UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

INC. Plaintiff, vs PAUL T. AND INDUSTRIES, INC. Defendants.	Case No. 3:07-cv-04735-FLW-TJB Motion Date: January 7, 2008 ORAL ARGUMENT REQUESTED

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

memorandum and declarations are rife with hearsay and unsupported conclusions and do not come close to meeting its burden of introducing competent evidence to support specific personal jurisdiction. Not only are allegations with respect to the defendants' New Jersey contacts almost entirely inadmissible hearsay, but all of the jurisdictional "facts" underlying actual claims are based exclusively on hearsay.

Even were the Court to consider that hearsay (and it may not), has not shown that Due Process permits the exercise of jurisdiction. relies heavily on the defendants' contacts with New Jersey during a franchise relationship that *ended* in 2003. Such contacts may not be considered in a case like this where the allegations against defendants post-date the termination of the relationship and do not arise out of it.

The alleged contacts between the defendants and New Jersey after 2003 are insufficient to establish minimum contacts and the alleged contacts that purportedly give rise to claims are even scarcer; indeed, virtually every act alleged in the Complaint as a basis for liability took place in Massachusetts. Nor can the mere allegation of intentional torts satisfy the Constitutional requirement. Accordingly, the Court should dismiss the complaint.

I. Improperly Relies on Hearsay and Unsupported Conclusions in its Effort to Manufacture Sufficient Minimum Contacts.

As Mr. has challenged jurisdiction, bears the burden of demonstrating, by "sworn statements or **other competent evidence**," sufficient contacts with New Jersey to support the exercise of personal jurisdiction. *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 66 n. 9 (3d Cir. 1984) (emphasis added) ; *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1302 (3d Cir. 1996) (same). There is a "significant procedural distinction" between a motion to dismiss for lack of personal jurisdiction and a motion to dismiss for failure to state a claim. *Time Share*, 735 F.2d at 66 n.9. In the latter, the allegations of the non-moving party are assumed to be true, while the former is "inherently a matter which requires resolution of factual issues outside the pleadings, *i.e.*, whether in personam jurisdiction actually lies." *Id.* Thus, "[a]t no point may a plaintiff rely on the bare pleadings alone." *Id.*; *Green Keepers, Inc. v. Soft Spikes, Inc.*, 1998 WL 717355 at *2 (E.D. Pa. 1998).

Relying on the bare pleadings alone is exactly what does. The Complaint consists almost exclusively of inadmissible hearsay and unsupported conclusions that presents as facts and then parrots in its brief. As an illustration, paragraphs 12, 15, 18, 23, and 24 of the Complaint all allege that is "informed and believes" various things, while paragraph 21 alleges that it "learned" certain things from unidentified sources. Based on that hearsay, then alleges a variety of conclusions: that was unable to pay "in substantial part due to the financial burdens placed on the business by Defendants" (¶ 14); that Mr. "assum[ed] financial control of the business" (¶ 17); that Mr. allegedly engaged in a "scheme to collect monies from consumers with no intention to perform the contractually required services," (¶ 18); that Mr.

"surreptitiously was diverting revenues collected from renewal customers to pay off business debt on which Mr. was personally liable." (¶ 22.) It is on these hearsay allegations and unsupported conclusions that relies for its various claims against the defendants and to justify personal jurisdiction. Yet, not one of these allegations has any basis other than the bare hearsay allegations of the Complaint. (They are also untrue.)

Those same hearsay allegations appear unchanged in brief, emphasizing how depends on them. For example, at page 4 of its brief, repeats the hearsay allegations of paragraph 12 of the Complaint, while at pages 6-7 of the brief, recites the hearsay allegations of paragraphs 23 and 24 of the Complaint. does not even pretend to offer competent evidence to support these allegations – it cites only the Complaint.

declarations are no better. was obligated to come forth with sworn affidavits or "other competent evidence" establishing the jurisdictional facts. Statements in affidavits have value only when they are based on the affiant's personal knowledge. *Green Keepers*, 1998 WL 717355 at *3 (citing *Davis v. Portline Transportes Maritime, Internacional*, 16 F.3d 532, 537 n.6 (3d Cir. 1994)). declarations fall far short of this requirement. Mr. 's declaration is almost entirely hearsay. For example, he asserts that in late November 2006, he "learned from Brandon that Mr. had taken control of the checkbook for the business."[1] (Decl. ¶ 12.) This is classic hearsay. He goes on to allege that Mr. made 26 telephone calls to toll-free

[1] Although hearsay is generally inadmissible, the Court should be especially wary of hearsay information allegedly learned from Mr. who quite obviously has every incentive to blame Mr. for his own failure to meet his obligations as a franchisee. The fact that has chosen not to sue its actual franchisee, the person who failed to meet his obligations, and whose contractual relationship with and contacts with New Jersey cannot be disputed, raises the substantial possibility that may have agreed not to sue Mr. in exchange for his cooperation in blaming Mr.

number. (*Id.* ¶ 14.) Mr. does not explain how he knows this, but it is apparent that he has no personal knowledge because he says that only "some" of those calls were to speak with him, and he candidly admits that he has no idea "why all the calls to were made or to whom Mr. spoke."[2] (*Id.* ¶ 15.) Nor does he know the content of those alleged calls; he only speculates based on his recollection of the "gist" of some of his conversations. (*Id.* ¶ 16.) Mr. 's testimony is, therefore, either information that he learned from somebody else (hearsay), or pure speculation. Either way, it is not based on personal knowledge and he is not competent to testify to those alleged facts.[3] *See* Fed. R. Evid. 602. Mr. also states conclusions that are based entirely on hearsay and to which he is also incompetent to testify. *See, e.g.*, Decl. ¶ 14 ("Mr. assured me that only the bills necessary to keep the business operating were being paid, although I *later found out* that was taking money out of the company himself"); *id.* ¶ 15 (stating that "it is because of Mr. deceptions" that has been harmed, which assumes the truth of the hearsay that he allegedly "found out"); *id.* ¶ 16 ("It is ironic that he told me this when just the previous day *I learned from D'Eramo* that Paul had been taking money out of the business and putting it in his own account."). Similarly, although Mr. declaration is largely irrelevant for reasons discussed below, he ends by reciting what allegedly "learned" or "was told by (Decl. ¶ 16.)

The Court may not consider any of the hearsay or bare conclusions based on that hearsay in evaluating whether personal jurisdiction exists. As the Court held in *Green Keepers*:

> The information Carroll learned from unidentified Green Keepers representatives . . . is clearly inadmissible hearsay. There is no

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[2] Mr. cannot even say that Mr. made those telephone calls – he simply assumes it.

[3] Such telephone calls would not support the exercise of jurisdiction in any event.

> specific reference that other critical "facts" are within Carroll's personal knowledge, as opposed to simply being "information" in his possession. Because plaintiff has not established the admissibility of the statements proffered, we must disregard them. Accordingly, plaintiff has failed to come forward with any competent evidence that jurisdiction . . . is proper.

1998 WL 717355 at *3. *See also Cunningham v. Walt Disney World Co.*, 1991 WL 22062 at *2 (E.D. Pa. 1991) (rejecting affidavits where "much of the information . . . is incompetent and inadmissible hearsay"); *Piccinini v. Kraft, Inc.*, 1986 WL 4321 at *1 (E.D. Pa. 1986) (affidavit "consists of 29 paragraphs of which 20 are hearsay"); *cf. Time Share*, 735 F.2d at 66 ("Unlike summary judgment proceedings, in which a party need only submit affidavits which make out disputes of material fact, in establishing in personam jurisdiction, Time Share had a burden of proof to sustain, and thus mere affidavits which parrot and do no more than restate plaintiff's allegations . . . do not end the inquiry.")[4]

Stripped of the hearsay and bare conclusions, neither Mr. nor Mr. provides any factual basis at all to support the exercise of jurisdiction. It goes without saying that the inflammatory rhetoric attorneys construct from the hearsay of the Complaint cannot substitute for competent evidence. apparent hope is that its overheated rhetoric will paint Mr. as sufficiently venal that the Court will not notice its failure to meet its burden. The Court should ignore the rhetoric and dismiss the Complaint.

[4] *See also, Ariel Maritime Group, Inc. v. Pellerin Milnor Corp.*, 1989 WL 31665 at *2 n. 4 (S.D.N.Y. 1994) ("The Court notes that the allegations concerning the telephone calls of Yevrakes and Rane are apparently hearsay statements contained in the Merritt Affidavit as Merritt does not assert personal knowledge that these telephone calls were made. Additionally, plaintiff has failed in any way to indicate when and to whom these alleged telephone calls were made. The affidavit that is submitted by plaintiff to establish jurisdiction lacks a sufficient degree of detail, is mainly hearsay, and puts forth legal conclusions rather than competent facts and therefore is insufficient to defeat defendant's motion to dismiss."); *Signtronix, Inc. v. General Sign, Inc.*, 2007 WL 2398515 at *4 (N.D.Tex. 2007) (rejecting hearsay in declaration); *Sfasciotti v. Copy-Plus, Inc.*, 1985 WL 5051at *1 (N.D. Ill. 1985) (same).

II. The Parties' Relationship Prior to December 2003 Does Not Support Personal Jurisdiction Over Mr. for Alleged Acts Four Years Later.

Perhaps because it recognizes that it otherwise cannot establish personal jurisdiction, expends substantial effort recounting its prior relationship with Mr. and then asserts that "*were this* an action directly arising from one or more of the Franchise Agreements, it goes without saying that this Court would have personal jurisdiction" over Mr. under *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). (Br. at 10) (emphasis added). Whatever might be the case "were this" an action arising out of the terminated franchise agreements, it is not. misses the mark in arguing that its assertion of tort claims should not "alter" the result because those claims "fundamentally arise from" the parties' long-since-terminated franchisor/franchisee relationship. (Br. at 10.) The Court lacks personal jurisdiction not because this is a tort action, but because Mr. lacks sufficient contacts with New Jersey specifically related to claims. points to no precedent supporting its "fundamentally arising from" approach. There is none. This Court and others have rejected the notion that specific jurisdiction may be based on contacts that occurred in the context of a terminated franchise relationship. *See Ramada Worldwide, Inc. v. AGA Hospitality, Inc.*, 2007 WL 979917 (D.N.J. Mar. 28, 2007). Ramada, which was headquartered in New Jersey, sued AGA for breach of a franchise agreement. AGA in turn asserted claims against third-party defendants Balbir Chhokar and Paragon Triple S., Inc. ("Paragon"), from which AGA had leased property in Georgia on which it had operated a Ramada hotel. Paragon and Chhokar moved to dismiss for lack of personal jurisdiction. As does here, AGA countered that Paragon's and Chhokar's prior franchise relationship with Ramada provided the requisite contacts. This Court disagreed:

> Specifically, Third Party Plaintiffs argue that based on the fact that Paragon previously made use of the protection of New Jersey state laws, they may fairly be haled into court in this jurisdiction. While it is true that Paragon has previous contacts with New Jersey it is not apparent to this Court that this cause of action arises from Paragon's previous franchise relationship with Ramada. As such, these previous contacts are not sufficient grounds to find that this Court may exercise personal jurisdiction over Paragon. In sum, Paragon could not reasonably have anticipated being haled into court in New Jersey based on the Paragon-Ramada License Agreement that terminated years ago.

2007 WL 979917 at *3. *See also Rescuecom Corp. v. Hyams*, 477 F. Supp. 2d 522, 531 (N.D.N.Y. 1996) (holding that a terminated franchise agreement could not provide the requisite contacts); *Sparks Tune-Up Centers, Inc. v. Strong*, 1994 WL 87487 at *5 (N.D. Ill. 1984) ("The contacts on which plaintiffs rely relate to Kaminski's status as a franchisee of Sparks. . . . Since plaintiffs' claims . . . arose after Kaminski terminated his own franchise relationship with Sparks, this court does not believe that the minimum contacts essential to due process are present."). *Cf. Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Products Co.*, 75 F.3d 147, 153 (3d Cir. 1996) (refusing to consider contacts from prior contractual relationship).

Nor do the facts surrounding the sale of the defendants' franchises in December 2003 support jurisdiction. asserts that the defendants financed part of the purchase price for and obtained a security interest in the transferred collateral, an arrangement to which admits it explicitly consented. (Br. at 10.) also points out that it agreed to give the defendants the right to cure any default by if they should choose to do so. (The defendants never exercised this right.) (*Id.*) All of this is true, but fails to suggest how its claims in this case are even related to, let alone arise out of, those facts. wishful pronouncements that the relationship was "very much alive" even after it "technically" ended in December 2003 (Br. at 11) and that the termination of the franchises was actually "a continuation" of the parties' relationship (Lawn

Br. at 13), would make Orwell proud. Indeed, does not even allege a single contact or communication from Mr. between December 2003 and late 2006 or early 2007. The facts surrounding the sale of the franchises in 2003 provide no basis for jurisdiction.

III. Bare Allegations of Intentional Torts Do Not Support Personal Jurisdiction.

next argues that the mere fact that it has alleged—based purely on hearsay— that Mr. has committed intentional torts directed at it in New Jersey is sufficient to create minimum contacts. (Br. at 11.) This argument also has no merit. asserts three intentional torts: [5] common law fraud (Count I), based on statements that Mr. allegedly made to in late 2006 and early 2007[6] (Complaint ¶¶ 27-29); tortious interference with contract (Count III), based on Mr. alleged interference with payments to in late 2006 and early 2007 (Complaint ¶ 45); and unfair business practices in violation of Mass. Gen. L. c. 93A (Count IV), again based on Mr. alleged acts in late 2006 and early 2007 (Complaint ¶¶ 50-52).

does not dispute that each of the things that it alleges Mr. did, he did in Massachusetts. Rather, it wrongly asserts that the Court may exercise jurisdiction because supposedly felt the effect of these alleged torts in New Jersey. (Br. at 11.)

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[5] Count II, negligent misrepresentation, is not an intentional tort and the Court may not exercise personal jurisdiction on that Count even under theory.

[6] alleges that Mr. made false statements to it to discourage it from terminating franchises. never explains why Mr. would care if were to terminate the franchises, since he had a superior security interest in the business that greatly exceeded the value of that collateral. allegations that Mr. made fraudulent statements to keep from foreclosing make no sense; if there were a fraud (and there was not), it would have been a singularly pointless one that would not have harmed in any way because Mr. could have foreclosed on his collateral at any time.

To begin with, simply cannot establish the jurisdictional facts necessary to support jurisdiction. Each of the alleged intentional torts is premised entirely on hearsay; either the alleged falsity of Mr. statements to in view of what purportedly "learned" or is "informed and believes" about Mr. actual behavior (common law fraud), or on what "learned" or "is informed and believes" that Mr. did (tortious interference, unfair trade practices). Absent hearsay and unsupported conclusions about what Mr. actually did in Massachusetts, has not even alleged any tort at all. Thus, to exercise personal jurisdiction over the alleged intentional torts, the Court necessarily must consider and give credence to bald assertions and hearsay. This the Court cannot do. *See* Section I, *supra*; *see also Nichols v. G.D. Searle & Co.*, 783 F. Supp. 233, 244 (D. Md. 1992) (holding that plaintiff failed to make a prima facie showing of fraud where "[o]f the eleven documents offered to the Court to support the plaintiff's position, not one credibly implies that Searle committed fraud on the FDA. Instead, the documents represent an attempt by the plaintiffs to make Searle amenable to jurisdiction based on speculation and hearsay.") This case thus differs fundamentally from those cites; in none of those cases did the plaintiff rely on hearsay to establish the factual basis for its claims.

simplistically contends that fraudulent statements made to a New Jersey resident confer personal jurisdiction. New Jersey state courts look to federal law to determine the Constitutional limits of personal jurisdiction, and the Third Circuit has explained the circumstances under which an intentional tort directed at a forum resident may provide Constitutional minimum contacts. *Imo Industries, Inc. v. Kiekert, AG*, 155 F.3d 254, 259 (3d Cir. 1998). In *Imo*, the court analyzed the ruling in *Calder v. Jones*, 465 U.S. 783 (1984), which established the "effects" test for intentional torts, and held that *Calder* did not "carve out a

special intentional torts exception to the traditional specific jurisdiction analysis, so that a plaintiff could always sue in his or her home state." 155 F.3d at 265. To the contrary, even in intentional tort cases, "the jurisdictional inquiry focuses on the relations among the defendant, the forum, and the litigation." *Id.* (internal quotation omitted). It is not enough that the effects of the tort are "felt" in the forum where plaintiff's corporate domicile is. Rather, the plaintiff must:

> point to contacts which demonstrate that the defendant *expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity. Simply asserting that the defendant knew that the plaintiff's principal place of business was located in the forum would be insufficient in itself to meet this requirement. The defendant must manifest behavior intentionally targeted at and focused on the forum for *Calder* to be satisfied.

Id. at 265 (emphasis in original, internal quotation omitted). There must be "specific activity indicating that the defendant expressly aimed its tortious conduct at the forum." *Id.* at 266. Again, the cases cites are not on point.

There is nothing to indicate that Mr. expressly aimed his allegedly tortious activity at New Jersey such that it is the focal point. Rather, every act that alleges (based on hearsay) that Mr. did to carry out the alleged fraud was done in and directed exclusively at Massachusetts, making Massachusetts the focal point. Even if felt any effect at all from the alleged acts, it is only because it happens to be headquartered in New Jersey that it can claim to have felt the effects there. This is insufficient under *Imo*. *Id.* at 266.

IV. Exercising Personal Jurisdiction Over the Defendants Would Offend Traditional Notions of Fair Play and Justice.[7]

asserts that *Burger King* "put to rest" the idea that the court should consider the relative resources of a defendant "who has purposefully derived commercial benefit from his affiliations in a forum." (Br. at 15, quoting *Burger King*, 471 U.S. at 483 n.25.) *Burger King* itself, however, cited the burden on the defendant as one of the factors to consider in evaluating minimum contacts, 471 U.S. at 477, and here the defendants had no franchise relationship with and thus had no "affiliations" in New Jersey from which to derive any commercial benefit. It is manifestly unjust to drag Mr. a retiree living on a fixed income, into New Jersey to litigate unfounded and well-nigh frivolous allegations based only on hearsay as to what Mr. allegedly did in Massachusetts. can obtain full relief in Massachusetts courts, and decision to sue in New Jersey smacks of abusive pressure tactics.

deliberately misstates the basis for Mr. well-founded fear that he will be forced to litigate simultaneously in both New Jersey and Massachusetts. As explained in the defendants' opening brief, Mr. is contractually obligated to indemnify Mr. Mr. acceptance of collateral in satisfaction of debt to Mr. did not extinguish that obligation. The forum selection clauses in Mr. various agreements with however, preclude Mr. from impleading Mr. in this action.[8]

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[7] Section C of brief simply repeats its efforts to rely on pre-December 2003 contacts and does not merit further response. We note, however, that incorrectly suggests that the defendants must "excuse themselves" from litigating in New Jersey. In fact, it is burden to establish that this Court may exercise personal jurisdiction over the defendants, not the defendants' burden to "excuse themselves."

[8] Nor, it is worth noting, could itself have sued Mr. in this Court, because its franchise agreements with Mr. mandate arbitration of any disputes. (*See* Exh. 1 to Decl. Art. 15.F.)

Finally, New Jersey has no interest in this dispute. As the Third Circuit in *Imo* emphasized, the mere fact that a corporation is headquartered in the forum is irrelevant. Indeed, it may not even be correct to say that "felt" the effects of the alleged torts in New Jersey at all. *Imo*, 155 F.3d at 265 n. 9 (observing without deciding that a corporation may not suffer harm in a particular geographic location as an individual does, and noting a possible distinction between physical harm and abstract harm such as economic loss).

CONCLUSION

For the foregoing reasons, as well as those set forth in Defendants' opening brief, the Court should dismiss the Complaint in its entirety for lack of personal jurisdiction.

Respectfully submitted,

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