IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

INC., Plaintiff, v. PAUL T. AND INDUSTRIES, INC., Defendant.	Civil Action No.3:07-cv-04735-FLW-TJB

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

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INTRODUCTION

The Court should dismiss the Complaint of Inc. against Paul T. and Industries, Inc.[1] pursuant to Fed. R. Civ. P. 12(b)(2). The Court lacks personal jurisdiction over the defendants, each of whom is a Massachusetts citizen that has transacted no business in New Jersey. The Complaint, at base, alleges that the defendants did a variety of acts in Massachusetts that were directed at Massachusetts. Accordingly, neither defendant has the contacts with New Jersey necessary to support the exercise of personal jurisdiction.

FACTS

Paul T. is a citizen of the Commonwealth of Massachusetts residing in the Town of Acton, MA. (Declaration of Paul T. (" Dec."), ¶ 2.) Mr. has lived in Acton continuously since 1969. (*Id.*) Mr. has never lived or worked in New Jersey, nor has he ever conducted any business in New Jersey. (*Id.* ¶ 3.)

Industries was incorporated on January 27, 1988, with Paul T. as its sole shareholder. (*Id.* ¶ 4.) Before it was dissolved, Industries, Inc. was a Massachusetts corporation with its principal place of business at Ayer, MA. (*Id.*) Industries never conducted any business in New Jersey. (*Id.* ¶ 5.) Industries was not registered to do business in New Jersey, had no registered agent in New Jersey, and had no offices, telephone listings, bank accounts, or other contacts with New Jersey. (*Id.*)

Beginning in 1979, Mr. entered into a total of four Franchise Agreements with whereby he became the exclusive franchisee for certain geographic territories. Three of these franchisees were located entirely within the Commonwealth of

[1] Defendant Industries, Inc. no longer exists as a legal entity, having been dissolved by the Massachusetts Secretary of State's Office in May, 2007. We refer to Industries herein as a defendant strictly to conform with the case caption.

Massachusetts, while the fourth was located entirely within the State of New Hampshire.[2] (*Id.* ¶ 6.) In 1988, Mr. with the consent of assigned the 1979 Franchise Agreement to Industries. (*Id.* ¶ 7.) In 2001, Mr. assigned the other three Franchise Agreements to Industries, again with consent. (*Id.*)

In 2003, Mr. was diagnosed with colon cancer and decided to retire. (*Id.* ¶ 8.) In connection with that decision, Mr. agreed, with consent and active participation, to sell his franchise businesses to a long-time employee, Brandon (*Id.* ¶ 9.) On December 23, 2003, Mr. and Industries entered into an Asset Purchase Agreement by which the businesses, including the franchises, were sold to Mr. and Industries, LLC, a Massachusetts Limited Liability Corporation formed by Mr. with its principal place of business in Ayer, Massachusetts. (*Id.* ¶ 10.) (Mr. and Industries, LLC are referred to herein collectively as " The Asset Purchase Agreement contains a jurisdictional clause vesting exclusive jurisdiction in the state courts of Massachusetts and the U.S. District Court for Massachusetts, and a choice of law provision mandating application of Massachusetts internal law. (Exh. A to Dec. Arts. 13.4(b) and 13.13).

In connection with the sale of the businesses, Mr. and Industries agreed to lend the sum of $900,000 as partial purchase money. (Dec. ¶ 11.) The Loan Agreement memorializing this loan contained a choice of law and jurisdictional clause applicable to the Loan Agreement and any Notes issued thereunder, whereby the parties agreed to the

[2] The dates of the franchise agreements and their respective territories were as follows: November 26, 1979 (Acton, Concord, Sudbury, and Stow, Massachusetts); March 21, 1988 (Tyngsboro, Chelmsford, and Westford, Massachusetts); December 21, 2000 (Goffstown, Bedford, Amherst, Merrimac, Litchfield, Milford, Brookline, Hollis, Nashua, and Hudson, New Hampshire); February 21, 2001 (Hubbardston, Westminster, Gardner, Ashburnham, Ashby, Townsend, Lunenberg, Pepperell, Shirley, Ayer, Harvard, Bolton, Hudson, and Marlborough, Massachusetts).

application of Massachusetts law and to the exclusive jurisdiction of Massachusetts courts. (Exh. B to Dec. Art. 8.10.)

To secure the purchase money loan, issued a Promissory Note to Mr. and Industries in the amount of $900,000, with interest-only payments to be made for the first year and then principal and interest payments to be made monthly until the loan was paid off. (Decl. ¶ 11; Exh. C to Dec.) The Promissory Note contained a choice of law clause mandating the application of the internal laws of the Commonwealth of Massachusetts. (Exh. C to Dec. Art. 3.4.)

The parties also entered into an Hypothecation/Pledge Agreement whereby Mr. pledged his shares of stock in Industries, LLC to Mr. as further security for the loan. (Dec. ¶ 12.) The Hypothecation/Pledge Agreement contained a choice of law clause providing for the application of Massachusetts law and for the exclusive jurisdiction of the Massachusetts courts. (Exh. D to Dec. Art. 15.)

The parties further entered into a Security Agreement by which pledged as collateral for the loan the assets of Industries, LLC, including the franchise agreements between and (*Id.* ¶ 13.) The Security Agreement contained a clause mandating the application of the internal laws of Massachusetts and binding the parties to the jurisdiction of the Massachusetts courts. (Exh. E to Decl. Art. 10.10.)

Among the collateral securing the Promissory Note were franchise agreements (covering towns in Massachusetts and New Hampshire). expressly consented to the assignment of the franchise agreements to Mr. and Industries, Inc. as collateral for the Promissory Note. (*Id.* ¶ 13; Exh. F to Dec.) In approving the assignment of the franchise agreements to the defendants as collateral for

the loan, expressly reserved the right to terminate the franchise agreements should default, but gave Mr. the option of curing any such default if he elected to do so. (*Id.* ¶ 17; Exh. F to Dec.)

Mr. also agreed to lend his years of expertise to in running the franchises, and entered into a three-year consultancy agreement with whereby he would provide advice as necessary from Massachusetts to in Massachusetts. (Dec. ¶ 15.)

was fully aware of and approved of the Asset Purchase Agreement, the Loan Agreement, the Promissory Note, the Security Agreement, and of Mr. role as a consultant. (*Id.* ¶ 16.)

Between December 2003 and September 2006, Mr. made a limited number of interest-only payments on the $900,000 Promissory Note, and Mr. repeatedly waived timely payment of interest and principal in order to assist Mr. in developing the business. (*Id.* ¶ 18.) As time went on, however, it became increasingly clear that Mr. was incapable of successfully running the businesses in the manner that Mr. had done for more than two decades. Accordingly, Mr. with approval, actively attempted to assist Mr. in keeping the businesses afloat and to maintain the value of the franchises, while encouraging to find a buyer for the franchises so that both Mr. and might recover some of the amounts due them. failed to find a buyer. (*Id.* ¶ 20.)

By the fall of 2007, it was evident that Mr. security interest—and his retirement funds—were in serious jeopardy and that was not serious about finding a buyer. Therefore, Mr. and agreed that, in lieu of foreclosure, Mr. would

accept the collateral securing the Promissory Note in full satisfaction of the outstanding balance, pursuant to Uniform Commercial Code § 9-620. (*Id.* ¶¶ 27; Exh. G to Dec.) The collateral accepted did not include the franchise agreements between and or interest in Industries, LLC. (*Id.*)

In August 2007, issued a notice of default to and also provided notice of default to Mr. so that Mr. could have the opportunity to cure the default if he wished to do so. Mr. did not exercise that option. (*Id.* ¶ 26.)

On October 2, 2007, filed its Complaint in this matter. In it, makes a series of offensive and outlandish allegations. On their face, however, those allegations establish that the defendants are not subject to personal jurisdiction in this district.

ARGUMENT

I. General Scope Of Personal Jurisdiction

Federal Rule of Civil Procedure 4(e) provides that district courts have personal jurisdiction over non-resident defendants "to the extent authorized under the law of the forum state in which the district court sits." The defendant must fall within the reach of the state long-arm statute, and the exercise of personal jurisdiction over the defendant must comport with Constitutional due process. New Jersey courts have emphasized that the state's long-arm statute, N.J. Ct. R. 4:4-4, reaches "to the uttermost limits permitted by the United States Constitution." *Avdel Corp. v. Mecure*, 58 N.J. 264, 268 (1971). Accordingly, the question whether the New Jersey long-arm authorizes the exercise of personal jurisdiction merges with the question whether the exercise of personal jurisdiction comports with Constitutional due process. *See Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 698 (3d. Cir. 1990).

The Constitution permits the exercise of personal jurisdiction over a defendant who has developed sufficient "minimum contacts" with the forum state. A defendant that has

"continuous and systematic general business contacts in the forum" is subject to "general" personal jurisdiction for any claims, whether arising out of those contacts or not. *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 416 (1984). If such continuous and systematic business contacts do not exist, however, a court may still exercise "specific" personal jurisdiction over a defendant if the claims asserted arise out of the defendant's actions that take place in or are purposefully directed to the forum:

> This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a "substantial connection" with the forum State.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (citations omitted). In all cases, the court's exercise of personal jurisdiction must comport with "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The defendant's "conduct and connection with the forum State [must] [be] such that he should reasonably anticipate being haled into court there." *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980)). Reasonableness is judged, among other things, in light of the burden on the defendant, the forum state's interest in adjudicating the dispute, and the plaintiff's interest in convenient and effective relief.

It is burden to prove by a preponderance of the evidence facts sufficient to establish that the Court's exercise of personal jurisdiction over the defendants would comport with Constitutional due process and traditional notions of fair play and justice. *Carteret Savings Bank, F.A. v. Shushan*, 954 F.2d 141 (3d Cir. 1992). cannot meet this burden, and the Court has neither specific nor general personal jurisdiction over the defendants. The Court must, therefore, dismiss the Complaint.

II. The Court Lacks Specific Personal Jurisdiction Over The Defendants.

cannot establish specific personal jurisdiction over the defendants because it cannot demonstrate that its claims arise out of any purported actions by the defendants that took place in New Jersey or that "purposefully availed themselves of the privilege of conducting activities within" New Jersey.

To begin with, as discussed in detail above and in the Declaration, neither Mr. nor Industries had any business relationship with during any relevant period. To the contrary, the business relationship between the parties ended no later than December 2003. Since then, the only "relationship" between the defendants and has been that was simply a secured creditor of and a consultant to The essence of claim in its Complaint is that failed to pay amounts allegedly due it, and allegedly urged to delay enforcing its rights against so that would be able to continue its operations and pay what it owed him. Apart from dubious, self-serving claim that as a secured creditor of had some duty to ensure that paid before [3] the fact is that connection to this entire dispute is tenuous and indirect at best, and undeniably centered on Massachusetts. In such circumstances, it can hardly be said that any of the defendants alleged actions "purposefully availed" defendants of the privilege of conducting activities within New Jersey.

[3] Put another way, it is clear from the Complaint that is unable to pay amounts due it, and therefore seeks to collect debt to it from a supposed deep pocket,

Nor does the Complaint itself suggest that New Jersey has any role in this dispute. Reduced to its essence and stripped of its wildest hyperbole, the Complaint alleges as follows:[4]

a. In 2003, Defendants, a Massachusetts individual and a Massachusetts corporation, sold their businesses covering towns in Massachusetts and New Hampshire to Mr. a New Hampshire resident, and Industries, a Massachusetts LLC. (Complaint ¶ 9.)

b. entered into four franchise agreements with covering territories in Massachusetts and New Hampshire. (Complaint ¶ 9.)

c. Defendants financed a portion of purchase of the businesses. (Complaint ¶ 10.)

d. agreed to assignment of his franchise agreements to the defendants as collateral for the purchase money loan. (Complaint ¶ 10.)

e. Mr. "painted a rosy picture" of the future growth of the businesses but the businesses carried a large debt load. (Complaint ¶ 12.)

f. failed to pay money allegedly due to in connection with the franchise agreements, but elected not to terminate the franchise agreements. (Complaint ¶ 14.)

g. Mr. allegedly "assumed substantial executive management control" of business in Massachusetts in November 2006. (Complaint ¶ 15.)

h. Mr. informed that he might foreclose upon the defaulted Promissory Note. (Complaint ¶ 16.)

i. The defendants "devised a plan" to divert funds from Massachusetts bank accounts and customers to themselves in Massachusetts and to engage in "sham negotiations" to "allay" concerns. (Complaint ¶¶ 18, 21-22, 24.)

[4] For purposes of this motion only, even most absurd and inflammatory allegations are assumed to be true.

j. The defendants paid off a line of credit at Middlesex Savings Bank in Massachusetts with money taken from bank account at Middlesex Savings Bank in Massachusetts. (Complaint ¶ 23.)

Each of the foregoing acts that the defendants are alleged to have done occurred exclusively in and was directed exclusively at Massachusetts. Construed in the light most favorable for the allegations are that Mr. acting in Massachusetts, exercised control over Industries, LLC in Massachusetts, used Industries funds maintained in a bank account in Massachusetts to pay off a line of credit in Massachusetts, and otherwise acted in Massachusetts to use assets in Massachusetts to pay off a portion of the $900,000 loan that the defendants made to in Massachusetts.

does not even allege a single act that the defendants purportedly committed in New Jersey (or anywhere else outside Massachusetts).

Indeed, itself implicitly concedes that the defendants' alleged acts took place in Massachusetts. asserts that the alleged facts set out in the Complaint "constituted an unfair or deceptive act or practice declared unlawful by Mass. Gen. [L]aws chapter 93A, § 2." (Complaint ¶ 51.) Mass. Gen. L. c. 93A § 2 prohibits certain unfair business practices. Section 11 of the statute creates a cause of action for businesses, such as for damages allegedly suffered as a result of certain violations of Section 2. However, the statute explicitly prohibits filing suit *unless* the conduct occurred within Massachusetts:

> No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice *occurred primarily and substantially within the commonwealth*. For the purposes of this paragraph, the burden of proof shall be upon the person claiming that such transactions and actions did not occur primarily and substantially within the commonwealth.

M.G.L. c. 93A § 11 (emphasis added). counsel is presumed to be aware of this provision, *see* Fed. R. Civ. P. 11(b)(2) (signature certifies that claims are warranted by existing

law), and therefore must agree that the actions complained of occurred "primarily and substantially within the commonwealth." Accordingly, this Court may not exercise specific personal jurisdiction over the defendants.

III. The Exercise of Personal Jurisdiction Would Not Comport With Traditional Notions of Fair Play and Justice.

Even if there were a basis for asserting specific jurisdiction over the defendants in New Jersey (and there is not), doing so would offend traditional notions of fair play and justice. In judging the reasonableness of haling a defendant into court in a particular forum, courts evaluate the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in convenient and effective relief, the judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest in the several states in furthering fundamental social policies. *Amberson Holdings LLC v. Westside Story Newspaper*, 110 F. Supp. 2d 332, 337 (D.N.J. 2000). These factors weigh heavily against the exercise of personal jurisdiction in New Jersey.

First, the defendants would suffer an enormous burden if they were forced to litigate in New Jersey. Mr. is a retiree living on a fixed income in Massachusetts. He has already suffered significant financial losses from default under his Promissory Note with Mr. which was supposed to represent a substantial portion of Mr. retirement funds. Unlike Mr. has limited resources to defend himself against the claims in the Complaint, frivolous as they are.

Moreover, if forced to defend against lawsuit, Mr. would seek to implead Mr. and Industries, LLC pursuant to Fed. R. Civ. P. 14(a) or to join them under Fed. R. Civ. P. 19, as the foundation for claims is failure to pay Such an impleader or joinder would be prohibited, however, by the terms

of the various agreements between the defendants and which provide for the exclusive jurisdiction of the Massachusetts courts and the application of Massachusetts law. Mr. would therefore suffer the extraordinary prejudice of having to defend himself against allegations in New Jersey while simultaneously pursuing separate litigation against in Massachusetts. That prejudice is compounded by the possibility of inconsistent results in the two fora. on the other hand, will suffer no prejudice at all if it decides to pursue its unjustified vendetta against Mr. in Massachusetts. Indeed, touts itself as "the nation's largest automated lawn care franchise, with approximately 500 franchises in 40 states and Puerto Rico." (website, http://www /en/118/default.aspx.)

Second, New Jersey has no interest in adjudicating this dispute. The *only* connection between New Jersey and the dispute is the "fortuitous" fact that is headquartered in New Jersey — a function of unilateral action. This tenuous thread is insufficient to overcome the overwhelming interest of Massachusetts in resolving the dispute.

Third, there is no question that may obtain convenient and effective relief in Massachusetts courts. As one of the largest franchise companies in the nation, which conducts business in 40 states including Massachusetts, represented by a national law firm with "3,600 lawyers located in 25 countries and 64 offices throughout Asia, Europe, the Middle East and the U.S.," including in Boston, *see* http://www. com/global/locations/, can hardly plead inconvenience.

IV. The Court Lacks General Personal Jurisdiction Over The Defendants.

We doubt that even will contend that the defendants are subject to general personal jurisdiction in New Jersey. The Court cannot exercise general personal jurisdiction

over the defendants because neither Mr. nor Industries (when it existed) had a systematic and continuous presence in New Jersey — indeed, whatever contacts the defendants may have had with New Jersey are so attenuated as to barely have existed at all. Only where "continuous corporate activity within a state [is] thought to be 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" may a court assert general jurisdiction over a defendant. *International Shoe*, 326 U.S. at 318.

CONCLUSION

For the foregoing reasons, the defendants respectfully request that the Court dismiss the Complaint in its entirety.

Respectfully submitted,

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