Benihana stock."[27] Because BOT predicated its claim on matters that occurred before the date of the Board Book, I do not find the claim "plainly at odds" with the information contained in the Board Book, as BFC suggests. Additionally, in its Amended Complaint, BOT specifically alleges that at the May 6th board meeting,

> Joseph, Abdo, Dornbush and/or Schwartz *falsely informed* the Benihana Board on May 6, 2004 that Abdo had not been involved in any negotiation of the term sheet, that BFC had accepted the terms as proposed by Morgan Joseph, that there had been no significant negotiation of the term sheet and that the final term sheet that the Benihana Board was asked to approve was better for Benihana than the term sheet proposed by Morgan Joseph.[28]

---

25 Letter from John G. Harris to Court, dated October 29, 2004, at 1; Fein Aff. ¶ 7.

26 *Chandler*, 2003 WL 21040185, at *10 (quoting *Computer People, Inc. v. Best Int'l Group, Inc*., 1999 WL 288119, at *5 (Del. Ch. Apr. 27, 1999)).

27 Am. Compl. ¶ 47 (emphasis added).

28 *Id*. (emphasis added).

In this allegation, BOT does not contend that there was a failure to disclose; they contend that there was a *false* disclosure. Because all factual inferences are viewed in a light most favorable to the plaintiff, it is conceivable here that BOT was referring to statements made by certain Director Defendants at the May 6th board meeting, not statements contained in the Board Book. While not making any determination as to whether fraud was actually committed, I find that BOT has alleged facts sufficient to make a prima facie showing of the fraud aspect of a conspiracy to defraud.[29]

Defendants also criticize BOT for characterizing BFC's actions as "aiding and abetting" breaches of fiduciary duties, rather than civil conspiracy. Such criticism, however, is mere hair-splitting and contravenes the equitable principle of looking to the substance rather than to the form.[30] Indeed, this court has, in the past, noted that claims for civil conspiracy are "sometimes called aiding and abetting."[31] "It is well settled that a

---

[29] Defendants argue that BOT failed to allege fraud with particularity in accordance with Rule 9(b). Because BOT does not separately allege fraud as a count upon which it claims relief, I question the extent to which Rule 9(b) should apply to this circumstance. Assuming *arguendo*, that Rule 9(b) does apply, I find that BOT has alleged fraud with sufficient particularity. That is, BOT has adequately referred "to the time, place and contents of the false representations, the facts misrepresented, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Metro Communication Corp. BVI v. Advanced Mobilcomm Tech. Inc.*, 854 A.2d 121, 144 (Del. Ch. 2004) (quoting *York Linings v. Roach*, 1999 WL 608850, at *2 (Del. Ch. July 28, 1999)).

[30] *See, e.g., In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at *6 (Del. Ch. Jan. 27, 2000); *Noddings Inv. Group, Inc. v. Capstar Communications, Inc.*, 1999 WL 182568 (Del. Ch. Mar. 24, 1999); *Atlantis Plastics Corp. v. Sammons*, 1988 WL 32371 (Del. Ch. Mar. 30, 1988).

[31] *Weinberger v. Rio Grande Indus., Inc.*, 519 A.2d 116, 131 (Del. Ch. 1986) (internal quotations omitted).

third party who knowingly participates in the breach of a fiduciary's duty becomes liable to the beneficiaries of the trust relationship."[32] Here, BOT has alleged: (1) a "plan" between certain Director Defendants including Abdo, who at times was acting on behalf of BFC; (2) actions taken to entrench the Benihana Board and dilute BOT's voting power that, if found to be true, would constitute a breach of fiduciary duties; (3) a knowing participation by BFC in that breach by executing the Stock Purchase Agreement that required the filing of a certificate of designations in Delaware; and (4) damages resulting from the actions of the Defendants. Thus, whether termed "aiding and abetting" or "conspiracy," BOT has, at the very least, sufficiently pled the elements of civil conspiracy[33] to support use of the conspiracy theory of personal jurisdiction.

Turning to the remaining prongs of the conspiracy theory test, I find them satisfied as well. BFC, through Abdo's negotiation of the Stock Purchase Agreement on behalf of BFC, was a member of the conspiracy. Additionally, by executing the Stock Purchase Agreement, BFC required that the Certificate of Designations be filed with Delaware's Secretary of State.[34] The filing of a certificate of designation of rights and preferences

---

[32] *Gilbert v. El Paso Co*., 490 A.2d 1050, 1057 (Del. Ch. 1984), *aff'd*, 575 A.2d 1131 (Del. 1990).

[33] The elements of civil conspiracy are: (1) A confederation or combination of two or more persons; (2) An unlawful act done in furtherance of the conspiracy; and (3) Actual damages. *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149-50 (Del. 1987). Also, "[t]he combination must be undertaken in furtherance of some unlawful purpose." *Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at *13 n.143 (Del. Ch. Apr. 15, 2004).

[34] *See* Stock Purchase Agreement § 4(l).

constitutes "a substantial act or substantial effect in furtherance of the conspiracy."[35] Moreover, this filing was required by 8 *Del. C.* § 151(g) in order to effectuate the terms of the Stock Purchase Agreement. As such, BFC "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 "the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy."[36]

I am mindful that the conspiracy theory of jurisdiction is narrowly construed.[37] "Plaintiffs must assert specific factual evidence, not conclusory allegations, to show that the non-resident defendants were conspirators in some wrongful act resulting in harm to Delaware entities or their owners in order for the Court to exercise jurisdiction over them."[38] In this case, however, I find that BOT has asserted specific factual evidence in its Amended Complaint that, if proven, would demonstrate that BFC was a part of a

---

35 *See Gibralt*, 2001 WL 647837, at *6; *Chandler*, 2003 WL 21040185, at *10.

36 *See Istituto*, 449 A.2d at 225.

37 *See Crescent*, 846 A.2d at 976.

38 *Id.* (citing *Computer People*, 1999 WL 288119, at *16). Former Vice Chancellor Steele further noted in *Crescent* that the applicable wrongful acts, in his view, could not be limited to fraud alone. *Id*. at 976 n.28. I agree. If a party has pled a conspiracy to breach fiduciary duties of loyalty, entrench the board and improperly dilute a controlling shareholder's voting power, as was the case in BOT's original Complaint, a conspiracy to commit such wrongful acts and effect such inequitable results should satisfy the first element of conspiracy theory jurisdiction.

conspiracy with Director Defendants that caused harm to at least BOT. These allegations are sufficient to support subjecting BFC to the jurisdiction of this Court.[39]

B. Step 2 – Due Process Requirements

In order to subject a nonresident defendant to personal jurisdiction, due process requires that they "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[40] To the extent a corporation

> exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[41]

The Delaware Supreme Court has held that a "defendant who has so voluntarily participated in a conspiracy with knowledge of its acts in or effects in the forum state can

---

[39] Because I find jurisdiction over BFC to exist under the conspiracy theory of jurisdiction and § 3104(c)(1), it is not necessary to address BOT's argument that jurisdiction over BFC exists under 10 *Del. C.* § 365. I note, however, that this court has found jurisdiction under § 365 proper in circumstances such as this where claims arise directly from the transaction creating ownership in certain shares. *See Chandler*, 2003 WL 21040185, at *12 n.52 (noting that "[s]uch an exercise of jurisdiction, in the context of the present case, comports with the due process requirements of the United States Constitution because this case arises directly out of the transaction giving rise to their ownership of the shares" and citing *Shaffer v. Heitner*, 433 U.S. 186, 207-08 (1977) for the proposition that "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction.").

[40] *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

[41] *Id*. at 319.

be said to have purposefully availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws."[42]

Requiring BFC to appear in a Delaware court does not offend traditional notions of fair play and substantial justice. BFC is a sophisticated party that understands the effects of the "Delaware-directed nature of their conduct."[43] BOT alleges that BFC and the other Defendants conspired to eliminate BOT's control of Benihana and entrench themselves in their positions as directors or managers of Benihana. At the time Defendant Abdo negotiated and executed the Stock Purchase Agreement on behalf of BFC, he himself was a director of Benihana, a Delaware corporation. Additionally, the Stock Purchase Agreement specifically calls for filing the Certificate of Designation in Delaware, which was necessary, under 8 *Del. C.* § 151(g), to accomplish an important objective of the alleged conspiracy, the issuance of the convertible preferred stock to BFC. Additionally, "Delaware has a strong interest in resolving disputes involving the ownership of shares in, and the governance of, corporations formed under its laws."[44] BOT's cause of action arises out of a dispute over the validity of such convertible preferred stock. Therefore, BFC can be said to have voluntarily participated in a conspiracy with knowledge of its acts in or effects in Delaware and to have purposefully

---

42 *Istituto*, 449 A.2d at 225.

43 *Chandler*, 2003 WL 21040185, at *12.

44 *Id*.

availed itself of the privilege of conducting activities in Delaware, thereby fairly invoking the benefits and burdens of its laws.[45]

IV. DEFENDANTS' OTHER ARGUMENTS FOR DISMISSAL

For the reasons stated above, I find that personal jurisdiction over BFC exists under 10 *Del. C.* § 3104(c)(1) and the conspiracy theory of jurisdiction, and that such jurisdiction is appropriate under the Due Process Clause of the Fourteenth Amendment. Because I have found personal jurisdiction over BFC, BFC's remaining motion to dismiss for insufficient service of process under Rule 12(b)(5) is moot. Additionally, those rulings render moot the motion of Benihana and most of the Director Defendants to dismiss for failure to join a necessary party (BFC) under Rule 19.

With regard to Defendants' motion to dismiss pursuant to Rule 23.1, I find all pleading requirements under Rule 23.1 to be met by the Amended Complaint. The complaint alleged that BOT was a stockholder "at the time of the transaction of which the plaintiff complains" as well as the reasons for futility of demand.[46] As such, no basis for dismissing the claims on a motion to dismiss exists. The parties agree that BOT's claims I thru III are direct. They dispute, however, whether claims IV and V are derivative. I reserve decision as to whether claims IV and V are derivative or direct in nature and will consider that question in the context of the post-trial argument and ultimate ruling on the merits.

---

[45] *See Istituto*, 449 A.2d at 225.

[46] *See* Chancery Court Rule 23.1.

V. CONCLUSION

For the reasons stated above, Defendants' motions to dismiss are DENIED. BOT's motion for an order directing BFC to appear under 10 *Del. C.* § 365 is DENIED without prejudice as moot. The Court reserves decision regarding whether certain of the claims alleged by BOT are derivative under Rule 23.1. IT IS SO ORDERED.