UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Docket No.: 07-11046

JOHN FIATO and
LIZANDRA FIATO,

Plaintiffs

v.

DRAKES APPLETON CORPORATION,
DAVID WHITE, and
JSN ASSOCIATES, INC.,

Defendants

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS DAVID WHITE AND JSN ASSOCIATES, INC.'S MOTION TO DISMISS

Facts

This litigation concerns Plaintiff John Fiato's injury, and Plaintiff Lizandra Fiato's loss of consortium from that injury, arising out of a construction site accident at a project in Hampton, NH. Defendant Drakes Appleton Corporation was the owner and general contractor of the project; Defendant David White was the architect; and Defendant JSN Associates, Inc. was the consulting structural engineer. On November 17, 2004, Plaintiff John Fiato suffered a spinal fracture and significant spinal injury when a stairway at the project collapsed as he was ascending it. Plaintiff John Fiato, a licensed Massachusetts plumber lawfully working at the Defendants' worksite, has undergone multiple spinal surgeries, is still treating for his injuries, and has been disabled since the accident.

Defendants White and JSN Associates, Inc. have significant contacts with the Commonwealth of Massachusetts, and conduct substantial business here. Defendant White is a licensed architect in the Commonwealth of Massachusetts. *Affidavit of Daniel Malis, Esq., Exhibit 1; Internet Printouts, Exhibit 2.* Furthermore, Defendant White has provided architectural and design services for several construction projects in Massachusetts from 2000 until the present, including: a completed large residential project in Chelmsford, MA of over 140 units of residential housing; a completed large residential project of over 51 units in residential housing in Tewksbury, MA; an ongoing large residential project of 36 units in residential housing in Tewksbury, MA; an ongoing residential complex in Salisbury, MA named "South Beach Condominiums"; and a planned construction project, in association with Defendant Drakes Appleton Corporation[1], in Merrimack, MA. *See Affidavit of Daniel Malis, Exh. 1, together with attached internet printouts, Exhibit "2"..*[2] In addition, White had previously participated in the design and construction of nursing homes in Hingham, MA which resulted in litigation in this Court. *See United States v. David M. White, et al., 97-cr-10325; docket sheet, Exhibit 2..*

Similarly, Defendant JSN Associates, Inc. purports to provide structural engineering services 'throughout New England', and has provided and continues to provide engineering support services for projects in Massachusetts, including a residential building in Merrimack, MA, and construction of a $7.2 million dollar public

[1] The general contractor of the project, Drakes Appleton Corporation, has refrained from disputing this Court's jurisdiction to date.

[2] The support provided by these contentions has been obtained simply through web research, and therefore should be considered by this Court as 'the tip of the iceberg' concerning the Defendants' work in this jurisdiction.

hockey rink in Haverhill, MA. *Exhibit 3.*[3] Furthermore, both Defendants' Affiant John S. Narwocki, chief executive and principal of JSN Associates, and an additional engineer at the firm are licensed structural engineers in the Commonwealth of Massachusetts. *Id.*

Despite the substantial business conducted by the Defendants here, Defendants White and JSN Associates, Inc. argue that this Court has no personal jurisdiction over the Plaintiffs' claims against them, and therefore seek dismissal of their action. In opposition, Plaintiffs contend that this Court has general jurisdiction over the Defendants, based upon their substantial business conducted in Massachusetts. Moreover, Plaintiffs assert here that this Court has specific jurisdiction over Defendants concerning Plaintiff Lizandra Fiato's consortium claim, pursuant to G.L. c. 223A §3(d), as her consortium injury occurred here in Massachusetts, not in New Hampshire, as alleged by Defendants; specific jurisdiction over Defendant JSN Associates, Inc., pursuant to G.L. c. 223 §83, based upon its substantial business conducted in Massachusetts; and that an appropriate balancing of factors and fundamental fairness would, in the absence of general jurisdiction, warrant this Court's assumption of pendent jurisdiction over John Fiato's claim against David M. White, warranting denial of the Defendants' motions.

[3] See fn. 2, supra. Also, again, note JSN's internet marketing claim that it conducts business 'throughout New England.'

ARGUMENT

I. THE DEFENDANTS' SUBSTANTIAL BUSINESS ACTIVITIES IN MASSACHUSETTS DEMONSTRATE DEFENDANTS' PURPOSEFUL AVAILMENT OF THE PRIVILEGE OF CONDUCTING ACTIVITIES IN MASSACHUSETTS, WARRANTING DENIAL OF THEIR MOTIONS.

A motion to dismiss must be based upon the Complaint and submitted pleadings. While the Plaintiff must establish that this Court has jurisdiction over the Defendants, the Court must take the factual allegations in the Complaint as true, and dismissal should be granted only if it appears beyond a reasonable doubt that the plaintiff cannot prove any facts which would support a claim for relief. *Manning v. Miller, 355 F.3d 1028, 1031 (7th Cir. 2004).* "Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith . . . legally sufficient allegations of jurisdiction, i.e., by making a *prima facie* showing of jurisdiction." *Jazini v. Nissan Motor Co., 148 F.3d 181, 184 (2d Cir.1998) (quotations and citation omitted)*; *see also Koehler v. Bank of Berm., Ltd., 101 F.3d 863, 865* (2d Cir. 1996). As noted by the Court in *In re Lupron Marketing 245 F.Supp 280 (2003),* this burden 'is not, generally, a heavy one'. *Id. at 289.* .

A court will have personal jurisdiction over a Defendant who purposefully establishes minimum contacts in its forum. Specifically, the defendant's contact in the forum or in connection with the state must be such that the Defendant 'would reasonably anticipate being haled into court there." *CH Babb Co., Inc. v. AM Manufacturing, 14 Mass. App. Ct. 291, 294 (1982).* A court will have jurisdiction over a Defendant where he, or it, 'purposefully avail[s] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."

Walsh v. National Seating and Motor Coach Industries, 411. F. Supp 564 (1976), quoting Hanson v. Denckla, 357 U.S. at 235, 253. The Court must determine that the Defendants have established enough "minimum contacts" that 'the maintenance of the litigation does not offend 'traditional notions of fair play and substantial justice.' *Id. at 568, quoting International Shoe v. Washington, 326 U.S. 310, 316 (1945)*

Jurisdiction in a diversity case is determined by the law of the forum state in which the ruling court resides. *Walsh, supra.* Such diversity can be generally established in two ways. (1) For general jurisdiction, in which this Court must determine whether the conduct of the Defendant is such that the Defendant's business activities in the state are 'substantial'; (*See, generally, Massachusetts G.L. c. 223 §38; Walsh v. National Seating Co., Inc. and Motor Coach Industries, Inc.; See also Perkins v. Benguet Mining Co., 342 U.S. 437 (1952),;* Alternatively, (2) for specific jurisdiction, this Court must find that a state's laws, consistent with Constitutional requirements of due process and fairness, specifically grant local jurisdiction over an out of state Defendant. *(See, generally, Massachusetts G.L. 223A §3).*

A. This Court Has General Jurisdiction over Defendants Based Upon Their Substantial Business in Massachusetts.

As the United States Supreme Court noted in *Perkins, supra,* in an analysis of general jurisdiction, the Court must, on a case by case basis, review the 'amount and kind of activities . . . in the state of the forum . . . so as to make it reasonable and just" to subject the Defendant to the jurisdiction of the state. *Id. at 445.* To obtain jurisdiction, the defendant's activities in the forum must be purposeful and intentional, rather than `random,' fortuitous or `attenuated' contacts . . . or [not] of the `unilateral

activity of another party or third person. . . .' *World-Wide Volkswagen Corp. v. Woodson*, *444 U.S. 286, 297.* As the *Perkins* court noted,

> "There have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities . . . .some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state . . . But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction." *Id. at 446.*

Such an analysis prompted Judge Tauro of this Court to find that this Court had personal jurisdiction over an out of state manufacturer in *Walsh v. National Seating and Motor Coach Industries, 411. F. Supp 564 (1976)*[4]. In *Walsh*, an out of state seat manufacturer whose seat collapsed under a Plaintiff in New Hampshire was sued in this Court. Judge Tauro, on behalf of the Court, looked to Massachusetts law and determined the service of process statute allowing a foreign corporation to conduct substantial business in the Commonwealth, G.L. c. 223 §38, essentially imposed jurisdiction in Massachusetts over a foreign corporation conducting substantial business in Massachusetts on a continuous basis.

Judge Tauro noted that Motor Coach Industries was actively involved in sales of its product in Massachusetts. While noting that in order to find such jurisdiction, it was unnecessary for the Defendant to maintain an office within the Commonwealth *(Id. at 574, citing Jet Manufacturing v. Sanford Ink, 330 Mass. 173, 175),* Judge Tauro did observe that Motor Coach had an office in Massachusetts. Judge Tauro found the substantial revenue earned by Motor Coach through sales in Massachusetts, and the

[4] Ironically, this case is prominently cited by the Defendants in their memorandum, but, providently for the Defendants, only for the ancillary point that Plaintiff John Fiato's pain and suffering do not amount to an 'injury within the Commonwealth' within the meaning of the Massachusetts Long-Arm Statute, G.L. c. 223A §3(d), a point which Plaintiffs willingly concede.

presence of sales and repair personnel in the state, far more probative on the question of jurisdiction. Based upon these findings, Judge Tauro concluded that this Court had jurisdiction over Defendant Motor Coach Industries, even though its particular Massachusetts activities did not have a specific causal nexus to the Plaintiff's eventual injury. Judge Tauro noted, "When, as here, a foreign defendant's contacts with a forum are substantial, a suit may be maintained ***though it concern a matter having no connection with the forum."*** *(Emphasis added)* Therefore, although the plaintiff's injuries in *Walsh* were not a product of the Motor Coach Industries' Massachusetts activities, and had actually occurred in New Hampshire, Judge Tauro found that this Court had personal jurisdiction over Motor Coach.

Using the reasoning enumerated in *Walsh* as a guide, it is apparent that this Court has general jurisdiction over both objecting Defendants here. The facts at bar demonstrate a substantial and deliberate effort by David White and JSN Associates, Inc. to perform substantial business in Massachusetts encompassing the period during which John Fiato was injured at their New Hampshire worksite.

Here, both parties deliberately sought out the rights and protections of the Massachusetts forum by a direct means, specifically, the obtaining of professional licenses in the Commonwealth. Many courts have equated 'doing business' with minimum contacts. For jurisdictional and venue purposes, these courts have found that if a Defendant's activities are so localized in a jurisdiction that the state would require licensing for those activities, the state has jurisdiction over the Defendants. *Cumis Insurance Society, Inc. v. South Coast Bank, 587 F. Supp 339 (1984), citing Watson McDaniel Co. v. National Pump & Control, Inc., 493 F. Supp 18 (E.D. PA., 1979);*

Lubrizol v. Neville Chemical Co., 463 F. Supp 33 (N.D. Ohio, 1978); P.C. Products Corp. v. Williams, 418 F. Supp 418 F. Supp. 331 (M.D. PA, 1978). Such licensing has been described by these courts as the 'most restrictive' definition of conducting business in the forum. *Cumis Insurance Society, Inc. v. South Coast Bank, 587 F. Supp 339, 345-346 (1984); Warner Press v. Warner Books, 366 F. Supp 187, 188-189 (1973)*

Defendants conduct meets this 'most restrictive' definition. During this decade (if not before), Defendants have used their licenses to perform substantial, non-incidental design and engineering work on multiple construction projects in the Commonwealth worth millions of dollars, based merely from what can be found publicly on the internet. The character of this work has been "intentional, substantial, and continuous rather than inadvertent, trivial, or sporadic." *In re Lupron, 245 F.Supp at 305 (2003), citing Asset Allocation and Management Co. v. Western Employers Ins. Co., 892 F.2d 566, 570 (7th Cir. 1989)* Neither White, a licensed architect, and JSN Associates, licensed structural engineers, could have performed this work in the Commonwealth without obtaining licensure from the state's regulatory authorities, based upon application and their submission of degree and qualification information and examination results. *See M.G.L. c. Chapter 13, §§ 44A TO 44D; M.G.L. Chapter 112, Sections 60A to 60O M.G.L. Chapter 112, Sections 61 to 65; 231 Code of Massachusetts Regulations 1.00 - 4.00; 250 CMR 2.00 – 6.00.* The Defendants also annually re-certified their qualifications to perform such work in Massachusetts. The Defendants' obtaining such licenses 'is a factor proving in establishing personal jurisdiction.' *Perkins, supra at 445; See International Shoe Co. v. Washington, 326 US 310, 317-320.*

Certainly, the simple obtaining of the licenses may not be adequate to show that the Defendants' contacts with the Massachusetts forum were purposeful, continual and substantial.[5] However, once the Defendants repeatedly used their licenses to conduct ongoing business activities on large construction projects, their contact with Massachusetts became far more than incidental. These Defendants' activities in the Commonwealth have 'more closely approximate the regular conduct" of a domestic, or in-state, Defendant. *Walsh, supra at 575.*[6] As the Defendants wish to be treated like Massachusetts residents when it is to their benefit, they should be subject to local jurisdiction, including for causes of actions which occur to Massachusetts residents outside of state borders. *Walsh, supra at 575; Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952); Volkswagen Interamericana S.A. v. Rohlsen, 360 F.2d 437, 440 (1st. Cir. 1977)*

Moreover, a finding of Massachusetts jurisdiction comports with due process requirements. The Due Process Clause . . . forbids the exercise of personal jurisdiction under circumstances that would offend 'traditional notions of fair play and substantial

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[5] For example, should one of the Defendants have obtained their licenses to perform work in Massachusetts in school here, and have left the licenses automatically renewed without any further involvement or work in the Commonwealth, the licenses would be a poor basis to argue jurisdiction.

[6] It is strange for the Defendants, without having disclosed any information to the Plaintiffs to date, to argue in their Memorandum that the Plaintiffs have not provided this Court enough facts about the Defendants' businesses to determine general jurisdiction. The Defendants' affidavits produced here have been carefully worded to concede work in Massachusetts, but to avoid admitting the quantity or substance of that work, presumably to prevent this Court from reaching a conclusion which it should accept, in any event, on the strength of the pleadings. *See Walsh, supra at 567 (this Court must accept as true the allegations in Plaintiff's Complaint and supporting documents in determining the merits of a jurisdictional Motion to Dismiss)* In any event, the information available in the public 'ether' on the internet, produced here, are ample proof of the Defendants' substantial contacts with Massachusetts, which this Court should view as more than appropriate evidence, especially where they do not disclose all of the contacts which a full review of the Defendants' business and earnings records would, in discovery, disclose.

justice." *International Shoe Co. v. Washington*, *326 U.S. 310, 316*. "These 'reasonableness' considerations (termed the 'Gestalt' factors) include: 'the plaintiffs' interest in obtaining convenient and effective relief; the burden imposed upon the defendant by requiring it to appear; the forum's adjudicatory interest; the interstate judicial system's interest in the place of adjudication; and the common interest of all affected sovereigns, state and federal, in promoting substantive social policies.' *Donatelli v. National Hockey League, 893 F.2d 459, 465 (1990), citing Burger King Corp. V. Rudzewicz, 471 U.S. 462, 477 (1985).*

This forum has a pressing regulatory interest in the Defendants' work, and therefore in retaining jurisdiction. Both JSN, a structural engineering company, and David White, an architect, have participated in building substantial structures throughout Massachusetts. Structural engineers and architects are, of necessity, the parties in the construction process who ensure that structures are erected safely, within industry standards, and subject to the safety codes and requirements of the Commonwealth. In obtaining local licenses, the Defendants have obtained the benefit of the state's regulations which prevent competition from unqualified non-professionals. The Commonwealth's interest in assuring that licensed professionals working within its borders are providing reliable and safe services demonstrates a compelling local regulatory interest warranting preservation of jurisdiction, regardless of where these Defendants' negligence actually caused specific injury.

Nor is this forum particularly 'inconvenient' to either Defendant. Both Defendants have worked on projects in Massachusetts; both are indemnified by powerful insurers

with substantial funds to litigate here; and both are within 90 minutes (or less) drive of this Court. *See Argument II.D., infra*.

As the Defendants have 'purposefully availed themselves of the protections' of the Commonwealth of Massachusetts in order to conduct substantial business in the state, they "cannot now avoid the present 'distasteful consequences' of a law suit." *Walsh, supra at 575-576, citing Volkswagen Interamericana S.A. v. Rohlsen, 360 F.2d at 440.* Moreover, given the general jurisdiction established here, Defendants' arguments that their work in the Commonwealth has no specific nexus to the particular injury suffered by the Plaintiff do not apply. *Walsh, supra; Pharmachemie BV v. Pharmacia SPA, 934 F. Supp 484, 490 (1996); Perkins v. Benguet Consolidated Mining, supra.* The Defendants' motion should therefore be DENIED.

II. THIS COURT HAS SPECIFIC JURISDICTION OVER BOTH DEFENDANTS.

A. This Court Has Specific Jurisdiction Over Plaintiff Lizandra Fiato's Consortium Claim

Even assuming that this Court finds that it does not have general jurisdiction over Defendants White and JSN Associates, there is more than ample evidence to find specific jurisdiction, and to deny the Defendants' Motion to Dismiss.

G.L. c. 223A, §3(d) (the so-called "Long-Arm" Statute), provides a Massachusetts court with jurisdiction over a foreign Defendant which conducts substantial business in the Commonwealth for an 'injury occurring in the Commonwealth'. Defendants correctly cite the *Walsh* case for the proposition that John Fiato's pain, suffering and medical treatment in Massachusetts do not constitute an injury within the Commonwealth within the meaning of the statute. On this basis, and viewed in isolation, as the objecting

Defendants would have this Court do, the language of this statute does not provide this Court with jurisdiction over the Defendants concerning John Fiato's claim.

However, the Defendants have failed to demonstrate, beyond any reasonable doubt, that there are no claims presented here within this Court's jurisdiction, as is their burden on a motion to dismiss. Lizandra Fiato has filed a claim for loss of consortium arising out of her husband's spinal fractures and multiple surgeries, and his continued inability to perform gainful work. As many courts have noted, a loss of consortium may be based upon the spouse's injury, but stands as a completely independent claim of the injured spouse. *See Ferriter v. Daniel O'Connell and Sons, Inc., 381 Mass. 507, 525-526 (1980).* This Court has previously noted that Massachusetts has a stronger interest in determining the rights and liabilities of its married residents *vis a vis* each other than does a foreign jurisdiction. *Saharceski v. Marcus, 373 Mass. 304, 311 (1977); Sullivan v. Bankhead Enterprises, 1986 U.S. Dist. Lexis 16595, Civil Action No. 84-1186-N.* Specifically, unlike a claim for bodily injury, the 'injury' for purposes of a consortium claim is to the marriage, and not to the person directly 'hurt'. Therefore, for purposes of the Long-Arm statute, Mrs. Fiato's injury occurred where her marriage was situated—Massachusetts—and not where her husband's accident occurred. As noted in *Darcy v. Hankle, 54 Mass. App. Ct. 846,*

> "If the out-of-State wrong, however, causes, shame, embarrassment, or **loss of consortium in the forum State**, that sort of injury constitutes the primary tortious injury in the forum State on which personal jurisdiction under G.L. c. 223A §3(d) may rest." *Id. at 850, citing Noonan v. Winston Co., 135 F.3d 85, 92 (1st Cir., 1998) (Emphasis added)*

Since the injury to Mrs. Fiato occurred in Massachusetts, there is an appropriate 'nexus' between Defendants' actions and the Plaintiff's injury called

for in the Massachusetts long-arm statute. As demonstrated above, the Defendants have engaged in substantial business in the Commonwealth, addressing the second requirement of G.L. c. 223A §3(d). Therefore, jurisdiction lies with this Court regarding Mrs. Fiato's claim, and that portion of the Defendants' Motion should be DENIED.

B. This Court Has Specific Personal Jurisdiction Over Defendant JSN Associates, Inc. Pursuant to G.L. c. 223 §38

G.L. c. 223, §38 provides, in pertinent part, that in an action against a foreign corporation… with or without such usual place of business, is engaged in or soliciting business in the commonwealth, **permanently or temporarily**," may be served upon the secretary of state or, in the alternative, upon a resident agent, if extant. *(Emphasis added)* This statute stands alone as a basis for jurisdiction, and has not been supplanted by the Massachusetts long-arm statute, G.L. c. 223A. *Campbell v. Frontier Fishing and Hunting, 10 Mass. App. Ct. 53, 55 (1980); Walsh v. National Seating and Motor Coach Industries, supra.* As noted above, this statute was interpreted by Judge Tauro of this Court to grant specific statutory jurisdiction in Massachusetts over a corporation which conducts substantial business here. *Walsh v. National Seating and Motor Coach Industries, 411. F. Supp 564 (1976).*

As noted above, there can be little dispute about the substantial nature of JSN Associates, Inc.'s business dealings in Massachusetts. These are not 'one-time' or occasional contacts, but are continual over substantial periods of time.

These extensive activities in the Commonwealth, warranting a finding that JSN is 'doing business' within the meaning of §38, provide this Court with specific jurisdiction over JSN concerning the Plaintiffs' claims, without the need for a connection between the cause of action and in the in-forum activities. "So long as the contacts between [Defendant] and Massachusetts are sufficient to constitute 'doing business' within the meaning of §38, the statute authorizes the exercise of personal jurisdiction over it for all causes of action." *Pharmachemie BV v. Pharmacia, SPA, 934 F. Supp 484, 490 (1996).*

C. This Court Should Assume Pendent Jurisdiction Over This Litigation, as the Claims are Related, Fairly Presented in this Jurisdiction, and Should be Decided in One Forum

This Court will accept pendent jurisdiction of a claim not ordinarily under its jurisdiction where "judicial economy, and the convenience and fairness to litigants" impels a view of the matters as a single action within diversity jurisdiction, especially where 'both claims ordinarily would be tried in one judicial proceeding" in federal or state practice. *Jacobson v. Atlantic City Hospital, 493 F.2d 149, 154 (1968), citing Wilson v. American Chain and Cable Co., 364 F.2d 558 (3d Cir., 1966).*

Here, there are ample facts indicating the fundamental fairness of litigating this matter here in Massachusetts, in one litigation. It is clear that at least Ms. Fiato's consortium claims are within this Court's jurisdiction ambit. *(See Argument II. A., above)* Moreover, the evidence strongly indicates that this Court has personal jurisdiction over corporate Defendant JSN Associates, Inc. *Argument II. B., above).* Defendant Drakes Appleton Corp. has not moved for

dismissal, indicating that the claim against the general contractor would be moving forward in this jurisdiction regardless of the outcome of this motion, leading potentially to splintered verdicts from multiple jurisdictions should the objecting Defendants prevail.[7] Therefore, even if this Court finds Defendant White's contacts with the forum do not rise to the level of general jurisdiction, he is well acquainted with this forum, and has a more than incidental presence here in Massachusetts, as indicated in Argument I, supra. It would be illogical and unfair to simply distinguish jurisdiction over JSN Associates, a significant business providing engineering and design services to the construction of structures with many projects in Massachusetts, from David White, a significant business providing architectural and design services to the construction of structures with many projects in Massachusetts. Simply because one business opted to use a corporate structure, and the other opted not to, should have no bearing upon whether they are fairly before this Court. Judicial economy, efficiency, and fairness would all augur in favor of litigating this set of facts once, in one court, before one jury, with one disposition amongst all Defendants and Plaintiffs.[8]

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[7] This court should take notice of the pending project which Drakes Appleton Corporation has undertaken in Merrimack, MA with Defendant White as the architect, as well as other substantial projects which that company has or will be undertaking in this state which would support a finding of general jurisdiction against that company as well.

[8] Defendants JSN Associates, Inc. and David White's joint representation in this litigation should also favor exercise of pendent jurisdiction. It appears they have cast their lots together for purposes of this argument. This Court should respect that decision and order their cases tried in this jurisdiction together.

D. This Forum is Not "Inconvenient" or Unduly Prejudicial to the Defendants.

Furthermore, Defendants' *forum non conveniens* arguments, geared towards the alleged fundamental fairness of dismissing this case, are misplaced and misleading here. Defendants contend that New Hampshire is a far more 'fair' jurisdiction to resolve this dispute than Massachusetts. They argue that as the accident occurred in New Hampshire, the key witnesses to the accident are located there, rather than in Massachusetts; New Hampshire law will likely apply to the resolution of the tort claim; and that the forum is generally 'more convenient' to resolution than Massachusetts.

However, to establish that a venue is ultimately unfair, 'the defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum.' *Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (1986).*

Defendants can not establish Massachusetts as an inconvenient forum. To the contrary, Massachusetts is not unduly inconvenient or prejudicial a venue, and for purposes of the Plaintiffs' interest, more convenient and appropriate. Massachusetts is the Plaintiffs' home forum, and is far more convenient for them for court appearances, medical examinations, and trial than is New Hampshire. This Court should also view the comparative wealth of the parties, and the Defendants' ability to bear the slightly increased expense of litigating in Massachusetts as opposed to New Hampshire compared to the Plaintiff's comparative inability to bear such expense, as another basis

for finding venue appropriate in this state.[9] *Galonis v. National Broadcasting, 498 F. Supp 789, 792 (1980); Samson Cordage Works v. Wellington Puritan Mills, Inc., 303 F. Supp 155, 161-162 (D. R. I. 1969).* Moreover, many of the critical witnesses are likely to be in the employ of the Defendants or of Defendant Drakes Appleton Corporation. The location of these witnesses, therefore, should not a factor for the Court's consideration. *Galonis, supra.* All of the witnesses are likely to be within the 100 mile subpoena power of this Court, and therefore will be subject to compulsory process if need be. *(F.R.C.P. 45)* To the extent that some non-party witnesses may prefer to be deposed in their native New Hampshire, counsel can certainly accommodate that need if required. Depositions of New Hampshire witnesses, furthermore, can be held at Plaintiff's counsel's offices in Methuen, Massachusetts, coincidentally approximately mid-way between the two jurisdictions, which impose equivalent 'hardships' or 'conveniences' for either party. The 'inconvenience' argument is particularly ill-founded in the case of Defendant JSN, which boasts on its website of its work 'throughout New England'. If the company can handle work in Maine and Rhode Island, clearly the trip to Boston should not be too daunting a task. *See Affidavit, Tab B.*

Nor does the Court's determination as to choice of law dictate forum. This Court is quite capable of applying the law of either Massachusetts or New Hampshire to Plaintiff John Fiato's case, depending on the dictates of Massachusetts' choice-of-law rules. As to Mrs. Fiato's claims, this Court has previously determined that the law of Massachusetts applies to consortium claims made here by its citizens, even where the trauma to her husband occurred out of this jurisdiction, again mitigating in favor of

[9] Defendants are professionals still employed in their field, indemnified by well-funded insurers who are footing the bill for the litigation; The Plaintiffs are a disabled union pipefitter and his spouse, without such ample resources.

leaving venue with this Court. *Sullivan v. Bankhead Enterprises, 1986 U.S. Dist. Lexis 16595, Civil Action No. 84-1186-N.*

Defendants' arguments concerning failure to establish damages consistent with jurisdictional limits are similarly groundless. It is readily apparent from the allegations of the Plaintiff's Complaint that the Plaintiff had significant spinal injuries requiring "multiple surgeries" and has been "disabled from gainful employment" since the accident, it is 'legally certain' that each Plaintiff's claim exceeds the jurisdictional amount required for diversity jurisdiction. *See 28 U.S.C. §1332.* Any possible defect in pleading occasioned by the Plaintiffs' failure to assert specifically that their claims exceed $75,000 each can easily be addressed by requiring that the Complaint be amended, rather than dismissed.

Finally, should this Court determine that diversity jurisdiction is inappropriate here, this Court should avoid the draconian relief of dismissal sought by Defendants. Should Defendants somehow persuade this Court that companies which earn many thousands of dollars in Massachusetts; continue to seek business in this forum; and continue to be licensed to perform such business in this forum, should paradoxically not be subject to adjudication in this forum, the Defendants can hardly object to litigating this matter in the United States District Court in New Hampshire, which would retain diversity jurisdiction over the parties. Rather than dismissing the matter outright, preservation of judicial resources and judicial efficiency would warrant transfer of the action to the New Hampshire District, rather than dismissing the matter outright.

In summary: the essence of the question of jurisdiction, as court decisions have made clear, is whether a defendant has a reasonable right to expect to be brought to

court in a forum. The Defendants herein have consciously and intentionally chosen Massachusetts as a forum to conduct business. Both Defendants have obtained professional licenses to perform work here. Both have presented matters before local zoning and planning arms of Massachusetts municipalities. Both have generated designs and specifications in Massachusetts, and have applied Massachusetts' building and safety codes to work and structures here. Finally, both have been substantially reimbursed for such work in this state. Having earned their revenue here, Defendants cannot begrudge Massachusetts' jurisdiction over them, however 'distasteful', and jurisdiction in this Court over these Defendants offends neither 'fair play nor substantial justice.' *Walsh, supra at 568, 576.* The Plaintiff has established general jurisdiction over both objecting Defendants based upon their substantial activities in this state.

Moreover, there is a specific statutory basis for jurisdiction over all Defendants for Lizandra Fiato's claims; and specific statutory jurisdiction for John Fiato's claims against JSN Associates, Inc. Joining David White to this litigation promotes substantive fairness, while not unduly prejudicing any party.

Jurisdiction is therefore appropriate in this venue, and the Defendants' Motion to Dismiss should be DENIED.

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CERTIFICATE OF SERVICE

I, Daniel Malis, Esq., attorney for the Plaintiff, hereby certify that this document filed through the ECF System will be sent electronically pursuant to Local Rule 5.2(b) to the registered participants as identified on the Notice of Electronic Filing (NEF).

Daniel Malis, Esq.
9/3/2009