IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

HOMER MILLER; BECKY MILLER; and FIRST INTERSTATE BANK, Trustee for G.M. and W.M. (Minor Children), Plaintiffs, vs. FBL FINANCIAL GROUP, INC.; SOLO, INC.; MOUNTAIN WEST FARM BUREAU MUTUAL INSURANCE CO.; FARM BUREAU FINANCIAL SERVICES; FRED STURDEVANT; JOHN BORGIALLI; NANCY L. HAUGAN; CAREY BERTSCH; AN UNKNOWN BUSINESS ENTITY; and DOES 1-93 INCLUSIVE, Defendants.	**No. 4:05-cv-00343-JEG-CFB** **O R D E R**

This matter comes before the Court on Defendants' Motions and Renewed Motions to Dismiss for lack of personal jurisdiction and improper venue (Clerk's Nos. 14, 18, 33, and 35). Plaintiffs are represented by John L. Timmons and James P. Mason. Defendants Solo, Inc., Fred Sturdevant, and Nancy Haugan are represented by Barry A. Russell and Lu Ann White. Defendants Mountain West Farm Bureau Mutual Insurance Company, John Borgialli, and Carey Bertsch are represented by Jason T. Madden. Defendant FBL Financial Group is represented by Mark Sherinian. A hearing on the pending motions was held on March 28, 2006.[1] This matter is fully submitted and is ready for disposition.

[1] Defendant FBL Financial Group has filed an Answer and did not participate in the hearing.

FACTS

Plaintiffs Homer and Becky Miller, husband and wife, have two minor children, W.M., age 3, and G.M., age 1 (collectively, "the Millers"). Each of the Millers is a Montana resident. Homer Miller was once a member of the Amish Church but left the organization in approximately 1998. The religious affiliation of the other Plaintiffs is unknown, but the Plaintiffs' filings suggest they are not Amish. See First Am. Compl. ¶¶ 35, 46, 56, 65(d), 66, 67(b); Recast Compl. ¶ 50.

Defendant Solo, Inc. ("Solo") is a Montana corporation. Defendants Fred Sturdevant and Nancy Haugan are husband and wife and are Montana residents. Sturdevant is Solo's president, and Haugan is one of its directors. Solo operates a ranch located near Rexford, Montana.

Defendant FBL Financial Group, Inc. ("FBL") is an Iowa corporation headquartered in West Des Moines, Iowa. Defendant Farm Bureau Financial Services ("FBFS") is either an affiliate or subsidiary of FBL. Defendant Mountain West Farm Bureau Mutual Insurance Company ("MWFB") is a Wyoming corporation with its principal place of business in Laramie, Wyoming. MWFB is a property casualty insurance company authorized to sell insurance policies in Montana and other states, but not Iowa. Defendant John Borgialli, a Montana resident, is employed by MWFB as a claims representative. Defendant Carey Bertsch, also a Montana resident, works as a claims manager for MWFB.

In May 2003, MWFB issued a property casualty insurance policy naming Sturdevant and Solo as insureds. Under the terms of the policy, coverage extended to Haugan. In June 2003, Homer Miller was allegedly injured when he was thrown from a horse on Solo's ranch. The Millers sought benefits under the MWFB policy covering the ranch. As part of that process, Homer and Becky Miller were interviewed by Borgialli in late August 2003. The Millers

contend Borgialli represented he was an FBFS employee during the interview because he provided them with a business card bearing an FBFS (and no MWFB) logo. In a letter authored by Bertsch dated September 23, 2003, the Millers were denied coverage under Solo's policy. The Millers note the letterhead of Bertsch's letter contains the logos of both FBFS and MWFB.

On June 17, 2005, the Millers initiated this action by filing a Complaint in this Court bringing claims against FBL and Solo. On September 23, 2005, the Plaintiffs filed an Amended and Substituted Complaint, bringing a total of nine causes of action against different combinations of the current lineup of Defendants. The Amended Complaint totaled eighty-nine paragraphs (many with subparagraphs) and ran to twenty-nine pages in length. On December 5, 2005, FBL filed a Motion to Strike and Recast Complaint, arguing that the Complaint failed to make short and plain statements of the Plaintiffs' allegations, as required by Federal Rule of Civil Procedure 8(a). On December 30, 2005, Magistrate Judge Celeste Bremer granted FBL's motion. The Plaintiffs filed a Recast and Substituted Complaint ("Recast Complaint") on January 19, 2005.

Counts 1 through 3 of the Recast Complaint are brought against Solo, Sturdevant, and Haugan, and allege common law torts of negligence, negligence per se, and negligent infliction of emotional distress, respectively. Count 4, alleging the violation of a Montana unfair claim settlement practices statute, Count 5, alleging the breach of an implied covenant of good faith and fair dealing, and Count 6, alleging fraud, are brought against FBL, FBFS, MWFB, Borgialli, and Bertsch. Counts 8 and 9 set forth intentional infliction of emotional distress and loss of consortium claims, respectively, and are brought against all of the Defendants.

Count 7, the only claim premised upon the violation of a federal statute, alleges the existence of "a civil conspiracy to interfere with the rights of Homer and Becky [Miller]" among

all Defendants.[2] The gist of this claim is that the Defendants conspired to deny the Millers insurance benefits with knowledge that Amish principles "do not allow for initiating civil suits in any [c]ourt forum." Recast Compl. ¶ 51. Consequently, the Millers contend, they were denied rights of a type protected by Title 42 U.S.C. section 1985(3).[3]

Solo, Sturdevant, and Haugan have moved to dismiss under Federal Rule of Civil Procedure 12(b)(2), arguing insufficient contacts exist between them and Iowa, making this Court's exercise of personal jurisdiction over them improper. They alternatively argue that even if this Court could exercise personal jurisdiction over them, the Southern District of Iowa is an improper venue for this action, making dismissal proper under Federal Rule of Civil Procedure 12(b)(3). MWFB, Borgialli, and Bertsch have filed a motion to dismiss filed on identical grounds.[4]

In their reply briefs, and again at the hearing, Solo, Sturdevant, and Haugan "suggest[ed]" under Rule 12(h)(3) that the Plaintiffs have raised "no viable claim . . . pursuant to section 1985(3)." Consequently, it was argued, that claim should be dismissed. Because the balance of the Plaintiffs' claims do not arise under a federal statute, see 28 U.S.C. § 1331, and the parties are not diverse, see id. § 1332, the Plaintiffs allegedly lack a basis for the exercise of subject-matter jurisdiction over those claims, rendering dismissal of their entire action appropriate.

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[2] The Recast Complaint alleges a violation of 42 U.S.C. section 1985(c). Recast Compl. ¶ 55. There is no subsection (c) in section 1985. See 42 U.S.C. § 1985 (2000). It is likely the Plaintiffs intended to plead a violation of section 1985(3). See id.

[3] The fact that the Plaintiffs complain of a violation of a federal statute makes the allegation proffered by MWFB, Borgialli, and Bertsch that "[n]ot one of the claims asserted in the Recast Complaint are premised on Iowa law or that of the Eighth Circuit" incorrect. Derived from an Act of Congress, section 1985 is indeed the law of this circuit.

[4] MWFB, Borgialli, Bertsch, Solo, Sturdevant, and Haugan are collectively referred to as the "Moving Defendants".

DISCUSSION

I. Motion to Dismiss for Lack of Subject-Matter Jurisdiction.

Federal Rule of Civil Procedure 12(h)(3) requires dismissal of an action "[w]henever it appears by suggestion of the parties . . . that the court lacks jurisdiction of the subject matter." Fed. R. Civ. P. 12(h)(3).[5] Solo, Sturdevant, and Haugan have made such a suggestion. They have not packaged their argument as a motion to dismiss under Rule 12(b)(6); instead, by making a Rule 12(h)(3) "suggestion," they challenge the existence of subject-matter jurisdiction under Rule 12(b)(1). See Trimble v. Asarco, Inc., 232 F.3d 946, 954 (8th Cir. 2000) (treating a district court's dismissal under Rule 12(h)(3) as a dismissal under Rule 12(b)(1)), abrogated on other grounds, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. —, 125 S. Ct. 2611 (2005).

There is, of course, a difference between a case in which subject-matter jurisdiction is lacking and a case in which a plaintiff's complaint fails to set forth a claim under which relief could be granted. Sixty years ago, the Supreme Court recognized that

> [j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which [a party] could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.

Bell v. Hood, 327 U.S. 678, 682-83 (1946) (emphases added); accord Steel Co. v. Citizens for A Better Env't, 523 U.S. 83, 89 (1998). Thus, whether the Plaintiffs have pled a violation of a

[5] Of course, even if no party made such a suggestion, the Court would be obligated to satisfy itself of the existence of subject-matter jurisdiction. See Arbaugh v. Y & H Corp., 546 U.S. —, 126 S.Ct. 1235, 1244 (2006).

federal statute is the focus of a Rule 12(h)(3) motion; whether such a violation is viable is the focus of a Rule 12(b)(6) motion, which is not before the Court.

Here, unquestionably, the Complaint alleges the violation of a federal statute. See Recast Compl. ¶¶ 50-58. As a result, the Plaintiffs have "claim[ed] a right to recover under the . . . laws of the United States." Bell, 327 U.S. at 681. On the present record, resolution of the Rule 12(h)(3) motion in favor of the Plaintiffs is therefore appropriate. See Country Club Estates, LLC v. Town of Loma Linda, 213 F.3d 1001, 1003-04 (8th Cir. 2000) ("A complaint that pleads violations of both state and federal law is within the original jurisdiction of a federal district court.").

An exception to the rule that pleading the violation of a federal statute establishes jurisdiction is that "[a] claim invoking federal-question jurisdiction . . . may be dismissed for want of subject-matter jurisdiction if it is not colorable, i.e., if it is 'immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous,'" Arbaugh v. Y & H Corp., 546 U.S. — n.10, 126 S. Ct. 1235, 1244 n.10 (2006) (quoting Bell, 327 U.S. at 682-83)), or "when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy," Steel Co., 523 U.S. at 89 (quoting Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974)). Here, Solo, Sturdevant, and Haugan "suggested" the lack of subject-matter jurisdiction for the first time in their reply briefs. But see LR 7.1(g) (2006) (permitting a party in a reply brief "to assert newly-decided authority or to respond to new and unanticipated arguments made in the resistance"). The Court cannot conclude the Plaintiffs' section 1985(3) claim is not "colorable" because they have not yet had an adequate opportunity to respond to allegations that it is not; and thus, the record is insufficient.

The Court could order the parties to conduct additional discovery and provide additional briefing to then resolve any remaining subject-matter jurisdiction questions. But, the Court must consider what is to be gained by pursuing that exercise in the unique circumstances of this case. The Court would not be compelled to conclusively resolve subject-matter jurisdiction questions first, so long as a "straightforward" personal jurisdiction flaw also exists. Cf. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 588 (1999) ("Where . . . a district court has before it a straight-forward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction."). But cf. Crawford v. F. Hoffman-La Roche Ltd., 267 F.3d 760, 764-65 (8th Cir. 2001) (refusing to expand Ruhrgas to the situation where a court considered a motion for voluntary dismissal before finding it had subject-matter jurisdiction where the subject-matter jurisdiction questions were "not particularly time consuming or difficult to resolve"). In addition to providing an excellent illustration of the continued vitality of Occam's Razor (entities should not be multiplied beyond necessity), this rule is also sensible because expending the parties' and the Court's resources to exhaustively pursue a subject-matter jurisdictional issue when a fully-submitted and relatively easy personal jurisdiction question disposes of the case as to the moving defendants anyway is not only uneconomical, but would add much surplusage to any Order issued by the Court.

This conclusion of process does not decide, and in no way implies, that the Plaintiffs have set forth a claim under which relief could be granted with respect to their alleged section 1985(3) violation.

II. Motions to Dismiss for Lack of Personal Jurisdiction.

Relying on Federal Rule of Civil Procedure 12(b)(1), the Moving Defendants have moved to dismiss the Millers' claims against them on the basis that this Court cannot exercise personal jurisdiction over each Moving Defendant.

A. Applicable Legal Principles.

When personal jurisdiction is challenged or controverted by a motion to dismiss for lack of personal jurisdiction, the nonmoving party must prove jurisdiction is proper in the proposed forum. Romak USA, Inc. v. Rich, 384 F.3d 983-84 (8th Cir. 2004); Dever v. Hentzen Coatings, Inc., 380 F.3d 1070, 1072-73 (8th Cir. 2004); Epps v. Stewart Info. Servs. Corp., 327 F.3d 642, 647 (8th Cir. 2003); Burlington Indus., Inc. v. Maples Indus., Inc., 97 F.3d 1100, 1102 (8th Cir. 1996). Only a prima facie showing of jurisdiction is required until the occurrence of either an evidentiary hearing[6] or a trial, then proof by a preponderance of the evidence is necessary. Epps,

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[6] It is surprisingly unclear what constitutes an "evidentiary hearing" for the purposes of a Rule 12(b)(1) motion. Cf. United States v. 1998 BMW "I" Convertible, VIN # WBABJ8324 WEM20855, 235 F.3d 397, 400 (8th Cir. 2000) (hereinafter "BMW") ("As no statute or rule prescribes a format for evidentiary hearings on jurisdiction, any rational mode of inquiry will do." (quotation marks and citation omitted)). An evidentiary hearing certainly requires the Court to do more than review affidavits, pleadings, and other documents, see Stanton v. St. Jude Med., Inc., 340 F.3d 690, 693 (8th Cir. 2003) (written submissions); Epps, 327 F.3d at 645-47 & nn.3-4, 650 (SEC filings, press releases, and affidavits); Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1387 (8th Cir. 1991) (pleadings and affidavits); Watlow Elec. Mfg. Co. v. Patch Rubber Co., 838 F.2d 999, 1000 (8th Cir. 1998) (written submissions), but hearing oral arguments, as the Court did here, is neither sufficient, see Digi-Tel Holdings, Inc. v. Proteq Telecomms. (PTE), Ltd., 89 F.3d 519, 521-22 (8th Cir. 1996) (requiring only a prima facie showing despite a hearing); compare St. Paul Fire & Marine Ins. Co. v. Courtney Enters., Inc., 108 F. Supp. 2d 1057, 1058 & n.1 (D. Minn. 2000) (reflecting the occurrence of oral arguments), with St. Paul Fire & Marine Ins. Co. v. Courtney Enters., Inc., 270 F.3d 621, 623-24 (8th Cir. 2001) (noting that no evidentiary hearing was requested), nor necessary, Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 676 (1st Cir. 1992). Perhaps the rule is that "live testimony" must be heard, see Digi-Tel Holdings, 89 F.3d at 521-22 (applying the lower standard of proof where no "live testimony" was heard), or perhaps a court must resolve factual questions and make witness credibility determinations, cf. BMW, 235 F.3d at 400. Or, perhaps it makes no difference: at

327 F.3d at 647; Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A., 51 F.3d 1383, 1387 (8th Cir. 1995); Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1387 (8th Cir. 1991). The Court must examine any written submissions in the light most favorable to the Plaintiffs, who also benefit from the resolution of any factual disputes in their favor. See Romak, 384 F.3d at 983; Lakin v. Prudential Sec., Inc., 348 F.3d 704, 706 (8th Cir. 2003); Stanton v. St. Jude Med., Inc., 340 F.3d 690, 693 (8th Cir. 2003); Epps, 327 F.3d at 647; Digi-Tel Holdings, Inc. v. Proteq Telecomms. (PTE), Ltd., 89 F.3d 519, 522 (8th Cir. 1996). Because no evidentiary hearing occurred, see supra note 6, the Court must decide if the Millers have made a prima facie showing of personal jurisdiction over each Moving Defendant.

Because the federal statute the Millers claim the Defendants violated contains no national service of process provision, the Court may exercise jurisdiction over each Moving Defendant only if an Iowa state court could. Compare Fed. R. Civ. P. 4(k)(1)(A) (service of summons is sufficient "to establish jurisdiction over the person of a defendant who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located"), with id. R. 4(k)(1)(D) (service of summons is sufficient "to establish jurisdiction over the person

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least twice the court has announced the rule that motions to dismiss for want of personal jurisdiction require nothing more than a prima facie showing without addressing whether an evidentiary hearing occurred, see Lakin v. Prudential Sec., Inc., 348 F.3d 704, 706 & n.3 (8th Cir. 2003); Pecoraro v. Sky Ranch for Boys, Inc., 340 F.3d 558, 561 (8th Cir. 2003), and in at least one instance, a district court held an evidentiary hearing, Porter v. Berall, 142 F. Supp. 2d 1145, 1147 (W.D. Mo. 2001), yet the court of appeals still required only a prima facie showing, 293 F.3d 1073, 1075 (8th Cir. 2002).

Here, no "live testimony" was heard, so the record consists of the Complaint, affidavits, and other written submissions. Regardless of where the line happens to fall dividing a "hearing" from an "evidentiary hearing," the Court concludes that the hearing held in this case was not an evidentiary hearing. At bottom, it makes little difference because the Plaintiffs' attempt to show the existence of minimum contacts between the Moving Defendants and Iowa fails under the less onerous standard as a result of the paucity of contacts between the Moving Defendants and Iowa, as well as because of the legal theory the Plaintiffs advance, discussed in detail below.

of a defendant when authorized by a statute of the United States"). As a result, the Iowa long-arm statute[7] along with familiar due process principles guide the analysis.

The Moving Defendants are neither physically present in nor are they residents of Iowa, and they have not waived their ability to challenge personal jurisdiction. Therefore, a two-pronged inquiry guides the analysis. First, Iowa's long-arm statute must give the Court authority to exercise jurisdiction over each Defendant. See Lakin, 348 F.3d at 706-07; Porter v. Berall, 293 F.3d 1073, 1075 (8th Cir. 2002); Bell Paper Box, Inc. v. U.S. Kids, Inc., 22 F.3d 816, 818 (8th Cir. 1994); Gould v. P.T. Krakatau Steel, 957 F.2d 573, 575 (8th Cir. 1992); Dakota Indus., 946 F.2d at 1387-88. If that statute authorizes jurisdiction, the Court's exercise of jurisdiction must in each instance comport with due process principles. See Lakin, 348 F.3d at 707; Porter, 293 F.3d at 1075-76; Bell Paper Box, 22 F.3d at 818; Gould, 957 F.2d at 575; Dakota Indus., 946 F.2d at 1388. The jurisdictional reach of Iowa's state courts is commensurate with that permitted by due process principles embedded in the federal Constitution. Hammond v. Fla. Asset Fin. Corp., 695 N.W.2d 1, 5 (Iowa 2005); see United Fire & Cas. Co. v. Applied Fin., Inc., 397 F. Supp. 2d 1086, 1090 (N.D. Iowa 2005); Wright v. City of Las Vegas, 395 F. Supp. 2d 789, 801 (S.D. Iowa 2005). Therefore, the first prong of the analysis folds into the second: whether the exercise of personal jurisdiction over each Moving Defendant is consistent with principles of due process.

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[7] The Iowa jurisdictional statute provides, in relevant part,

> Every corporation, individual, personal representative, partnership or association that shall have the necessary minimum contact with the state of Iowa shall be subject to the jurisdiction of the courts of this state, and the courts of this state shall hold such corporation, individual, personal representative, partnership or association amenable to suit in Iowa in every case not contrary to the provisions of the Constitution of the United States.

Iowa R. Civ. P. 1.306 (2005).

"[D]ue process requires . . . that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980). The "minimum contacts" requirement is met if the controversy is related to or arises out of a defendant's activities within the forum state (specific jurisdiction), or if a defendant has continuous and systematic contacts with the forum state (general jurisdiction). See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-76 & nn.15, 17-18 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 404, 413-15 & nn.8-9 (1984); Johnson v. Woodcock, — F.3d at —, 2006 WL 925427, at *1-*3 (8th Cir. 2006); Dever, 380 F.3d at 1073; Lakin, 348 F.3d at 707; Epps, 327 F.3d at 647-48. In either situation, the defendant's contacts must be based upon "'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" Burger King, 471 U.S. at 475 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). More than "random, fortuitous, or attenuated contacts" are required, id. (quotation marks omitted); the defendant's connection with the forum state must be sufficient to cause the defendant to "reasonably anticipate being haled into court" in the proposed forum, World-Wide Volkswagen, 444 U.S. at 297. But even if a nonresident defendant has the requisite minimum contacts with the proposed forum, a federal court may still decline to exercise personal jurisdiction over a nonresident defendant if the exercise of jurisdiction "would be inconsistent with traditional notions of fair play and substantial justice." Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113-14 (1987) (quoting Int'l Shoe, 326 U.S. at 316); see also id. at 116

(Brennan, J., concurring in part); id. at 121-22 (Stevens, J., concurring in part); accord Ferrell v. West Bend Mut. Ins. Co., 393 F.3d 786, 790-91 (8th Cir. 2005).

When determining the sufficiency of a defendant's contacts, the Eighth Circuit has frequently and recently applied a five-factor test, with the first three considered in the aggregate and carrying the most weight. The five factors are (1) the nature and quality of the contacts with the forum state, (2) the quantity of such contacts, (3) the relation of the cause of action to the contacts, (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties. Johnson, — F.3d at —, 2006 WL 925427, at *2; Romak, 384 F.3d at 984; Stanton, 340 F.3d at 694; Epps, 327 F.3d at 648; Burlington Indus., 97 F.3d at 1102; Digi-Tel Holdings, 89 F.3d at 522-23; Dakota Indus., 946 F.2d at 1390. The third factor is used to distinguish cases invoking specific personal jurisdiction from those invoking general personal jurisdiction. See Burlington Indus., 97 F.3d at 1102-03 (discussing Helicopteros, 466 U.S. at 414 nn.8-9); Digi-Tel Holdings, 89 F.3d at 522 n.4 (same); Bell Paper Box, 22 F.3d at 819 (same).

B. Analysis.

1. Personal Jurisdiction Over Solo, Sturdevant, and Haugan.

Solo, Sturdevant, and Haugan have moved to dismiss each claim against them, arguing the Court cannot exercise personal jurisdiction over them because insufficient contacts exist between each of them and Iowa. Their evidence consists of affidavits by Sturdevant and Haugan.

Sturdevant and Haugan are Montana residents. Both claim neither they nor Solo has had contact with Iowa regarding the facts or claims this litigation presents, and the record does not reveal any connection between them and Iowa in any other capacity. Sturdevant admits

purchasing an insurance policy from MWFB in his capacity as an officer of Solo but denies either he or Solo has had any contact with FBL or FBFS. To his knowledge, neither FBL nor FBFS was involved with the purchase of his policy from MWFB.

As best as can be deciphered from the Plaintiffs' brief, they believe the Court should exercise jurisdiction over Solo, Sturdevant, and Haugan because "an affiliation [exists] between the Iowa-based businesses (FBFS and FBL) and [MWFB] which is an [sic] Wyoming [c]orporation, all of whom represented the insured interests of Solo, Sturdevant, and Haugan." Consequently, the Plaintiffs argue, because Solo, Sturdevant, and Haugan "are clearly, by contract, affiliated with" MWFB, Bertsch, and Borgialli, they have sufficient contacts with Iowa to render this Court's exercise of personal jurisdiction over them proper. From this strained point of departure, the Millers appear to argue the Court may exercise personal jurisdiction over Solo, Sturdevant, and Haugan because they interacted with agents (Borgialli and Bertsch) of a company (MWFB) allegedly having contacts with another entity (FBFS) which is a subsidiary of yet another company (FBL) that is apparently subject to personal jurisdiction in Iowa.[8] This is an awkward argument. And it is incorrect, as illustrated by application of the first three of the five factors delineated above.

Instead of identifying contacts between Solo, Sturdevant, and Haugan and Iowa, the Millers point to contacts occurring wholly in Montana between Solo, Sturdevant, and Haugan, all of whom are Montana residents; the Plaintiffs, all of whom are Montana residents; and agents

[8] Although FBL claims the Court lacks subject-matter jurisdiction over the Plaintiffs' claims, Answer of Def. FBL Fin. Group, Inc. ¶ 67, FBL does not contend the Court lacks personal jurisdiction over it, see Fed. R. Civ. P. 12(b) (requiring a contention that a court lacks personal jurisdiction over a party to be made in either a motion preceding a responsive pleading or in a responsive pleading).

of MWFB, a Wyoming corporation not authorized to do business in Iowa. In fact, even if Borgialli and Bertsch happened to be agents of FBL, their interactions with Solo, Sturdevant, and Haugan demonstrate connections between Solo, Sturdevant, and Haugan and those Defendants, not connections between Solo, Sturdevant, and Haugan, the litigation, and Iowa.[9] See Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (focusing on "the relationship among the defendant, the forum, and the litigation" (emphasis added)); accord Guinness Import Co. v. Mark VII Distribs., Inc., 153 F.3d 607, 614 (1998); Land-O-Nod Co. v. Bassett Furniture Indus., Inc., 708 F.2d 1338, 1340 (8th Cir. 1983). No interaction between those individuals occurred in Iowa. At bottom, the record is devoid of activities by Solo, Sturdevant, and Haugan directed at or conducted in Iowa. See Burger King, 471 U.S. at 475-76. Consequently, the nature (indirect, if that), quality (attenuated, at best), and quantity (scant, if any) of contacts between Solo, Sturdevant, and Haugan and Iowa weighs strongly against a finding of personal jurisdiction over those Defendants.

Applying the fourth and fifth factors requires little effort. The fourth factor, Iowa's interest in providing a forum for its residents to litigate, weighs against the exercise of personal jurisdiction, as none of the Plaintiffs and none of Solo, Sturdevant, or Haugan are Iowa residents. Considering the fifth factor, Iowa presents an inconvenient place to litigate a dispute between the Millers and Solo, Sturdevant, and Haugan. Even if discovery could occur with equal ease in Iowa, Wyoming, or Montana with respect to the Millers' civil conspiracy claim, this observation

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[9] The Millers also argue that because Solo, Sturdevant, and Haugan are affiliated "by contract" with MWFB, Bertsch, and Borgialli, they are indispensable parties. This argument actually undermines the Millers' position. If Solo, Sturdevant, and Haugan are indispensable, the Millers could face dismissal of all of their claims against each Defendant, instead of only the Moving Defendants, should the Court conclude it lacks personal jurisdiction over even a single nonresident Defendant. See Fed. R. Civ. P. 19(a)-(b).

ignores the fact that eight other claims have been advanced, nearly half of which are against parties located only in Montana. Additionally, the Millers' claims center around a dispute arising from an insurance policy purchased in Montana from a Wyoming company by two Montana residents operating a Montana company to provide coverage for events occurring on real property in Montana. Little argumentative artistry is required to conclude Iowa is an inconvenient place to litigate this dispute.

Solo, Sturdevant, and Haugan do not have the necessary contacts with Iowa that would make the Court's exercise of personal jurisdiction over them consistent with due process.[10] As a result, their Motion to Dismiss must be **granted**.

2. Personal Jurisdiction Over MWFB, Borgialli, and Bertsch.

Relying on a trio of affidavits, MWFB, Borgialli, and Bertsch claim they lack the contacts with Iowa needed to permit this Court to exercise personal jurisdiction over them.

Light is shed on MWFB's corporate structure by Colleen K. McKinnon, a Litigation Specialist/Corporate Counsel of MWFB. She states that MWFB is not authorized to sell insurance in Iowa, does not solicit or market products to Iowa residents, and does not own, lease, or rent any real property in Iowa. She claims MWFB has no bank accounts or other assets in Iowa. According to McKinnon, MWFB is not required to pay taxes in Iowa and employs no Iowa residents. McKinnon also states MWFB has no "agreement or arrangement with FBL . . . or [FBFS] related to the sale or issuance of property casualty insurance."

As part of the investigative process following Homer Miller's alleged injuries, he and Becky Miller were interviewed by Borgialli. Borgialli, a Montana resident, is employed by

[10] Consequently, the Court need not consider whether the exercise of personal jurisdiction would be fair. See Ferrell, 393 F.3d at 790-91.

MWFB as a claims representative. His office is located in Montana. He claims to have no business or personal relationship with FBL or FBFS. He claims all conversations between himself and the Millers occurred in Montana.

The Millers allege Borgialli is actually employed by FBFS, relying on a business card Borgialli presented during the interview. They have submitted a photocopy of a business card with an FBFS logo above Borgialli's name. Absent from this business card is an indication he was employed by either MWFB or FBL. The Millers contend this fact shows Borgialli is a "[d]esignated agent of both FBL and FBFS."

In late September 2003, the Millers were informed of the denial of their claims by MWFB in a letter authored by Bertsch. Bertsch, also a Montana resident, is employed by MWFB as a Montana claims manager. Bertsch's office is located in Montana as well. He is not an insurance agent and, like Borgialli, claims to have no relationship with FBL or FBFS. He avers that each communication between himself and the Millers occurred in Montana.

The Millers correctly observe the presence of the FBFS and MWFB logos on the letter authored by Bertsch. They claim the existence of the FBFS logo on Bertsch's letter shows he is affiliated with FBFS.

At bottom, the Millers claim the presence of the FBFS logo on two documents presented by Borgialli and Bertsch coupled with their allegations that FBFS is a subsidiary of an Iowa corporation renders the exercise of personal jurisdiction proper over Borgialli, Bertsch, and their employer. MWFB, Bertsch, and Borgialli respond by arguing that FBFS "is nothing other than a trade name ([and] is not an independent legal entity) under which specific, wholly independent companies conduct separate businesses." This allegation is not supported by an affidavit or other evidence.

As noted above, primary among the factors the Court must consider are the nature and quality of the Defendants' contacts with the forum state, the quantity of those contacts, and the relationship between the contacts that exist with the causes of action asserted by the Plaintiffs. Unfortunately for the Millers, applying these factors aids them little because neither the business card nor the letterhead demonstrates a connection between Borgialli, Bertsch, or MWFB and Iowa. See Guinness Import, 153 F.3d at 614 (analyzing the connection between the defendant and the forum); Land-O-Nod, 708 F.2d at 1340 (same). Both documents were passed from one Montana resident to another within the state of Montana. And although MWFB's logo appears with FBFS' on Bertsch's letter, that reality does not show MWFB has any connection with Iowa. For example, no MWFB letterhead or business cards have found their way into Iowa. Although both documents may tend to show FBFS reached into Montana to interact with that state's citizens and businesses, neither document shows MWFB, Borgialli, or Bertsch reached into Iowa for any purpose. That is, the act of an Iowa company or its subsidiary or affiliate reaching into a foreign state does not show a contact between that state's residents and Iowa; it only shows a connection between citizens of a foreign state and an Iowa company. And contact with an Iowa company in a foreign jurisdiction does not equate to a contact with Iowa.

But even if Borgialli and Bertsch were agents of both MWFB and FBL, the latter of which is subject to personal jurisdiction in Iowa, the fact that a court may in some circumstances exercise personal jurisdiction over a nonresident principal through conduct of its nonresident agents in a proposed forum, e.g., Romak, 384 F.3d at 985; Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc., 65 F.3d 1427, 1433-34 (8th Cir. 1995); Wright, 395 F. Supp. 2d at 804-05, does not mean a court may exercise personal jurisdiction over nonresident agents (and their nonresident employer) because of conduct by their resident principal in a foreign forum. That

method of establishing personal jurisdiction is a one-way street. Because the Plaintiffs rely solely on contacts among MWFB, Borgialli, and Bertsch and an Iowa company occurring in states other than Iowa, they have not pointed to any contacts between those Defendants and Iowa itself.

Considering the remaining two factors requires little effort. None of the Plaintiffs, MWFB, Borgialli, or Bertsch are Iowa residents, so Iowa has little interest in providing a place for them to litigate. And, as with the Millers' claims against the other Moving Defendants, much of the litigation involving MWFB, Borgialli, and Bertsch will focus on conduct occurring and property located in Montana, rendering Iowa an inconvenient place to continue this litigation.

The discussion above illustrates why Borgialli, Bertsch, and MWFB do not have the requisite contacts with Iowa needed to render the exercise of personal jurisdiction proper.[11] Consequently, their Motion to Dismiss must be **granted**.

C. Conclusion.

None of the Moving Defendants have the requisite number or type of contacts with Iowa needed to permit this Court to exercise personal jurisdiction over them. Consequently, the Moving Defendants' Motions to Dismiss for lack of personal jurisdiction must be **granted**.

III. Motions to Dismiss for Improper Venue.

Because the Court has concluded personal jurisdiction is lacking over each of the Moving Defendants, "venue [is] necessarily improper under 28 U.S.C. [§] 1391(a)." Richards v. Aramark Servs., Inc., 108 F.3d 925, 929 (8th Cir. 1997). However, even if the Moving Defendants had the requisite contacts with Iowa, dismissal would still be required because venue is

[11] As above, this conclusion renders unnecessary an analysis of the fairness of Court's exercise of personal jurisdiction. See Ferrell, 393 F.3d at 790-91.

improper in the Southern District of Iowa. Because the Moving Defendants' arguments are virtually identical on this point, their motions are addressed together.

A. Applicable Legal Principles.

The Plaintiffs have not claimed the violation of any statute equipped with its own venue provision, so the general venue statute applies. See Woodke v. Dahm, 70 F.3d 983, 985 (8th Cir. 1995). Because this action is not founded on diversity of the parties' citizenship, Title 28 U.S.C. section 1391(b) applies. Compare 28 U.S.C. § 1391(a) (applying in "[a] civil action wherein jurisdiction is founded only on diversity of citizenship"), with id. § 1391(b) (applying in "[a] civil action wherein jurisdiction is not founded solely on diversity of citizenship"). That section provides that venue lies in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . or . . . a judicial district in which any defendant may be found, if there is no district in which the action be otherwise be brought." Id. § 1391(b)(2)-(3).[12] When determining if venue is proper, the goal is not to determine if a plaintiff has selected the "best" venue in which to litigate; the inquiry instead focuses on "whether the district the plaintiff chose has a substantial connection to the claim, whether or not other forums had greater contacts." Pecoraro v. Sky Ranch for Boys, Inc., 340 F.3d 558, 563 (8th Cir. 2003) (citing Setco Enters. Corp. v. Robbins, 19 F.3d 1278, 1281 (8th Cir. 1994)); accord Woodke, 70 F.3d at 985.

[12] Title 28 U.S.C. section 1391(b)(1) is not applicable because the Defendants do not all reside in the same state. See 28 U.S.C. § 1391(b)(1). This conclusion remains true even if Solo and MWFB are deemed to be subject to personal jurisdiction in Iowa pursuant to section 1391(c), because the Millers have chosen to include claims against individuals residing in a state other than Iowa.

The parties' dispute centers on whether section 1391(b)(2) or (b)(3) applies. The Millers contend subsection (b)(3) applies, arguing that venue would not be proper in any other district because FBL "does not avail itself of the personal jurisdiction of the State of Montana." The Moving Defendants, noting that subsection (b)(3) only applies in situations where there exists "no district in which the action may otherwise be brought," 28 U.S.C. § 1391(b)(3), argue that the Millers' action may be brought in Montana, rendering an application of subsection (b)(3) improper. They further argue that because "a substantial part of the events . . . giving rise to the claim occurred" in Montana, and not Iowa, the Court should find venue is improper in the Southern District of Iowa.

Section 1391(b)(3) only applies if sections (b)(1) and (b)(2) are not applicable. Algodonera de las Cabezas, S.A. v. Am. Suisse Capital, Inc., 432 F.3d 1343, 1345 (11th Cir. 2005); Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 434-35 (2d Cir. 2005); cf. Doctor's Assocs., Inc. v. Stuart, 85 F.3d 975, 983 (2d Cir. 1996) (discussing analogous provisions in section 1391(a)); Medicap Pharmacies, Inc. v. Faidley, 416 F. Supp. 2d 678, 683 (S.D. Iowa 2006) (same). Therefore, the parties' arguments reduce to whether section (b)(2) applies. The applicability of that section is dependent upon whether a substantial part of the events giving rise to the Millers' claims occurred in Iowa.

B. Analysis.

The record reveals only tenuous connections between this litigation and Iowa. See Richards, 108 F.3d at 928 ("'One of the central purposes of statutory venue is to ensure that a defendant is not haled into a remote district, having no real relationship to the dispute.'" (quoting Woodke, 70 F.3d at 985 (quotation marks omitted))). Many of the Plaintiffs' tort claims are against Defendants residing in states other than Iowa. Another claim involves a purported

violation of Montana law, and other claims involve conduct that occurred wholly in Montana. The only arguable connection between this litigation and Iowa consists of allegations of a conspiracy among a number of parties, including at least one company located in Iowa. However, the record is devoid of proof showing where the conduct the Millers claim amounts to a conspiracy occurred. Cf. Woodke, 70 F.3d at 986 ("express[ing] no view on whether the locus of a conspiracy might provide venue, because [the plaintiff] produced no evidence of such a conspiracy in the court below"). Allegations that a conspiracy occurred, without evidence connecting the conspiracy with Iowa, are not enough. See id.; Intercoast Capital Co. v. Wailuku River Hydroelectric Ltd. P'ship, No. 4:04-CV-40304, 2005 WL 290011, at *3 n.4 (S.D. Iowa Jan. 19, 2005) (concluding, after a comprehensive review of authority, that the burden of showing venue is proper rests with the plaintiff); Weitz Co., LLC v. Lloyd's of London, No. 4:04-CV-90353, 2004 WL 3158070, at *6 (S.D. Iowa Dec. 6, 2004) ("Once a defendant raises an objection to venue, the burden of proof is on the plaintiff to establish that the district it chose is a proper venue."); Beckley v. Auto Profit Masters, LLC, 266 F. Supp. 2d 1001, 1003 (S.D. Iowa 2003) (same). Aside from allegations in the Plaintiffs' pleadings, the record contains no proof of a connection between this litigation and Iowa. See 28 U.S.C. § 1391(b)(2).

The connection between this litigation and Montana is much stronger. The alleged negligence of Solo, Sturdevant, and Haugan giving rise to Homer Miller's alleged injuries occurred in Montana. See Wisland v. Admiral Beverage Corp., 119 F.3d 733, 734, 736 (8th Cir. 1997) (deciding that venue was improper in Wisconsin despite the plaintiff's residence and receipt of medical treatment there because "the events giving rise to her action involve[d] the alleged negligence of the defendants in" a different state). The insurance policy under which the Millers were denied coverage was purchased by a Montana resident from a Wyoming company to provide

coverage for property in Montana. Before being denied insurance benefits in a letter written by a Montana resident, the Millers were interviewed by a different Montana resident. This record clearly shows that a "substantial part of the events . . . giving rise" to the Millers' claims occurred in Montana. See 28 U.S.C. § 1391(b)(2). And if the Plaintiffs' contentions that FBL reached into Montana to conduct business there are correct, their claims against FBL could in all likelihood be pursued there. Consequently, section 1391(b)(3) is not applicable.

Venue is improper in the Southern District of Iowa.

C. Conclusion.

Upon a finding of improper venue, a district court "shall dismiss, or if it be in the interest of justice, transfer such case to any district . . . in which it could have been brought." 28 U.S.C. § 1406(a).[13] Our circuit has interpreted this language to allow a district court to transfer an action even if it lacks jurisdiction over the person of each defendant. E.g., North Dakota v. Fredericks, 940 F.2d 333, 338 (8th Cir. 1991) (dicta). However, dismissal is the appropriate resolution because the record does not contain a motion to transfer this case to another district. See Richards, 108 F.3d at 928-29. Similarly lacking is evidence that the Millers would be willing to dismiss the Moving Defendants to preserve venue, and the Court is not required to take that step for them. Woodke, 70 F.3d at 986. It therefore follows that the Millers must bring their claims against the Moving Defendants in a different forum.

[13] The Moving Defendants' reliance on section 1404(a) is misplaced because venue is improper in Iowa. See Wisland, 119 F.3d at 736 ("Venue . . . did not lie in [the lower court's district] so the transfer had to have been under 28 U.S.C. § 1406(a)" and not section 1404(a)).

IV. Conclusion.

The Moving Defendants' Motions and Renewed Motions to Dismiss for lack of personal jurisdiction and improper venue (Clerk's Nos. 14, 18, 33, and 35) must be **granted**. The Plaintiffs' claims against Defendants Solo, Inc., Sturdevant, Haugan, Mountain West Farm Bureau Mutual Insurance Co., Borgialli, and Bertsch are **dismissed**.

IT IS SO ORDERED.

Dated this 27th day of April, 2006.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT