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Case No. 5957-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEWART MATTHEW,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 5957-VCN**
	:	
CHRISTOPHE LAUDAMIEL, ROBERTO CAPUA, ACTION 1 SRL, FLÄKT WOODS GROUP SA and SEMCO LLC,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: March 14, 2012
Date Decided: March 20, 2012

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NOBLE, Vice Chancellor

On February 21, 2012, this Court issued a Memorandum Opinion[1] (the "Opinion") dismissing Plaintiff Stewart Matthew's ("Matthew") claims against Defendant Fläkt Woods Group SA ("Fläkt Woods") (the "Fläkt Woods claims") based upon the Court's conclusion that it lacked personal jurisdiction over Fläkt Woods.[2] Matthew now brings this motion pursuant to Court of Chancery Rule 54(b) seeking entry of a final judgment confirming Fläkt Wood's exit or, alternatively, certification of an interlocutory appeal pursuant to Supreme Court Rule 42 of the order that implemented the Opinion.

I. BACKGROUND

The claims in Matthew's Second Amended Complaint (the "Complaint") all relate to the dissolution, winding up, and cancellation of Aeosphere LLC ("Aeosphere"). Matthew, Laudamiel, and Action 1 were the owners of Aeosphere. Matthew, Laudamiel, and Capua—the majority owner of Action 1—constituted Aeosphere's Board of Managers. Matthew and Laudamiel were Aeosphere's co-Chief Executive Officers. Fläkt Woods

[1] *Matthew v. Laudamiel*, 2012 WL 605589 (Del. Ch. Feb. 21, 2012).
[2] The Court also dismissed Matthew's claims against SEMCO LLC ("SEMCO"), a member of the same "family of companies" as Fläkt Woods, on the basis of personal jurisdiction, and it dismissed certain counterclaims brought against Matthew by the remaining defendants, Christophe Laudamiel ("Laudamiel"), Roberto Capua ("Capua"), and Action 1 srl ("Action 1") (together, the "Remaining Defendants").

and SEMCO allegedly collaborated with Aeosphere on its primary business venture.

Matthew asserted seven claims against various combinations of defendants. These claims cover a range—breach of contract, breach of fiduciary duty, unjust enrichment, and civil conspiracy, just to name a few—but all of them in some way relate to Aeosphere's allegedly improper dissolution and winding up by Laudamiel and Capua. The following claims were asserted against Fläkt Woods: (1) aiding and abetting a breach of fiduciary duty (Count III); (2) tortious interference with contractual relations (Count IV); (3) unjust enrichment (Count VI); and (4) civil conspiracy (Count VII).

Fläkt Woods moved to dismiss the claims brought against it for lack of personal jurisdiction. Matthew argued that Fläkt Woods was subject to personal jurisdiction under the conspiracy theory of jurisdiction; he did not contend that Fläkt Woods was subject to personal jurisdiction under any other theory. In the Opinion, this Court applied the familiar five factor test enunciated in *Istituto Bancario Italiano SpA v. Hunter Eng'g Co., Inc.*[3] to determine whether it was appropriate to exercise personal jurisdiction under the conspiracy theory. The Court concluded that Matthew failed to satisfy

[3] 449 A.2d 210, 225 (Del.1982) (the "*Istituto Bancario* factors" or "*Istituto Bancario* test").

the fourth *Istituto Bancario* factor because "[t]here [was] nothing in the record from which this Court [could have] infer[red] that Fläkt Woods knew that the conspiracy would have a Delaware nexus until *after* the conspiracy's goal had been attained and the conspiracy itself was completed."[4] As a result of Matthew's failure to carry his burden of demonstrating that this Court had personal jurisdiction over Fläkt Woods, the Court granted Fläkt Woods's motion to dismiss.

II. COURT OF CHANCERY RULE 54(b)

A. *Court of Chancery Rule 54(b) Standard*

Court of Chancery Rule 54(b) provides in part:

> When more than 1 claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the Court may direct the entry of a final judgment upon 1 or more but fewer than all of the claims or parties only upon an express determination that there is not just reason for delay and upon an express direction for the entry of judgment.

Therefore, for the Court to grant Matthew's motion, it must find that: (1) the action involves multiple claims or parties; (2) at least one claim (or the rights and liabilities of at least one party) has been finally decided; and (3) that there is no just reason for delaying an appeal.[5] The parties do not

[4] *Matthew*, 2012 WL 605589, at *8 (emphasis in original).
[5] *In re Tri-Star Pictures, Inc., Litig.*, 1989 WL 112740, at *1 (Del. Ch. Sept., 26 1989).

dispute that the first two prongs of this test are satisfied, and the Court concurs.[6]

As is often true with a contested Rule 54(b) motion, the question here is whether the third prong is met. Whether there is a just reason for delaying an appeal is a determination addressed to the sound discretion of the Court.[7] In exercising this discretion, the Court may consider any factor relevant to judicial administrative interests or the equities of the case.[8] The Court must "balance those factors against the long established policy against piecemeal appeals that requires this Court [to] exercise that discretion sparingly."[9] To prevent excessive resort to Rule 54(b) from increasing "the already sizeable burden of appellate dockets . . . a Rule 54(b) order should not be entered unless the moving party can show some danger of hardship or injustice through delay which would be alleviated by immediate appeal."[10]

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[6] This action involves both multiple claims and multiple parties. Also, a dismissal for lack of personal jurisdiction disposes of a claim completely and brings it within Rule 54(b). 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2656 (3d ed. 2011) (interpreting Federal Rule of Civil Procedure 54(b)). Authorities interpreting the Federal Rule of Civil Procedure 54(b) afford "helpful guidance" in cases arising under Court of Chancery Rule 54(b) because the two Rules are "substantially identical." *Tri-Star*, 1989 WL 112740, at *1 n.1 (citation omitted).

[7] *Tri-Star*, 1989 WL 112740, at *1 (citation omitted).

[8] *Id.* (citation omitted).

[9] *Gatz v. Ponsoldt*, 2004 WL 3031203, at *1 (Del. Ch. Dec. 29, 2004) (internal quotation and citation omitted).

[10] *Tri-Star*, 1989 WL 112740, at *1 (internal quotation and citation omitted).

The discretionary power conferred by Rule 54(b) should only be employed to "afford a remedy in the infrequent and harsh case."[11] It should "not be used as a vehicle to trigger routine appellate review."[12] Indeed, the discretion of this Court is not as great as a plain reading of the Rule might suggest: "The terms used by earlier cases make it clear no wide swath of discretion exists allowing trial courts to enter final judgment on claims even where it would be more convenient for the future course of the case below to have some interim direction from the Supreme Court."[13]

B. *Contentions*

Matthew's motion asserts five arguments supporting entry of a partial final judgment. His first two arguments focus on judicial economy and efficiency. First, he contends that the issues presented by an appeal of Fläkt Woods's dismissal (the "Jurisdictional Issue") are severable from the remaining action; because the Remaining Defendants have not asserted a personal jurisdiction defense, allowing an immediate appeal would not raise the possibility that the Supreme Court would address the same issue in a later appeal. Second, Matthew argues that allowing him to pursue an immediate appeal would eliminate the potential of holding two separate

[11] *Id.* (internal quotation and citation omitted).
[12] *Zimmerman v. Home Shopping Network, Inc.*, 1990 WL 140890, at *1 (Del. Ch. Sept. 25, 1990).
[13] *Emerald Partners v. Berlin*, 1996 WL 361510, at *3 (Del. Ch. June 25, 1996).

trials if the Court's Order, dated February 21, 2012, (the "Order") is reversed following final adjudication of his claims against the Remaining Defendants and their counterclaims against him.

Related to this second-trial argument, Matthew contends that, if final judgment is not entered now and the Order is later reversed, the parties will need to obtain supplemental discovery and re-open the trial record, which he argues would constitute a significant hardship.

Matthew's fourth argument points to possible hardship or injustice that could be eliminated by an immediate appeal. The hardship he identifies here is the risk that the Fläkt Woods claims could be time-barred in other potential forums by the time the judgment is final and an appeal is resolved. Matthew specifically points to New York as a potential forum for the Fläkt Woods claims. He notes that New York imposes a three-year statute of limitations on actions "to recover damages for an injury to property"[14] and provides no savings statute for actions dismissed for lack of personal jurisdiction.[15] Finally, Matthew asserts that *Hercules Inc. v. Leu Trust & Banking (Bah.) Ltd.*,[16] a case that involved factual and procedural

[14] N.Y. C.P.L.R. § 214 (McKinney 2011).
[15] *See id.* § 205(a).
[16] 611 A.2d 476 (Del. 1992).

circumstances similar to those at issue here, is controlling precedent and compels the conclusion that this Court must grant his motion.

In response, Fläkt Woods argues that entry of a final judgment could result in piecemeal appeals because the factual and legal issues involved in the Jurisdictional Issue are closely related to those of the remaining claims. Fläkt Woods also argues that the claims against it could be moot following a trial on the remaining claims, and, as such, issuance of a final judgment could waste the judicial resources of the Supreme Court. Additionally, it contends that the possibility of a second trial would not be eliminated even if this motion were granted and that the discovery concerns advanced by Matthew are not unusually harsh. Finally, Fläkt Woods argues that Matthew's statute of limitations argument fails because the alleged hardship does not meet the standard articulated in *Tri-Star*; there is no guarantee that an immediate appeal would alleviate this hardship; and there is nothing preventing Matthew from pursuing an action in New York.

C. *Analysis*

There is limited Delaware case law directly addressing how a party's dismissal for lack of personal jurisdiction affects a plaintiff's request for a final judgment under Rule 54(b). In *Hercules*, the Superior Court appears to have entered a final judgment upon request of the plaintiff at least in part

due to the fact that the defendants at issue were dismissed for lack of personal jurisdiction.[17] *Hercules* involved procedural and factual circumstances similar to those now before the Court; the plaintiff sought entry of a final judgment as to the dismissal of its claims against foreign defendants that the Superior Court concluded were not subject to personal jurisdiction in Delaware because the plaintiff failed to satisfy the fourth *Istituto Bancario* factor.[18] On appeal, the Supreme Court held that it was within the sound discretion of the Superior Court to enter a final judgment, and it affirmed the Superior Court's Rule 54(b) ruling.[19] Although the Supreme Court mentioned the Superior Court's consideration of the personal jurisdiction issue,[20] it did not elaborate on how this factor should be weighed by a trial court when addressing a Rule 54(b) motion.[21]

The federal courts have considered this issue, and they have consistently concluded that when claims against a defendant are dismissed for lack of personal jurisdiction final judgment should generally be entered

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[17] *See Hercules*, 611 A.2d at 484-85.
[18] *Id.* at 478-85.
[19] *Id.* at 485.
[20] Indeed, the role of the Superior Court's reliance upon the personal jurisdiction issue formed the basis of the defendants' challenge to the Superior Court's entry of a final judgment. *See id.* 484-85.
[21] *See id.* (referring to the Superior Court's comments regarding personal jurisdiction as a "single passing remark" and holding that the Superior Court's entry of a final judgment was within its sound discretion).

upon request of the plaintiff.[22] Indeed, this result has been reached by the federal courts "with virtual unanimity,"[23] and "[o]ne would be hard-pressed to find a decision in which a [federal] court denied Rule 54(b) certification after dismissing a party for lack of personal jurisdiction."[24] Considerations of judicial efficiency and potential hardship implicated when claims against a defendant are dismissed for lack of personal jurisdiction and that underlie the federal courts' decisions to enter final judgments in such cases[25] were well-summarized by the Southern District of New York in *Freeplay Music*:

> If [the plaintiff's] case against [the dismissed defendant was in fact] properly brought in this Court, a binding determination of [the] legal issues can be achieved in the same proceeding, without the risk of inconsistent results in two different courts. If [plaintiff's] position [that this Court's dismissal was erroneous] is ultimately sustained in the [Supreme Court], allowing an immediate appeal permits the case against [the defendant] to proceed along with those against the other [defendants] in this Court.

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[22] *See McMahan Jets, LLC v. X-Air Flight Support, LLC*, 2011 WL 4344208 (S.D. Miss. Sept. 14, 2011); *Animale Group, Inc. v. Sunny's Perfume, Inc.*, 2007 WL 2010476 (S.D. Tex. July 5, 2007); *Freeplay Music, Inc. v. Cox Radio, Inc.*, 2005 WL 2464571 (S.D.N.Y. Oct. 5, 2005). As previously noted, authorities interpreting the Federal Rule of Civil Procedure 54(b) afford "helpful guidance" in cases arising under Court of Chancery Rule 54(b) because the two Rules are "substantially identical." *Tri-Star*, 1989 WL 112740, at *1 n.1 (citation omitted).

[23] *McMahan Jets*, 2011 WL 4344208, at *2 (citing *Commissariat a L'EnergieAtomique v. Chi Mei Optoelectronics Corp.*, 293 F. Supp. 2d 430, 434-45 (D. Del. 2003); *Chamberlain v. Harnischfeger Corp.*, 516 F. Supp. 428 (E.D. Pa. 1981)).

[24] *Id.* at *1 (quoting *Animale Group*, 2007 WL 2010476, at *1).

[25] *See Animale Group*, 2007 WL 2010476, at *1 (stating that the consistency of the federal courts' decisions when these circumstances are present "is likely because of the implications of such a dismissal, implications presciently summarized by the Southern District of New York in [*Freeplay Music*]").

> Conversely, if this Court's ruling on jurisdiction is affirmed, [the plaintiff] would learn this result promptly, and could then . . . file a new action in a [forum] which has jurisdiction over [the defendant]. Delaying resolution of the issue forces [the plaintiff] to choose between deferring its claims against [the defendant] to be resolved at a much later date, either in this Court or in some other [forum], or withdrawing its appeal, acquiescing in this Court's decision on personal jurisdiction, and proceeding simultaneously in two courts. This would not be in the interest of efficiency or justice, as compared with presenting the [Supreme Court] with a relatively straightforward judgment about whether [the defendant is subject to personal jurisdiction in Delaware].[26]

The court in *Freeplay Music* also noted that entering final judgment to allow an immediate appeal would not "delay adjudication of the claims against the other defendants," since "[t]he jurisdictional issue is entirely distinct from the merits of those claims."[27]

The analysis presented above addresses most of the arguments raised by the parties. Although the Jurisdictional Issue is severable from the remaining action in which personal jurisdiction is not at issue,[28] the Court recognizes that severability is less clear-cut here because Matthew asserts that jurisdiction may be found under the conspiracy theory. The conspiracy

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[26] *Freeplay Music*, 2005 WL 2464571, at *2.
[27] *Id.* at *3.
[28] The severability of the issue of personal jurisdiction from the claims remaining against other defendants has been repeatedly recognized by the federal courts. *See e.g. McMahan Jets*, 2011 WL 4344208, at *2; *Animale Group*, 2007 WL 2010476, at *2 ("[Entering final judgment] has been deemed particularly appropriate in this context since the initial appeal will resolve issues relevant to only the dismissed party, rather than substantive law issues relevant to the underlying suit; as such, the appellate process may be bifurcated, but not duplicative.").

theory of jurisdiction muddies the waters in two ways. First, since claims of civil conspiracy against the Remaining Defendants are still left to be adjudicated by this Court, there is some legal connection between the Jurisdictional Issue and the remaining claims. Second, since appellate review of the Jurisdictional Issue will necessarily require that the Supreme Court consider the factual allegations regarding Aeosphere's troubled history, the contested emergency Board meeting, and the filing of Aeosphere's Certificate of Cancellation, there is some factual connection between the Jurisdictional Issue and the remaining claims.[29] The key considerations, though, are that an appellate ruling on the Jurisdictional Issue will not decide issues of law relevant to the underlying suit and personal jurisdiction is not contested by the Remaining Defendants. Furthermore, in general, some factual overlap between an issue appealed following entry of a partial final judgment and the remaining claims is probably unavoidable.

[29] This Court has recognized that factual connections between an issue for which final judgment is sought and the remaining claims should be considered when determining whether granting final judgment would be in the interest of judicial efficiency. *See Emerald Partners*, 1996 WL 361510, at *1-2. *See also Republic Envtl. Sys., Inc. v. RESI Acquisition (Del.) Corp.*, 1999 WL 464521, at *6-7 (Del. Super. May 28, 1999). Matthew incorrectly contends that on appeal the Supreme Court would only need to review this Court's holding regarding the fourth *Istituto Bancario* factor. This ignores the facts that the Court did not assess the fifth *Istituto Bancario* factor in the Opinion and that the Supreme Court reviews trial court rulings granting motions to dismiss *de novo*. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC,* 27 A.3d 531, 535 (Del. 2011).

The analysis in *Freeplay Music* also highlights why the possibility of avoiding two trials must be assessed differently when the claims against a defendant are dismissed for lack of personal jurisdiction. In the past, this Court has rejected arguments related to the possible avoidance of two trials, correctly noting that, even if an immediate appeal were granted, two trials could still be required if the Supreme Court were to reverse any final judgment and remand the case for a new trial.[30] But, when claims against a defendant are dismissed because this Court lacks personal jurisdiction, the plaintiff is free to pursue the claims in another court. If the plaintiff does so and the hypothetical scenario described above occurs, there could be *three* trials, not just two. Thus, in a situation such as the one currently before the Court, an immediate appeal may prevent the need for an additional trial. Also, the positive effects on judicial efficiency that may result from an immediate appeal, in this instance, extend beyond this Court,[31] because a successful appeal by Matthew may prevent the filing of a separate action in a different forum. Furthermore, if the Supreme Court reverses this Court and the Fläkt Woods claims are pursued in this Court, the risk of inconsistent results in two different courts would be eliminated.

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[30] *Tri-Star*, 1989 WL 112740, at *2.

[31] This is an important point because, as this Court has previously stated, "[t]here can be no mystery about the relative weight the Supreme Court places on its policy against piecemeal appeals and the possibility of avoiding judicial inefficiency in the Court below." *Emerald Partners*, 1996 WL 361510, at *3.

Fläkt Woods is correct in noting that a trial of the remaining claims could moot the Fläkt Woods claims.[32] Although this factor weighs against entry of a final judgment, it is not a complete bar. As this Court stated in *Tri-Star*, where it concluded that trial of the remaining claims could moot the issue for which final judgment was sought, "[s]ound judicial administration favors not fostering the piecemeal appeal of closely related causes of action, *where declining Rule 54(b) relief will cause no substantial hardship to the plaintiff*."[33] As discussed below, the Court concludes that, absent an immediate appeal, Matthew faces a risk of significant hardship. Also, the possibility that trial of the remaining claims could moot the claims

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[32] Matthew argues that the viability of the Fläkt Woods claims is not completely dependent upon the outcomes of the remaining claims, and, thus, it is impossible that trial of the remaining claims could moot all of the Fläkt Woods claims. Specifically, he argues that he could prevail over Fläkt Woods on claims of tortious interference with Matthew's employment agreement and unjust enrichment, regardless of how the Court rules on the remaining claims. While technically true, this argument minimizes the practical realities of this action. At the cores of the Complaint and Matthew's various claims are allegations that Laudamiel and Capua wrongfully schemed to deprive him of his interest in Aeosphere and accomplished their goal utilizing a severely flawed process of dissolution, winding up, and cancellation. The facts pled in the Complaint and uncovered in jurisdictional discovery suggest that Fläkt Woods's involvement was, at most, limited to functioning on the periphery of the purported conspiracy. Another reasonable, perhaps better, interpretation of these facts is that Fläkt Woods was indifferent to how Aeosphere resolved its internal problems. Either way, it is difficult to see how the Remaining Defendants could not be found liable on any claim, and, yet, Matthew would prevail on claims against Fläkt Woods. It is within the Court's discretion to discount such hyper-technical arguments when considering a Rule 54(b) motion.

[33] *Tri-Star*, 1989 WL 112740, at *2 (emphasis added).

for which entry of a final judgment is sought was recognized in *Freeplay Music* where final judgment was, nonetheless, entered.[34]

Although the Court recognizes that entry of a final judgment here implicates factors that may negatively impact judicial efficiency, the Court concludes, on the whole, that entry of a final judgment would be in the interest of judicial efficiency, because the Jurisdictional Issue is severable and an immediate appeal may prevent the need for an additional trial and eliminate the risk of inconsistent results in two different courts.

Matthew contends that an immediate appeal could eliminate possible hardship or injustice. Unless this Court grants his Rule 54(b) motion, he argues, it is unlikely that a final judgment will be rendered and an appeal decided before the time-bar defenses run in other forums where he could pursue the Fläkt Woods claims. Although he could file suit in another forum now, doing so would effectively deprive him of the opportunity to appeal the Order and, possibly, of the opportunity to try his claims against Fläkt Woods here. In response, Fläkt Woods argues that even an immediate appeal would not guarantee a ruling from the Supreme Court before the applicable statute

[34] *See Freeplay Music*, 2005 WL 2464571, at *3 ("[R]esolution of the legal issues in the [remaining] case may well be largely determinative of [the defendant's] interests if the case is returned to this Court.").

of limitations runs and that nothing prevents Matthew from bringing his claims in another forum now.

In the Court's view, "forc[ing Matthew] to choose between deferring [his] claims against [Fläkt Woods] to be resolved at a much later date . . . or acquiescing in this Court's decision on personal jurisdiction"[35] is not in the interest of justice and constitutes significant hardship.[36] When a plaintiff's claims have been dismissed for lack of personal jurisdiction, waiting for the judgment eventually to become final carries a greater risk of significant hardship or injustice than when a plaintiff's claims are dismissed under Court of Chancery Rule 12(b)(6) or the defendant is granted summary judgment. This is because, in the former instance, the plaintiff has not received a ruling on the substance of his claims, and he may never, if the lower court's ruling on personal jurisdiction is affirmed and the statutes of limitations have run in the other forums where he could otherwise have asserted the claims.

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[35] *Freeplay Music*, 2005 WL 246457, at *2.

[36] *See id.* at *2-3. The Court notes that this conclusion does not turn on the statute of limitations or presence or absence of an applicable savings statute in any particular forum where Matthew may be able to assert the Fläkt Woods claims. Furthermore, the Court rejects Matthew's argument that possible discovery inefficiencies constitute significant hardship. As was recognized in *Freeplay Music*, even if Matthew succeeds on appeal to the Supreme Court, it is likely that discovery pertaining to the Fläkt Woods claims will not be performed in conjunction with discovery taken for the remaining claims. *See id.* at *3. As such, the discovery inefficiencies noted by Matthew will not be eliminated by an immediate appeal.

The Court concludes that entry of a final judgment as to the Fläkt Woods claims is in the interests of judicial efficiency and justice and will alleviate a danger of hardship. This conclusion alone is enough to move the Court to exercise its discretion and enter final judgment, but, the Court also notes that this decision finds some precedential support in *Hercules*, where the Supreme Court affirmed entry of a final judgment under similar procedural and factual circumstances.[37]

III. SUPREME COURT RULE 42

In the alternative, pursuant to Delaware Supreme Court Rule 42, Matthew seeks certification of an interlocutory appeal from the Order with respect to the Court's dismissal of the Fläkt Woods claims. Since the Court granted Matthew's request for entry of a final judgment pursuant to Court of Chancery Rule 54(b), it need not address his request for certification under Rule 42. Nevertheless, because one of Matthew's arguments in support of his request for certification of an interlocutory appeal seems to misstate the Court's holding and the standard it applied when assessing Fläkt Woods's Court of Chancery Rule 12(b)(2) motion, the Court will address that flawed argument.

[37] Although the factual and procedural circumstances of *Hercules* are similar as they relate to Rule 54, there are significant differences between these two cases with regard to the Superior Court's underlying decision to dismiss certain defendants for lack of personal jurisdiction.

To satisfy Rule 42, an interlocutory order must: (1) determine a substantial issue; (2) establish a legal right; and (3) comply with one of the five criteria listed in Rule 42(b)(i)-(v).[38] Interlocutory appeals are usually only accepted by the Supreme Court where the circumstances are "extraordinary" or "exceptional,"[39] and the Supreme Court has insisted upon strict compliance with Rule 42.[40]

In order to establish the third element of the Rule 42 test, Matthew argues that the Order complies with Rule 42(b)(i), which incorporates by reference the criteria for certified questions of law set forth in Supreme Court Rule 41. Specifically, he contends that the standard of Rule 41(b)(ii) is applicable: "The decisions of the trial courts are conflicting upon a question of law." Matthew argues that there is a conflict between decisions of this Court concerning the appropriate standard of review applied to motions to dismiss under Court of Chancery Rule 12(b)(2) where the plaintiff, as here, has had an opportunity to take jurisdictional discovery, but no evidentiary hearing was held. The majority view, according to Matthew, is that, if no evidentiary hearing is held, the plaintiff only needs to make a prima facie showing of personal jurisdiction and "the record is construed in

[38] Supr. Ct. R. 42(b).
[39] *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 4357667 (Del. Ch. Dec. 6, 2007) (citation omitted).
[40] Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 14.04, at 14–6 (2011).

the light most favorable to the plaintiff"[41] (the "Majority Standard"). A minority of this Court's opinions, according to Matthew, has imposed a "more exacting factual standard" when jurisdictional discovery has been taken[42] and required the plaintiff to "allege specific facts supporting its position"[43] (the "Minority Standard").[44]

Matthew contends that this Court applied the more stringent Minority Standard when assessing whether this Court had personal jurisdiction over Fläkt Woods, and

> had the Court construed the factual record in the light most favorable to him, it should have found (or at least reasonably inferred) that Fläkt Woods knew or had reason to know that the dissolution of Aeosphere, as a central act in furtherance of defendants' conspiracy, occurred and had an effect in Delaware.[45]

Furthermore, regardless of which standard the Court applied, Matthew argues that "the parties' reliance upon inconsistent statements of this Court

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[41] *E.g. Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007) (internal quotation and citation omitted).

[42] *Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *6 n.42 (Del. Ch. Dec. 1, 2009).

[43] *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251, at *2 (Del. Ch. Mar. 4, 2004).

[44] The shorthand labels assigned to the two standards should not be understood to imply that the Court agrees with Matthew's characterization of one as the majority standard and the other as the minority standard. The shorthand labels simply track Matthew's characterization of the two standards and are used for ease of reference.

[45] Pl.'s Mot. for Entry of Final J. as to Fläkt Woods Group SA or, Alternatively, Application for Certification of Interlocutory Appeal ("Pl.'s Mot. for Entry of Final J.") ¶ 13a.

concerning the proper standard of review justifies interlocutory appeal of the [Order] to permit the Supreme Court to resolve the conflict."[46]

Matthew's argument fails for several reasons: (1) it misconstrues the Court's holding regarding the Jurisdictional Issue; (2) it introduces a new argument that Matthew did not raise in his previous briefs or at oral argument; and (3) it misconstrues the standard applied by this Court in the Opinion.

First, Matthew misconstrues this Court's holding. According to Matthew, had the Court applied the Majority Standard, it would have found or inferred "that Fläkt Woods knew or had reason to know that the dissolution of Aeosphere, as a central act in furtherance of defendants' conspiracy, occurred and had an effect in Delaware."[47] This contention does not address the issue crucial to this Court's holding. In the Opinion, this Court held: "Since Matthew does not establish that Fläkt Woods knew of the conspiracy's Delaware nexus *before* the completion of the conspiracy, he

[46] *Id.* In their briefs and at oral argument Matthew and Fläkt Woods argued in favor of different standards. Matthew argued that the Court should apply the Majority Standard. *See* Pl.'s Answering Br. in Opp'n to Defs. Fläkt Woods Group SA's & SEMCO LLC's Mot. to Dismiss ("Pl.'s Answering Br.") 25; Cross Mots. to Dismiss & Mot. to Strike Hr'g Tr. ("Hr'g Tr.") 47-50. Fläkt Woods argued that the Court should apply the Minority Standard. *See* Reply Br. in Support of Def SEMCO LLC's & Def. Fläkt Woods Group SA's Mots. to Dismiss 1 ("Reply Br."); Hr'g Tr. 31-33.

[47] Pl.'s Mot. for Entry of Final J. ¶ 13a.

fails to satisfy the fourth *Istituto Bancario* factor."[48] There is no question that Matthew has alleged that Fläkt Woods, through its employee Neil Yule, eventually discovered that Aeosphere's Certificate of Cancellation was filed in Delaware. The Court recognized as much in the Opinion.[49] Matthew's problem is that "[t]here [was] nothing in the record from which this Court [could have] infer[red] that Fläkt Woods knew that the conspiracy would have a Delaware nexus until *after* the conspiracy's goal had been attained and the conspiracy itself was completed."[50] Even accepting as true the results that Matthew contends would flow from applying the Majority Standard,[51] it is not clear that the holding he challenges would change.

Second, Matthew apparently attempts to address this deficiency by presenting a new argument in a parenthetical quotation following a citation to *Hercules*. With some alterations to the original text, he quotes: "Given the superior knowledge and sophistication of [a foreign defendant], it either possessed, or had available to it, sufficient information to infer that the actions of the conspiracy would affect [the plaintiff] in Delaware."[52] Presumably, Matthew intends to suggest that this logic could be applied to

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[48] *Matthew*, 2012 WL 605589, at *9 (emphasis added).
[49] *Id.* at *8-9.
[50] *Id.* at *8 (emphasis in original).
[51] As discussed below, the Court did apply the Majority Standard, but it did not reach the conclusions proposed by Matthew.
[52] Pl.'s Mot. for Entry of Final J. ¶ 13a (quoting *Hercules*, 611 A.2d at 484).

Fläkt Woods, and, as a result, the Court should have inferred that Fläkt Woods knew or had reason to know of the purported conspiracy's Delaware nexus before the conspiracy's completion.

The Court will briefly address this argument, even though this is the first time that Matthew has raised it[53] and Rule 42 motions are not an appropriate vehicle for presenting new arguments regarding an issue that has previously been briefed, argued, and decided by this Court. But, there are striking differences between these two cases that bear mentioning. The defendants in *Hercules* were "sophisticated international banking organizations" ("Bank Leu") that facilitated the insider trading of an investment banker, Dennis Levine ("Levine"), including trades of the stock of Delaware corporations.[54] Bank Leu not only profited from the commissions on these trades, but it and some of its highest officials also "piggy-backed" off of Levine's trades so that they, too, could directly profit

[53] *Matthew*, 2012 WL 605589, at *9 (summarizing all of the arguments Matthew presented regarding the fourth the *Istituto Bancario* factor). The Court notes that Matthew did cite *Hercules* in his Answering Brief, but not for the proposition noted above. *See* Pl.'s Answernig Br. 27. The Court further notes that in its joint Reply Brief with SEMCO, Fläkt Woods cited *Hercules* and quoted the same sentence Matthew quotes in his Motion for Entry of Final Judgment. Reply Br. 17-18. Unsurprisingly, Fläkt Woods argued that the Court should draw the conclusion opposite from that which Matthew now, seemingly, asks the Court to reach. Since Matthew did not raise this argument in his Answering Brief or at oral argument, there was no reason for the Court to address it in the Opinion.

[54] *Hercules*, 611 A.2d at 478-79.

from his inside information.[55] The case before the Supreme Court in *Hercules* involved the acquisition of Simmonds Precision Products ("Simmonds") by Hercules Inc. ("Hercules"), a Delaware corporation.[56] Hercules paid an inflated price for Simmonds due to bad advice given to it by Levine, who owned Simmonds stock.[57] Bank Leu also owned Simmonds stock.[58] After the Hercules-Simmonds merger was announced, Bank Leu sold all of the Simmonds stock it was holding on behalf of Levine, the bank's officers, and its managed accounts.[59] The Superior Court dismissed the claims against Bank Leu for lack of personal jurisdiction, concluding that Hercules did not satisfy the fourth *Istituto Bancario* factor.[60] On appeal, the Supreme Court reversed that decision.[61]

First, without deciding whether Fläkt Woods could be deemed to have had "superior knowledge and sophistication" in the sense that phrase is used in *Hercules*, the Court notes that there are striking differences between the defendants and the relevant circumstances in these two cases. Bank Leu was an international bank whose business activities included the active trading of

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[55] *Id.*
[56] *Id.* at 480.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 482.
[61] *Id.* at 483-84.

and investing in U.S. equities, including the stock of Delaware companies.[62] Through its managed accounts, Bank Leu held stock in Simmonds, which was bought by Hercules, a Delaware company, in a deal that was publicly announced *before* Bank Leu sold its Simmonds stock.[63] Bank Leu also evinced enough sophistication regarding corporate law that it assisted Levine in establishing a Panamanian corporation through which he could make his illicit trades, and it, itself, established a foreign corporation to which it transferred all of the assets of Levine's Panamanian corporation.[64] That the Bank Leu employees involved in the conspiracy were knowledgeable in the areas of law and finance is further evidenced by the facts that one official wrote an internal memorandum warning that the Securities and Exchange Commission (the "SEC") was "getting tough" on insider trading and that Bank Leu took many other steps to hide its and Levine's illegal activities from the view of the SEC.[65]

In contrast, Fläkt Woods is a "Swiss business entity that provides management services to the Fläkt Woods family of companies[, which] . . . are involved in the air climate and air movement industries."[66] Its relationship with Aeosphere arose from "the development of a localized air

[62] *Id.* at 479.
[63] *Id.* at 480.
[64] *Id.* at 479.
[65] *Id.*
[66] *Matthew*, 2012 WL 605589, at *1.

scenting system called the 'scent organ.'"[67] Aeosphere and Fläkt Woods later "partnered to develop an air fragrancing component for use in Fläkt Woods's products."[68] Aeosphere was a small, non-public company with no readily apparent ties to Delaware, except for the not-well-publicized fact that it was a Delaware limited liability company ("LLC").[69]

Another significant difference between *Hercules* and the instant case is the timing of when the defendant in question can be fairly viewed to have become aware of the conspiracy's Delaware nexus. The Supreme Court viewed Bank Leu as becoming charged with knowledge of the conspiracy's Delaware nexus when the Hercules-Simmonds merger was publicly announced.[70] Furthermore, the Supreme Court noted: "Significantly, after Hercules acquired Simmonds, and this became public, Bank Leu, nevertheless continued to profit from the conspiracy's illegal activities and,

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[67] *Id.* at *3.
[68] *Id.*
[69] The only written agreement alleged to have existed between the two parties, referred to as the Collaboration Agreement in the Opinion, contained no indication that Aeosphere was a Delaware LLC. *See* Decl. of Thad J. Bracegirdle, Esq., Ex. 5 (unamended Collaboration Agreement). The Collaboration Agreement gave no other indications that Aeosphere had any nexus with Delaware. For instance, the unamended Collaboration Agreement listed a Florida address for Aeosphere, and the two amendments to the Collaboration Agreement listed a New York address for the company. *Id.*, Exs. 5-7 (unamended Collaboration Agreement and amendments).
[70] *See Hercules*, 611 A.2d at 483-84 (stating that "[c]learly, Bank Leu knew, or had reason to know, that such a misappropriation had an effect in Delaware by its impact on a Delaware company" after explaining that Bank Leu sold its Simmonds stock after it learned that Hercules was acquiring Simmonds). *See also id.* at 480 (highlighting that Bank Leu continued to partake in the conspiracy after the announcement of the merger).

most importantly, actively concealed the conspiracy's existence, including the Levine-Bank Leu activities respecting the Hercules-Simmonds acquisition."[71] Therefore, the Supreme Court made it clear that Bank Leu's participation in the conspiracy continued *after* it learned of the conspiracy's Delaware nexus. This is precisely what the Court held that Matthew did not fairly allege in the instant case.[72]

Finally, the Court did not apply the Minority Standard as Matthew contends, and, in fact, it did apply the Majority Standard. Matthew argued that Fläkt Woods was subject to personal jurisdiction under the conspiracy theory. This Court followed well-settled Delaware law regarding the conspiracy theory of jurisdiction and the test used to assess its compliance with constitutional due process, namely the standard set forth in the Supreme Court precedent *Istituto Bancario*. The Court never stated in the Opinion that Matthew was being held to a "more exacting factual standard," nor did the Court apply such a standard when assessing the factual allegations contained in the Complaint and entered into the record as a result of jurisdictional discovery. The Court did state that Matthew was required to

[71] *Id.* at 484. *See also id.* at 480 ("In July 1983, after announcement of the Hercules-Simmonds merger, Bank Leu sold all of the Simmonds stock it was holding on behalf of Levine, the bank's officers, and its managed accounts. Thus, Bank Leu's illegal activities did not abate once Hercules' participation in the Simmonds transaction became known. Notably, these activities were among those which Bank Leu initially tried to conceal from the SEC.").

[72] *Matthew*, 2012 WL 605589, at *8.

make a "factual showing" of the *Istituto Bancario* factors.[73] This language comes verbatim from *Istituto Bancario*.[74] In what is, essentially, a restatement of the "factual showing" requirement, the Court also noted that "factual proof of each enumerated element is required."[75] Without even considering that this statement is directly supported by *Istituto Bancario*, one can hardly claim that it is a novel standard or a conflicted question of law.[76]

The prima facie standard and the "factual showing" requirement of *Istituto Bancario* can be and are applied at the same time.[77] Requiring that the plaintiff present specific factual allegations and not mere conclusory allegations does not displace the prima facie standard. In assessing Matthew's arguments in favor of personal jurisdiction, the Court did not engage in fact-weighing; it accepted that Matthew's non-conclusory factual allegations were true, even when these allegations were contested by Fläkt Woods; it accepted as true allegations pled in the Complaint but not

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[73] *Id.* at *7.
[74] *Istituto Bancario*, 449 A.2d at 225.
[75] *Matthew*, 2012 WL 605589, at *7.
[76] Cases recognizing that each *Istituto Bancario* factor must be supported by factual proof include: *Benihana of Tokyo Inc. v. Benihana, Inc.*, 2005 WL 583828, at *8 (Del. Ch. Feb. 4, 2005) (citation omitted); *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 330 (Del. Ch. 2003) (citation omitted); *Crescent Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 976 (Del. Ch. 2000) (citation omitted); *Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, 1995 WL 694397 (Del. Ch. Nov. 21, 1995) (citing *Istituto Bancario*, 449 A.2d at 225); *Newspan, Inc. v. Hearthstone Funding Corp.*, 1994 WL 198721, at *4 (Del. Ch. May 10, 1994) (citation omitted).
[77] *See Benihana*, 2005 WL 583828, at *5, *8; *Newspan*, 1994 WL 198721, at *4.

supported by evidence in the record;[78] it even—as discussed below—credited Matthew with all of the reasonable, favorable inferences that could be drawn from the non-conclusory factual allegations he presented in the Complaint or through jurisdictional discovery. The Court did not explicitly recite that it was applying the prima facie standard, but a fair reading of the Opinion makes it abundantly clear that was the standard applied.

The Court also credited Matthew with all of the reasonable, favorable inferences that could be drawn from the non-conclusory factual allegations he presented in the Complaint or through jurisdictional discovery. "At this stage, the Court must draw all reasonable inferences in [Matthew's] favor."[79] The Court repeatedly referred to favorable inferences it drew or was unable to draw based upon the factual allegations presented by Matthew.[80] The

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[78] *See Canadian Commercial Workers Indus. Pension Plan v. Alden*, 2006 WL 456786, at *11 n.93 (Del. Ch. Feb. 22, 2006) (explaining that the decisions of this Court "make clear that a plaintiff can, in fact, make the necessary prima facie showing using only the facts alleged in the complaint").

[79] *Matthew*, 2012 WL 605589, at *8 (citing *Sample v. Morgan,* 935 A.2d 1045, 1056 (Del. Ch.2007)). Although this statement followed the Court's recitation of the elements of civil conspiracy, the Court did not only draw all reasonable, favorable inferences in Matthew's favor when assessing whether he properly pled a conspiracy. *See id.* ("There is nothing in the record from which this Court *may infer* that Fläkt Woods knew that the conspiracy would have a Delaware nexus until *after* the conspiracy's goal had been attained and the conspiracy itself was completed." (initial emphasis added and latter emphasis in original)). Furthermore, the Court's citation of *Sample* would not make sense if it was only drawing all reasonable inferences in Matthew's favor in this limited manner, since *Sample* explained that the Court would draw reasonable inferences in the plaintiff's favor while setting forth the general standard for a Court of Chancery Rule 12(b)(2) challenge. *See Sample*, 935 A.2d at 1056.

[80] *Matthew*, 2012 WL 605589, at *8, *9, *10.

Court even explicitly stated that Matthew failed to satisfy the fourth *Istituto Bancario* factor because "[t]here [was] nothing in the record from which this Court [could have] infer[red] that Fläkt Woods knew that the conspiracy would have a Delaware nexus until *after* the conspiracy's goal had been attained and the conspiracy itself was completed."[81] Matthew is incorrect in arguing that the Court did not draw all reasonable inferences in his favor.

In sum, the Court did not apply the Minority Standard, and, in fact, it did apply the Majority Standard. The Court rejected Matthew's jurisdictional argument under the very standard he seeks to have applied. Even if the Supreme Court were to endorse the Minority Standard on appeal, the result of this Court's analysis would not change.

Matthew also argues that interlocutory review of the Order is consistent with the criterion set forth in Rule 42(b)(v). Rule 42(b)(v) permits interlocutory review where "[a] review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice." Matthew contends that review of the Order would serve considerations of justice because, if review is granted and he succeeds on appeal, he would be able to pursue his claims against Fläkt Woods

[81] *Id.* at *8 (emphasis in original). *See also id.* at *9 ("Matthew [pled] no other facts from which the Court could infer that Fläkt Woods knew that the conspiracy had a Delaware nexus or even that Aeosphere was a Delaware entity.").

concurrently with his claims against the Remaining Defendants in a single trial. This argument is similar to the one Matthew advanced in support of his request for entry of a final judgment, which the Court has fully addressed above. Because the Court has already granted Matthew's request for entry of a final judgment, it is unnecessary to assess this argument in the context of Rule 42, and Matthew's motion for certification of an interlocutory appeal is denied as moot.

IV. CONCLUSION

For the foregoing reasons, Matthew's motion for entry of a final judgment dismissing Fläkt Woods on personal jurisdictional grounds is granted. His motion for certification of an interlocutory appeal is denied as moot. An order will be entered.