IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HOSPITALISTS OF DELAWARE, LLC and MORGAN KALMAN CLINIC, P.A., Plaintiffs, v. KATHLEEN LUTZ, JOHN MCILWRAITH, DOV ROSENBERG, INTEGRA GROUP, INC., BLUE CHIP VENTURE COMPANY, LTD., BLUE CHIP CAPITAL FUND II LIMITED PARTNERSHIP, and BLUE CHIP IV LIMITED PARTNERSHIP, Defendants, and CUBIT MEDICAL PRACTICE SOLUTIONS, INC., Nominal Defendant.	)	C.A. No. 6221-VCP

MEMORANDUM OPINION

Submitted: May 16, 2012
Decided: August 28, 2012

Paul M. Lukoff, Esq., Thad J. Bracegirdle, Esq., Andrea S. Brooks, Esq., WILKS, LUKOFF & BRACEGIRDLE, LLC, Wilmington, Delaware; *Attorneys for Plaintiffs.*

Gregory G. Grivner, Esq., BUCHANAN INGERSOLL & ROONEY PC, Wilmington Delaware; *Attorneys for Defendants Kathleen Lutz, John McIlwraith, Dov Rosenberg, and Nominal Defendant Cubit Medical Practice Solutions, Inc.*

Albert H. Manwaring, IV, Esq., James G. McMillan, III, Esq., PEPPER HAMILTON LLP, Wilmington, Delaware; *Attorneys for Defendant Integra Group, Inc.*

Gregory P. Williams, Esq., Rudolf Koch, Esq., Christopher H. Lyons, Esq., RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; *Attorneys for Defendants Blue Chip Venture Company, Ltd., Blue Chip Capital Fund II Limited Partnership, and Blue Chip IV Limited Partnership.*

PARSONS, Vice Chancellor.

The plaintiffs in this derivative and direct action are two judgment creditors of Nominal Defendant, Cubit Medical Practice Solutions, Inc. ("Cubit" or the "Company"), a dissolved Delaware corporation. Those judgments remain unsatisfied. In this action, the plaintiffs accuse seven other defendants—Cubit's three directors, its controlling stockholder, and three other entities within the same corporate family—of participating in an "elaborate scheme" to dissolve the Company only after siphoning off its assets. Consequently, according to the plaintiffs, the defendants unlawfully evaded the plaintiffs' judgments while insulating their own investments. In their complaint, the plaintiffs seek damages and declaratory relief from all seven participants in the alleged scheme.

None of the defendants other than the Company, however, are Delaware residents. Furthermore, although the Company's directors and controlling stockholder have consented to this Court's exercise of personal jurisdiction over them, the three other defendants have not. Thus, currently before the Court are those three defendants' motions to dismiss under Court of Chancery Rule 12(b)(2) for lack of personal jurisdiction (the "Jurisdiction Motions"). Additionally, one of those three defendants, Integra Group, Inc. ("Integra"), alternatively has moved to dismiss under Rule 12(b)(6) for failure to state a claim (the "12(b)(6) Motion"). This Memorandum Opinion constitutes the Court's rulings on the Jurisdiction and 12(b)(6) Motions. For the following reasons, the Jurisdiction Motions are denied as to Integra, but granted as to the other two moving defendants. Furthermore, Integra's 12(b)(6) Motion is granted in part and denied in part, to the extent indicated *infra*.

I. BACKGROUND

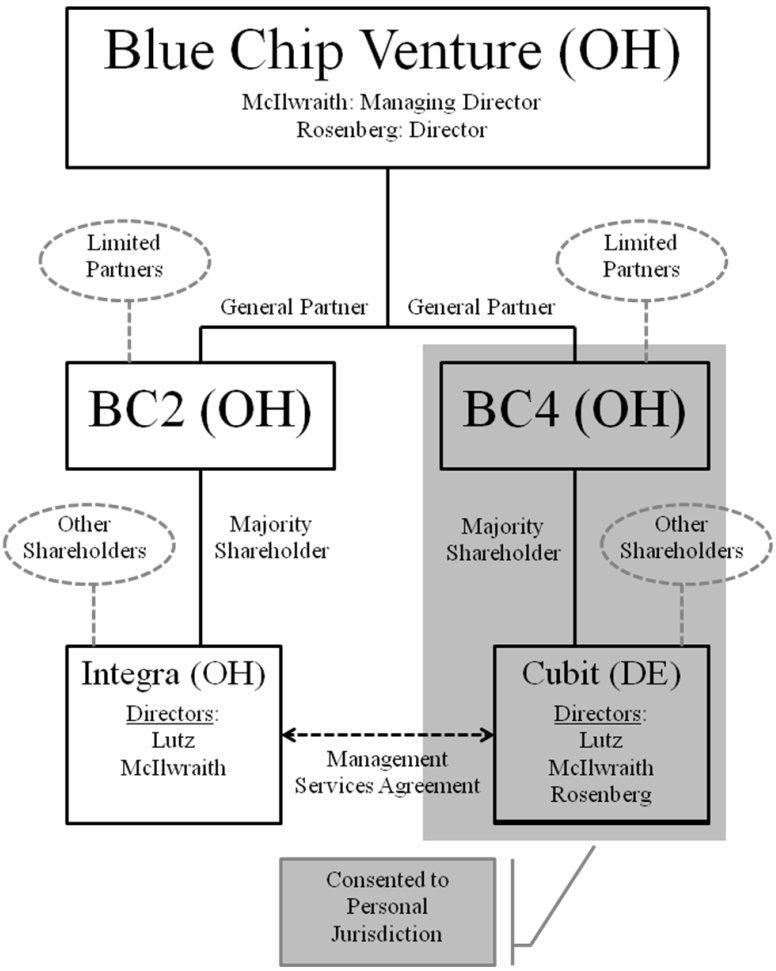
A. The Parties

Plaintiffs are Hospitalists of Delaware, LLC ("Hospitalists"), a Delaware limited liability company, and Morgan Kalman Clinic, P.A. ("MKC"), a professional association incorporated under Delaware law. Both Hospitalists and MKC provide professional medical services in Delaware.

Until its dissolution, Cubit was a Delaware corporation operating as a medical billing company with a principal place of business—like all of the entities named as Defendants in this action—in Cincinnati, Ohio. Pursuant to 8 *Del. C.* §§ 103 and 275, Cubit's dissolution became effective on October 8, 2010 upon the Secretary of State's endorsement of its certificate of dissolution. Cubit remains, however, a body corporate under 8 *Del. C.* § 278 for the purpose of prosecuting and defending suits. At all times relevant to this case, Defendants Kathleen Lutz, John McIlwraith, and Dov Rosenberg (collectively, the "Director Defendants") comprised Cubit's board of directors. Defendant Blue Chip IV Limited Partnership ("BC4"), an Ohio limited partnership, was Cubit's controlling shareholder. Other than BC4, Cubit's only shareholders were Lutz and another individual not named in this action. Cubit, the Director Defendants, and BC4 have submitted to the jurisdiction of this Court.

Defendant Blue Chip Venture Company, Ltd. ("BCV") is an Ohio limited liability company. In addition to their roles at Cubit, McIlwraith and Rosenberg serve as a managing director and director, respectively, of BCV. BCV is the general partner of both BC4 and Defendant Blue Chip Capital Fund II Limited Partnership ("BC2"), an Ohio

limited partnership. In turn, until approximately the same time as Cubit's dissolution, BC2 held a controlling stake in Integra, an Ohio corporation.[1] At all relevant times, Lutz and McIlwraith held two of Integra's three board seats. As further discussed *infra*, Integra and Cubit were parties to a Management Services Agreement by which Integra provided management services to Cubit in exchange for management fees. For the reader's convenience, the following organizational chart depicts the various relationships among Defendants just described:



[1] On occasion, BCV, BC2, and Integra collectively are referred to as the "Moving Defendants" for purposes of this Memorandum Opinion.

B. Facts[2]

1. The formation of Cubit

In 2005, BC4 was the majority owner and a significant note holder of NextMed Systems, Inc. ("NextMed"), a failing medical billing company. Apparently intending to merge Integra with NextMed and "turn it into a successful business,"[3] BC4 incorporated Cubit in November 2005 as Integra Professional Services, Inc. and then caused Cubit to foreclose on NextMed's assets. "Cubit was therefore, in substance, NextMed in the guise of a newly formed entity with a different name."[4] Although BC4 initially infused Cubit with just over $500,000, there is no allegation that this cash restored Cubit (f/k/a NextMed) to financial health. To the extent Plaintiffs' claims are premised on "directors of an *insolvent* corporation ow[ing] fiduciary duties to the corporation and to its creditors,"[5] a reasonable inference drawn from the allegations of the Complaint is that

---

[2] Unless otherwise noted, the facts recited herein are drawn from the well pled allegations of Plaintiffs' Verified Amended Complaint (the "Complaint"), together with its attached exhibits, and are presumed true for purposes of Integra's 12(b)(6) Motion.

Although the Court may consider evidence outside the pleadings for purposes of the Jurisdiction Motions, *see Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007), this overview facts section omits reference to such evidence in an effort to avoid confusion regarding the materials considered on each set of Motions. To the extent the Court has considered evidence beyond the pleadings in deciding the Jurisdiction Motions, such additional evidence is discussed in context throughout the analysis in Section II, *infra*, with appropriate citations.

[3] Compl. ¶ 34.

[4] *Id*. ¶ 31.

[5] *Id.* ¶ 64 (emphasis added).

Cubit was born into insolvency and remained in a precarious financial condition throughout its life.

Plaintiffs further allege that, "[g]iven the synergies between [Integra] and Cubit, and [D]efendants' intent ultimately to merge the two companies, [Integra] and Cubit were treated and operated as one company."[6] For example, in December 2005, Cubit and Integra entered into a Management Services Agreement by which Integra provided various services to Cubit, including Cubit's principal medical billing business, in exchange for management fees. Though they accrued from the Agreement's inception, no management fees actually were paid to Integra until sometime in 2008 at the earliest. Additionally, Cubit and Integra shared certain common directors, officers, employees, office space, technology infrastructure, and at least one credit card account.

2. Plaintiffs' litigation against Cubit

Dissatisfied with the medical billing services Cubit had been providing to it, Hospitalists threatened the Company with litigation in a letter dated July 20, 2009. On December 7, 2009, Hospitalists formally filed a complaint in Delaware Superior Court accusing Cubit of failing to process and collect Hospitalists's medical bills from insurers. Ultimately, after delaying discovery for approximately six months and after two attempts by Cubit's counsel to withdraw from the case, Cubit elected not to defend itself in the Hospitalists litigation. Therefore, on October 5, 2010, the Superior Court entered a default judgment against Cubit in the amount of approximately $817,000.

---

6 *Id*. ¶ 35.

Meanwhile, on June 7, 2010—*i.e.*, six months after Hospitalists brought its action against Cubit—MKC commenced its own action against Cubit in Superior Court alleging similar failures by Cubit to process and collect MKC's medical bills from insurers. Cubit again did not defend itself against MKC's claims. Hence, on October 1, 2010, the Superior Court entered judgment in MKC's favor for approximately $1.3 million.

3. Defendants' scheme to evade Plaintiffs' claims

Plaintiffs allege that, immediately upon receiving Hospitalists's claims letter in July 2009, Defendants "began to devise a plan by which they would either sell or dissolve [Cubit] and, at the same time, extract their investment from [Integra] for the purpose of avoiding [Cubit's] creditors."[7] The first component of that plan involved untangling the formerly intertwined relationships between Cubit and Integra. On March 25, 2010, the Company officially changed its name from Integra Professional Services, Inc. to Cubit. Consequently, from June to August 2010, MKC struggled to perfect service of process on the Company because of the nascent name change. Nevertheless, MKC promptly informed Cubit's counsel of record in the Hospitalists litigation of the new MKC complaint. In addition, on June 8, 2010, the day after MKC filed its complaint, "Rosenberg instructed Cubit and [Integra] to 'take down' the Cubit website so that it

---

[7] *Id.* ¶ 39.

would be 'as hard as possible for folks to track any of us down, make connections to [Integra], etc.'"[8]

While the process of separating Cubit from Integra was underway, the alleged scheme further involved transferring Cubit's assets elsewhere within the Blue Chip corporate structure. In that regard, Rosenberg, acting in his capacity as a director of Cubit, directed Integra to document the management fees it was receiving from Cubit as secured payments so that Integra could claim priority over Cubit's other creditors. Although Plaintiffs emphasize the allegation that Rosenberg *told* Integra to claim secured status, there is no allegation that Integra ever did. In any event, with management fees being paid regularly to Integra more or less for the first time in or after 2008 and because of the previously intertwined operations of the two companies, Defendants "fear[ed] that [Integra] could be held liable for judgments against Cubit."[9] Thus, in an apparent effort to further insulate Defendants' investments from Cubit's creditors, BC2 ultimately effected a redemption of its Integra stock for $2.5 million sometime in the late summer or fall of 2010.[10]

---

8 *Id.* ¶ 43. Although the Complaint itself does not cite the source of the internal quotation, it accurately quotes Rosenberg's June 8 email, which Plaintiffs submitted in connection with the Jurisdiction Motions. Brooks Aff. Ex. 13. Thus, by either drawing the inferences in the nonmoving party's favor or treating the June 8 email as integral to or incorporated in the Complaint, the Court attributes the quoted statement to Rosenberg even for purposes of the 12(b)(6) Motion.

9 Compl. ¶ 54.

10 Of this amount, $1.5 million was paid to BC2 at the transaction's closing and two additional payments of $500,000 each were to be paid later. *Id.*

The final aspect of the alleged scheme was Defendants' attempt to unwind their investment in Cubit altogether, either by selling the Company to a third party or distributing its assets within the Blue Chip corporate family and dissolving the worthless business. Again, this process unfolded in tandem with the untangling of Integra and Cubit's operations and BC2's redemption of its Integra stock. By mid 2010, Defendants realized that judgments of one sort or another against Cubit were inevitable. At about that time, they abandoned their attempts to sell the soon-to-be-encumbered business and allegedly decided instead to "dissolve Cubit before [P]laintiffs could obtain default judgments."[11] Thus, Cubit ceased its business operations in early August 2010, its directors and stockholders authorized its dissolution on September 21, 2010, and its certificate of dissolution was filed with the Secretary of State on October 8, 2010. In connection with that dissolution process, however, the Director Defendants allegedly caused Cubit to transfer all or substantially all of the Company's remaining assets to BC4 in partial satisfaction of a purportedly secured note of approximately $500,000 by which Cubit initially was capitalized in 2005.

---

[11] *Id.* ¶ 53. The Complaint does not allege outright that Defendants believed a judgment against Cubit was "inevitable." I infer that, however, from the allegation that "[D]efendants believed that they could not 'sell' any part of the Cubit's business if there was a default judgment against Cubit. Therefore, [D]efendants caused Cubit to keep the [Hospitalists] and MKC lawsuits active . . . while they attempted to sell off pieces of Cubit's business and dissolve Cubit before [P]laintiffs could obtain default judgments." *Id.*

C. Procedural History

Plaintiffs commenced this action on February 25, 2011, initially naming only the Director Defendants and Cubit. On November 29, 2011, after taking discovery, Plaintiffs filed the operative Complaint, which amended the original complaint by, among other things, naming the Moving Defendants and BC4 as additional defendants. Although BC4 answered the Complaint, BCV and BC2 moved to dismiss for lack of personal jurisdiction on January 20, 2012. Integra similarly moved to dismiss on January 27, for both lack of personal jurisdiction and failure to state a claim. The Court heard argument on the Moving Defendants' Jurisdiction Motions and Integra's 12(b)(6) Motion on May 16, 2012. This Memorandum Opinion constitutes the Court's rulings on both sets of Motions.

II. THE JURISDICTION MOTIONS

A. Parties' Contentions

BCV, BC2, and Integra are Ohio entities with, at most, only nominal contacts of their own with Delaware. Plaintiffs contend nevertheless that the Court may exercise personal jurisdiction over the Moving Defendants because (1) the Director Defendants caused Cubit to file a certificate of dissolution with the Delaware Secretary of State, which constitutes the transaction of business for purposes of long arm jurisdiction, and (2) that jurisdictional act can be attributed to BCV, BC2, and Integra under the so-called "conspiracy theory" of personal jurisdiction recognized by the Delaware Supreme Court

in *Istituto Bancario Italiano SpA v. Hunter Engineering Co.*[12] According to Plaintiffs, all Defendants participated in an elaborate conspiracy furthered, in part, by the formal dissolution of Cubit. Because conspirators' actions are attributable to their confederates, Plaintiffs maintain that the Director Defendants' jurisdictional act of filing a certificate of dissolution in Delaware may be imputed to the Moving Defendants and is sufficient for the exercise of personal jurisdiction over them in Delaware consistent with constitutional due process.[13]

The Moving Defendants do not contest that a proper exercise of jurisdiction under the conspiracy theory comports with constitutional due process, but they deny that any such conspiracy exists in this case. Specifically, the Moving Defendants argue that there is no evidence that they conspired or participated in a scheme to dissolve Cubit.[14] Furthermore, although the Director Defendants held various senior positions and interests in the Moving Defendants, they assert that Plaintiffs cannot identify any conduct by the

---

12 449 A.2d 210 (Del. 1982) [hereinafter *Istituto Bancario*].

13 In the case of Integra, Plaintiffs argue in the alternative that the "alter ego" and "agency" theories of personal jurisdiction equally warrant denying Integra's Jurisdiction Motion. Because I ultimately conclude that the conspiracy theory of personal jurisdiction is sufficient to find Integra amenable to suit in Delaware, I do not reach Plaintiffs' alternative theories of personal jurisdiction. To the extent Integra's 12(b)(6) Motion seeks dismissal of Count VIII on similar grounds, however, I address the parties' arguments in Section III, *infra*.

14 Additionally, Integra asserts that, in its case, such a conspiracy or participation is impossible under the circumstances because dissolution requires approval from a corporation's directors and stockholders, *see* 8 *Del. C.* § 275(a)-(c), and Integra could not have caused any of Cubit's directors or stockholders to vote in favor of dissolution. *See, e.g.*, Tr. 33-34; Integra's Reply Br. 9-11.

Moving Defendants themselves—*i.e.*, by BCV, BC2, or Integra as legally distinct entities—showing agreement or participation in a conspiracy separate and apart from the actions the Director Defendants took on behalf of Cubit alone.

B. Standard Under Rule 12(b)(2)

On a motion to dismiss under Court of Chancery Rule 12(b)(2), the plaintiff bears the burden to show the basis for the Court's exercise of personal jurisdiction over the defendant.[15] To do so, the plaintiff must demonstrate: "(1) a statutory basis for service of process; and (2) the requisite 'minimum contacts' with the forum to satisfy constitutional due process."[16] When considering such motions, "the Court is not limited to the pleadings"[17]; rather, it "may consider the pleadings, affidavits, and any discovery of record. If, as here, no evidentiary hearing has been held, plaintiffs need only make a *prima facie* showing of personal jurisdiction and 'the record is construed in the light most favorable to the plaintiff.'"[18]

---

15 *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003).

16 *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *6 (Del. Ch. May 7, 2008), *aff'd*, 984 A.2d 124 (Del. 2009) (TABLE).

17 *Matthew v. Laudamiel*, 2012 WL 605589, at *6 (Del. Ch. Feb. 21, 2012) [hereinafter *Laudamiel*].

18 *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007) (footnotes omitted) (quoting *Cornerstone Techs., LLC v. Conrad*, 2003 WL 1787959, at *3 (Del. Ch. Mar. 31, 2003)).

C. Statutory Basis

Regarding the "statutory basis" prong of personal jurisdiction, the Delaware Long Arm Statute provides, in pertinent part, that "a court may exercise personal jurisdiction over any nonresident . . . who in person or through an agent . . . [t]ransacts any business . . . in the State."[19] "[T]he filing of a corporate instrument in Delaware that facilitated transactions under challenge in litigation in this court . . . [is] sufficient to constitute the transaction of business under § 3104(c)(1)."[20] Here, Defendants Lutz, McIlwraith, and Rosenberg, in their capacities as directors of Cubit, caused the Company to file a certificate of dissolution with the Secretary of State. The parties agree that this filing represents a transaction of business for purposes of long arm jurisdiction.[21] The parties dispute, however, whether the Director Defendants' actions can be attributed to the Moving Defendants consistent with constitutional due process.

D. Constitutional Due Process

Because the Long Arm Statute speaks in terms of acts committed "in person *or through an agent*,"[22] and because "conspirators are considered agents for jurisdictional

---

19 10 *Del. C.* § 3104(c)(1).

20 *Sample v. Morgan*, 935 A.2d 1046, 1057 (Del. Ch. 2007).

21 "[T]he Delaware-related conduct" from which long arm jurisdiction arises also "must form a source of the claim." *Id.* at 1057 n.43. Here, the nexus between effecting Cubit's dissolution, which is a source of the cause of action, and the alleged scheme to evade Cubit's creditors, "make[s] service under the single act provisions of the long-arm statute unproblematic." *Id.*

22 10 *Del. C.* § 3104(c) (emphasis added).

purposes,"[23] "a foreign defendant may be subject to jurisdiction in Delaware, despite lacking direct forum contacts of its own, where it acts as part of a scheme in which others engaged in Delaware-directed activity."[24] Under the five-part test established in *Istituto Bancario*, a plaintiff asserting a conspiracy theory of jurisdiction must make a factual showing that:

> (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.[25]

"This is a strict test with a narrow scope, and, as a result, factual proof of each enumerated element is required."[26] For organizational purposes, the following subsections address whether Plaintiffs have satisfied the *Istituto Bancario* test as to Integra, BC2, and BCV in that order.

---

23 *Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd.*, 611 A.2d 476, 481 (Del. 1992).

24 *Hamilton P'rs, L.P. v. Englard*, 11 A.3d 1180, 1197 (Del. Ch. 2010).

25 *Istituto Bancario*, 449 A.2d at 225.

26 *Laudamiel*, 2012 WL 605589, at *7.

1. Conspiracy jurisdiction exists over Integra

a. *Istituto Bancario* elements 1-2

"Although *Istituto Bancario* literally speaks in terms of a 'conspiracy to defraud,'" it now is well-settled that "a claim for aiding and abetting a breach of fiduciary duty satisfies the first and second elements of the *Istituto Bancario* test."[27] Count III of the Complaint advances a claim against Integra for aiding and abetting the Director Defendants' alleged breaches of fiduciary duty. Therefore, "if properly pled," that claim satisfies the first two *Istituto Bancario* elements.[28]

The elements of aiding and abetting a breach of fiduciary duty are: "(1) a fiduciary relationship; (2) a breach of that relationship; (3) that the alleged aider and abettor knowingly participated in the fiduciary's breach of duty; and (4) damages proximately caused by the breach."[29] There is no dispute for purposes of the pending Motions that the Complaint adequately pleads the existence of a fiduciary relationship and Plaintiffs' damages. Integra denies, however, that Plaintiffs have pled a breach of duty against the Director Defendants or that Integra—*i.e.*, the entity itself, as opposed to its directors, Lutz

---

[27] *Hamilton P'rs*, 11 A.3d at 1198 (citing *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 2005 WL 583828, at *7 (Del. Ch. Feb. 4, 2005) and *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 977 (Del. Ch. 2000)); *accord Laudamiel*, 2012 WL 605589, at *7; *Dubroff v. Wren Hldgs.*, 2011 WL 5137175, at *14 (Del. Ch. Oct. 28, 2011); *see also Allied Capital Corp. v. GC–Sun Hldgs., L.P.*, 910 A.2d 1020, 1038 (Del. Ch. 2006) ("in cases involving the internal affairs of corporations, aiding and abetting claims represent a context-specific application of civil conspiracy law").

[28] *Laudamiel*, 2012 WL 605589, at *7.

[29] *Gatz v. Ponsoldt*, 925 A.2d 1265, 1275 (Del. 2007).

and McIlwraith—"knowingly participated" in Lutz, McIlwraith, and Rosenberg's fiduciary breaches in their capacities as directors of Cubit.

Integra's argument that Plaintiffs fail to plead a breach of duty deserves short shrift. When a company is insolvent, giving preferential treatment to insider creditors constitutes a self-interested transaction that may breach a director's duty of loyalty.[30] The Complaint alleges that the Director Defendants "breached their fiduciary duties by unlawfully dissolving Cubit and engaging in a series of self-dealing and interested transactions . . . to the detriment of Cubit's creditors, including [P]laintiffs."[31] That allegation is supported by the specific fact, among others, that Cubit made preferential payments to Integra under the 2005 Management Services Agreement while insolvent and when Defendants feared that judgment creditors like Plaintiffs would have priority over Integra's accounts receivable.[32] These allegations state a claim for breach of fiduciary duty.

"'Knowing participation in a . . . fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach.'"[33] Integra argues that the Complaint lacks nonconclusory allegations that it knowingly

---

30 *Prod. Res. Gp., L.L.C. v. NCT Gp., Inc.*, 863 A.2d 772, 791-92 & n.62 (Del. Ch. 2004).

31 Compl. ¶ 97.

32 *Id.* ¶ 37.

33 *Gatz*, 925 A.2d at 1276 (alteration in original) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001)).

participated in Cubit's dissolution, a formal action that, in any event, only Cubit's directors and stockholders had the authority to effect. That argument, however, is a straw man. As just indicated, the alleged breach of duty in this case includes not only the formal and final act of filing a certificate of dissolution, but also "unlawfully dissolving Cubit *and engaging in a series of self-dealing and interested transactions*."[34] Thus, the flaw in Integra's argument is that it mischaracterizes the alleged wrong as a conspiracy to dissolve Cubit. Although dissolution of the Company was a substantial component of the Director Defendants' alleged scheme to effect self-dealing transactions, the "conduct advocated or assisted constitut[ing the] breach" was the preferential treatment Cubit gave to a subset of its creditors for self-interested reasons at a time when the Company was insolvent and, ultimately, planning to dissolve. Hence, Plaintiffs only need to plead facts permitting an inference that Integra knowingly advocated or assisted the Director Defendants in giving Integra the alleged preferential treatment.

Delaware courts have observed in the context of merger negotiations that, while the acquirer's mere receipt of preferential terms does not demonstrate participation in the target board's breach of duty, "the terms of the negotiated transaction themselves [may be] so suspect as to permit, if proven, an inference of knowledge of an intended breach of trust."[35] Here, the alleged breach of duty does not involve a negotiated merger, but

---

34 Compl. ¶ 97 (emphasis added).

35 *Greenfield v. Tele-Commc'ns*, 1989 WL 48738, at *3 (Del. Ch. May 10, 1989); *accord Malpiede*, 780 A.2d at 1097 ("a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and

disloyal preferential treatment to certain creditors. By analogous reasoning, however, the extent of preferential treatment to insider creditors also may be so suspect or egregious as to permit an inference of knowing participation in the breach of duty.

The Complaint makes sufficient allegations to that effect. Plaintiffs allege, for example, that Cubit did not make payments under the 2005 Management Services Agreement "for a period of almost three years."[36] That allegation is corroborated by the limited evidentiary record developed to date: of the management fees Cubit did pay to Integra, the majority appears to have been paid after Cubit learned in July 2009 that Hospitalists was threatening litigation in Superior Court.[37] Although Integra was entitled

---

abetting, whereas a bidder may be liable to the target's stockholders if the bidder attempts to create or exploit conflicts of interest in the board" (footnote omitted)); *In re Answers Corp. S'holder Litig.*, 2012 WL 1253072, at *9-10 (Del. Ch. Apr. 11, 2012) (holding allegations that acquirer received favorable, non-public information and pushed the board into an expedited market check before the market price reflected that information were sufficient to state a claim for aiding and abetting under Rule 12(b)(6)).

[36] Compl. ¶ 37.

[37] Lutz testified at her deposition that Cubit owed Integra approximately $1.1 million as of March 2009, but Integra ultimately had to write down only approximately $700,000 of unpaid invoices when Cubit dissolved in late 2010. Lutz Dep. 139-40, 144-45. That is, from March 2009 to October 2010, Cubit effectively paid all of Integra's invoices as they were incurred and made good on an additional $400,000 or so of earlier invoices. Lutz also testified that Cubit ultimately paid Integra approximately $1.4 million of the approximately $2.1 million in management fees that Integra billed over the five-year life of the Management Services Agreement, from December 2005 to Cubit's dissolution in October 2010, *id.* at 131, in the following stages: (1) initially, Cubit made no payments, *id.* at 141; (2) by the end of 2008 at the latest (*i.e.*, still before, but only by a matter of months, Hospitalists threatened litigation in July 2009), Cubit began making payments if it could and attempting to keep its accounts payable to Integra from

to these amounts under the Management Services Agreement, it was an inside creditor receiving 100 cents on the dollar when the Company faced financial uncertainty and other creditors were denied similar treatment. Furthermore, the Complaint alleges that, in March 2010, "Rosenberg . . . instructed Integra Group to start formally documenting payables from Cubit to Integra Group as a secured note rather than an unsecured payable so that Integra Group could claim priority over any potential judgment creditors of Cubit."[38] Perhaps it would be more accurate to characterize the email upon which this allegation is based as a "suggestion," rather than an "instruction." In either case, however, Rosenberg's explicit reasoning for the suggestion was so that, "*if anything happens with these lawsuits*, [Integra] will still have its money on the top of the heap."[39] In June 2010, Rosenberg also suggested that Cubit take down its website because, "[i]f we go the winddown path, we're going to want it to be as hard as possible for folks to track any of us down, make connections to Integra Group, etc."[40] At all relevant times,

---

growing, *id.* at 142-44; and (3) by March 2010 at the latest, Cubit paid Integra's monthly invoices in full as they became due, *id.* at 174. Although still under-developed and murky, the record at this stage of the proceedings permits a reasonable inference that Cubit paid the majority of the $1.4 million in management fees to Integra after Hospitalists threatened litigation in July 2009. Moreover, to the extent the record is susceptible to competing inferences in this regard, Plaintiffs are entitled to have those inferences drawn in their favor in this procedural setting. *See Ryan v. Gifford*, 935 A.2d at 265.

[38] Compl. ¶ 37.

[39] Brooks Aff. Ex. 6 (emphasis added).

[40] Brooks Aff. Ex. 13.

Rosenberg was a director of Cubit but not Integra, and Lutz, a director of Cubit and Integra, was carbon copied on both emails just mentioned.

The brash attitude reflected in Rosenberg's two emails about managing Cubit's affairs solely and explicitly to undermine Plaintiffs' ability to recover on their then-still-prospective judgments and to advantage its affiliate Integra is sufficiently suspicious—indeed, even egregious—to permit a reasonable inference that Integra knowingly participated in the preferential treatment it was offered and received. Integra also knew that Cubit was insolvent; both of its directors served on Cubit's board and Integra provided day-to-day management services to the Company.[41] Thus, Plaintiffs have alleged that Integra acted with the knowledge that the preferential treatment it advocated or assisted would violate the Director Defendants' fiduciary duties to Cubit under the circumstances. By doing so, and despite the fact that Integra did not recoup all the management fees to which it was due under its contract with Cubit, Plaintiffs adequately have pled a claim for aiding and abetting against Integra. Therefore, Plaintiffs satisfy the first two *Istituto Bancario* elements.

---

[41] *See, e.g., In re Am. Int'l Gp., Inc. Consol. Deriv. Litig.*, 976 A.2d 872, 883 n.25 (Del. Ch. 2009) ("Under basic agency principles, [a corporation] is charged with the knowledge of its agents."), *aff'd sub nom. Teachers' Ret. Sys. of La. v. Gen. Re Corp.*, 11 A.3d 228 (Del. 2010) (TABLE).

b. *Istituto Bancario* elements 3-5

The third *Istituto Bancario* element is that "a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state."[42] "[T]he filing of a corporate instrument . . . is considered an act occurring in Delaware."[43] Here, Cubit filed a certificate of dissolution with the Secretary of State. Moreover, that filing was a substantial act in furtherance of the Director Defendants' allegedly disloyal scheme to give preferential treatment to Integra. Of course, a corporation need not formally dissolve to effect a disloyal transaction. Nevertheless, the illicit scheme alleged by Plaintiffs involved both siphoning Cubit's assets and then causing the Company to dissolve in October 2010. Actually filing the certificate of dissolution, therefore, was an important action to further the conspiracy as planned. Lastly, as Plaintiffs' counsel emphasized at argument, Hospitalists and MKC "are not only Delaware entities, but [also] businesses in Delaware" with "physical bricks-and-mortar businesses in the state."[44] To the extent that Plaintiffs accuse Defendants of participating in an "elaborate scheme" to avoid Plaintiffs' judgments, the alleged scheme itself arguably was designed to have, and did have, a substantial effect in Delaware.

"The fourth and fifth *Istituto Bancario* elements are that 'the defendant knew or had reason to know of the act [or effect] in the forum state' and that 'the act in[, or effect

---

42 449 A.2d at 225.

43 *Laudamiel*, 2012 WL 605589, at *8.

44 Tr. 59.

on,] the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.'"[45] Both elements are satisfied here. Integra is charged with the knowledge of its directors,[46] Lutz and McIlwraith, both of whom authorized Cubit's dissolution in their alternate capacities as Cubit directors. Moreover, the act of filing a certificate of dissolution in Delaware is a direct and foreseeable result of conspiring to dissolve a Delaware corporation, such as Cubit was. Similarly, it is reasonable to infer that Integra, through Lutz and McIlwraith, knew of the preferential payments to Integra and that, as a result of those payments, Cubit would be unable to afford comparable treatment to Plaintiffs, even though they were (or imminently would be) judgment creditors of the Company.

"In *Istituto Bancario*, the Delaware Supreme Court explained that when the *Istituto Bancario* factors are met 'a defendant . . . has so voluntarily participated in a conspiracy with knowledge of [his] acts in . . . the forum state [that he] can be said to have purposefully availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws.'"[47] Accordingly,

---

45 *Hamilton P'rs*, 11 A.3d at 1198 (quoting *Istituto Bancario*, 449 A.2d at 225).

46 *See, e.g., In re Am. Int'l Gp.*, 976 A.2d at 883 n.25.

47 *Dubroff*, 2011 WL 5137175, at *14 (alterations in original) (quoting *Istituto Bancario*, 449 A.2d at 225).

because Plaintiffs have satisfied the *Istituto Bancario* test as to Integra, this Court's exercise of personal jurisdiction over it also comports with constitutional due process.[48]

2. Conspiracy jurisdiction does not exist over BC2

In the case of Integra, I found that it "knowingly participated" in the Director Defendants' alleged breaches of duty—ultimately satisfying the *Istituto Bancario* test—because (1) an interlocking directorate necessarily would have known of the Director Defendants' breaches of duty and (2) Integra, an inside creditor, received priority treatment for the explicit purpose of limiting other creditors' recovery. That reasoning is inapposite to Defendant BC2, however. First, none of the Director Defendants served in a board-level position at BC2, thus limiting this Court's ability to impute the Director Defendants' knowledge to a distinct entity. But, even assuming each entity in the Blue Chip corporate family shared actual knowledge of the Director Defendants' machinations, there still is no nonconclusory allegation or evidence that BC2 actually participated in wrongdoing.

Plaintiffs assert that BC2 did participate in wrongdoing when, on August 2, 2010—less than two months before Cubit's stockholders authorized the Company to dissolve on September 21—BC2 redeemed its Integra stock for $2.5 million.[49]

---

[48] *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (holding minimum contacts satisfied where "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws").

[49] The August 2 closing date is not specifically alleged in the Complaint, but inferred from a contemporaneous email chain circulating executed signature pages to what

Furthermore, on December 8, 2009—*i.e.*, the day after Hospitalists filed its initial complaint against Cubit in Superior Court—McIlwraith circulated a detailed, four-page draft term sheet for the redemption transaction.[50] In Plaintiffs' view, Defendants must have "fear[ed] that [Integra] could be held liable for judgments against Cubit," and so, once Cubit fraudulently transferred its assets to Integra, Defendants engaged in a second-order transfer of assets up to BC2, Integra's controlling shareholder, to further distance Cubit's assets from creditors.[51]

As McIlwrath testified, however, BC2 was formed in 1997 as a ten-year fund with three one-year extensions.[52] By August 2010, therefore, BC2 was in the final months of its maximum allowed existence and, as a matter of ordinary practice, was liquidating its investments. Indeed, McIlwrath testified that discussions to redeem the Integra stock had begun sometime in 2009 at the latest.[53] Plaintiffs have not sought to rebut this deposition testimony, nor have they argued—other than by one conclusory allegation unsupported

---

appears to be the documentation for the relevant transaction. Brooks Aff. Ex. 21. As alleged in the Complaint, however, of the total redemption price, "$1,500,000 [was] payable at closing and two additional payments of $500,000 [were] to be paid later." Compl. ¶ 54.

50 Brooks Aff. Ex. 3.

51 Compl. ¶ 54.

52 McIlwrath Dep. 205.

53 *Id.* at 204 ("A. . . . Discussion started months and months and, frankly, it could have started a year before that. Q. It started when? A. I can't tell you exactly when it started. I know it started well before April of 2010 . . . .").

by specific facts—that the redemption price exceeded the redeemed stock's value.[54] There also is no evidence McIlwraith drafted and circulated the term sheet in response to the Hospitalists litigation commenced the day before, which—based on the level of detail of the term sheet—appears unlikely in any case. That is, the only even arguably suspicious aspect of this transaction is its temporal proximity to Cubit's dissolution.

Thus, the relevant allegations and evidence comprise, on the one hand, Plaintiffs' unsupported and conclusory allegation that BC2 and Integra must have effected the redemption "with the actual intent to hinder, delay or defraud Cubit's creditors"[55] and, on the other hand, Defendants' account that the redemption related to the inevitable liquidation of an entirely unrelated entity at an aboveboard price, discussion about which preceded those regarding Cubit's dissolution by as much as one year. Even construing the pleadings and record in the light most favorable to Plaintiffs, something more than a single conclusory allegation is necessary to permit a reasonable inference that BC2 affirmatively participated in the Director Defendants' breaches of duty. Because nothing more was pled, the aiding and abetting claim against BC2 is not sufficient to support exerting personal jurisdiction over BC2 under a conspiracy theory.

Alternatively, Plaintiffs could satisfy the first two *Istituto Bancario* elements consistent with the test's literal terms by pleading a claim for civil conspiracy. The

---

[54] Compl. ¶ 104 (Integra "made this transfer without receiving a reasonably equivalent value in exchange.").

[55] *Id.* ¶ 103.

elements of civil conspiracy are: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds between or among such persons relating to the object or a course of action; (4) one or more unlawful acts; and (5) damages as a proximate result thereof."[56] Such a claim against BC2 stalls, however, at element (3), a meeting of the minds between BC2 and the other alleged conspirators. Although Plaintiffs "need not allege 'the existence of an explicit agreement [because] a conspiracy can be inferred from the pled behavior of the alleged conspirators,'"[57] I cannot infer that BC2 agreed to conspire with the other Defendants from the mere allegation that it unwound its investment in Integra under mostly innocent circumstances. The only suspicious aspect of the redemption is its temporal proximity to Cubit's dissolution, an aspect explained by uncontested evidence that BC2 itself was liquidating for unrelated and legitimate reasons during the same period. Consequently, the pleadings, depositions, and other discovery submitted as part of this Rule 12(b)(2) motion belie an inference of a civil conspiracy that included BC2.

Because Plaintiffs' pleadings fail to state a claim of either aiding and abetting or civil conspiracy against BC2, a nonresident defendant, Plaintiffs likewise fail to satisfy the first two elements of the *Istituto Bancario* test. As a result, the conspiracy theory of jurisdiction does not permit this Court to exercise personal jurisdiction over BC2

---

56 *Laudamiel*, 2012 WL 605589, at *8.

57 *Id.* (quoting *In re Am. Int'l Gp.*, 976 A.2d at 806).

consistent with constitutional due process. Because Plaintiffs advanced no other basis for jurisdiction over BC2, I grant its motion to dismiss under Rule 12(b)(2).

3. Conspiracy jurisdiction does not exist over BCV

Plaintiffs' basis for personal jurisdiction over BCV fails for the same reason: the absence of nonconclusory allegations or evidence that BCV conspired or knowingly participated in an unlawful scheme to defraud Cubit's creditors. By way of comparison, both Integra and BC4 were counterparties to transactions allegedly constituting fraudulent transfers. Similarly, BC2 negotiated and received consideration in a transaction that allegedly constituted a fraudulent transfer, but—as discussed above—that transaction ultimately appears unrelated to the wrongdoing alleged in this case. Except for conclusory allegations, however, there is no indication that BCV participated in any of the events that gave rise to Plaintiffs' various claims. It was not a counterparty to any of the transactions at issue and did not negotiate any such transaction on its affiliates' behalf.[58] There also is no evidence or specific allegation that BCV directed the management of Cubit's affairs in any meaningful way.

---

[58] Plaintiffs do argue that three email chains, all involving Rosenberg, demonstrate BCV's involvement in Cubit's efforts in early and mid-2010 to sell itself, which occurred before a decision was made to dissolve. Pls.' Ans. Br. 10 (citing Brooks Aff. Exs. 10-12). Because Rosenberg was a director of both BCV and Cubit, however, his participation in these discussions does not necessarily mean that he was acting on behalf of BCV at the time. Nevertheless, in one instance, Rosenberg specifically answered a question about whether a stock-for-stock transaction would be "ok for BCVC?" Brooks Aff. Ex. 12. In any event, Defendants ultimately abandoned their attempts to sell Cubit, opting instead for dissolution. Moreover, had a sale occurred, BCV still would have protected its investment and Plaintiffs presumably would have retained their claims against the

The only specific allegations supporting Plaintiffs' conspiracy theory of jurisdiction are that two of the alleged primary wrongdoers, McIlwraith and Rosenberg, hold management-level positions at BCV and that BCV benefited—derivatively through its direct investments in BC2 and BC4 and through its indirect interest in Integra—from the allegedly fraudulent transfers. Plaintiffs essentially plead the circumstantial theory that BCV must have concocted the scheme because two of its agents had full knowledge of all relevant events and BCV indirectly benefited. That theory, however, conflates imputing McIlwraith and Rosenberg's knowledge to BCV with imputing their conduct on behalf of Cubit to BCV, which would undermine the touchstone principle of separate legal existence. It would posit a per se rule that a controller of a controller of a Delaware corporation necessarily submits to this Court's jurisdiction so long as it knew of the Delaware entity's conduct. Stated differently, it would transform the conspiracy theory of personal jurisdiction under *Istituto Bancario* into a substantially broader enterprise theory of personal jurisdiction.[59] More than mere knowledge, however, is required to

---

Company. That is, only the dissolution and preceding asset transfers are alleged to have harmed Plaintiffs. Thus, BCV's arguable participation in an aborted, lawful transaction does not support a reasonable inference that BCV participated in a conspiracy to harm Plaintiffs.

[59] *See Red Sail Easter Ltd. P'rs, L.P. v. Radio City Music Hall Prods., Inc.*, 1991 WL 129174, at *4 (Del. Ch. July 10, 1991) ("A theory of personal jurisdiction based upon an alleged conspiracy between a foreign corporation and its . . . Delaware subsidiary is very close to being merely another way to assert that a controlling shareholder may always be sued in Delaware on any claim made against the subsidiary. . . . [A]n attempt to apply a conspiracy theory to parent-subsidiary corporations in order to extend the reach of Section 3104 raises particular concerns."). *Cf. AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*,

subject a foreign corporation to the personal jurisdiction of this Court. Rather, unless Plaintiffs seek to predicate personal jurisdiction on a veil-piercing theory,[60] they must identify some *action* by BCV, the entity, from which the Court can infer the requisite knowing participation or conspiratorial agreement.[61]

Plaintiffs and BCV dedicated much of their briefing to whether the facts of this case are more similar to those of *In re Transamerica Airlines, Inc.*[62] or of *Allied Capital Corp. v. GC-Sun Holdings, L.P.*[63] In my view, however, the facts alleged here are not similar to either of those cases, both of which involved controlling entities that took affirmative steps for the alleged purpose of evading their subsidiaries' creditors. In *Transamerica*, the parent caused its subsidiary to dissolve and transfer all of the

---

871 A.2d 428, 439 (Del. 2005) ("[T]he ownership of a Delaware subsidiary does not, without more, amount to the transaction of business under Delaware's Long Arm Statute."); *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 975 (Del. Ch. 2000) (Steele, V.C., by designation) ("[S]tock ownership of a Delaware corporation is not, without more, a sufficient contact on which to base personal jurisdiction.").

60 As previously noted, Plaintiffs asserted their veil-piercing theory only as to Integra, not to BCV. *See supra* note 13.

61 *See Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *16 n.90 (Del. Ch. May 18, 2009) (dismissing aiding and abetting claim where plaintiff failed to prove the defendant had "any connection to the challenged behavior beyond her status as majority stockholder" or "that she personally received any ill-gotten gain, other than indirectly as an owner of [the company]"), *aff'd*, 988 A.2d 938 (Del. 2010) (TABLE); *In re Am. Int'l Gp.*, 976 A.2d at 806 ("a conspiracy can be inferred from the pled *behavior* of the alleged conspirators" (emphasis added)).

62 2006 WL 587846 (Del. Ch. Feb. 28, 2006) [hereinafter *Transamerica I*].

63 910 A.2d 1020 (Del. Ch. 2006).

subsidiary's assets directly to the parent.[64] In *Allied Capital*, various subsidiaries transferred assets between themselves in a series of transactions that literally complied with a negative covenant in one subsidiary's debt obligations, but effectively rendered that subsidiary unable to repay the debt in question. Although the questionable transactions were part of a complex reorganization, the essential step necessary to ensure that the restructuring "starved" only the indebted subsidiary was the creation of a new subsidiary that was insinuated into the middle of the extant capital structure.[65] The *Allied Capital* Court inferred that the parent had caused the subsidiaries to undertake the complex restructuring because the parent itself created the critical, new subsidiary.[66]

Thus, notwithstanding their differing outcomes on the issue of conspiracy, *Transamerica* and *Allied Capital* share the common fact pattern that the parent alleged to have conspired with and aided and abetted its subsidiary had done more than merely preside atop the corporate structure while wrongdoing ensued. In each case, the parent

---

64 2006 WL 587846, at *6. Although not discussed in *Transamerica I*, the parent entity in that case *both* received all of the subsidiary's assets *and* assumed all of its liabilities. *In re Transamerica Airlines, Inc.*, 2007 WL 1555734, at *19 (Del. Ch. May 25, 2007) [hereinafter *Transamerica II*]. For that reason alone—*i.e.*, because the parent had assumed the dissolved subsidiary's liabilities—the Court in *Transamerica II* held the parent liable for the outstanding judgments in favor of the plaintiff against its subsidiary. *Id.* at *20. Therefore, the precise question in *Transamerica I*, namely, whether it would be futile under the circumstances to allow the plaintiff to amend his complaint to assert an alternative claim for civil conspiracy, did not involve a potentially case-dispositive issue.

65 910 A.2d at 1027-28.

66 *Id.* at 1039-40.

itself had taken some affirmative action in its own name to further the alleged scheme. Here, by contrast, Plaintiffs are attempting to hold BCV accountable for failing to instruct its direct affiliate to prevent the board of its indirect subsidiary from committing the wrongful behavior. This contrast highlights the importance of identifying specific behavior from which a court can infer knowing participation or conspiratorial agreement.

Accordingly, it is not necessary here to attempt to delineate more precisely than our existing precedents when a parent may be held secondarily liable for its affiliates or subsidiaries' actions.[67] Rather, I find that Plaintiffs have failed to show knowing participation in any breach of duty or a meeting of the minds regarding a conspiracy involving BCV. Therefore, Plaintiffs have failed to demonstrate a basis for personal jurisdiction over BCV under a conspiracy theory.

Lastly, I note that Rule 15(aaa) does not preclude the filing of an amended pleading when a party is dismissed for lack of personal jurisdiction, only when dismissal

---

[67] To the extent BCV attempts to rely on *Transamerica* as supporting a per se rule that business entities cannot conspire with their affiliates or subsidiaries, I do not read *Transamerica* so broadly. Furthermore, BCV acknowledged at argument that a controller can conspire with its affiliates or subsidiaries under Delaware law where it does not "share common economic interests" with the controlled entity, *Allied Capital*, 910 A.2d at 1042, and "steps out of [its] corporate role [to] act[] pursuant to personal motives," *Transamerica*, 2006 WL 587846, at *6. *See, e.g.*, Tr. 21-22. Here, Plaintiffs did argue that BCV had its own reason to "impoverish the subsidiary at the expense of the subsidiary's other constituencies." *Allied Capital*, 910 A.2d at 1042. Specifically, that reason was to ensure that whatever assets Cubit possessed in its final months stayed within the Blue Chip corporate family and were not distributed in dissolution to outsiders such as Plaintiffs. As discussed above, however, this motive on its own is insufficient to support an inference that BCV affirmatively acted or conspired to harm Cubit.

is under Rules 12(b)(6) or 23.1. Hence, if during discovery Plaintiffs uncover additional information to support the exercise of personal jurisdiction over BCV or BC2, they may move for leave to amend the Complaint under Rule 15(a). For the reasons stated above, however, the Court will dismiss BCV and BC2 from this action without prejudice under Rule 12(b)(2) for lack of personal jurisdiction, but deny Integra's Jurisdiction Motion.

III. INTEGRA'S 12(b)(6) MOTION

A. Parties' Contentions

Having denied Integra's Jurisdiction Motion, I now turn to its alternative motion to dismiss under Rule 12(b)(6). In that regard, four of the Complaint's eight counts assert claims against Integra: Count III for aiding and abetting the Director Defendants' breach of duty; Count IV for fraudulent transfer under 6 *Del. C.* § 1304 relating to BC2's $2.5 million redemption of its Integra stock; Count VII for civil conspiracy; and Count VIII for a declaratory judgment that Integra is jointly and severally liable for Cubit's obligations under either a veil-piercing or agency theory.

Integra contends that Counts III and VII, the aiding and abetting and civil conspiracy claims, fail to state a claim for the same reasons that it moved to dismiss for lack of personal jurisdiction. Moreover, it argues that the civil conspiracy claim should be dismissed as redundant of the aiding and abetting claim. Regarding Count IV for fraudulent transfer, Integra argues that Plaintiffs failed to plead the element of intent under either § 1304(a)(1) or (2) with the requisite degree of specificity. Finally, as to Count VIII, Integra maintains that Plaintiffs' allegations are insufficient to support a reasonable inference that Cubit lacked an independent identity or acted as an agent of

Integra, as opposed to Integra's acting as Cubit's agent under the Management Services Agreement. For their part, Plaintiffs likewise stand on their personal jurisdiction arguments to support their claims for aiding and abetting, civil conspiracy, and declaratory relief premised on alter ego or agency liability. As to the fraudulent transfer claim, Plaintiffs defend the adequacy of their pleadings to establish each element of the statutory wrong.

B. Standard Under Rule 12(b)(6)

Pursuant to Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief. "The pleading standards governing the motion to dismiss stage of a proceeding in Delaware, however, are minimal."[68] Thus, when considering a Rule 12(b)(6) motion, a court must

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[69]

---

68 *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

69 *Id.*

The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[70] Additionally, when deciding a motion under Rule 12(b)(6), a court may consider documents attached to or incorporated by reference in the complaint, matters "integral" to the complaint, and facts of which a court may take judicial notice at any time (*e.g.*, corporate instruments filed with the Secretary of State).[71]

C. Count III: Aiding and Abetting

In Section II.D.1.a, *supra*, regarding Integra's Jurisdiction Motion, I concluded that Plaintiffs sufficiently pled a claim against Integra for aiding and abetting the Director Defendants' breaches of fiduciary duty. That same reasoning applies here in the context of its motion to dismiss for failure to state a claim.[72] Therefore, I deny Integra's 12(b)(6) Motion as to Count III of the Complaint.

---

70 *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

71 *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995).

72 In three instances, the analysis in Section II.D.1.a, *supra*, relied on evidence outside the pleadings. *See supra* notes 37, 39-40. Disregarding that outside evidence here to account for the change in procedural posture from a Rule 12(b)(2) to 12(b)(6) motion does not affect my earlier reasoning. In the first instance, I construed disputed evidence in Plaintiffs' favor; hence, excluding that evidence altogether does not benefit Integra. In the second and third instances, I reviewed the original correspondence on which two particular allegations of the Complaint apparently were based. Specifically, I characterized Rosenberg's emails as "suggestions," rather than "instructions," and gave some weight to the apparent fact (based on the record as it currently stands) that Cubit ultimately did not book its management fees to Integra as secured payments. In the context of Integra's 12(b)(6) Motion, however, I must accept the truth of those allegations,

D. Count IV: Fraudulent Transfer Under 6 *Del. C.* § 1304

Integra maintains that Plaintiffs pled only conclusory allegations to support their claim that BC2's redemption of its Integra stock constitutes a fraudulent transfer. The Court agrees. Section 1304(a) of the Delaware Uniform Fraudulent Transfer Act provides, in full, as follows:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> b. Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Paragraphs 103-104 of the Complaint essentially parrot the statutory text. They read as follows:

> 103. [Integra] made this transfer [*i.e.*, payment of the redemption price to BC2] with the actual intent to hinder,

---

which does not strengthen Integra's argument. Finally, in all other respects, the earlier analysis relied exclusively on the well pled allegations of the Complaint together with its attached exhibits.

> delay or defraud Cubit's creditors, including [Plaintiffs], and to the benefit of the Blue Chip Defendants.
>
> 104. [Integra] made this transfer without receiving a reasonably equivalent value in exchange for the transfer or obligation and (a) while it was about to engage in a business or a transaction for which the remaining assets of [Integra] were unreasonably small in relation to the business or transaction, or (b) it believed or reasonably should have believed that by doing so, the transaction would prevent [Integra] (and Cubit, its alter ego) from paying its debts as they became due.

Other than these two paragraphs, the Complaint contains no allegations of specific facts that Integra paid the redemption price (1) "with the actual intent to hinder, delay or defraud Cubit's creditors," or (2) "without receiving a reasonably equivalent value in exchange," at a time when Integra either "was about to engage in a business or a transaction" in relation to which Integra's remaining assets were unreasonably small or had an actual or constructive belief that "the transaction would prevent Integra . . . from paying its debts as they became due." In the circumstances of this case, even under Delaware's minimal notice pleading standard, simply reciting the statutory or common law elements of an offense, as Plaintiffs have here, is insufficient to state a claim upon which relief may be granted.[73]

---

[73] *In re Coca-Cola Enters., Inc.*, 2007 WL 3122370, at *4 n.28 (Del. Ch. Oct. 17, 2007) ("If a complaint were held sufficient simply because it restates the legal elements of a particular cause of action, Rule 8(a) would be rendered meaningless. Plaintiffs need not offer prolix tales of abuse belabored by needless details, but plaintiffs must allege *facts* sufficient to show that the legal elements of a claim have been satisfied."), *aff'd sub nom. Int'l Broth. Teamsters v. Coca-Cola Co.*, 954 A.2d 910 (Del. 2008) (TABLE).

Plaintiffs contend that the Court can infer actual intent on the part of Integra under § 1304(a)(1) by reference to the eleven nonexclusive factors § 1304(b) directs courts to consider. Of those factors, however, only one—"[t]he transfer or obligation was to an insider"—clearly supports Plaintiffs' position.[74] The statutory definition of "insider" in this context includes, among other things, "[a] person in control of the debtor."[75] The Complaint alleges that BC2, albeit "collectively" with BCV and BC4, "control[s] and [has] a majority ownership [in] Cubit and Integra . . . ."[76] Assuming the truth of this allegation, Integra's agreement to pay, and payment of at least most of, the $2.5 million redemption price to BC2 involved a transfer of assets to an insider. Nevertheless, any stock redemption by a controlling shareholder of a debtor necessarily satisfies this factor. Therefore, I accord this factor on its own only minimal weight in the circumstances of this case.

All of the remaining factors, meanwhile, either support a lack of intent or are irrelevant to the facts alleged in the Complaint. The additional factors are:

> (2) The debtor retained possession or control of the property transferred after the transfer; (3) The transfer or obligation was disclosed or concealed; (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (5) The transfer was of substantially all the debtor's assets; (6) The debtor absconded; (7) The debtor removed or concealed assets; (8) The value of the

---

74 6 *Del. C.* § 1304(b).

75 6 *Del. C.* § 1301(7)(b)(3).

76 Compl. ¶ 5.

> consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[77]

Taking each factor in turn: (2) Integra did not retain possession of the redemption price it paid to BC2; (3) the redemption was not concealed; (4) although *Cubit* had been threatened with litigation as early as July 2009 (*i.e.*, before the redemption occurred in late 2010), there is no allegation that Plaintiffs threatened suit against *Integra* until the filing of the operative Complaint on November 29, 2011[78]; (5) there is no allegation addressing the extent of Integra's assets; (6)-(7) Integra did not abscond or conceal assets; (8)-(10) as just noted regarding factor five, there are no specific allegations regarding the value of Integra stock, Integra's financial condition before and after the $2.5 million redemption, or other debts Integra incurred; and (11) there is no allegation that BC2 was a lienor. Thus, under the circumstances, the § 1304(b) factors do not

---

[77] 6 *Del. C.* § 1304(b).

[78] Plaintiffs did not argue in support of their fraudulent transfer claim that Integra should have anticipated litigation with Plaintiffs at any earlier time. Even if Plaintiffs had, however, the statutory text speaks of actual threats or commencement of litigation against the debtor specifically (here, Integra). If the Legislature had meant the factor to be if one "reasonably anticipates being sued," I believe they would have said so.

support Plaintiffs' otherwise conclusory allegation that Integra undertook the redemption with the actual intent to harm Cubit's creditors.

Similarly, Plaintiffs have not alleged sufficient facts to state a claim under § 1304(a)(2). As just recounted, the Complaint contains no allegations from which the Court reasonably could infer how the value of Integra stock that was held by BC2 compared to the redemption price. The Complaint does not reference an imminent business or transaction in which Integra was about to engage other than in conclusory fashion in Paragraph 104 quoted above, nor does the Complaint contain any information about the state of Integra's solvency before or after the redemption by BC2.

In sum, based on the dearth of relevant factual allegations, the Complaint fails to state a claim under the Delaware Uniform Fraudulent Transfer Act. Therefore, I dismiss Count IV.

E. Count VII: Civil Conspiracy

Count VII accuses all Defendants of "conspir[ing] to avoid liability to [P]laintiffs and to protect [BCV, BC2, and BC4's] investments in [Integra] and Cubit."[79] Integra moved to dismiss this claim on two independent, but related, grounds. Because "claims for civil conspiracy are sometimes called aiding and abetting,"[80] Integra argues that the civil conspiracy claim must be dismissed (1) for the same reasons Integra argued as to the

---

79 Compl. ¶ 120.

80 *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 2005 WL 583828, at *7 (Del. Ch. Feb. 4, 2005) (internal quotation marks omitted), *aff'd*, 906 A.2d 114 (Del. 2006).

aiding and abetting claim and (2) because a distinct claim for civil conspiracy would be merely redundant or duplicative of the aiding and abetting claim. Having determined that the Complaint, in fact, sufficiently states a claim for aiding and abetting against Integra, I conclude, in turn, that the first of Integra's two arguments for dismissing Count VII is unpersuasive. Additionally, I conclude that Integra's second basis for dismissal of Count VII may be viable at a later stage of the proceedings, but is premature for purposes of a motion to dismiss under Rule 12(b)(6).

Though related, "there is a distinction between civil conspiracy and aiding and abetting . . . ."[81] At times and in certain circumstances, that distinction might be immaterial[82] or amount to "mere hair-splitting."[83] Likewise, a court ultimately might find after trial that "any relief granted for the civil conspiracy claims . . . would be redundant of the relief for aiding and abetting [a breach of fiduciary duty]," and, on that basis, decline to consider one claim or the other.[84] Yet, despite their similarities, the claims are different: "[a]iding and abetting is a cause of action that focuses on the wrongful act of

---

81 *Malpiede v. Townson*, 780 A.2d 1075, 1098 n.82 (Del. 2001).

82 *Id.* ("Although there is a distinction between civil conspiracy and aiding and abetting, we do not find that distinction meaningful here.").

83 *Benihana*, 2005 WL 583828, at *7.

84 *Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *17 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010) (TABLE).

providing assistance, unlike civil conspiracy that focuses on the agreement."[85] Furthermore, as noted *supra*, each cause of action requires a showing of independent elements.[86]

It is conceivable, therefore, that Plaintiffs ultimately might adduce evidence at trial that supports only one claim or the other, but not both. Consequently, it would be inappropriate for the Court to insist that Plaintiffs elect to pursue only one of these claims while the litigation is only at the motion to dismiss stage. Indeed, in *Zirn v. VLI Corp.*, for example, the court denied a motion to dismiss a claim for aiding and abetting corporate directors' alleged conversion of the plaintiff's stock precisely because it already had "found that the plaintiff ha[d] adequately stated a conspiracy to defraud claim against the individual directors."[87] Likewise, in *MCG Capital Corp. v. Maginn*, the court observed that, based on the circumstances of that case and "for all practical purposes, the claims for breach of fiduciary duty and unjust enrichment are redundant."[88] Nevertheless, because "[o]ne can imagine . . . factual circumstances in which the proofs

---

85 *WaveDivision Hldgs., LLC v. Highland Capital Mgmt. L.P.*, 2011 WL 5314507, at *17 (Del. Super. Nov. 2, 2011), *aff'd*, — A.3d —, 2012 WL 2928604 (Del. July 19, 2012).

86 *Compare Gatz v. Ponsoldt*, 925 A.2d 1265, 1275 (Del. 2007), *with Laudamiel*, 2012 WL 605589, at *8. *See supra* notes 29, 56 and accompanying text.

87 1989 WL 79963, at *11 (Del. Ch. July 17, 1989).

88 2010 WL 1782271, at *25 n.147 (Del. Ch. May 5, 2010).

[for the two claims] are not identical," the court held on a motion to dismiss that "there is no bar to bringing both claims."[89]

Analogous reasoning applies here. Although both the aiding and abetting claim and the civil conspiracy claim are predicated on the same "bad faith attempts to avoid Cubit's creditors,"[90] either the necessary proofs or scope of relief conceivably might diverge at a later stage of the proceedings such that the two claims ultimately are not redundant or duplicative. In these circumstances, there is no categorical bar to Plaintiffs' asserting both claims. Therefore, I deny Integra's motion to dismiss Count VII.

F. Count VIII: Declaratory Judgment

Lastly, in Count VIII, Plaintiffs request a judicial declaration "that, for purposes of this action, [Integra] is jointly and severally liable with Cubit for [P]laintiffs' damages."[91] Plaintiffs advance two alternative theories for such a declaration: (1) Integra "is the alter ego of Cubit and Cubit's corporate veil should be pierced"; and (2) "at all relevant times, Cubit was and acted as [Integra's] agent."[92]

Plaintiffs' veil-piercing theory for holding Integra jointly and severally liable must fail.

> The "corporate veil" is a legal term of art that stands for the proposition "that the acts of a corporation are not the actions

---

89 *Id.*

90 Compl. ¶ 122.

91 *Id.* ¶ 124.

92 *Id.* ¶¶ 125-26.

> of its shareholders, so that the shareholders are exempt from liability for the corporation's actions." To "pierce" the corporate veil is to disregard that legal assumption and to go directly after a corporation's shareholders rather than the corporation itself.[93]

Integra, however, is neither a shareholder nor an owner of Cubit. Plaintiffs allege that "[n]on-party Mark Warner, Lutz, and [BC4] were the only shareholders of Cubit."[94] Under no set of circumstances, therefore, could Plaintiffs' factual allegations regarding the relationship between Integra and Cubit entitle them to a judicial declaration that piercing Cubit's corporate veil renders Integra, an entity expressly acknowledged not to be a shareholder, jointly and severally liable for Cubit's actions. Hence, to the extent that Count VIII seeks to hold Integra liable under a veil-piercing theory, the claim is dismissed with prejudice.

Plaintiffs' alternative agency liability theory, however, fares much better. "[A] corporation—completely independent of a second corporation—may assume the role of the second corporation's agent in the course of one or more specific transactions. This restricted agency relationship may develop whether the two separate corporations are

---

93 *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 828-29 (Del. Ch. 2007) (footnote omitted) (quoting *Black's Law Dictionary* 365 (8th ed. 2004)); *accord* 2 Edward P. Welch, Andrew J. Turezyn & Robert S. Saunders, *Folk on the Delaware General Corporation Law* § 329.3, at GCL-XIII-161 (5th ed., rev. vol. 2012) ("In certain instances courts will ignore the presence of a properly constituted corporation to hold the *owners* personally responsible for the acts of the corporation, or for other purposes." (emphasis added)).

94 Compl. ¶ 15.

parent and subsidiary or are completely unrelated outside the limited agency setting."[95] Plaintiffs allege that the Management Services Agreement empowered Integra to direct Cubit's affairs and, relatedly, that Integra "essentially financed Cubit's operations by not requiring [Cubit] to pay [Integra] for services it rendered."[96] Integra stresses that it "acted as Cubit's agent under the Management Services Agreement, and not vice versa,"[97] but "the 'label' that the parties ascribe to their relationship is not controlling."[98] Rather, the existence of an agency relationship may be inferred from, among other things, the principal's day-to-day control over the agent's business.[99] Thus, the appellations conferred by the Management Services Agreement itself are not dispositive of this analysis. Here other facts buttress Plaintiffs' argument, including, importantly, that a majority of Cubit's three directors also were Integra directors. In addition, beyond the Management Services Agreement, Plaintiffs further allege that Integra and Cubit shared the same: "management, officers, and employees"; address and physical office space; phone systems, "hardware, software, and data services"; and a credit card account.[100]

---

95 *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *8-9 (Del. Ch. Aug. 26, 2005) [hereinafter *Alex. Brown*].

96 Compl. ¶ 126.

97 Integra's Reply Br. 20.

98 *WaveDivision Hldgs., LLC v. Highland Capital Mgmt., L.P.*, — A.3d —, 2012 WL 2928604, at *7 (Del. July 19, 2012).

99 *Id.* at *6-7; *accord Billops v. Magness Const. Co.*, 391 A.2d 196, 198 (Del. 1978).

100 Compl. ¶ 36.

Cubit and Integra also allegedly shared payrolls.[101] Collectively, these allegations suffice, at least at the pleading stage, to support a reasonable inference that Integra exercised control over Cubit's day-to-day affairs consistent with a principal-agent relationship.

Once an agency relationship exists, the legal consequences of the agent's actions can be attributed to the principal if, among other possibilities, the agent acts with the principal's actual authority, *i.e.*, "that authority which a principal expressly or implicitly grants to an agent."[102] Assuming Plaintiffs can prove that Cubit, in fact, acted at Integra's express direction regarding any of the challenged transactions in this case, it is conceivable that the legal consequences of Cubit's actions could be attributed to Integra and that, accordingly, Integra would be liable jointly and severally for Plaintiffs' damages. Consequently, to the extent Count VIII seeks to hold Integra liable under an agency theory, I deny Integra's 12(b)(6) Motion.[103]

---

101 *Id.* ¶ 126.

102 *Alex. Brown*, 2005 WL 2130607, at *10. *See also Restatement (Third) of Agency* ch. 2, intro. note (2006) [hereinafter *Restatement*] (There are "three distinct bases on which the common law of agency attributes the legal consequences of one person's action to another person[:] . . . actual authority, apparent authority, and respondeat superior"); *Restatement* § 2.01 ("An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.").

103 In advancing their agency liability theory in Count VIII, Plaintiffs literally pled that "*Cubit's corporate veil should be pierced* because, at all relevant times, Cubit was and acted as [Integra's] agent." Compl. ¶ 126 (emphasis added). For the reasons stated as to Plaintiffs' alter ego theory, piercing Cubit's veil would not

IV. CONCLUSION

For the reasons stated in this Memorandum Opinion, BCV and BC2's Jurisdiction Motions are granted. Accordingly, they are dismissed from this action without prejudice. Integra's Jurisdiction Motion, however, is denied.

Additionally, Integra's Rule 12(b)(6) Motion is denied to the extent I have concluded herein that Counts III, VII, and VIII of the Complaint state claims upon which relief can be granted. Specifically, those claims are that Integra, respectively, aided and abetted the Director Defendants' breaches of fiduciary duty, conspired in the Director Defendants' breaches of fiduciary duty, and could be liable jointly and severally under an agency theory—but not a veil-piercing theory—for Cubit's actions. Count IV for fraudulent transfer, however, is dismissed with prejudice as against Integra.

IT IS SO ORDERED.

---

expose Integra to liability under any reasonably conceivable set of circumstances. Nevertheless, the mere presence of the words "corporate veil" is not fatal to Plaintiffs' claim. Count VIII seeks a declaration that Integra "is jointly and severally liable with Cubit for [P]laintiffs' damages." *Id.* ¶ 124. Plaintiffs seek such relief, "[a]lternatively . . . because, at all relevant times, Cubit was and acted as [Integra's] agent." *Id.* ¶ 126. Therefore, Count VIII provides Integra with adequate notice of Plaintiffs' agency liability claim to survive a motion to dismiss. *See Cent. Mortg. Co.*, 27 A.3d at 536.