

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

AMAYSING TECHNOLOGIES)
CORPORATION,)
)
Plaintiff and)
Counterclaim Defendant,)
)
v.) Civil Action No. 19890-NC
)
CYBERAIR COMMUNICATIONS, INC.,)
)
Defendant and)
Counterclaim Plaintiff,)
)
_____)
)
CYBERAIR COMMUNICATIONS, INC.,)
)
Third-Party Plaintiff,)
)
v.)
)
ROBERT J. MAYS, JR., MED FADEL,)
and RAYMOND B. ATILANO,)
)
Third-Party Defendants.)

MEMORANDUM OPINION

Submitted: November 19, 2004
Decided: March 3, 2005

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Robert J. Mays, Jr., Duncanville, Texas, *Third-Party Defendant Pro Se*

PARSONS, Vice Chancellor.

On September 6, 2002, Amaysing Technologies Corp. (“ATC”) brought an action for breach of contract against CyberAir Communications, Inc. (“CyberAir”). After two rounds of motions to dismiss, CyberAir filed its Answer, Counterclaim, and Third-Party Complaint against Robert Mays, Jr. (“Mays”), Med Fadel (“Fadel”), and Raymond Atilano (“Atilano,” together referred to as the “Third-Party Defendants”) on July 1, 2004. Fadel and Atilano are officers and shareholders of ATC; Mays is alleged to have been an agent of ATC. The Third-Party Complaint alleges securities fraud under 15 U.S.C. § 17j(b) and 6 *Del. C.* § 7303, common law fraud, and equitable fraud.

Pending before the Court is Third-Party Defendants’ motion to dismiss under Chancery Court Rule 12(b)(2) for lack of personal jurisdiction and Rule 12(b)(5) for insufficient service of process. CyberAir asserts that the Third-Party Defendants are subject to jurisdiction in this Court under Delaware’s long-arm statute, 10 *Del. C.* § 3104. Because I find that this Court does not have personal jurisdiction over the Third-Party Defendants, their motion to dismiss is GRANTED.

I. BACKGROUND

Plaintiff, ATC, is a Texas corporation with its principal place of business in Austin, Texas. ATC was created in September of 2000 to license and develop technology relating to holographic displays and optical interfaces for computers. Defendant and Third-Party Plaintiff, CyberAir, is a Delaware corporation with its principal place of business in Gilbert, Arizona.

On August 12, 2001, ATC and CyberAir entered into a Bridge Convertible Loan Agreement (“Bridge Loan Agreement” or “Agreement”). Under the terms of the

Agreement, CyberAir would extend ATC a “bridge” loan of \$1,500,000 for use as “start-up” funding to develop ATC’s technology to a level of performance defined as “Successful Qualified Testing” in the Agreement. The Agreement provided that if Successful Qualified Testing were attained, CyberAir would be entitled to either purchase the technology from ATC or discharge the amount payable on the loan in exchange for an issuance of approximately 4 million shares of ATC stock. CyberAir had the power to choose which option it preferred. If, on the other hand, the technology failed to reach Successful Qualified Testing, CyberAir could choose either the purchase or conversion option, or request repayment of the principal of the loan with interest.

At the same time they entered into the Bridge Loan Agreement, the parties also executed five additional agreements (the “Transaction Documents”) that structured the potential future relationship of the parties.¹ The Transaction Documents were placed in escrow. Only if, among other requirements, Successful Qualified Testing were achieved and CyberAir elected to purchase the technology, would the Transaction Documents be released from escrow and the parties’ rights and obligations under such documents be triggered.²

In its Counterclaim and Third-Party Complaint, CyberAir alleges that various misrepresentations and frauds were committed by ATC and the Third-Party Defendants.

¹ The Transaction Documents include the Stock Purchase Agreement, Sublicense Agreement, Shareholders Agreement, Loan Agreement and Technology Purchase Agreement.

² See Def.’s Countercl. ¶ 37.

Specifically, CyberAir alleges that ATC made statements about patents on the technology, capabilities of the technology, and actions that ATC would take after receiving start-up cash, that CyberAir now believes were false. According to CyberAir, these statements were contained in ATC's business plan and reiterated by Mays, Fadel and Atilano at April and July 2001 meetings in Texas. Relying on these misrepresentations, CyberAir entered into the Bridge Loan Agreement and disbursed \$560,000 to ATC in accordance with the Agreement.

CyberAir alleges that it later determined that ATC's representations were inaccurate and confronted Fadel and Atilano about them. According to CyberAir, Fadel and Atilano admitted that ATC had misrepresented the applications of the technology, but stated that the technology still could be developed under the Bridge Loan Agreement if Mays were replaced and the project were moved to a competent lab. CyberAir claims that it conditioned its future performance under the Bridge Loan Agreement on receipt of a new marketing plan from Fadel and Atilano. CyberAir never received any such plan.

Between August 2001, when the Agreement was signed, and May 2002, ATC and CyberAir executed 13 Addenda to the Agreement granting CyberAir additional time to perform. To date, CyberAir has paid ATC a total of \$560,000. ATC claims that CyberAir's failure to provide complete funding has prevented ATC from developing its technology. On August 6, 2002, ATC demanded payment of the \$940,000 bridge loan balance. When CyberAir did not comply, ATC filed a complaint for specific performance of the Agreement or, in the alternative, money damages.

There is no evidence that any of the Third-Party Defendants had any contacts with the State of Delaware in connection with the negotiation of the Bridge Loan Agreement, Transaction Documents, or Addenda to the Agreement. The only contact that the Third-Party Defendants allegedly had with Delaware related to the filing of this suit.

II. PROCEDURAL HISTORY

ATC brought this action for breach of contract, specific performance and damages against CyberAir on September 6, 2002. On April 21, 2003, CyberAir moved to dismiss ATC's Second Amended Complaint (the "Complaint") for lack of subject matter jurisdiction. On May 21, 2003, ATC moved for summary judgment. On May 28, 2004, this Court denied both motions.³

Thereafter, CyberAir filed its Answer, Counterclaim, and Third-Party Complaint. CyberAir served the Third-Party Defendants pursuant to 10 *Del. C.* § 3104. Pending before the Court is a motion by Third-Party Defendants Fadel and Atilano to dismiss under Rule 12(b)(2) for lack of personal jurisdiction and Rule 12(b)(5) for insufficient service of process. The final Third-Party Defendant, Mays, is proceeding *pro se* and has asked to be included in the motion to dismiss.

III. ANALYSIS

On a motion to dismiss for lack of personal jurisdiction under Chancery Court Rule 12(b)(2), plaintiff must present a "*prima facie* case establishing jurisdiction over a

³ *Amaysing Tech. Corp. v. CyberAir Communications, Inc.*, 2004 WL 1192602 (Del. Ch. May 28, 2004).

nonresident.”⁴ A court may look beyond the bare pleadings to affidavits and other discovery of record when deciding a motion to dismiss for lack of personal jurisdiction.⁵ All factual inferences, however, are viewed by the court in a light most favorable to the plaintiff.⁶

Delaware courts apply a two-step analysis to determine whether the exercise of personal jurisdiction over a nonresident is appropriate.⁷ First, the court must determine whether “Delaware statutory law offers a means of exercising personal jurisdiction” over the nonresident defendant.⁸ Second, after establishing a statutory basis for jurisdiction, the court must determine “whether subjecting the nonresident defendant to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment.”⁹

CyberAir sets forth three grounds for personal jurisdiction over the Third-Party Defendants. First, CyberAir asserts that the Third-Party Defendants voluntarily

⁴ *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 974 (Del. Ch. 2000).

⁵ *See Chandler v. Ciccoricco*, 2003 WL 21040185, at *8 (Del. Ch. May 5, 2003); *Hart Holding Co. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 538-39 (Del. 1991). The Transaction Documents were attached to the Complaint as exhibits. Therefore, they are part of the pleadings. *See* Chancery Court Rule 10(c).

⁶ *Computer People, Inc. v. Best Int'l Group, Inc.*, 1999 WL 288119, at *5 (Del. Ch. Apr. 27, 1999).

⁷ *See Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd.*, 611 A.2d 476, 480 (Del. 1992); *Chandler*, 2003 WL 21040185, at *7.

⁸ *Hart Holding Co. v. Drexel Burnham Lambert Inc.*, 1992 WL 127567, at *2 (Del. Ch. May 28, 1992).

⁹ *Hercules*, 611 A.2d at 481. *See generally Int'l Shoe Co. v. State of Wash.*, 326 U.S. 310 (1945) (discussing minimum contacts required under the Due Process Clause).

submitted to the jurisdiction of this Court by written agreement. Second, they contend that the Third-Party Defendants should be judicially estopped from contesting personal jurisdiction based on allegedly contradictory arguments previously advanced by ATC. And third, CyberAir asserts that jurisdiction over the Third-Party Defendants exists under Delaware’s long-arm statute, 10 *Del. C.* § 3104, both individually and under the “conspiracy theory” of jurisdiction.¹⁰

A. Voluntary Submission to Jurisdiction

CyberAir asserts that Third-Party Defendants voluntarily submitted to this Court’s jurisdiction by signing certain of the Transaction Documents in their individual capacity. The Transaction Documents CyberAir relies upon are the Technology Purchase Agreement (for May’s signature in his individual capacity) and the Stock Purchase Agreement (for Fadel and Atilano’s signatures in their individual capacities). The claims in this litigation, however, arise out of a breach of the Bridge Loan Agreement and alleged misrepresentations made during the negotiation of that Agreement. While the Bridge Loan Agreement does contain a clause consenting to the jurisdiction of this Court,¹¹ none of the Third-Party Defendants signed that Agreement in their individual

¹⁰ Because ATC is a Texas corporation, 10 *Del. C.* § 3114 is inapplicable.

¹¹ Compl. Ex. A. Section 8.7 of the Bridge Loan Agreement states:

Consent to Jurisdiction and Service of Process. Each party hereto hereby irrevocably submits to the exclusive jurisdiction of the Chancery Court of the State of Delaware in any such action, suit or proceeding [presumably, arising out of or relating to the Agreements (see § 8.8)], and agrees that any such action, suit or proceeding shall be brought only in

capacities.¹² “Delaware law clearly holds that officers of a corporation are not liable on corporate contracts as long as they do not purport to bind themselves individually.”¹³ Thus, the Third-Party Defendants are not bound by the Bridge Loan Agreement.

Furthermore, the Transaction Documents CyberAir relies upon do not demonstrate voluntary submission to this Court’s jurisdiction because they are not yet effective. Even if the Third-Party Defendants signed the Technology Purchase Agreement and the Stock Purchase Agreement in their individual capacities and the documents contained language consenting to jurisdiction over each of them individually, it is undisputed that these documents continue to be held in escrow. CyberAir was unable to cite any authority that suggests that the terms of a document held in escrow are enforceable against the parties to such documents. Thus, CyberAir has failed to present a *prima facie* case regarding its contention that the Third-Party Defendants voluntarily submitted to jurisdiction in Delaware.

such court (and waives any objection based on *forum non conveniens* or any other objection to venue therein), *provided, however*, that such consent to jurisdiction is solely for the purpose referred to in this Section 8.7 and shall not be deemed to be a general submission to the jurisdiction of said courts or in the State of Delaware other than for such purpose.

¹² CyberAir’s briefs appear to include an argument that the Third-Party Defendants signed the Bridge Loan Agreement in their individual capacities. At argument, however, counsel clarified that CyberAir is not making any such contention. Tr. at 27-28.

¹³ *Wallace v. Wood*, 752 A.2d 1175, 1180 (Del. Ch. 1999).

B. Judicial Estoppel

CyberAir contends that the Third-Party Defendants should be judicially estopped from arguing that jurisdiction is improper given the arguments ATC made in response to CyberAir's previous motion to dismiss for lack of subject matter jurisdiction. "Judicial estoppel is an equitable doctrine designed to protect the integrity of the judicial process by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment.'"¹⁴ The doctrine serves to prevent "a litigant from advancing an argument that contradicts a position previously taken by that same litigant, and that [a court] was persuaded to accept as the basis for its ruling."¹⁵

The arguments ATC made against CyberAir's previous motion to dismiss for lack of subject matter jurisdiction do not estop the Third-Party Defendants from arguing that the terms of the escrowed Transaction Documents are not yet effective. On the previous motion, ATC asked the Court to consider the fact that the Transaction Documents existed and, though held in escrow, would be triggered upon Successful Qualified Testing as evidence that a "unique relationship with CyberAir . . . not merely a traditional loan" existed.¹⁶ Even if the Court were to treat ATC and the Third-Party Defendants as the same party, ATC's earlier argument regarding the Transaction Documents differs from the argument now being advanced by the Third-Party Defendants. Specifically, ATC did

¹⁴ *In re Silver Leaf, LLC*, 2004 WL 1517127, at *2 (Del. Ch. June 29, 2004) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 743 (2001)).

¹⁵ *Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 409352, at *3 (Del. Ch. July 13, 1998).

¹⁶ *Amaysing*, 2004 WL 1192602, at *3.

not ask this Court to give effect to the terms of the Transaction Documents; instead, ATC relied upon the existence and possible future impact of the Transaction Documents as evidence of the nature of their relationship with CyberAir.¹⁷ In the present context, CyberAir attempts to rely on the Transaction Documents, as though they were effective, to establish that the Third-Party Defendants have voluntarily submitted to this Court's jurisdiction. There is nothing contradictory between ATC's previous argument and the Third-Party Defendants' position that those documents are not binding because they are still being held in escrow. Accordingly, the Third-Party Defendants are not estopped from arguing that this Court lacks personal jurisdiction over them as individuals.

In further support of their estoppel argument, CyberAir also contends that not hearing its claims against the Third-Party Defendants in this Court would "offend[] the notion of judicial efficiency and economy" and "leave[] CyberAir at risk of incurring inconsistent judgments in different jurisdictions."¹⁸ The promotion of judicial efficiency and economy are continual concerns of courts. Nevertheless, CyberAir has made no showing that such concerns alone provide an adequate basis for exercising personal jurisdiction over a nonresident. Rather, the law clearly indicates that minimum contacts between a nonresident and a jurisdiction must be found before a court may assert personal jurisdiction over them.¹⁹ Furthermore, the Court is not convinced that

¹⁷ *See id.*

¹⁸ Defendant and Third-Party Plaintiff CyberAir Communications Inc.'s Answering Brief in Opposition to Third-Party Defendants' Motion to Dismiss ("DAB") at 18.

¹⁹ *See e.g., Int'l Shoe Co.*, 326 U.S. 310.

dismissing the Third-Party Complaint is likely to create a serious risk of inconsistent judgments. If CyberAir chooses to file suit against the Third-Party Defendants in Texas or another forum, that should not interfere with this Court's ability to resolve the issues pending between ATC and CyberAir in a timely fashion. Depending on the outcome of this litigation and how the parties choose to prosecute it, there may be issue and claim preclusive effects that would reduce the likelihood of duplicative litigation elsewhere. In addition, the purported Third-Party Defendants can be expected to be deposed for purposes of this action, whether or not they remain parties to it. That discovery presumably will not need to be duplicated in any future litigation. For all of these reasons, I conclude that CyberAir's arguments regarding practical considerations of economy and efficiency provide no basis for asserting personal jurisdiction over the Third-Party Defendants.

C. Jurisdiction Under 10 *Del. C.* § 3104(c)

Delaware's long-arm statute, 10 *Del. C.* § 3104(c), provides a mechanism through which a Delaware court may obtain jurisdiction over a nonresident. It is "broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause."²⁰ CyberAir asserts two different theories under which it believes this Court may exercise personal jurisdiction over the Third-Party Defendants under § 3104(c). The first argues that jurisdiction exists because Fadel and Atilano transacted business in Delaware

²⁰ *Hercules*, 611 A.2d at 480. *See also Chandler*, 2003 WL 21040185, at *8.

sufficient to satisfy § 3104(c)(1). The second applies the “conspiracy theory” of jurisdiction.²¹

1. Individual jurisdiction under 10 Del. C. § 3104(c)(1)

CyberAir contends that Fadel and Atilano’s decision-making authority in ATC, coupled with ATC’s act of filing suit in this State, is sufficient to constitute a business transaction under § 3104(c)(1) that would support the exercise of personal jurisdiction over them. Section 3104(c)(1) states that “a court may exercise personal jurisdiction over any nonresident, or a personal representative who in person or through an agent: (1) Transacts any business or performs any character of work or service in the State”

CyberAir argues that § 3104(c)(1) is satisfied because Fadel and Atilano filed this suit. Viewing the record in the light most favorable to CyberAir, the Court accepts as true that Fadel and Atilano made the decision to have ATC file a complaint regarding the

²¹ CyberAir states in its brief that:

Delaware’s courts have traditionally applied three tests of personal jurisdiction which, when coupled with the agency provision in § 3104 provide a statutorily and constitutionally effective basis for exerting jurisdiction over nonresidents who engage in unlawful Delaware-directed activity in concert with others. The first test involves an examination of whether an out-of-state defendant conducted business in a manner that satisfies § 3104 as an individual or through an agent. The second test applies the “conspiracy theory” of jurisdiction. The third and final test applies the “alter ego” theory of personal jurisdiction.

DAB at 15 (internal citations omitted). Nevertheless, CyberAir argues only that, “[a]n examination of the facts and circumstances of this case reveals that process and service of process on [Third-Party] Defendants is proper under the first and second tests.” *Id.* Thus, CyberAir does not argue that personal jurisdiction over the Third-Party Defendants exists under the alter ego theory.

Bridge Loan Agreement in this Court.²² The suit against CyberAir, however, was filed by ATC, not Fadel and Atilano. A corporation can act only through its officers and agents.²³ In fact, while ATC, as a party to the Agreement, had the right to sue for breach of the Agreement, none of the Third-Party Defendants individually had the right to do so.²⁴ Furthermore, CyberAir specifically alleges that at all times mentioned in the Third-Party Complaint “the Third-Party Defendants were the agents, servants and employees of ATC, and in doing the things mentioned [in the Counterclaim and Third-Party Complaint], were acting within the course and scope of such agency, employment and service and with the knowledge, permission and consent of the other.”²⁵ Therefore, there is no basis for CyberAir’s argument that Fadel and Atilano’s decision to cause ATC to file suit in Delaware satisfies § 3104(c)(1) and subjects them to personal jurisdiction in their individual capacities.

CyberAir also contends that the Third-Party Defendants committed fraudulent acts through ATC that constitute sufficient contacts to give rise to personal jurisdiction in this State. Under Delaware law a “corporate officer cannot be hailed before a Delaware court

²² See Erickson Aff. ¶ 14; Compl. Ex. O.

²³ See *Hessler, Inc. v. Farrell*, 226 A.2d 708, 712 (Del. 1967).

²⁴ “As a general matter, only a party to a contract has enforceable rights under, and may sue for breach of, that contract.” *Madison Realty Partners 7, LLC v. Ag ISA, LLC*, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001) (citing *Institutform of N. Am., Inc. v. Chandler*, 534 A.2d 257 (Del. Ch. 1987)). CyberAir has not presented any basis for applying a different rule in this case. They have not argued, for example, that the Third-Party Defendants had rights under the Bridge Loan Agreement as third-party beneficiaries.

²⁵ Third-Party Compl. ¶ 131.

for a wrong of the corporation merely because he or she has that status.”²⁶ CyberAir argues that the import of that principle has been limited by cases such as *Brady v. Preferred Florist Network*, in which this court held that:

[W]here there is a *prima facie* showing that an individual personally engaged in substantial contacts in Delaware or with a nexus to Delaware having a clear relationship to the tortious injury alleged, 10 *Del. C.* § 3104 permits the exercise of personal jurisdiction over that individual, whether or not the individual was acting in a corporate capacity.²⁷

The situation in *Preferred Florist Network*, however, is readily distinguishable from the facts of this case. There, an individual defendant, Meola, was the owner, manager, officer and employee, of both corporate defendants. The corporate defendants had their principal place of business in Meola’s New Jersey home. The complaint asserted violations of the Consumer Fraud Act (“CFA”) and Uniform Deceptive Trade Practices Act (“UDTPA”) that caused injury in Delaware. The complaint asserted that Meola’s own conduct violated both of those statutes and, under Delaware law, such violations gave rise to “tortious injury” for purposes of 10 *Del. C.* §§ 3104(c)(3) and (4). Based on the allegations that Meola personally committed a number of tortious acts, the court concluded that the plaintiff had made a *prima facie* showing that Meola “engaged in substantial contacts in Delaware or with a nexus to Delaware having a clear relationship

²⁶ *Brady v. Preferred Florist Network*, 791 A.2d 8, 14 (Del. Ch. 2001) (interpreting *Gebelein v. Perma-Dry Waterproofing Co.*, 1982 WL 8776 (Del. Ch. Jan. 12, 1982)).

²⁷ *Id.*

to the tortious injury alleged.”²⁸ The court, therefore, held that § 3104 permitted the exercise of personal jurisdiction over Meola, whether or not he performed the challenged acts in a corporate capacity.²⁹

Though officers and directors may be found personally liable for their tortious actions such as fraud, a court must nonetheless have jurisdiction over the officers and directors to hear such a claim.³⁰ In contrast to the *Preferred Florist Network* case, here, the only contact with Delaware was ATC’s filing suit in this Court for breach of the Bridge Loan Agreement. As explained *infra*, the nexus between ATC’s filing suit and the alleged fraudulent misrepresentations of the Third-Party Defendants is tenuous at best. This fact and the inability of ATC to file this suit and pursue its contractual claim except through an officer and agent, such as Fadel or Atilano, lead me to conclude that the filing of suit in their corporate capacity was not a sufficiently substantial contact in

²⁸ *Id.* at 14.

²⁹ *See id.*

³⁰ *See St. James Recreation, LLC v. Rieger Opportunity Partners, LLC*, 2003 WL 22659875, at *6 (Del. Ch. Nov. 5, 2003) (“The default common-law rule is that corporate officials may be held individually liable for their tortious conduct, even if undertaken while acting in their official capacity.”). CyberAir argues that claims under 6 *Del. C.* § 7303 of the Delaware Securities Act may be brought against individuals, such as the Third-Party Defendants. *See* DAB at 20. This argument fails to address the threshold requirement that, regardless of the nature of the claim brought against them, the Court must have personal jurisdiction over the Third-Party Defendants to hear such claims. *See, e.g., Gibralt Capital Corp. v. Smith*, 2001 WL 647837, at *5 (Del. Ch. May 9, 2001) (describing personal jurisdiction as a “threshold issue”).

Delaware related to the alleged wrong to warrant subjecting the Third-Party Defendants to jurisdiction here.³¹

2. Jurisdiction under the “conspiracy theory”

Under the conspiracy theory of jurisdiction recognized by the Delaware Supreme Court in *Istituto Bancario Italiano SpA v. Hunter Eng’g, Co.*:³²

[A] conspirator who is absent from the forum state is subject to the jurisdiction of the court, assuming he is properly served under state law, if the plaintiff can make a factual showing that: (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.

All five of the delineated elements must be satisfied in order to establish personal jurisdiction under the conspiracy theory.

In *Istituto*, the court explained the conspiracy theory as follows:

First, the acts of each co-conspirator are attributable to each of the other co-conspirators. Therefore, any act by a conspirator in furtherance of the conspiracy which takes place in the jurisdiction is attributable to the other conspirators.

³¹ CyberAir cannot successfully argue that Fadel and Atilano committed sufficient acts in Delaware through an agent to subject them individually to personal jurisdiction. To invoke § 3104(c)’s rubric of action “through an agent,” CyberAir would have to show that ATC was an agent of its own officers, Fadel and Atilano. Such a contention would be tantamount to an argument to pierce the corporate veil. As discussed later in this opinion, CyberAir has failed to clearly articulate, let alone meet its burden of proof on, an argument for piercing the corporate veil in this case.

³² 449 A.2d 210, 225 (Del. 1982).

Consequently, if the purposeful act or acts of one conspirator are of a nature and quality that would subject the actor to the jurisdiction of the court, all of the conspirators are subject to the jurisdiction of the court.³³

The theory is rooted in policies that make conspirators liable for the acts of their co-conspirators in furtherance of a conspiracy.³⁴ CyberAir claims that “[ATC] and Third-Party Defendants, unlawfully conspired and acted in concert in committing and performing the [fraud].”³⁵ The alleged act in Delaware by a conspirator in furtherance of the conspiracy that CyberAir points to is ATC’s filing suit in this Court. Following that line of logic, ATC would have to be a co-conspirator with the Third-Party Defendants to justify imputing ATC’s acts to them. CyberAir’s own declarations, however, assert that the Third-Party Defendants were ATC’s agents at all relevant times.³⁶ The issue, therefore, becomes whether a corporation may conspire with its own directors, officers or agents.

Both parties agree that no Delaware decisions have directly addressed this issue.³⁷

With regard to a similar issue, however, the Superior Court has noted that “a parent

³³ *Id.* at 222.

³⁴ “It is a fundamental principle of our jurisprudence that co-conspirators are jointly and severally liable for the acts of their confederates committed in furtherance of the conspiracy.” *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 170 (Del. 1976).

³⁵ Third-Party Compl. ¶ 130.

³⁶ *See id.* ¶ 131. The only parties that CyberAir alleges were part of the conspiracy were Mays, Fadel, Atilano and ATC.

³⁷ *See* Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* §3-5[b], 3-85 (2004).

corporation cannot conspire with [its wholly owned] subsidiary.”³⁸ A number of other jurisdictions and authorities have held that a corporation cannot be deemed to have conspired with its officers and agents.³⁹ “It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.”⁴⁰

Turning to the circumstances of this case, I hold that a corporation generally cannot be deemed to have conspired with its officers and agents for purposes of establishing jurisdiction under the conspiracy theory. An exception exists to this general rule, however, when the officer or agent of the corporation steps out of her role as an officer or agent and acts pursuant to personal motives.⁴¹

³⁸ *In re Asbestos Litig.*, 509 A.2d 1116, 1120 n.2 (Del. Super. 1986) (citing *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2740-42 (1984)), *aff'd*, 525 A.2d 146 (Del. 1987).

³⁹ *See, e.g., Coulbourne v. Rollins Auto Leasing Corp.*, 392 F. Supp. 1198 (D. Del. 1975); *Goldlawr, Inc. v. Shubert*, 276 F.2d 614 (3d Cir. 1960); *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911 (5th Cir. 1952); Wolfe & Pittenger §3-5[b], 3-85.

⁴⁰ *Nelson*, 200 F.2d at 914. *See also Goldlawr*, 276 F.2d at 617 (approving the “sound holding in *Nelson*”); *Coulbourne*, 392 F. Supp. at 1201 (applying the general rule set forth in *Nelson* that “the act of the agent was the act of the corporation and, therefore, that a corporation could no more conspire with its agent than it could conspire with itself”).

⁴¹ *See, e.g., Johnston v. Baker*, 445 F.2d 424, 427 (3d Cir. 1971) (finding that a conspiracy existed where there was “evidence to support the finding that [defendants] were acting for personal reasons”); *Nelson*, 200 F.2d at 914 (“Nor is it alleged affirmatively, expressly, or otherwise, that these officers, agents, and employees were actuated by any motives personal to themselves.”).

CyberAir argues that the Third-Party Defendants were acting pursuant to personal motives and should be excepted from the general rule that a corporation cannot conspire with its agents. To support this argument, CyberAir claims that the “Cash Burn Statement” produced to it in discovery “establishes that Atilano, Fadel and Mays each received \$125,000 in compensation for less than 12 months of work for a total of \$375,000 or 67% of the total of \$560,000 that CyberAir gave to [ATC]” and that further monies are owed to business entities in which the Third-Party Defendants own interests.⁴² According to CyberAir, the compensation received by the Third-Party Defendants from ATC demonstrates their personal motive of profiting from the fraud.

Courts interpreting the “personal reasons” exception of *Johnston*, however, have read it to mean a “personal animus and/or desire for financial benefit other than one’s corporate salary.”⁴³ “Nowhere in *Nelson* or in *Johnston* is there any suggestion that the desire to protect or enhance one’s salary makes an agent sufficiently independent of the corporation to be capable of conspiring with it.”⁴⁴ CyberAir has presented no evidence of any impropriety regarding the compensation paid, or other monies ATC owed, to the Third-Party Defendants or their affiliates. In fact, the Cash Burn Statement that CyberAir

In *Johnston*, the court remarked that “at least one of the parties to the conspiracy was not an employee or an agent of the corporation” when finding that a conspiracy between the individuals and the hotel existed. 445 F.2d at 427. In contrast, all three of the Third-Party Defendants are alleged by CyberAir itself to have been agents of ATC at all relevant times. See Third-Party Compl. ¶ 131.

⁴² CyberAir Supplemental Briefing Letter (“CyberAir Supp. Br.”) at 4.

⁴³ *Coulbourne*, 392 F. Supp. at 1201.

⁴⁴ *Id.* (discussing *Nelson*, 200 F.2d 911, and *Johnston*, 445 F.2d 424).

relies on indicates that monies from ATC were also used for such things as licensing fees for the technology, rent, and compensation to other employees.⁴⁵ The evidence does not suggest that the Third-Party Defendants were siphoning off all monies from ATC or seeking to gain a benefit independent of their financial interest resulting from their employment by or investment in ATC. Thus, the factual allegations in this case do not support an inference that the Third-Party Defendants were motivated by personal motives divergent from those of the corporation.

Because the exception does not apply, the general rule governs this case. I therefore hold that CyberAir has failed to present a *prima facie* case for finding that ATC was a member of the alleged conspiracy among the Third-Party Defendants. Thus, the conspiracy theory provides no basis for imputing ATC's filing of this suit, the only alleged act in Delaware, to the Third-Party Defendants.⁴⁶

3. Alternative arguments regarding Mays

After conducting preliminary discovery, CyberAir has asserted that Mays controls R&DM Foundation, which is the largest shareholder of ATC. CyberAir argues that this court has, in the past, “determined that it may properly exercise jurisdiction over the majority shareholder of a Delaware corporation through the application of the conspiracy theory” and suggests that a conspiracy may be found under the facts of this case in the

⁴⁵ See CyberAir Supp. Br. Ex. C.

⁴⁶ Because I find that Delaware statutory law does not provide a basis for exercising personal jurisdiction over the Third-Party Defendants, it is not necessary to address whether subjecting them to jurisdiction in Delaware would violate the Due Process Clause of the Fourteenth Amendment.

same way.⁴⁷ This argument is misplaced. CyberAir has not asserted a claim against the R&DM Foundation, an alleged shareholder of ATC, but rather against Mays as an individual. The factual record as to May's relationship with R&DM Foundation is not sufficiently developed to support even colorably the exercise of personal jurisdiction over Mays.

D. Sufficiency of Service of Process

Because the Court has found that there is no statutory basis for personal jurisdiction over the Third-Party Defendants, service of process under 10 *Del. C.* § 3104 was also insufficient.

IV. CONCLUSION

For the reasons stated above, the Court finds that personal jurisdiction over the Third-Party Defendants does not exist. Therefore, Third-Party Defendants' motion to dismiss under Court of Chancery Rule 12(b)(2) for lack of personal jurisdiction and Rule 12(b)(5) for insufficient service of process is GRANTED.

IT IS SO ORDERED.

⁴⁷ CyberAir Supp. Br. at 2 (citing *Gibralt*, 2001 WL 647837).