UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JAMES McGINLEY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 07-59-P-H***
	)	
WAHOO FUNDING, INC.,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTIONS TO DISMISS OR, ALTERNATIVELY, FOR CHANGE OF VENUE[1]

The defendant, Wahoo Funding, Inc., having removed this case from the Maine Superior Court (Cumberland County), Notice of Removal (Docket No. 1), moves to dismiss the action for lack of personal jurisdiction or improper venue, or, in the alternative, to transfer the action to the Middle District of Florida. Defendant, Wahoo Funding, Inc.'s Motion to Dismiss Complaint, etc. (Docket No. 5) at 1. I recommend that the court grant the motion to dismiss.

I. Applicable Legal Standards

A motion to dismiss for lack of personal jurisdiction raises the question whether a defendant has "purposefully established minimum contacts in the forum State." *Hancock v. Delta Air Lines, Inc.*, 793 F. Supp. 366, 367 (D. Me. 1992) (citation and internal quotation marks omitted). The plaintiff bears the burden of establishing jurisdiction; however, where (as here) the court rules on a Rule 12(b)(2) motion

[1] The defendant combined its motions to dismiss or to transfer venue into one document, which the Clerk's Office (*continued on next page*)

without holding an evidentiary hearing, a *prima facie* showing suffices. *See, e.g., Archibald v. Archibald*, 826 F. Supp. 26, 28 (D. Me. 1993). Such a showing requires more than mere reference to unsupported allegations in the plaintiff's pleadings. *See, e.g., Boit v. Gar-Tec Prods., Inc*., 967 F.2d 671, 675 (1st Cir. 1992). However, for purposes of considering a Rule 12(b)(2) motion the court will accept properly supported proffers of evidence as true. *See, e.g., id*.

The filing of a Rule 12(b)(3) motion likewise places the burden on the plaintiff to demonstrate the propriety of venue. *See, e.g*., 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1352 at 321-22 (3d ed. 2004). As in the case of a Rule 12(b)(2) motion, the court accepts a plaintiff's properly supported proffers of evidence as true. *See, e.g., M.K.C. Equip. Co. v. M.A.I.L. Code, Inc*., 843 F. Supp. 679, 682-83 (D. Kan. 1994).

Per 28 U.S.C. § 1404(a), "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." A transfer pursuant to section 1404(a) lies within the discretion of the court. *See, e.g., Stewart Org., Inc. v. Ricoh Corp*., 487 U.S. 22, 29 (1988). The factors to be considered in the exercise of this discretion include the convenience of the parties and witnesses, the order in which jurisdiction was obtained by the district court, the availability of documents, and the possibilities of consolidation. *See, e.g., Cianbro Corp. v. Curran-Lavoie, Inc*., 814 F.2d 7, 11 (1st Cir. 1987). The fact that a prompt trial may be available in one of the districts at issue but not in the other is relevant to the inquiry. *See, e.g., Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 925 F. Supp. 36, 39 (D. Me. 1996). The defendant bears "a substantial burden" of demonstrating the need for a change of forum. *See, e.g., Demont & Assoc. v. Berry*, 77 F.

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docketed as two separate motions. See Docket Nos. 5, 6. I have followed the Clerk's Office's convention and treated the (*continued on next page*)

Supp.2d 171, 173 (D. Me. 1999). The evidence submitted by the defendant "must weigh heavily in favor of transfer" when this district is the plaintiff's "home forum." *Id*.

II. Factual Background

The following relevant facts are alleged in the complaint and properly supported by proffered evidence as required by case law construing Fed. R. Civ. P. 12(b)(2).

The plaintiff is a resident of Maine and the defendant is a Florida corporation with a principal place of business in Ocala, Florida. Complaint for Declaratory Judgment, Damages, and Accounting ("Complaint") (Attachment 1 to Docket No. 1) ¶¶ 1-2. On or about July 25 — presumably in 2006 — the plaintiff and the defendant entered into a stock purchase and sale agreement (the "Agreement") under which the plaintiff agreed to purchase certain shares of preferred stock in a corporation known as Annapolis Capital Holdings, Inc. ("Annapolis") *Id*. ¶ 6. On or about July 26, 2006 the plaintiff executed a promissory note in the principal amount of $200,000 payable to the defendant (the "Note") in connection with this purchase. *Id*. The Note does not provide for a date upon which it is due and payable. *Id*. ¶ 7.

The parties agreed that the balance due under the Note would be reduced through the sale of certain securities undertaken and/or arranged by the defendant. *Id*. ¶ 8. Pursuant to this agreement, one half of the net proceeds of the sales of these securities was to be used to reduce the outstanding obligation under the Note. *Id*. A dispute has arisen between the parties concerning the amount, if any, currently due and payable under the Note. *Id*. ¶ 10.

The plaintiff alleges that the defendant has breached the Agreement and the related oral agreements by failing to provide credits against the Note arising from the sale of securities and that he is entitled to

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unified document as presenting two separate motions.

further credits and offsets against the Note. *Id*. ¶ 9. He alleges that he has demanded an accounting from the defendant which the defendant has declined to provide. *Id*. ¶ 11. He seeks a declaratory judgment concerning the amount due under the Note, an order directing the defendant to provide an accounting and damages. *Id*. at [3].

III. Discussion

In diversity cases the exercise of personal jurisdiction over a nonresident defendant is governed by the forum state's long-arm jurisdiction statute. *See, e.g., American Express Int'l, Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1178 (1st Cir. 1989). Maine's long-arm jurisdiction statute declares that it is to be applied "so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the United States Constitution, 14th amendment." 14 M.R.S.A. § 704-A(1). Therefore, on a motion to dismiss for lack of personal jurisdiction, this court's inquiry focuses on whether the assertion of jurisdiction violates due process. *See, e.g., Archibald*, 826 F. Supp. at 29.[2]

A court may have general or specific personal jurisdiction over the defendants in an action. General jurisdiction arises when the defendant has engaged in substantial or systematic and continuous activity, unrelated to the subject matter of the action, in the forum state. *See, e.g., Scott v. Jones*, 984 F. Supp. 37, 43 (D. Me. 1997). Specific jurisdiction is based on a relationship between the forum and the particular acts or injuries that provide the basis for the action, that is, "where the cause of action arises directly out of, or relates to, the defendant's forum-based contacts." *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1088-89 (1st Cir. 1992). The plaintiff relies on establishment of the

[2] While there are differences between the phrasing of the Law Court's due-process test for exercise of personal jurisdiction over a nonresident defendant and that of the First Circuit, those differences have been described as "purely semantic[,]" *Telford Aviation, Inc. v. Raycom Nat'l, Inc.*, 122 F. Supp.2d 44, 46 n.3 (D. Me. 2000). Accordingly, I follow the test laid out by the First Circuit.

requisites of specific jurisdiction. *See* Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss, etc. ("Opposition") (Docket No. 9) at 4.

The First Circuit tests the appropriateness of the exercise of specific jurisdiction via a trifurcated analysis:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

United Elec. Workers, 960 F.2d at 1089. The "Gestalt factors," in turn, comprise

> (1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

Id. at 1088. As this court has observed:

> When a plaintiff succeeds in demonstrating relatedness and purposeful availment, the court's exercise of jurisdiction over the person of the defendant is proper unless the defendant can establish that certain gestalt factors would make the exercise of jurisdiction offensive to our traditional notions of fair play and substantial justice. Alternatively, if the plaintiff's showing on relatedness and purposeful availment is close but non-convincing, a strong showing by the plaintiff on the gestalt factors may tip the scale in favor of exercising jurisdiction over the defendant.

Halkett v. Golden, Civil No. 05-110-B-C, 2006 WL 1720124, at *3 (D. Me. June 19, 2006) (citations and internal quotation marks omitted).

A. Relatedness

In analyzing "relatedness" with respect to contract causes of action, a court "must look to the elements of the cause of action and ask whether the defendant's contacts with the forum were instrumental either in the formation of the contract or in its breach." *Phillips Exeter Acad. v. Howard Phillips Fund,*

Inc., 196 F.3d 284, 289 (1st Cir. 1999). With respect to this element of the test, the plaintiff relies on the facts that the Agreement, an escrow agreement and the Note were sent to him in Maine, where he executed them; that the original Note is in Maine; that the defendant directed a transfer agency to transfer the shares at issue to the plaintiff (although the shares remain in escrow); that the plaintiff "engaged in numerous email exchanges regarding the business of [the successor entity to Annapolis] with Richard Astrom of Wahoo" and Wahoo's attorney in Florida, some of which originated in or were sent to Maine; and that the defendant sent a letter to the plaintiff in Maine informing him that the defendant had "executed upon the 23 million Series C Preferred Shares held as security for payment of your obligations pursuant to that certain Promissory Note, Stock Purchase Agreement and oral agreements." Opposition at 6-7 (emphasis omitted).[3]

Both parties cite *Telford Aviation* in support of their respective positions on this issue. In that case, after noting that "[a] prima facie showing of [the necessary] nexus [between the forum state and the formation, performance or breach of the contract at issue] requires more than the mere existence of a contractual relationship between an out-of-state defendant and an in-state plaintiff," *Telford Aviation*, 122 F.Supp.2d at 46 (citation and internal quotation marks omitted), this court found that a "tenuous nexus" was established where the defendant initiated contract negotiations by contacting the plaintiff in Maine, the plaintiff's place of business was stated in the contract as being in Maine, the contract was formed and executed by the defendant in Alabama, the contract was governed by Alabama law, none of the services

[3] Contrary to the plaintiff's contention, if the defendant "commandeer[ed] control of [Annapolis' successor], in violation of its fiduciary obligations to [that successor]," Opposition at 7, a claim that is not asserted in the complaint, the defendant did so in Florida, where the shares are still held in escrow, Affidavit of Richard Astrom in Support of Defendant[] Wahoo Funding, Inc.'s Motion to Dismiss, etc. ("Astrom Aff.") (Exh. A to Docket No. 5) ¶ 22, not in Maine. In any event, that action cannot contribute to the relatedness analysis, because no breach of the Agreement by any such action is alleged in the complaint.

rendered under the contract took place in Maine, and the defendant frequently contacted the plaintiff in Maine to schedule contract services, *id*. at 46-47.

Here, the defendant did not initiate contract negotiations, Affidavit of Ed Hayter in Support of Defendant[] Wahoo Funding, Inc.'s Motion to Dismiss, etc. ("Hayter Aff.") (Exh. B to Docket No. 5) ¶¶ 2-4; Affidavit of James McGinley Pursuant to 28 U.S.C. § 1746(2) ("Plaintiff's Aff.") (Docket No. 10) ¶ 3; contract negotiations took place in New York, Hayter Aff. ¶ 5; the Agreement does not specify where the plaintiff resides, although the Note does so, Stock Purchase and Sale Agreement (Exh. 1 to Astrom Aff.), Promissory Note (Exh. A to Complaint); the defendant executed the Agreement in Florida, Astrom Aff. ¶ 13; the Agreement and the Note are governed by Florida law, Agreement § 8.4, Note; it is not clear where the actions required by the Agreement took place; and the defendant contacted the plaintiff in Maine on a limited (even if unspecified) number of occasions "regarding the consummation of the sale," Astrom Aff. ¶¶ 8, 10, Plaintiff's Aff. ¶ 4, and regarding the business of the successor corporation to Annapolis, Plaintiff's Aff. ¶ 7. The plaintiff cites no authority for his assertion that the fact that he has retained the original of the Note in Maine demonstrates relatedness under the *Phillips Exeter* test, and in any event, that fact would be balanced by the fact that the shares remain in Florida. I also give no weight to contacts between the parties in Maine having to do with "the business of" the successor corporation to Annapolis, because such contacts have not been shown to have been instrumental in the formation or alleged breach of the Agreement, the oral agreements or the Note. I find the remaining facts on which the plaintiff relies to be less significant than those found by this court to establish a "tenuous" nexus in *Telford*. *But see Scott v. Jones*, 984 F. Supp. 37, 44 (D. Me. 1997) (the "transmission of information into [the forum state] by way of telephone or mail is unquestionably a contact for purposes of [personal jurisdiction] analysis"). I need not rest on a conclusion that the relatedness prong of the test has not been established, however.

B. Purposeful Availment

I turn to the "purposeful availment" requirement, which "protects defendants from jurisdiction based solely on random, fortuitous, or attenuated contacts or the unilateral activity of another party." *Telford Aviation*, 122 F. Supp.2d at 47 (citation and internal quotation marks omitted). "This prong is only satisfied when the defendant purposefully and voluntarily directs his activities toward the forum so that he should expect, by virtue of the benefit he receives, to be subject to the court's jurisdiction based on these contacts." *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 624 (1st Cir. 2001). The in-forum effects of extra-forum activities do not suffice to constitute the necessary minimum contacts with the forum state. *Telford Aviation*, 122 F.Supp.2d at 47 n.4.

Here, the plaintiff lists the following as evidence of purposeful availment: that the defendant voluntarily entered into the Agreement with the plaintiff while knowing that he conducted his business in Maine; that the closing documents were sent to the plaintiff in Maine and were executed by him in Maine; that the original promissory note was sent to the plaintiff in Maine and remains here; that the defendant engaged in "frequent and continuous" business-related communications about the operation of the corporate successor to Annapolis with the plaintiff after the closing; and that the defendant "wrongfully interfer[ed] with" the plaintiff's ownership and control of that corporate successor. Opposition at 8-9. The only "wrongful interference" specified by the plaintiff is the transfer of ownership of the shares from the plaintiff to the defendant by the escrow agent, Opposition at 8-9, an action that could only have taken place in Florida. The conclusory allegation of "frequent and continuous" contacts between the parties, without any attempt to specify how many of these contacts took place in Maine, *see, e.g.*, *Telford Aviation*, 122 F.Supp.2d at 47 (at least 36 contacts with plaintiff's Maine office insufficient to show purposeful availment), are of little help

to this court or to the plaintiff under the circumstances. The remaining contacts listed by the plaintiff are, like the contacts in *Telford Aviation*, "fortuitous and resulted from" the plaintiff's decision to conduct his business in Maine. *Id*. The defendant did not benefit from the protections of Maine law through the specified contacts. *Id*. Thus, the defendant could not have reasonably anticipated litigation in Maine as a result of these contacts, *id*., at least on the showing made.

C. Reasonableness

"The purpose of the gestalt factors is to aid the court in achieving substantial justice, particularly where the minimum contacts question is very close. In such cases, the gestalt factors may tip the constitutional balance." *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 717 (1st Cir. 1996). That said, "[t]he gestalt factors rarely seem to preclude jurisdiction where relevant minimum contacts exist." *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. Kg.*, 295 F.3d 59, 66 (1st Cir. 2002). In this case, the minimum contacts question is not close, and there is thus no need to consider the gestalt factors.

D. Change of Venue

While this court has the power to transfer a case for improper venue even if it lacks personal jurisdiction, *Cormier v. Fisher*, 404 F. Supp.2d 357, 363 (D. Me. 2005), the defendant has requested transfer only if its motion to dismiss is denied, Motion at 14, the plaintiff has not requested transfer under any circumstances, and there is no suggestion that any applicable statute of limitations might be close to expiration. I therefore recommend that the motion to transfer the case to the Middle District of Florida be treated as moot.

IV. Conclusion

For the foregoing reasons, I recommend (i) that the defendant's motion to dismiss for lack of personal jurisdiction be **GRANTED**;[4] and (ii) that the defendant's motion to transfer the case be treated as **MOOT**.

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 21st day of June, 2007.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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[4] If the court adopts this recommendation, the defendant's motion to dismiss for improper venue will be moot.

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