IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MARK H. STEINMAN, Plaintiff, v. ARTHUR E. LEVINE, MARK MICKELSON, ANDREW COHEN, CAROL ADESHAK, LEVINE LEICHTMAN CAPITAL PARTNERS, L.P., LEVINE LEIGHTMAN CAPITAL PARTNERS, INC., and ING (U.S.). CAPITAL, L.L.C., Defendants.	)	C.A. No. 19107

MEMORANDUM OPINIONAND ORDER

SUBMITTED: August 6, 2002
DECIDED: November 27, 2002

Edmond D. Lyons, Jr., Esquire, THE LYONS LAW FIRM, Wilmington, Delaware; Michael J. Maimone, Esquire, GORDON FOURNARIS & MAMMARELLA, P.C., Wilmington, Delaware, *Attorneys for Plaintiff*

Josy W. Ingersoll, Esquire, Martin S. Lessner, Esquire, Sara Beth Reybum, Esquire, YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; Michael Sherman, Esquire, ALSCHULER GROSSMAN STEIN & KAHAN, LLP, Los Angeles, California, *Attorneys for Defendants Arthur Levine, Levine Leichtman Capital Partners, Inc., and Levine Leichtman Capital Partners, L.P.*

Raymond J. DiCamillo, Esquire, Becky A. Hartshom, Esquire, RICHARDS, LAYTON & FINGER, Wilmington, Delaware, *Attorneys for Defendant ING (US.) Capital, L.L. C.*

LAMB, Vice Chancellor.

I.

This action arises out of a series of loan and pledge agreements between a Delaware corporation, its nonresident founding stockholder, and its nonresident creditors and current controlling stockholders. The loan agreements at issue provided more than $32,000,000 in financing to the Delaware corporation. At the time the loan agreements were executed, the plaintiff owned one-third of the Delaware corporation's common stock. Pursuant to a pledge agreement executed contemporaneously with the loan agreements, the plaintiff agreed to secure the corporation's obligations by a pledge of all his stock in the Delaware corporation. If the corporation defaulted on the loans, the creditors could exercise certain rights under the pledge agreement, including voting the plaintiffs pledged shares.

The Delaware corporation defaulted on its loan agreements at various times and the corporation's creditors waived the defaults and restructured the loans. To induce the corporation's creditors to restructure the loans and waive the defaults, the Delaware corporation issued warrants exercisable for 50% of the corporation's voting stock, on a fully diluted basis. Finally, after the Delaware corporation's third default, its creditors chose to exercise their rights

under the pledge agreement by voting the plaintiffs shares. The plaintiff thereafter filed suit alleging various causes of action.

The plaintiffs complaint contains essentially two core allegations. First, the plaintiff alleges that the Delaware corporation did not default on its most recent loan agreement. Second, the plaintiff alleges that the directors of the Delaware corporation should not have made principal payments pursuant to the most recent loan agreement, even though such amounts were legally owed. The plaintiff argues that the actions of the defendants were part of some overarching scheme to usurp the plaintiffs rights in his stock and to obtain control of the corporation.

The plaintiffs complaint must be dismissed for several reasons. First, the complaint must be dismissed against two of the corporation's creditors-controlling stockholders because this court cannot exercise personal jurisdiction over those defendants. The complaint must also be dismissed against the remaining defendants because its fails to state a claim upon which relief can be granted.

The plaintiff is estopped from arguing that the Delaware corporation was not in default on its loans because he previously obtained a judgment in California state court based on the fact that the corporation was in default. Moreover, the plaintiffs claims related to its principal payments pursuant to the

loan agreements must be dismissed because these claims are derivative in nature and the complaint fails to comply with Rule 23.1. In addition, there is no valid claim because the challenged payments were admittedly made with respect to legally enforceable obligations. Finally, none of the disclosures or non-disclosures in this case rise to the level of a breach of the directors' fiduciary duty of disclosure, nor do they amount to fraudulent or negligent misrepresentations.

II.

A. The Parties

1. The Plaintiff

Mark Steinman is a California resident and was co-founder of Chorus Line Corporation ("Chorus"). From 1975 until 1996 Steinman was President and Chief Operating Officer of Chorus. From 1975 until 1997, he was a director of Chorus. At all times relevant to this litigation, Steinman was a Chorus stockholder. Chorus was originally a California corporation founded in 1975 by Steinman and Barry Sacks. In September 1987, Chorus reincorporated in Delaware. In the mid-l 990s, Chorus was one of this country's largest designers and marketers of women's and junior's dresses, with sales in 1996 exceeding $240,000,000. By 1999, however, revenues had decreased to $130,000,000. Before the events alleged in Steinman's complaint, Steinman,

Sacks and Jay Balaban each owned one-third of the issued and outstanding shares of Chorus stock.'

2. The Defendants

Arthur E. Levine, Mark Mickelson, Andrew Cohen and Carol Adeshak (collectively the "Defendant Directors") constituted a majority of the five-person board of directors (the "Board") of Chorus during the relevant period. Cohen was Chorus's CEO from 1997 until 2000, and from 1998 until 2000 he was also its CFO.

Levine Leichtman Capital Partners, Inc. ("LLCP") is a California corporation that manages hundreds of millions of dollars of institutional capital. LLCP invests capital through various entities, including Fund I (see below). LLCP (through its control of Fund I) has been a controlling stockholder of Chorus since 1998.

Levine Leichtman Capital Partners, L.P. ("Fund I") is a California limited partnership that manages over $100 million of institutional capital. Fund I has been a creditor of Chorus since 1996, and has been a controlling stockholder since 1998. Fund I is managed and controlled by LLCP.

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[1] For purposes of this motion, the following facts are taken from Steinman's well-pleaded allegations in his Amended Complaint.

Mickelson, in addition to being a director of Chorus, was a general partner of Fund I during the relevant period.

Levine, in addition to being a director of Chorus, is a co-founder and general partner of Fund I. He is also a director, President, and a stockholder of LLCP. As disclosed in various public filings, Levine, Fund I, and LLCP are "affiliated" under the federal securities laws.

ING (U.S.) Capital, L.L.C. ("IN,") is a Delaware corporation. ING has been a creditor of Chorus since 1994. In 1999, ING entered into an agreement with LLCP (through its control of Fund I) appointing Fund I as ING's agent and permitting LLCP (through its control of Fund I) to exercise ING's rights (including voting rights) in connection with ING's investment in Chorus.

B. LLCP And ING Make Loans To Chorus

On February 1, 1994, Chorus and ING (among others) entered into an agreement where (a) ING agreed to invest in Chorus by purchasing notes of Chorus from a third-party investor, and (b) Chorus agreed to issue warrants to ING exercisable for 30% of Chorus stock on a fully diluted basis. The obligations of Chorus under the loan agreement were secured by, among other things, a pledge by Sacks, Balaban and Steinman of all their Chorus stock.

On April 30, 1996, Chorus and Steintnan entered into a Separation Agreement related to the termination of Steinman's employment with Chorus.

The Separation Agreement provided (among other things) that Steinman had a right to receive accurate financial information from Chorus, but only if requested by Steinman.

On November 18, 1996, Chorus, LLCP (through its control of Fund I) and ING entered into an agreement, whereby Chorus and ING agreed to amend the above described loan agreement, and LLCP (through its control of Fund I) and ING agreed to loan additional funds to Chorus (the "November 1996 Agreement"). Specifically, under the November 1996 Agreement, Chorus, LLCP (through its control of Fund I) and ING agreed that: (a) ING would purchase additional long-term notes from Chorus that would result in a loan to Chorus from ING with an aggregate value of $22,500,000, (b) LLCP (through its control of Fund I) would acquire from ING a portion of the long-term notes originally purchased from Chorus with an aggregate value of $10,500,000, and (c) LLCP (through its control of Fund I) would purchase additional long-term notes from Chorus with a value of $1,500,000. In addition, LLCP (through its control of Fund I) and ING agreed to provide Chorus with two short-term loans in the aggregate amount of $14,000,000 (a "Term A Note" in the amount of $8,000,000 and a "Term B Note" in the amount of $6,000,000). Chorus agreed to issue a "Deferred Fee Note" to ING in the amount of approximately $1,600,000. All of the loans made by ING to Chorus under the November 1996

Agreement were secured with a pledge by Sacks, Balaban, and Steinman of all their stock in Chorus. The warrant agreement between Chorus and ING was also amended, which resulted in Chorus issuing warrants to ING exercisable for 15% of Chorus stock on a fully diluted basis, and Chorus issuing warrants to LLCP (through its control of Fund I) exercisable for 20% of Chorus stock on a fully diluted basis.

The November 1996 Agreement provided that Chorus would repay the loans in accordance with a repayment schedule. On or about December 3 1, 1996, and continuing until May 29, 1997, Chorus defaulted on various provisions of the November 1996 Agreement. On May 29, 1997, as a result of such defaults, Chorus requested that: (a) LLCP (through its control of Fund I) and ING waive the events of default that occurred, (b) the maturity date of the Term A Note be extended, and (c) various financial covenants in the November 1996 Agreement be amended. LLCP (through its control of Fund I) and ING agreed to the requests of Chorus (the "May 1997 Agreement"). Again, Sacks, Balaban and Steinman pledged all their shares of Chorus stock to secure the loans. In connection with the May 1997 Agreement, the warrant agreement between Chorus, ING and LLCP was again amended, which resulted in Chorus issuing warrants to ING exercisable for 20% of Chorus stock on a fully diluted

basis, and Chorus issuing warrants to LLCP (through its control of Fund I) exercisable for 25% of Chorus stock on a fully diluted basis.

On November 21, 1997, the Board approved various amendments to the May 1997 Agreement (the "November 1997 Agreement"). Under the terms of the November 1997 Agreement, LLCP (through its control of Fund I) and ING waived the events of default that occurred after May 29, 1997, and agreed to make an additional loan to Chorus under the provisions of the Term B Note in the aggregate amount of $3,000,000. The November 1997 Agreement also required Chorus to repay its loans in accordance with an amended payment schedule. The November 1997 Agreement was again secured by a pledge of all Chorus stock held by Sacks, Balaban and Steinman (the "1997 Pledge Agreement").

In order to induce ING to agree to the November 1997 Agreement, the warrant agreement between Chorus, ING and LLCP (through Fund I) was further amended, which resulted in Chorus issuing warrants to ING and LLCP (through Fund I) exercisable for 25% of Chorus stock, respectively, on a fully diluted basis. Thus, after execution of the November 1997 Agreement, Chorus had issued warrants to LLCP (through its control of Fund I) and to ING exercisable for, in the aggregate, 50% of the shares of voting stock of Chorus on a fully diluted basis.

During the end of 1997 and the beginning of 1998, LLCP and Fund I (in their capacity as creditors) became involved in the day-to-day operations of Chorus. On March 19, 1998, Chorus, LLCP (through Fund I) and ING agreed to amend the payment schedule set forth in the November 1997 Agreement (the "March 1998 Agreement"). The March 1998 Agreement was not consented to by Steinman, and Steinman was never asked to execute an amendment to the 1997 Pledge Agreement. However, neither Steinman's consent nor an amendment to the 1997 Pledge Agreement was required. Instead, the 1997 Pledge Agreement refers to the "[e]xisting [Loan Agreement] as amended by the [Loan Agreement Amendment] and as it may be subsequently amended, restated or otherwise modified."[2] The 1997 Pledge Agreement goes on to state that ING and LLCP could, without notice to Steinman, "renew, extend, accelerate or otherwise change the time, place, manner or terms of payment by Chorus of the Underlying Debt."[3]

C. Fund I Obtains Board Renresentation

On July 20, 1998, LLCP (through its control of Fund I) exercised the warrants it received from Chorus in connection with the various loan

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[2] Amend. Comp. Ex. D at § 1.1.

[3] Amend. Comp. Ex. B at § 14(a).

agreements. After LLCP's exercise, it controlled 47% of Chorus's voting stock on a non-diluted basis. Levine then approached a Chorus representative and insisted that Fund I be allowed to appoint members to Chorus's Board. As a result, on or about October 20, 1998, Levine and Mickelson were nominated and elected as directors of Chorus during a special meeting of the Board. The Board then consisted of Levine, Mickelson, Cohen, Sacks and Balaban.

At various times before an October 20, 1998 special meeting of the Board, Levine and Mickelson allegedly contacted Cohen and stated that if Cohen agreed to side with LLCP, LLCP (a) would grant Cohen a significant increase in compensation and would provide Cohen with other employee-related benefits (including an equity interest in Chorus), (b) would support Cohen's continued employment as the Chorus CEO, (c) would support the removal of Sacks as the CFO of Chorus and the election of Cohen as the new CFO, and (d) would make Cohen responsible for the operations of all major Chorus divisions, including the divisions that Balaban had been managing. Essentially, LLCP offered to remove Sacks and Balaban from their respective positions of responsibility at Chorus and replace them with Cohen. Cohen allegedly agreed.

At a special meeting of the Board on October 20, 1998, Cohen was granted an increase in compensation and other benefits. At another special

meeting of the Board on December 3, 1998, Levine moved that the Board elect Adeshak to fill a vacant seat on the Board. Cohen seconded the motion, and the Board elected Adeshak as a Chorus director. At the same meeting, the Board decided not to renew Sacks's employment agreement, and, thus, terminated Sacks as the CFO. It then elected Cohen to replace Sacks as the CFO.

As a result of the events that occurred during December 1998, LLCP essentially obtained control of the Board. However, this control was far from secure. So long as Sacks, Balaban, and Steinman voted their stock as a group, they continued to have voting control of Chorus. Thus, they had the authority to (a) expand the Board, pursuant to Chorus's Certificate of Incorporation, and elect individuals to serve in the vacant and newly-created seats on the Board,[4] and (b) replace any director at the end of the director's term or "for cause," and nominate and elect an individual to fill such vacancy on the Board. On February 5, 1999, at a special meeting, the Board demoted

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[4] **Article FIFTH of Chorus's Certificate of Incorporation provides:**

> **The business affairs of the corporation shall be managed under the direction of the Board of Directors. The number of directors constituting the Board shall be seven (7); provided, however, that the Board of Directors shall be authorized to increase the number of directors to not more than ten (1'0).**

Amend. Comp. at 19.

Balaban and promoted Cohen to manage all of Chorus's major divisions (including those divisions formerly managed by Balaban).'

Balaban was removed from his duties as an employee of Chorus "for cause" at a February 26 Board meeting. Balaban contested the Board's decision and threatened litigation. In order to avoid litigation, on or about May 25, 1999, Chorus, LLCP and Balaban entered into a stock purchase agreement. Pursuant to the stock purchase agreement, LLCP agreed to purchase 90% of Balaban's Chorus shares. After this purchase, LLCP (through its control of Fund I) controlled approximately 65% of Chorus's voting stock, and with ING (if ING executed the warrants it received from Chorus in connection with the various loan agreements) controlled approximately 76% of the shares of Chorus's voting stock.

Balaban refused to sell the remaining 10% of his shares to LLCP because he did not want to give absolute control of the corporation, and its capital

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[5] **Specifically, the Board approved the following resolution:**

> **BE IT HEREBY RESOLVED, that Andrew Cohen be responsible for the running of the operations of all of the divisions of the Company, and all division heads report to him; that Jay Balaban be delegated the responsibility of(i) operating a new 'private label" division of the Company, (ii) continuing to operate the Company's Jazz Sport division and (iii) continuing to deal with certain customers designated by the Company's Chief Executive Officer.**

Id. **at 22.**

structure, to LLCP.[6] Rather, Balaban sold his remaining 10% to Sacks. As a result, Steinman and Sacks, voting as a block, collectively controlled more than 20% of Chorus's voting stock. Accordingly, LLCP did not have the authority to cause Chorus to amend or alter its capitalization without the approval of either Sacks or Steinman.

On June 21, 1999, the Board approved a merger between Chorus and S.S.B., Inc., a wholly owned subsidiary of Chorus. On August 8, 1999, Cohen filed with the Delaware Secretary of State a certificate of merger related to the S.S.B. transaction.

D. Chorus Pays Part Of Its Debt

On September 30, 1999, Chorus provided August 1999 financial statements to its stockholders, which disclosed that during March 1999 Chorus paid $3,000,000 to LLCP (through Fund I) and ING in repayment of a portion of the Term A Note. Chorus also informed its stockholders that another payment of $1,500,000 was made to LLCP (through Fund I) and ING on August 31, 1999, in repayment of an additional portion of the Term A Note:

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[6] Article TENTH of Chorus's Certificate of Incorporation contained a super-majority provision that provided, that without the "affirmative vote of the holders of at least eighty percent (80%) of the voting power of all the stock of [Chorus]," the Board did not have the authority to amend or alter the capitalization of Chorus. Id. at 24.

> While the Company's excess cash flow allowed for repayment of approximately $2.6M other restraints as they applied to minimum availability giving effect to repayment allowed the Company to only repay $1.5M on August 31, 1999. The maturity date of the remaining $4.5M of short term debt . . . has been extended to November 2001. The Company will continue to make annual payments against the debt remaining based on excess cash flow calculations.

Furthermore, in a "Certificate of Compliance" accompanying the August 1999 financial statements, Chorus disclosed that "no Event of Default has occurred or is continuing under any working capital or other arrangement to which the Company is a party, nor has the Company received any notice of cancellation with respect to its insurance policies."

E. LLCP And ING Declare An Event Of Default

On December 3, 1999, ING, LLCP and Fund I entered into an agreement appointing Fund I as ING's agent and permitting LLCP (through its control of Fund I) to exercise ING's rights (including voting rights) in connection with the 1997 Pledge Agreement. Also, on December 3, 1999, Fund I (at the direction of LLCP) forwarded a notice to Steinman, informing him that Chorus was in default of the March 1998 Agreement. Specifically, in a letter addressed to Chorus, Sacks and Steinman, LLCP (through Fund I) stated that "[y]ou are hereby notified that by [Chorus's] failure to observe the [various financial] covenants" set forth in the March 1998 Agreement with LLCP (through Fund I)

and ING, an "Event of Default occurred and is continuing."[7] Such an "Event of Default" allowed ING to enforce its rights under the 1997 Pledge Agreement, including the right to vote the shares of Chorus stock owned by Sacks and Steinman. LLCP (through Fund I) notified Chorus, Sacks and Steinman that "all rights of [Sacks and Steinrnan] to exercise the voting rights with respect to their respective shares of common stock of [Chorus] shall hereby cease, and such rights are hereupon vested in" ING.[8]

In response to the notice that an Event of Default had occurred, on December 7, 1999 Steinman's attorneys forwarded a letter to Chorus's attorneys expressing surprise that an Event of Default occurred, and stated:

> We note that prior to the December 3 LLCP letter (which our client did not receive until December 4) our client had not received any notice or communication of any kind from [Chorus] or any of its lenders regarding [Chorus's] alleged financial distress. We also note that the LLCP does not identify the alleged Event of Default with any particularity. The lack of any prior notice or communication to our client as well as this lack of specificity leads us to question the severity of [Chorus's] financial position as claimed by LLCP. If in fact [Chorus] has been in material breach of its various credit facilities for some time, then we believe that it was incumbent upon [Chorus] to have called a shareholders' meeting to address the matter.[9]

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[7] *Id.* at 29.
[8] *Id.*
[9] *Id.* at 30.

On December 7, 1999, Cohen responded to Steinman's letter, and notified him for the first time that Chorus was experiencing significant financial difficulties that negatively affected Chorus's business:

> [Chorus] has been in default to . . . ING and LLCP since June 30, 1999 as a result of the difficult conditions that are currently present in the dress market. I also expect [Chorus] to be in default for the quarter ended December 3 1. As a result of these defaults, Heller Financial, [Chorus's] working capital lender, has refused to permit [Chorus] to full access of its overadvance facility. This has caused a liquidity crises at [Chorus] which is so severe that [Chorus] may not be able to meet its payroll on Friday December 10, 1999. In such a circumstance [Chorus] will have no choice but to file bankruptcy in which case your shares will be worthless."

Cohen also sent along with the letter, a memorandum dated December 1, 1999, which was prepared for the Board by Cohen, that stated "[d]espite [Chorus's] ability to manage its working capital through smaller, more timely inventory, its poor sales performance in 1999 has caused violations of its financial covenants for the second and third quarter . . . . It is further projected that [Chorus] will be in violation of its fourth quarter 1999 financial covenants.""[10] The memorandum further provided:

> In the declining sales and gross profit scenario that has been outlined above the Company was able to improve its use of working capital and reduce its long term debt through provisions of its working capital facility by $4.5M in 1999. This repayment

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[10] *Id.* at 30-31.

[11] *Id.* at 31.

represents the first debt repayment from operations to be repaid since November 1997. [12]

As was stated by LLCP (through Fund I) in the December 3, 1999 notice forwarded to Steinman, Fund I, individually and as agent of ING, voted the shares of Chorus stock owned by Sacks and Steinman. Specifically, on December 4, 1999, Fund I executed a written consent of the Chorus stockholders unanimously approving an amendment to Chorus's Certificate of Incorporation. The amendment increased the number of authorized shares and created a class of preferred stock. The amendment also altered the requirements for calling a special meeting of Chorus stockholders. On December 6, 1999, Fund I executed a written consent of the Chorus stockholders unanimously amending the capitalization of Chorus by creating a Series B redeemable and convertible preferred stock.

F. Subseauent Events

On or about November 14, 2000, three unsecured creditors of Chorus forced Chorus into an involuntary liquidation under Chapter 7 of the Bankruptcy Code. The involuntary liquidation under Chapter 7 was subsequently converted into a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The bankruptcy proceeding is still pending.

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[12] *Id.*

Finally, and significantly, on August 19, 1999, Steinman filed a complaint in the Superior Court of the State of California alleging that Chorus breached various provisions of the Separation Agreement discussed above. It is undisputed that Steinman filed his complaint, litigated and obtained a $250,000 judgment against Chorus based on the occurrence of the exact same Event of Default that he now claims did not occur.[13] Due to Chorus's solvency issues the judgment remains unpaid.

III.

Steinman filed his complaint against the defendants on September 17, 2001. An amended complaint was filed on February 22, 2002. Steinman's amended complaint contains essentially two arguments. First, it alleges that "in connection with the manipulation of the loan and pledge agreements, the Chorus Defendants claimed a default of the March 1998 Agreement although no such Default occurred."[14] Second, the amended complaint alternatively alleges that Chorus was actually in default, but that "the Chorus Defendants engineered such default by causing Chorus to make principal payments to

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[13] *See Steinman v. Chorus Line Cop,* Reyburn Aff. Ex. E, at p. 1 (accepting Steimnan's Statement of Undisputed Facts number 7 that "An Event of Default occurred by no later than September 30, 1999").

[14] Amend. Comp. at 38.

Fund I and ING in the amount of $4,500,000 in accordance with the March 1998 Agreement."[15] According to Steinrnan, all the acts complained of were due to the "motivation of the Chorus Defendants to orchestrate such a scheme ... [because] LLCP (through its control of Fund I) initially wanted majority control of Chorus, and ultimately, wanted complete control of Chorus . . .."[16]

Count I of the amended complaint alleges a breach of the fiduciary duty of loyalty against certain Chorus directors as well as against Chorus's controlling stockholders. Specifically, Count I alleges a breach of the duty of loyalty with respect to Levine, Mickelson, Cohen, and Adeshak as directors. It also alleges a breach of the duty of loyalty against Fund I and LLCP as controlling stockholders. Count II alleges a breach of the duty of disclosure against Levine, Mickelson, Cohen and Adeshak as directors.. Count III alleges ING aided and abetted the alleged breaches of fiduciary duty mentioned above. Count IV alleges common law fraud by LLCP, Fund I and ING to deprive Steinman of his equity interest in Chorus. Finally, Count V alleges negligent misrepresentation by Levine, Cohen, Mickelson, Adeshak, LLCP, and Fund I for failure to disclose certain material information.

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[15] *Id.* at *39.*

[16] *Id.*

On March 8, 2002, the defendants moved to dismiss all counts in the amended complaint for lack of personal jurisdiction with respect to LLCP and Fund I, as well as for failure to state a claim upon which relief can be granted with respect to all defendants.

IV.

A. Personal Jurisdiction Standard Of Review

When personal jurisdiction is challenged by a motion to dismiss pursuant to Court of Chancery Rule 12(b)(2), the plaintiff bears the burden of showing a basis for the court's exercise of jurisdiction over the nonresident defendant.[17] Generally, the court will engage in a two-step analysis: first determining whether service of process on the nonresident is authorized by statute; and, second, considering whether the exercise of jurisdiction is, in the circumstances presented, consistent with due process."

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[17] *See Plummer & Co. Realtors* v. *Crisafi*, 533 A.2d 1242, 1244 (Del. Super. 1987); *see also Finkbiner v. Mullins*, *532* A.2d 609,617 (Del. Super. 1987) (on a 12(b)(2) motion, "[t]he burden is on the plaintiff to make a specific showing that this Court has jurisdiction under a long-arm statute") (citing *Greedy v. Davis, 486* A.2d 669 (Del. 1984)).

[18] *LaNuova D & B, S.P.A. v. Bowe Co., 5* 13 A.2d 764, 768-69 (Del. 1986).

B. Rule 12(b)(6) Standard Of Review

When considering a motion to dismiss a complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the court is to assume the truthfulness of all well-pleaded allegations of fact in the complaint.[19] Although "all facts of the pleadings and reasonable inferences to be drawn therefrom are accepted as true . . . neither inferences nor conclusions of fact unsupported by allegations of specific facts . . . are accepted as true."[20] That is, "[a] trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in Plaintiffs' favor unless they are reasonable inferences."[21] Additionally, the court may consider, for certain limited purposes, the content of documents that are integral to or are incorporated by reference into the complaint.[22] For example, the court will take judicial notice of the various loan agreements and the Separation Agreement in assessing the merits of the claims asserted against the defendants. Under Rule 12(b)(6), a complaint may, despite allegations to the contrary, be dismissed

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[19] *Grobow v. Perot, 539* A.2d 180, 187 & n.6 (Del. 1988).
[20] *Id.*
[21] *Id.*
[22] *See in re Santa Fe Pac. Corp. S'holders Litig., 669* A.2d 59, 69-70 (Del. 1995).

where the unambiguous language of documents upon which the claims are based contradict the complaint's allegations.[23]

V.

A. The Amended Complaint Must Be Dismissed Against LLCP And Fund I Because Delaware's Long-Arm Statute And Due Process Reauirements Do Not Permit This Court To Exercise Jurisdiction Over These Entities

The court must first consider the defendants' motion to dismiss for lack of personal jurisdiction pursuant to Court of Chancery Rule 12(b)(2) before reaching the merits of their motion to dismiss under Court of Chancery Rule 12(b)(6).[24] LLCP and Fund I are both California entities, organized under the laws of the State of California, and are thus both nonresidents of Delaware. A two-step analysis is required to determine whether personal jurisdiction may be exercised over a nonresident defendant.[25] First, the court must consider whether Delaware's long-arm statute for service of process on nonresident defendants is applicable.[26] Second, the court must determine whether

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[23] *See In re Wheelabrator Tech 's, Inc. S 'holders Litig.,* 1992 WL 2 12595 at *3 (Del. Ch. Sept. 1, 1992) ("the Court is hardly bound to accept as true a demonstrable mischaracterization and the erroneous allegations that *flow* from it"); *See also Malpiede v. Townson,* 780 A.2d 1075, 1083 (Del. 2001) ("a claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law").

[24] *See Branson v. Exide Elecs. Corp., 625* A.2d 267, 268-69 (Del. 1993).

[25] *See* note *18, supra.*

[26] *Id.*

subjecting nonresident defendants to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment.[27]

1. The Amended Complaint Fails To Provide A Statutory Basis Under Delaware's Long;-Arm Statute For Asserting Personal Jurisdiction Over LLCP And Fund I

Steinman alleges this court has personal jurisdiction over LLCP and Fund I based on an application of Section 3 104(c)(1) of Delaware's long-arm statute.[28] Essentially, Steinman argues that "Levine and Mickelson . . . in their capacity as directors of Chorus were agents of LLCP and Fund I."[29] Any acts that Levine and Mickelson undertook as directors of Chorus, the argument goes, were acts that should be attributed to LLCP and Fund I for purposes of establishing personal jurisdiction. Steinman claims certain events "affected Chorus and/or occurred within Delaware."[30] None of these acts, however, are

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[27] *Id.*

[28] The relevant portion of Delaware's general long-arm statute, 10 *Del. C.* § *3* 104(c), provides as follows:

> As to a cause of action brought by a person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-resident, or his personal representative, who in person or through an agent: * * * (1) Transacts any business or performs any character of work or service in this state . . . .

[29] Pl. Ans. Br. at 27.

[30] *Id.*

sufficient to satisfy the requirements of 10 *Del. C.* § *3* 104(c)(l), and only two of the acts described actually occurred in Delaware.

The first act that occurred in Delaware upon which Steinman relies is Cohen's filing in August 1999, a certificate of merger with the Delaware Secretary of State regarding Chorus's merger with wholly owned subsidiary S.S.B. The second event that occurred in Delaware is Cohen's filing in December 1999 with the Secretary of State, an amendment to Chorus's certificate of incorporation increasing the number of authorized shares, creating a class of preferred stock, and altering the requirements for calling special meetings.[31] These acts are insufficient to satisfy 10 *Del. C.* § *3* 104(c)(1) because neither of the acts relate to Steinman's causes of action, namely breaches of fiduciary duties, fraud and negligent misrepresentation related to loan and pledge agreements executed between Steinman and certain defendants.

Steinman next argues that, "[u]nder Delaware law, a party that has not acted in or caused an effect within Delaware" may nonetheless be amenable to suit in Delaware under the conspiracy theory of jurisdiction.[32] To validly

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[31] Steimnan claims that the December 1999 amendment was necessary for Chorus to consummate a June 2000 merger with California Fashions. This allegation, however, is irrelevant under Delaware's long-arm statute because Steimnan does not challenge or assert any claims related to the June 2000 merger.

[32] Pl. Ans. Br. at 29.

exercise jurisdiction under a conspiracy theory a court must find that a five-part test has been satisfied.[33] The test requires: (1) the existence of a conspiracy to defraud; (2) defendant must be a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occur in Delaware; (4) the defendant know or have reason to know of the act in Delaware or that acts outside Delaware would have an effect in Delaware; and (5) the act in or effect on Delaware is a direct and foreseeable result of the conduct in furtherance of the conspiracy.[34]

Steinman concedes there is a question whether a substantial act or substantial effect in furtherance of the conspiracy occurred in Delaware.[35] He makes only the conclusory statement that, "upon examination of the conspiracy 'as a whole,' numerous actions occurred in furtherance of the conspiracy that affected Chorus and/or occurred in Delaware."[36] This reasoning fails for two reasons.

First, there is no allegation in the amended complaint of any "conspiracy," much less any alleged facts that support the unmentioned

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

[34] *See id.*

[35] PI. Ans. Br. at 30.

[36] *Id.*

conspiracy theory.[37] Second, there is no allegation that a substantial act or substantial effect in furtherance of the conspiracy occurred in Delaware. The only reference in the amended complaint that has any relation to Delaware *(by* agent or otherwise) are two filings with the Secretary of State by Chorus, which are unrelated to Steinman's causes of action. Thus, Steinman has not satisfied the necessary elements of a jurisdiction by conspiracy argument, and this court cannot exercise personal jurisdiction over LLCP and Fund I based on such a theory.

2. The Exercise Of Personal Jurisdiction Over LLCP And Fund I Would Violate The Due Process Clause Of The United States Constitution

Fund I and LLCP do not have the requisite contacts with Delaware to allow this court to exercise personal jurisdiction consistent with due process. Due process in the exercise of personal jurisdiction requires a "minimum contacts" analysis, which seeks to determine the fairness of subjecting a nonresident defendant to suit in a distant forum by considering all of the

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[37] *Istituto*, 449 A.2d at 225. Steinman attempts to make some conclusory allegations that all of the actions complained of were part of some overarching attempt to wrest control of Chorus away from Steinman. These allegations are not enough to establish jurisdiction by conspiracy because none of those allegations relate to causes of action in the amended complaint. Steinman's amended complaint limits itself to actions related to the loan and pledge agreements, not an overarching plan to obtain control of Chorus.

connections among the defendant, the forum and the litigation.[38] The "minimum contacts" test protects a defendant against the burdens of litigating in a distant or inconvenient forum, and ensures that "'the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.'"[39] A defendant's conduct and connection with the forum state should be such that she can reasonably anticipate being haled into court in her nonresident forum.[40]

LLCP and Fund I simply do not have enough contacts with Delaware to subject them to jurisdiction in this court. They have no office in Delaware. They do not conduct business in Delaware. They are not registered to do business in Delaware. Further, they have done no act in Delaware or any act outside of Delaware that has caused injury in this state. The loan agreements

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[38] *See International Shoe Co. v. Washington, 326* U.S. 310 (1945); *Shaffer v. Heitner, 433* U.S. 186,212 (1977); see *also Sternberg v. O'Neil, 550* A.2d 1105, 1116 (Del. 1988).

[39] *Newspan, Inc. v. Heathstone Funding Corp.,* 1994 WL 198721, at *5 (Del. Ch. May 10, 1994 (quoting *World- Wide Volkswagen Corp. v. Woodson, 444* U.S. 286,292 (1980)).

[40] *Id.* A basic tenet of the due process analysis of a court's exercise of personal jurisdiction is whether the party "purposely availed" itself of the privilege of conducting activities within the forum state, thus, invoking the benefits and protections of its laws. *Burger King* Corp. v. *Rudzewicz,* 471 U.S. 462,475 (1985) (This "purposeful avaihnent requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person"') (citations omitted).

were signed in California. The pledge agreements were signed in California. Essentially every transaction in this lawsuit occurred in California.

The only connection to Delaware that Steinman alleges with respect to Fund I and LLCP is that they were controlling stockholders of Chorus, and that Chorus is a Delaware corporation. The general rule, however, is that ownership of stock in a Delaware corporation is not enough to satisfy the "minimum contacts" test that due process requires.[41] This allegation, therefore, is not sufficient to establish personal jurisdiction.

Finally, from a policy perspective, the State of Delaware does not have an interest in providing a forum for claims against Fund I and LLCP, where those claims involve events occurring out of state, caused no injury in Delaware, and involve a plaintiff and defendants who are not Delaware residents. Therefore, the court will dismiss Steinman's complaint against LLCP and Fund I for lack of personal jurisdiction.[42]

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[41] *Shaffer*, *433* U.S. 207-09.

[42] It should be noted that dismissal with respect to LLCP and Fund I makes Steinman's reliance on *Odyssey Partners, L.P. v. Fleming Cos., Inc.*, 1996 WL 422377 (Del. Ch. July 24, 1996), inapplicable because none of the remaining defendants in the case occupy the position of being both a creditor and a fiduciary of Chorus. *Id.*, at *3-4.

B. Steinman Is Estonned From Alleging That No "Event Of Default" Occurred

The doctrine of collateral estoppel provides that a judgment in a prior suit "'precludes the relitigation of a factual issue which was litigated and decided in the prior suit between the same parties or persons in privity with them.'"[43] Also, the Delaware Supreme Court has stated, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation? Finally, under the doctrine of judicial estoppel, "'a party may be precluded from asserting in a legal proceeding, a position inconsistent with a position previously taken by him in the same or in an earlier legal proceeding. '"[45]

Steinman obtained a $250,000 judgment in the California lawsuit based on his successful assertion that, as a matter of fact, an Event of Default occurred. Yet, in this court, Steinman's complaint seeks an additional recovery based on the factual assertion that the Event of Default did not occur. Because the

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[43] *Kohls v. Kenetech Corp.*, 791 A.2d 763,767 (Del. Ch. 2000) (quoting *Foltz v. Pullman, Inc., 3 19* A.2d 38, 40 (Del. 1974)).

[44] *Hercules, Inc. v. AIU Ins. Co., 783* A.2d 1275, 1278 (Del. 2000).

[45] *Seigman v. Palomar Med. Techs., Inc.,* 1998 WL 409352, at *2 (Del. Ch. July 13, 1998) (quoting *Coates Int'l, Ltd. v. DeMott,* 1994 WL 89018 at *5 (Del. Ch. Feb. 4, 1994)).

remaining defendants in this case are sued in their capacities as directors of Chorus, they stand in privity with it for collateral estoppel purposes. Thus Steinman should be estopped from relitigating the factual issues relating to the Event of Default. Indeed, Steinman makes no cogent argument as to why collateral estoppel does not bar his claims that depend on the contention that there was no Event of Default, apparently conceding the point.

With respect to judicial estoppel, Steinman does not dispute that he argued to the California court that an Event of Default occurred, and that the California court accepted that argument when it awarded a $250,000 judgment to him.[46] Steinman's only response to this argument is that "Defendants did not change their position in *this* action" and cites *Norman v. Paco Pharm. Sews., Inc.*[47] for the proposition that judicial estoppel requires detrimental reliance. This argument is not persuasive. First, the defendants suffered detriment as a result of Steinman's prior argument that there was an Event of Default. This is

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[46] *See Steinman v. Chorus Line Cop,* Cal. Super., C.A. No. BC215508, Horwitz, J. (Oct. 3, 2000) (ORDER) at p. 5 of 9 ($250,000 judgment for Steinman under the Separation Agreement based on the holding that, "It is undisputed that LLCP voted Steinman's stock [on December 4, 1999]. This act constitutes the exercise by LLCP of 'any rights or remedies against any collateral security (including pledged stock) as a result of the occurrence of such Event of Default."').

[47] 1992 WL 301362, at *4 (Del. Ch. Oct. 21, 1992).

because Steinrnan obtained a judgment against Chorus and Chorus now has to deal with its implication in subsequent proceedings (including bankruptcy court). Second, more recent Delaware cases cite the elements of judicial estoppel similarly to *Siegman*, which does not require detrimental reliance.[48] Finally, Steinman cites no case (and this court is aware of none) where a plaintiff obtains a judgment based on the assertion of the existence of a particular set of facts, and then is permitted by a second court to seek another judgment, against the same party and/or its privies, based on the exactly contradictory factual allegations. For all of these reasons, Steinman is estopped from arguing that no Event of Default occurred, and the court will dismiss all of his claims that depend on that factual assertion.

C. Steinman's First Cause Of Action Must Be Dismissed

1. Steinman's Duty Of Loyalty Claim Is Derivative And Must Be Dismissed Pursuant To Rule 23.1

Because, Steinman is precluded from asserting his claims relating to an Event of Default, his only claim remaining related to the duty of loyalty is a $4,500,000 payment made to Fund I and ING by Chorus pursuant to its loan

[48] *See Woodall v. Playtex Products, Inc.*, 2002 WL 749188, at *3 (Del. Super. Apr. 26, 2002); *Steadfast Ins. Co. v. EON Labs Mfg., Inc.*, 1999 WL 743982, at * 1 n.6 (Del. Super. Aug. 18, 1999).

agreements. [49] The defendants contend that such a claim is derivative in nature and must be dismissed due to Steinman's failure to comply with the demand and/or pleading requirements of Chancery Court Rule 23.1. Steinman argues his claim is individual because he eventually lost the value of his equity interest in Chorus. This argument is not persuasive, however, because it cannot be said that a loan payment made in accordance with a properly executed loan agreement results in an "individual" injury. Such an "individual" injury or loss is required to maintain an individual action under these circumstances. When Chorus repaid part of its debt obligation, the result was that every stockholder in the corporation was affected in the identical manner on a stock-for-stock basis. Thus, this type of claim falls squarely within the definition of a derivative action.[50]

To maintain a derivative suit, a stockholder must allege either that the board rejected a demand that it assert the corporation's claim or allege with particularity why the stockholder was justified in not having made the effort to

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[49] To the extent Steinman alleges that the Defendant Directors breached their duty of loyalty by falsely claiming an Event of Default when no such default occurred, this allegation is precluded by the California litigation. See Section V:B, *supra*.

[50] See Donald J. Wolfe, Jr. and Michael A. Pittenger, ***Corporate and Commercial Practice in the Delaware Court of Chancery***, §9-2[a]. p. 9-6 n.18 (2001) (claims based on acts of waste or mismanagement arising from excessive payments of corporate assets or funds are derivative).

obtain board action? Steinman has done neither. Because Steinman has not pled that demand was excused or that demand was wrongfully refused, his duty of loyalty claim must be dismissed.[52]

2. Steinman Fails To State A Claim For Breach Of The Duty Of Lovalty

Even were the court to consider the substantive nature of Steinman's duty of loyalty claim, it must fail as a matter of law. Steinman claims that when, pursuant to the March 1998 Agreement, Chorus made a $4,500,000 payment to ING and Fund I in August 1999, the Defendant Directors breached their duty of loyalty. Steinrnan alleges that this payment amounts to a breach of the duty of loyalty because it was a "self-dealing" transaction "approved by the Defendant Directors."[53] This argument is unavailing.

Steinman's duty of loyalty claim must fail because Chorus was merely paying money legally owed to ING and Fund I. Steinman does not claim that the $4,500,000 paid was not actually owed to Fund I and ING. He makes no

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[51] Ch. Ct. R. 23.1.

[52] *See White v. Panic, 783* A.2d 543,550 (Del. 2001) (affirming dismissal of plaintiffs complaint for failure to show that demand *was* excused); *Grimes v. Donald, 673* A.2d 1207, 1219 (Del. 1996) (dismissing derivative claim where demand was refused because the plaintiff failed to plead with particularity why the board's refusal to act on the derivative claims was wrongful).

[53] Amend. Comp. at 39.

claim for waste. He does not even claim that the repayment of the loan was not entirely fair.[54] Rather, Steinman claims that paying money legally owed was detrimental to stockholders because it transferred capital from Chorus to ING and Fund I.[55] Anytime a corporation pays a legal obligation, however, it may be argued that it decreases the value of stockholders' equity. Without more, there cannot be a cause of action for such a payment.[56]

Finally, Steinrnan alleges that the $4,500,000 loan repayment "cause[d] Chorus to default on various provisions of the loan agreement."[57] However, Steinman has not alleged any facts to support such an allegation. In fact, Steinman's amended complaint essentially negates such an argument.[58] In that complaint, he quoted documents and witnesses that stated the Event of Default

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[54] *See Solomon v. Pathe Communications Corp.*, 1995 WL 250374, at *5 (Del. Ch. Apr. 2 1, 1995) ("Even in a self-interested transaction in order to state a claim a shareholder must allege some facts that tend to show that the transaction was not fair"), *aff'd*, 672 A.2d 35 (Del. 1996).

[55] See Amend. Comp. at 39.

[56] See, e.g., Solomon, 1995 WL 250374, at *5 ("Even if the consequences of that foreclosure [by creditor/stockholder] were, for example to render the value of the minority [] stock worthless, the secured creditor would have no obligation to forego or delay exercising its legal rights as a creditor. A controlling shareholder is not required to give up legal rights that it clearly possesses; this is certainly so when those legal rights arise in a non-stockholder capacity").

[57] Amend. Comp. at 39.

[58] *See Malpiede*, 780 A.2d at 1083 ("a claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law").

was caused by "significant financial difficulties,"[59] a "liquidity crisis,"[60] and "significant financial difficulties that had a negative impact upon the fundamental business of Chorus,"[61] and that Chorus has been in default "as a result of the difficult conditions that are currently present in the dress market."[62] In any event, there is a decided absurdity to Steinman's position because failure to make the payments would, itself, have resulted in default under the loan agreements. For all these reasons, therefore, this court will dismiss Steinman's duty of loyalty claim against the Defendant Directors.

D. Steinman Has Failed To State A Claim For Breach Of The Fiduciary Duty Of Disclosure

The Delaware Supreme Court has held that claims for a breach of fiduciary duty of disclosure can only arise when the defendant has made statements to the corporation's stockholders in connection with a request for stockholder action.[63] A duty of disclosure claim that is based on a cause of action that occurs "without a request for stockholder action" does not properly

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[59] Amend. Comp. at 25.

[60] *Id.*

[61] *Id.* at 30.

[62] *Id.*

[63] *See Malone v. Brincat, 722* A.2d 5, 10 (Del. 1998) ("The duty of disclosure obligates directors to provide the stockholders with accurate and complete information material to a transaction or other corporate event that is being presented to them for action").

state a claim for a breach of the fiduciary duty of disclosure? It is undisputed that Steinman's disclosure claims arise in the absence of a request for stockholder action. Courts are willing, however, to allow a plaintiff to plead such arguments under the rubric of duty of loyalty?

Even if Steinman were allowed to replead his duty of disclosure claim as a duty of loyalty claim, the allegations in his amended complaint fail to state a claim upon which relief can be granted. To successfully state a duty of loyalty claim against directors for providing information in the absence of a request for stockholder action, a stockholder must allege he received "false communications" from directors who were "deliberately misinforming shareholders about the business of the corporation. "[66] Steinman has failed to plead facts to satisfy this test.

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[64] ***Jackson Nat'l Life Ins. Co. v.*** Kennedy, 741 A.2d 377, 389 (Del. Ch. 1999) ("The duty of disclosure is merely a specific application of the more general fiduciary duty of loyalty that applies only in the setting of a transaction or other corporate event that is being presented to the stockholders for action").

[65] See ***id.,*** at 390 ("Plaintiffs, who have sufficiently pleaded the claim and supporting facts that [defendant] owed [plaintiff] a fiduciary duty of loyalty, but have failed to establish the existence of a similar fiduciary duty of disclosure as a matter of law, shall have the opportunity to replead to assert an appropriate cause of action based upon a breach of the duty of loyalty").

[66] ***Malone 722*** A.2d at 14; ***see Jackson Nat'l Life Ins. Co.,*** 741 A.2d at 389 (in the absence of a request for stockholder action, a duty of loyalty claim requires well pleaded allegations that directors "deliberately misinform[ed] stockholders through the dissemination of false information").

Steinman alleges officers of Chorus forwarded a Certificate of Compliance to Chorus stockholders that provided (among other things) "no Event of Default has occurred or is continuing under any working capital or other arrangement to which [Chorus] is a party . . .."[67] Steinman's allegations do not satisfy the requirements of *Jackson National Life Ins. Co.* because they are not false communications from directors *who were deliberately misinforming shareholders.* This is especially true because the Certificates of Compliance were not prepared as disclosure documents intended for stockholder use. The Certificates of Compliance were actually detailed *contractual* obligations that Chorus owed to certain creditors pursuant to the various loan agreements it had executed.[68] Nothing obligated Chorus to supply

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[67] Steinman also alleges that certain financial statements did not accurately reflect the deteriorating financial condition of Chorus. Yet, this allegation appears wholly conclusory. Steimnan fails to point to a single flaw in the financial statements, other than to say that they never disclosed that an Event of Default occurred. Steinman fails to demonstrate where such disclosure should have appeared in the financial statements. Also, Steinman claims that the August 1999 financial statements he was provided stated that Chorus had satisfied its payment obligations. In fact, Chorus had satisfied its payment obligations. It had made all required payments up to that date.

Steinman further alleges in his complaint that a statement made by Cohen on September 27, 1999 that Chorus was a solvent and viable corporation was false and misleading because Chorus had previously warranted that it was in default of certain loan covenants. This claim was refuted in defendant's opening brief, and Steinman failed to respond. Therefore, Steimnan is deemed to have waived this aspect of his complaint. In any event, it should be noted that a company can be solvent and viable, yet still be in default of certain loan covenants.

[68] It bears noting that nowhere in Steinman's amended complaint does he demonstrate how or why he relied on the disclosures provided in the Certificates of Compliance.

these Certificates to its stockholders, and it cannot be said that they were prepared to deliberately misinform stockholders, when in reality they were never meant for stockholders at all.

Finally, Steinman makes no allegations that he was not actually aware, or on notice, of the financial condition of Chorus. In fact, his complaint suggests that he was quite aware of what was going on or deliberately failed to avail himself of the tools at hand to find out. The Separation Agreement executed between Steinman and Chorus provided that Steinman "shall be granted access to all Company information and documentation that he may reasonably request."[69] He apparently chose not to request any such information. Furthermore, Sacks, Steinman's co-founder, friend, fellow stockholder, and fellow pledgor was an independent director on the Chorus Board during all relevant times. Also, pursuant to the Pledge Agreement Steinman executed, he warranted that he "has adequate means to obtain information" from Chorus and that it is his "responsibility for being informed of the financial condition" of Chorus.[70] For all these reasons, this court will dismiss Steinman's second cause of action.

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[69] Reybum Aff. Ex. A.

[70] Amend. Comp., Ex. B § 14(d).

E. Steinman Has Failed To State A Claim Against ING For Aiding And Abetting Breaches Of Fiduciary Duties By The Director Defendants

In Count III of his amended complaint, Steinman alleges that ING aided and abetted the alleged breach of the duty of loyalty by the Director Defendants. The elements that Steinman must allege to adequately plead an aiding and abetting claim are clear. Steinman must plead facts that support (1) the existence of a fiduciary relationship, (2) a breach of duty by the fiduciary, (3) ING's knowing participation in the breach, and (4) damages resulting from the concerting action of the fiduciary and ING.[71] Steinman has not satisfied this standard. Specifically, as discussed above, this court has found no breaches of fiduciary duty.[72] This finding is fatal to Steinman's aiding and abetting claim. Therefore, the court will dismiss Count III of Steinman's amended complaint.

F. Steinman Has Failed To State A Claim For Common Law Fraud Or Negligent Renresentation Against The Defendant Directors Or ING

1. Common Law Fraud

To state a cause of action for common law fraud under Delaware law, a plaintiff must allege (1) a false representation made by the defendant, (2) the defendant's knowledge of the falsity of the representation or reckless disregard

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[71] *Malpiede*, 780 A.2d at 1096; *Goodwin v. Live Entm 't, Inc.*, 1999 WL 64265, at *28 (Del. Ch. Jan. 25, 1999), *aff'd*, 741 A.2d 16 (Del. 1999) (TABLE).

[72] See Section V:C and V:D, *supra*.

for the truth, (3) the defendant's intent to induce the plaintiff to act or refrain from acting, (4) the plaintiffs justifiable reliance upon the representation, and (5) damage to the plaintiff as a result of such reliance.[73] Further, when a complaint alleges fraud, "the circumstances constituting fraud . . . [must] be stated with particularity."[74] Without pleading such particularity, those claims will be dismissed.[75] Steinman has failed to adequately allege his claim of fraud with particularity.

Steinman has only asserted fraud with respect to LLCP, Fund I and ING. As discussed in Section V:A, this court lacks personal jurisdiction over LLCP and Fund I to decide this claim. As to ING, Steinman only asserts:

> ING intentionally disclosed misleading information and failed to disclose other material information to plaintiff, which resulted in plaintiff (in justifiable reliance upon such misleading information) failing to take reasonable action in connection with his investment in Chorus.
>
> As a result of the unlawful conduct of.. . ING, plaintiff unlawfully was deprived of his equity interest in Chorus for no consideration. Accordingly, as a result of the unlawful conduct of.. . ING, plaintiff realized actual damages.[76]

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[73] *See Parfi Holding AB v. Mirror Image Internet, Inc., 794* A.2d 12 11, 1234 (Del. Ch. 2001); *see also Stephenson v. Capano Dev. Inc., 462* A.2d 1069, 1074 (Del. 1983).

[74] Ct. Ch. R. 9(b).

[75] *See Brown v. Robb, 583* A.2d 949,955 (Del. 1990) (affirming lower court dismissal of complaint that failed to allege any factual bases to support a claim for fraud).

[76] Amend. Comp. at 43-44.

This allegation does not satisfy the strenuous pleading requirements that must be alleged when asserting fraud as a cause of action. Specifically, "a well pleaded fraud allegation must include at least 'the time, place and contents of the false representations . . . and what [was] obtained thereby.'"[77] Steinman's fraud allegation has simply mirrored the language of the necessary fraud elements. Steinman's amended complaint contains no facts to support his conclusory allegations, as to the time, place or contents of the false representations. In fact he has failed to state what the false representations actually were. Therefore, the court will dismiss Count IV of Steinman's complaint against ING for failure to state a claim upon which relief can be granted.

2. Negligent Misrepresentation

Steinman has alleged a cause of action for negligent misrepresentation against all of the LLCP, Fund I and the Director Defendants. Since this court lacks personal jurisdiction over LLCP and Fund I, the court must only analyze this cause of action with respect to the Defendant Directors. To successfully assert a claim for negligent misrepresentation Steinman must

[77] ***Crescent/Mach I Partners, L.P. v. Turner, 2000*** WL 1481002, at *18 (Del. Ch. Sep. 29, 2000) (quotation omitted).

adequately plead that (1) the defendant had a pecuniary duty to provide accurate information, (2) the defendant supplied false information, (3) the defendant failed to exercise reasonable care in obtaining or communicating the information, and (4) the plaintiff suffered a pecuniary loss caused by justifiable reliance upon the false information.[78] Steinman has failed to adequately plead facts supporting his claim of negligent misrepresentation.

Steinman has failed to demonstrate that the Defendant Directors had a pecuniary duty to provide information. Such a duty would have to be found in the various loan agreements or in the Pledge Agreement, but, as discussed earlier, no affirmative duty to provide information existed. In fact, the Pledge Agreement specifically provided that Steinman was given the affirmative responsibility to keep informed of Chorus's financial condition."

Another flaw in Steinman's complaint is his failure to assert with any specificity what false documents or false statements he relied upon in connection with his alleged injury or who produced them. Rather, Steimnan

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[78] *Sanders v. Devine,* 1997 WL 599539, at *6-7 (Del. Ch. Sept. 24, 1997) (citing *Wolf v. Magness Constr. Co.,* 1995 *WL* 571896 *(Del. Ch.* Sept. 11, 1995), *aff'd,* 676 A.2d 905 (Del. 1996) (TABLE)).

[79] See Amend. Comp. Ex. B. § 14(d) (Steinman agrees that he "has adequate means to obtain information" from Chorus, that it is his "responsibility for being and keeping informed of the financial condition" of Chorus, and that he waives any duty on the part of LLCP to disclose any information regarding Chorus); see *also* Section V:D, *supra.*

only references certain "financial statements and other documents that contained material misrepresentations . . .."[80] Steinman does not even identify misrepresentations made by any particular individuals. He simply lumps all the Director Defendants together in this cause of action. Steinman is required to identify specific acts of individual defendants for his negligent misrepresentation claim to survive.*' He has failed to do so. Therefore, this court will dismiss Steinman's negligent misrepresentation cause of action for failure to state a claim upon which relief can be granted.

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[80] **Amend. Comp. at 44.**

[81] **See, e.g., 5 Charles A. Wright & Arthur R Miller, *Federal Practice and Procedure* $1248 (1990) ("in order to state a claim for relief, actions brought against multiple defendants must clearly specify the claims with which each particular defendants is charged'); *J. Royal Parker Assocs., Inc. v. Parco Brown & Root, Inc.*, 1984 WL 8255, at *5 (Del. Ch. Nov. 30, 1984) (action against defendant parent corporation dismissed because plaintiff only alleged facts related to defendant subsidiary's tortious conduct).**

VI.

For the foregoing reasons, the motion to dismiss for lack of personal jurisdiction is GRANTED as to LLCP and Fund I. The motion to dismiss for failure to state a claim is GRANTED as to Arthur Levine, Mark Mickelson, Andrew Cohen, Carol Adeshak, and ING. **IT IS SO ORDERED.**

Stephen P. Lamb
Vice Chancellor