

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

**PANDORA JEWELRY, INC.** )  
 )  
 **Plaintiff,** )  
 )  
 **v.** ) **C.A. No. CPU4-10-005767**  
 )  
 **STEPHEN'S JEWELERS, LLC,** )  
 )  
 **Defendant/Third-Party Plaintiff,** )  
 )  
 **v.** )  
 )  
 **BELLO PARADISO, LLC, MOLLY** )  
 **THOMPSON and MATT DAVIES,** )  
 )  
 **Third-Party Defendants.** )

Submitted: May 25, 2012

Decided: June 22, 2012

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## **OPINION AND ORDER**

This matter is before the Court on Third-Party Defendants Molly Thompson and Matt Davies' Motion to Dismiss for Lack of Personal Jurisdiction pursuant to *Court of Common Pl. Civ. R. 12(b)(2)* and for Failure to State a Claim under *Court of Common Pleas Civ. R. 12(b)(6)*. Upon for the reasons stated herein and upon consideration of the pleadings, written submissions, arguments and positions taken by counsel at oral argument on May 25, 2012, Third-Party Defendants' Motions are hereby **DENIED**.

### **Facts And Procedural History**

On September 27, 2010, Plaintiff Pandora Jewelry, Inc. ("Pandora") filed a debt action against Defendant Stephen's Jewelers, LLC ("Stephens"). The Complaint alleged that Stephens owes Pandora \$ 49,716.59 pursuant to a contract. Service was perfected upon Stephens' agent on October 13, 2010.

On November 16, 2010, Stephens filed an Answer denying the debt alleged, and asserted a third-party claim against Defendant Bello Paradiso, LLC ("Bello"), as well as individual defendants Molly Thompson and Matt Davies (collectively "Movants"). Stephens asserted that each third-party defendant is either a California resident or artificial entity. Stephens alleged that third-party defendants contacted Stephens to purchase goods from Pandora, and Movants made Stephens an authorized user on Movants' credit card to complete the purchases. Stephens claimed that after it made several purchases from Pandora at Movants' request totaling approximately \$ 45,000, Movants contacted Pandora

directly claiming that Stephens was not authorized to make charges from Pandora to their credit card.<sup>1</sup>

On April 15, 2011, Bello filed an Answer and Counterclaim against Stephens. Bello admitted the existence and terms of the Stephens-Bello contract, but denied that any breach occurred. Bello further stated that the contested purchases from Pandora were paid from a pre-existing debt owed by Stephens to Third-Party Defendants. Bello asserted affirmative defenses of failure to state a claim, ratification/waiver/acquiescence and unclean hands/laches/estoppel. The counterclaim alleges a breach of contract by Stephens and unjust enrichment. Bello seeks damages in the amount of \$ 1,791.59. Bello does not contest Delaware's jurisdiction. However, Third-Party Defendants Thompson and Davies moved to dismiss the Third-Party claims asserted against them arguing lack of personal jurisdiction and failure to state a claim for relief against them.

On March 22, 2012, Stephens filed an Answer to Bello's counterclaim denying the averments. Stephens also filed an Answer and Amended Third-Party Complaint which detailed the factual bases underlying the third-party claims asserted against Bello, Thompson and Davies. On April 23, 2012, Bello filed an Answer to the Amended Third-Party Complaint denying the averments in the Complaint and asserting various affirmative defenses. Third-Party Defendants Thompson and Davies filed a Motion to Dismiss as to the individual claims asserted against them. First, Movants argue that this court lacks

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<sup>1</sup> Attached to Pandora's Complaint are five (5) credit card receipts reflecting a series of purchases by Stephen's Jewelers from Pandora: (1) \$ 2,125.00; \$ 2,084.22; (3) \$ 1,735.26; (4) \$ 15,945.94; and (5) \$ 27,826.17. The sum total of these receipts is \$ 49,716.59. Each receipt bears the same date, and each is charged to an American Express, account XXXX1003. However, as to each separate sale, the amount charged, the time charged; the reference numbers, authorization codes and order numbers vary.

personal jurisdiction pursuant to *CCP Civ. R. 12(b)(2)*. They each filed Affidavits in support of their joint Motion. They contend that they are California residents; have never visited Delaware; do not conduct business in Delaware; do not maintain Delaware bank accounts; and do not own any real property. They further contend that merely contracting with a Delaware entity is not sufficient for this Court to exercise personal jurisdiction. Second, Movants allege Stephens' Third-Party Complaint fails to state a claim upon which relief may be granted pursuant to *CCP Civ. R. 12(b)(6)* because there is no express or implied right of indemnification for Stephens.

On April 30, 2012, Stephens filed a response to the Motion. Stephens argues that a sufficient basis exists for this Court to exercise personal jurisdiction over these Defendants under Delaware law. Stephens further argues that it does not assert a claim for Indemnification, but rather alleges independent claims for breach of contract, fraud and misrepresentation. Stephens also makes vague references to a claim for civil conspiracy and/or civil theft/conversion, but neither Pandora nor Stephens raise any separate factual allegations to support these causes of action against third-party defendants.

On May 25, 2012, the Court heard argument by Counsel on the merits of Movants Thompson and Davies' Motion to Dismiss. The Court reserved decision.

### **Analysis**

Movants unite in their request for a dismissal of the claims levied against them pursuant to *CCP Civ. R. 12(b)(2)* for lack of personal jurisdiction. Alternatively, Movants seek dismissal of the complaint pursuant to *CCP Civ. R. 12(b)(6)* for failure to state a claim. The Court will address these motions *seriatim*.

## I. Motion to Dismiss for Lack of Personal Jurisdiction

### A. Long-Arm Statute Provisions and Standard

Delaware's Long Arm Statute, *10 Del. C. § 3104*, provides a mechanism by which a Delaware court may obtain jurisdiction over a nonresident. When a motion to dismiss for lack of personal jurisdiction is filed, the plaintiff bears the burden to demonstrate a basis for the court's jurisdiction over the nonresident defendant.<sup>2</sup> This burden is met by a prima facie showing that jurisdiction is conferred by the statute.<sup>3</sup> A familiar two-prong analysis is used to determine whether a plaintiff has carried that burden. First, the Court must consider whether there is a statutory basis for jurisdiction under Delaware's long-arm statute.<sup>4</sup> In doing so, the Court must construe the long-arm statute broadly to the maximum extent permissible under the Due Process Clause.<sup>5</sup> Second, the Court must evaluate whether the exercise of jurisdiction violates the Due Process Clause of the Fourteenth Amendment.<sup>6</sup> This two step analysis "must not be collapsed into a single constitutional inquiry."<sup>7</sup> If the plaintiff cannot demonstrate the court has jurisdiction over the defendant based on this two-prong analysis, the court will dismiss the action for lack of personal jurisdiction.<sup>8</sup>

The first step of the analysis is to parse the terms of the Delaware long-arm statute, *10 Del. C. §3104*, to determine whether Plaintiff can satisfy one or more of its provisions.

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<sup>2</sup> *AeroGlobalCapital Mgmt, LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005); *Universal Capital Mgmt., Inc. v. Micco World, Inc.*, 2011 WL 2347612, at \*3 (Del. Super. June 2, 2011).

<sup>3</sup> *Daily Underwriters of America v. Maryland Automobile Ins. Fund*, 2008 WL 3485807, at \*2 (Del. Super. July 31, 2008) (citing *Harmon v. Eudaily*, 407 A.2d 232 (Del. Super. 1979))

<sup>4</sup> *AeroGlobalCapital Mgmt, LLC* 871 A.2d at 437.

<sup>5</sup> *LaNuova D & B, Sp.A v. Bowe, Inc.* 513 A.2d 764, 768 (Del. 1986).

<sup>6</sup> *Hercules, Inc. v. Leu Trust & Banking, Ltd.*, 611 A.2d 476, 480-81 (Del. 1992).

<sup>7</sup> *Power Intergenerations, Inc. v. BCD Semiconductor Corp.*, 547 F. Supp.2d 365, 370 n. 3 (D. Del. 2008).

<sup>8</sup> *Mayhall v. NEMPCO, Inc.*, 1994 WL 465545, at \*2 (Del. Super. July 29, 1994).

Pursuant to *section 3104(c) of Title 10*, a court may exercise personal jurisdiction over a nonresident if the person:

- (1) Transacts any business or performs any character of work or service in the State;
- (2) Contracts to supply services or things in this State;
- (3) Causes tortious injury in the State by an act or omission in this State;
- (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;
- (5) Has an interest in, uses or possesses real property in the State; or
- (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.<sup>9</sup>

Jurisdiction arising under subsections (c)(1) through (3) is referred to as “specific jurisdiction” whereas jurisdiction under (c)(4) is known as “general jurisdiction.”<sup>10</sup> The specific jurisdiction subsections require a showing that the cause of action arises from conduct occurring within the state, while general jurisdiction requires plaintiff to show that defendant regularly or continuously conducted business in Delaware.<sup>11</sup> Specific personal jurisdiction is based on the relationship between the forum and the controversy.<sup>12</sup>

If a defendant is found to be within the reach of the long-arm statute, the Court next determines whether the exercise of personal jurisdiction over the nonresident comports with

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<sup>9</sup> 10 *Del. C.* § 3104.

<sup>10</sup> *G & G LLC v. White*, 535 F. Supp.2d 452, 460 (D. Del. 2008).

<sup>11</sup> *Elliott v. The Marist Brothers of the Schools, Inc.*, 675 F.Supp.2d 454 (D. Del. 2009).

<sup>12</sup> *Boone v. Oy Partek Ab*, 724 A.2d 1150, 1154 (Del. Super. 1997)

due process.<sup>13</sup> Delaware courts construe *section 3401 of Title 10* liberally to the maximum extent possible under the Due Process Clause, thus favoring the exercise of jurisdiction.<sup>14</sup>

The Due Process Clause of the Fourteenth Amendment requires that a nonresident defendant have such “minimum contacts” with the forum state so that jurisdiction over the party “does not offend traditional notions of fair play and substantial justice.”<sup>15</sup> The nonresident’s conduct and connection to the forum state must be such that the party “should reasonably anticipate being haled into court there.”<sup>16</sup> To meet its burden, a plaintiff may submit “sworn affidavits or other competent evidence” since a *CCP Civ. R. 12(b)(2)* motion “requires resolution of factual issues outside the pleadings.”<sup>17</sup> It is within the Court’s discretion to order an evidentiary hearing to determine whether personal jurisdiction exists.<sup>18</sup>

### **1. Part 1: Long-Arm Statute Applicability and Analysis**

The Court turns its attention first to the question of whether the long-arm statute applies.

Movants contend that Delaware courts cannot exercise jurisdiction over them because none of the provisions of Delaware’s long-arm statute apply, and because Movants do not have the “minimum contacts” necessary to warrant the exercise of jurisdiction over it. Movants filed substantively identical Affidavits to support their motion. Movants maintain that the only two arguable contacts are that Bello, a California LLC, contracted

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<sup>13</sup> *G & G LLC*, 535 F. Supp.2d at 460.

<sup>14</sup> *Waters v. Deutz Corp.*, 460 A.2d 1332 (Del. Super. 1983).

<sup>15</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>16</sup> *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 294, 297 (1980).

<sup>17</sup> *G & G LLC*, 535 F. Supp.2d at 460.

<sup>18</sup> *Blue Ball Properties, Inc. v. McClain*, 658 F. Supp 1310, 1315 (D. Del. 1987).

with Stephens, a Delaware entity; and/or that Movants contracted with Stephens, neither of which in isolation suffices to conclude that Movants availed themselves of this Court's jurisdiction pursuant to *10 Del. C. 3104(c)*.

In response, Stephens argues that jurisdiction is proper in Delaware for three reasons. First, Third-Party Defendant Bello, a corporate entity for which Movants are the equity owners, concedes personal jurisdiction of this Court. If the facts alleged render jurisdiction proper as to Bello, by extension jurisdiction is proper as to Movants. Second, Movants targeted a Delaware entity to establish an ongoing business relationship. This was not a single transaction; rather, it was a series of transactions which transpired over a period of months for the purchase and delivery of goods from a Delaware supplier. Finally, Stephens alleges that Movants' conduct amounted to fraud and misrepresentation, thereby causing tortious harm in the forum state. As such, personal jurisdiction over these Movants is proper.

Applying the foregoing legal principles to these facts, this Court finds that Stephens satisfied its burden that the Long-Arm Statute provisions apply. The facts alleged in the Amended Third Party Complaint support a finding that specific personal jurisdiction lies under *section 3104(c)(1)* of the Long-Arm Statute. This is a single act statute.<sup>19</sup> At this nascent stage, Stephens' Amended Third-Party Complaint alleges that Movants transacted business in Delaware within the meaning of *10 Del. C. § 3104(c)(1)*. Movants intentionally sought out Stephens -- a Delaware corporation -- to enter into an ongoing business relationship with it to serve as an intermediary supplier to the California Movants. Movants

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<sup>19</sup> *State Farm Mutual Automobile Co v. Dann*, 794 A.2d 42, 48 (Del. Super. 2002).



failed to disclose any affiliation with Bello. This agreement was then allegedly modified by the parties to add Stephens as an authorized user on Davies' American Express credit card to streamline the purchase from Pandora by Stephens for Movants. Over a period of several months, the parties' course of conduct corroborates the terms of the business agreement whereby Stephens made specific inventory purchases from Pandora at Movants' request. Upon delivery of the goods from Pandora, Stephens mailed the product from Delaware to Movants in California at Movants' expense.

Moreover, the Court further observes that Stephens alleged facts to support a finding of "general" personal jurisdiction under *section 3104(c)(4)* of the Long-Arm Statute. Paragraph 4 of the Amended Third-Party Complaint alleges that Movants solicited Stephens at its retail location in Delaware. The parties agreed to establish a contractual relationship as a result of Movants' outreach. Paragraphs 6, 8, 10, 11, 12, and 13 each allege specific facts demonstrating the ongoing/continuous nature of the business relationship. Specifically paragraphs 11, 12 and 13 allege direct tortious conduct by Movants that resulted in a financial harm to Stephens in Delaware. Accordingly, as to the first prong of the analysis, I conclude that personal jurisdiction exists over nonresident Movants under *sections 3104(c)(1)* and/or (c)(4) of the Delaware Long-Arm Statute.

## **2. Part 2: Due Process Inquiry/Minimum Contacts Analysis**

The second prong of the two-part jurisdictional inquiry requires a determination as to whether due process would be violated if a defendant is subjected to the jurisdiction of the forum court. As stated above, the test for due process is whether these Movants have

sufficient minimum contacts with this forum such that the maintenance of suit would not offend the traditional notions of fair play and substantial justice.<sup>20</sup>

I find that there are sufficient minimum contacts such that it was reasonably foreseeable that Movants could be “haled” into Delaware court. In *Wilmington Supply Co. v. Worth Plumbing & Heating, Inc*<sup>21</sup>, the defendant’s president had applied for and been granted an open-running credit account with plaintiff to purchase materials, supplies and goods. Pursuant thereto, defendant placed in excess of 500 orders by telephone. The Court concluded that defendant had transacted business in the state within the meaning of *10 Del. C. 3104(c)(1)*. The Court further found that:

Based on the guidelines set forth in *International Shoe* and the decisions of the Illinois courts, as applied to the undisputed facts of this case, the Court concludes that defendant has sufficient contacts with Delaware to make it amenable to personal jurisdiction in this forum. First, the record clearly indicates that the defendant purposely availed itself of the privilege of acting in the forum state or causing a consequence in the forum state. Some four or five years prior to this litigation, the defendant's president applied for, and was granted, an open-running credit account with plaintiff to purchase materials, supplies and goods. After the credit account was opened defendant by telephone placed in excess of 500 orders for supplies and materials to be delivered to defendant in Philadelphia or its construction sites in Pennsylvania and New Jersey. Second, the claims sued upon here arose out of defendant's refusal to pay for the supplies and materials which it purchased during 1978 and 1979. Defendant's continuous course of conduct of purchasing plumbing supplies on an open account from the plaintiff in this state over a long period of time has a substantial enough connection with this forum to make the exercise of jurisdiction over defendant reasonable.<sup>22</sup>

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<sup>20</sup> *International Shoe*, 326 US at 316.

<sup>21</sup> *Wilmington Supply Co. v. Worth Plumbing & Heating, Inc.*, 505 F. Supp. 777, 780-81 (D. Del. 1980).

<sup>22</sup> *Wilmington Supply Co.*, 505 F. Supp. at 780-81.

The Court then concluded that the defendant transacted business in Delaware within the meaning of *10 Del. C. § 3104(c)(1)*, and denied the defendant's motion to dismiss. The key is the nature of the relationship between the nonresident defendants and the forum state, and ultimately the litigation.<sup>23</sup> There must be “some act by which the nonresident defendant purposely avails himself of the privilege of conducting activities within the forum state.”<sup>24</sup> This Court may also “take into account Delaware’s interest in adjudicating the dispute.”<sup>25</sup>

Thus, I conclude that it does not offend the notion of fairness to subject Movants to litigation for issues arising out of the performance of its business arrangement with Stephens. Stephens appears to have met its burden that Movants had a “substantial connection” with this forum state.<sup>26</sup> The well-plead facts show that Movants in California were directly engaged in the Delaware transactions, and they derived a financial benefit from these transactions. Movants contacted Stephens whom they knew to be a Delaware-based corporation to initiate a business relationship. They knew that Stephens was physically located and conducted its retail jewelry business in Delaware. Movants made several phone calls to Stephens. Movants placed separate orders with Stephens over a period of several months. Movants made Stephens an authorized user of their credit card so that Stephens could charge the purchases from Pandora to Movants’ card. Movants supplied the means by which product was to be shipped to California from Delaware (fed ex labels)— at Movants’

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<sup>23</sup> *Dillon*, 1991 WL 215906 at \*3 (citing *Mid-Atlantic Machine v. Chesapeake Shipbuilding*, 492 A.2d 250, 255 (1985)).

<sup>24</sup> *Id.* at \*3.

<sup>25</sup> *Id.*

<sup>26</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

expense.<sup>27</sup> Stated differently, like the defendant in *Wilmington Supply*, these Movants appear to have engaged in a continuous course of conduct to purchase goods on account from Stephens over an extended period of time such that this Court exercising jurisdiction over these Movants is reasonable. Therefore, I conclude that Movants had sufficient minimum contacts with Delaware such that it does not violate due process. Moreover, the arrangement which Movants claim as a basis for dismissal appears to be their business model in many jurisdictions.<sup>28</sup>

Accordingly, Movants' Motion to Dismiss for Lack of Personal Jurisdiction pursuant to *CCP Civ. R. 12(b)(2)* is **DENIED**.

## **II. Motion to Dismiss for Failure to State A Claim Upon Which Relief May Be Granted**

Alternatively, Movants filed a Motion to Dismiss the Amended Third-Party Complaint pursuant to *CCP Civ. R. 12(b)(6)* for failure to state a claim upon which relief can be granted. The standard of review for these motions is well-established. The plaintiff's burden to survive dismissal is low.<sup>29</sup> The Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."<sup>30</sup> This

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<sup>27</sup> The Court notes for the record that the terms of the Stephens-Bello contract, as described by Stephens, bear a striking resemblance to a contract which was the subject of an underlying dispute in *In Re Bartley L. Hatch and Diana L. Hatch*, 465 B.R. 479, 482-487 (W.D. Mich. 2012). In *Hatch*, the U.S. Bankruptcy Court provided significant factual background as to the nature, course and deterioration of a business relationship between an intermediary retail jeweler and Bello Paradiso, LLC, Molly Thompson and Matt Davies for the purchase/resale/delivery of Pandora Jewelry.

<sup>28</sup> See, *Hatch and Hatch, Bello Paradiso vs. Hatch and Hatch*, 465 B.R. 479 (Bankr. W.D. Mich. 2012)

<sup>29</sup> *Doe v. Cabill*, 884 A.2d 451, 458 (Del. 2005).

<sup>30</sup> *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); *Battista v. Chrysler Corp.*, 454 A.2d 286, 287 (Del. Super. 1982).

is referred to as the “conceivability standard.”<sup>31</sup> Allegations that are merely conclusory and lacking factual basis will not survive a motion to dismiss.<sup>32</sup> In addition, every reasonable factual inference will be drawn in favor of the non-moving party. If the claimant may recover under that standard of review, the motion to dismiss must be denied.<sup>33</sup>

The Court observes that Delaware is a “notice pleading jurisdiction and the complaint need only give general notice as to the nature of the claim asserted against the defendant in order to avoid dismissal for failure to state a claim.”<sup>34</sup> Even if the plaintiff’s allegations are “vague or lacking in detail, [a complaint] is nevertheless ‘well-pleaded’ if it puts the opposing party on notice of the claim being brought against it.”<sup>35</sup> A complaint with sufficient notice shifts the burden to the defendant to “determine the details of the cause of action by way of discovery for the purpose of raising legal defenses.”<sup>36</sup> The motion will be granted “only where it appears with reasonable certainty that the plaintiff could not prove any set of facts that would entitle him to relief.”<sup>37</sup>

In this case, Movants contend that the Amended Third-Party Complaint fails to state a claim upon which relief because, in their opinion, Stephens seeks indemnification and the facts as alleged do not support a cause of action for either an express, or implied, right of indemnification against Movants. Consequently, the complaint should be dismissed. By its response, Stephens argues that it does not seek a claim of indemnification against Movants.

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<sup>31</sup> *Carta v. Danberg*, 2012 WL 1537167, at \*1 (Del. Super. Apr. 30, 2012) (citing *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536–37 (Del. 2011)).

<sup>32</sup> *Lagrone v. American Mortell Corp.*, 2008 WL 4152677, at \*4 (Del. Super. Sept. 4, 2008).

<sup>33</sup> *Spence*, 396 A.2d at 968.

<sup>34</sup> *Nye v. Univ. of Delaware*, 2003 WL 22176412, at \*3 (Del. Super. Sept. 17, 2003).

<sup>35</sup> *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995).

<sup>36</sup> *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952).

<sup>37</sup> *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998) (citing *Spence*, 396 A.2d at 968).

Rather, it asserts independent claims for breach of contract (which includes liability of an undisclosed agent), fraud and misrepresentation.

#### **A. Indemnification**

The concept of indemnity is founded upon the basis that “everyone is responsible for his or her own wrongdoing, and if another person has been compelled to pay a judgment which ought to have been paid by the wrongdoer, then the loss should be shifted to the party whose negligence or tortious act caused the loss.”<sup>38</sup> A right to indemnification may exist under one of three scenarios: (1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity, i.e. indemnification implied in law.”<sup>39</sup> The majority of jurisdictions do not recognize an implied right to indemnification. Delaware courts, however, have embraced the minority view that “an obligation to indemnify may be implied from the circumstances of the case.”<sup>40</sup> A court must examine the factual circumstances surrounding each case to determine if an obligation is implied.<sup>41</sup>

The parties agree that no express right of indemnification exists. Where the paths diverge, however, is that Stephens has not alleged any facts to support an equitable right of indemnification, despite its allegation to the contrary contained in paragraph 14 of the Amended Third-Party Complaint. Absent either an express or implied contractual right to indemnity, Stephens’ claim for indemnity cannot survive this motion.

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<sup>38</sup> *Lagrone*, 2008 WL 4152677 at \*6 (citing 41 Am.Jur.2d “Indemnity” § 1 (2008)).

<sup>39</sup> *Id.*

<sup>40</sup> *Davis v. R.C. Peoples, Inc.*, 2003 WL 21733013, at \*3 (Del. Super. July 25, 2003) (discussing implied indemnity in the context of a construction accident).

<sup>41</sup> *Id.* at \*3-4.

Stephens' first line of defense is that it does not allege a claim for indemnification, express or implied. Rather, Stephens claims it sets forth independent causes of action against defendants for breach of contract, fraud and misrepresentation. Second, Stephens contends that even if it had alleged a right to indemnification, such liability would be predicated upon its claims for fraud and misrepresentation. Thus, an implied right to indemnity arguably may exist.

The Court finds that, as discussed below, Stephens has pled sufficient factual allegations to support independent claims for breach of contract, fraud and misrepresentation. This is sufficient at this stage of the proceedings to support a claim for implied indemnity.

Accordingly, Movants' Motion to Dismiss the Amended Third-Party Complaint pursuant to *CCP Civ. R. 12(b)(6)* is **DENIED** as to the claim for indemnification.

## **B. Breach of Contract**

To recover on a claim for breach of contract, a plaintiff must establish the following by a preponderance of the evidence: (1) the existence of a contract; (2) that defendants breached an obligation imposed by the contract; and (3) that plaintiff incurred damages as a result of the breach.<sup>42</sup> This Court finds that the allegations contained in the Amended Third-Party Complaint have sufficiently plead a cause of action for breach of contract against Movants.

Stephens alleges that an ongoing contract for sale of goods existed between the parties; that Movants breached that agreement by claiming the charges were not authorized

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<sup>42</sup> *VLIW Tech., LLC v. Hewlett-Packard, Co.*, 840 A.2d 606, 612 (Del. 2003).

contrary to their agreement, and by failing to return the Pandora goods for which no payment was made; and that Stephens sustained damages to the extent there is potential liability for the deficiency balance owed on the account triggered by Movants' conduct and representations. Stephens alleges that had Movants honored the payment terms of the Bello-Stephens agreement -- to pay for goods ordered on their behalf -- Stephens would not have been sued.

Moreover, Stephens predicates a theory of liability against Movants for breach of contract upon traditional principles of agency liability. Stephens essentially avers that Bello as an artificial entity could not have acted on its own behalf; Movants acted for it. Stephens makes a similar charge in paragraphs 6 and 7 which alleges that Movants acted as "undisclosed agents," individually and jointly, with apparent authority to enter into a contract with Stephens.<sup>43</sup>

Accordingly, Movants' Motion to Dismiss the Amended Third-Party pursuant to *CCP Civ. R. 12(b)(6)* is **DENIED** on the claim for breach of contract.

### **C. Fraud and/or Fraudulent Inducement**

Under Delaware law, to state a claim for fraud or fraudulent inducement, a plaintiff must plead with particularity the following elements: (1) a false representation, usually one of fact, made by defendant; (2) the defendant's knowledge of, or believe as to, the falsity of the representation, or that it was made with reckless indifference to the truth; (3) defendant's intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff

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<sup>43</sup> *McCabe v. Williams*, 45 A.2d 503, 505 (Del. 1944).



as a result of such reliance.”<sup>44</sup> An action for fraud may lie where “there is an overt misrepresentation but may exist where there is a deliberate concealment of material facts or silence when one has a duty to speak.”<sup>45</sup> Under Delaware law, a “word, even a nod or a wink or a shake of the head or a smile or gesture” can constitute a fraud if the intent is to induce action by causing belief in a false fact or a non-existing fact.”<sup>46</sup> When pleading special matters such as Fraud, CCP Civ. R. 9(b) requires that the claim be stated with particularity.<sup>47</sup> Malice, intent, knowledge and other condition of mind of a person may be averred generally.”<sup>48</sup> A well-pleaded fraud claim must include at least “the time, place and contents of the false representations.”<sup>49</sup>

The Court recognizes that the nature of inquiry at this nascent stage does not consider the merits of the fraud claim, nor does it seek to resolve questions of fact. Rather, the Court, drawing every reasonable factual inference in favor of the nonmoving party, determines whether there is any set of facts that could be proven which would support a claim of fraud. The Amended Third-Party Complaint, specifically at paragraphs 6, 7, 11, 12 and 13, detail the factual basis to support a purported claim for fraud and/or fraudulent inducement. The Court concedes that the format of the Third-Party Complaint makes it difficult to comb through, extract and discern which facts support what cause of action, as the allegations are lumped together. However, notwithstanding the cosmetic concerns of the

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<sup>44</sup> *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983)).

<sup>45</sup> *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987).

<sup>46</sup> *Duffield Associates, Inc. v. Meridian Architects & Engineers, LLC*,

<sup>47</sup> CCP Civ. R. 9(b).

<sup>48</sup> *Id.*

third-party complaint, the Court finds that substantively Stephens adequately stated a claim of fraud and/or fraudulent inducement against Movants.

Accordingly, Movants' Motion to Dismiss the Amended Third-Party Complaint pursuant to *CCP Civ. R. 12(b)(6)* is **DENIED** as to the claim for fraud and/or fraudulent inducement.

#### **D. Intentional Misrepresentation**

To state a claim for intentional misrepresentation, the following elements must be pled: (1) deliberate concealment by the defendant of a material past or present fact, or silence in the face of a duty to speak; (2) that defendant acted with scienter; (3) an intent to induce plaintiff's reliance upon the concealment; (4) causation; (5) damages resulting from the concealment.<sup>50</sup> The Amended Third-Party Complaint makes these allegations. At paragraph 5, Stephens alleges that Davies made Stephens an authorized user of his credit card to process purchases from Pandora. Further, at paragraph 11, Stephens alleges that the "material fact concealed," if you will, is that Movants contacted Pandora "directly and misrepresented that the credit card purchases were not authorized, notwithstanding the fact that the members of Third-Party Plaintiff were authorized users and Third-Party Defendants had received approximately \$ 45,000 in goods." This allegation includes the "scienter" element insofar as it alleges that Movants made that claim to Pandora knowing that it had previously authorized Stephens to make the jewelry purchases from Pandora. The alleged intention appears to be that they sought to keep Pandora product for which they had not paid. Stephens reliance on Movants' representation that Stephens was an authorized user

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<sup>50</sup> *Nicolet, Inc.*, 525 A.2d at 149.

caused damages when Movants contested the purchases by Stephens from Pandora on Movants' behalf. Further, Pandora's reliance upon Movants' representation challenging the charges caused damages when it reversed the charges, and Stephens was thrust to the front line of accountability for the delinquent account. As such, the Court finds that the elements of intentional misrepresentation have been pled sufficiently to survive this motion to dismiss.

Accordingly, Movants' Motion to Dismiss the Amended Third-Party Complaint pursuant to *CCP Civ. R. 12(b)(6)* is **DENIED** as to the claim for intentional misrepresentation.

#### **Conclusion**

For the reasons stated, Movants' Motion to Dismiss all claims against Third-Party Defendants Thompson and Davies based on lack of personal jurisdiction pursuant to *CCP Civ. R. 12(b)(2)* is **DENIED**.

Movants' Motion to Dismiss for Failure to State a Claim for Relief pursuant to *CCP Civ. R. 12(b)(6)*, the motion is **DENIED**.

**SO ORDERED this 22<sup>nd</sup> day of June, 2012**

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**Alex J. Smalls**  
**Chief Judge**