COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT
C.A. No. 04-2736-H

GURU DEVI M. KHALSA,

Plaintiff,

vs.

JOHN HANCOCK FINANCIAL SERVICES, INC., WILLIAM KELLY and DAVID L. CRANE

Defendants

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OF WILLIAM KELLY

Defendant William Kelly ("Mr. Kelly") respectfully submits this supplemental memorandum in further support of his motion to dismiss this action as against him for lack of long-arm jurisdiction under Section 3 of Chapter 223A of the General Laws of the Commonwealth and the Constitution of the United States, or, in the alternative, under the doctrine of forum non conveniens, pursuant to the order of this Court (Gants, J.) at oral argument on June 23, 2005.

No Massachusetts case speaks directly to the central jurisdictional issue in this case—whether Massachusetts courts possess personal jurisdiction over out-of-state representatives of financial service providers (in this case, defendant "John Hancock Financial Services"("John Hancock")) domiciled in Massachusetts. Nonetheless, it is well settled that

jurisdiction may not Constitutionally be exercised over foreign defendants who had no reasonable expectation of being hailed before the courts of a forum state for conduct completely outside that state. Furthermore, where the allegedly wrongful communications all took place outside the Commonwealth, well established principles of law leave no doubt that this Court possesses ample discretion to dismiss this case under the doctrine of forum non conveniens even if personal jurisdiction exists as a technical matter.

I.

WELL SETTLED PRINCIPLES OF LAW MANDATE THE DISMISSAL OF THE CLAIMS AGAINST MR.KELLY FOR LACK OF PERSONAL JURISDICTION

It is true that Mr. Kelly acted as representative of John Hancock affiliates domiciled in Massachusetts, communicated with John Hancock employees based in Boston concerning the transactions of which plaintiff Guru Devi K. Khalsa ("Ms. Khalsa") now complains, and may have had regular communications with John Hancock on compensation and training issues since the mid-1990's. It is also indisputable, however, that Ms. Khalsa resided in Georgia at the time of the events in issue, all communications between Ms. Khalsa and the individual defendants took place in Georgia, and Mr. Kelly was licensed to participate in insurance and securities transactions in Georgia—but not in Massachusetts. Mr. Kelly's dealings with customers took place

nowhere else than in Georgia. He had no reason to believe that claims against him for conduct in Georgia could be brought wherever John Hancock could be found. While no Massachusetts case has squarely addressed the question of whether Massachusetts courts possess personal jurisdiction over agents of Massachusetts financial service companies no matter where they may be located, both Federal and Massachusetts courts have held personal jurisdiction cannot be exercised over non-domiciliaries for out-of state acts where such persons engaged in no material wrongful conduct in Massachusetts. On this basis, the claims against Mr. Kelly must be dismissed for lack of personal jurisdiction.

It is beyond dispute that personal jurisdiction under G.L. c. 223A, §3 may be asserted only to the limits imposed by the Federal Constitution. See Good Hope Inds., Inc. v. Ryder Scott Co., 378 Mass. 1, 6, 389 N.E.2d 76, 80 (1979). The Supreme Court of the United States has recognized that personal jurisdiction is constitutional only where "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)(no personal jurisdiction over regional automobile distributors in state where they did no business even though accident giving rise to products liability claim took place in

forum state), quoted with approval, Heins v. Wilhelm Loh Wetzlar Optical Mach. GmbH & Co. KG., 26 Mass.App.Ct. 14, 23, 522 N.E.2d 989, 995 (1988). The fact that Mr. Kelly's principal employer, then known as Atlanta Glass Insurance Agency, was based in Georgia and Mr. Kelly could not legally sell either insurance products or securities outside Georgia (and occasionally, neighboring states) suggest that he had no expectation John Hanckock policyholders could use Massachusetts courts to resolve claims against him arising from his conduct in Georgia. Under World-Wide Volkswagen and its progeny, the exercise of personal jurisdiction by Massachusetts courts is simply unconstitutional and this case simply must be dismissed as against Mr. Kelly.

Both Massachusetts courts and Federal courts sitting in Massachusetts have followed the direction of World-Wide Volkswagen and found the exercise of personal jurisdiction to be improper when the out-of-state defendant, although engaged in a forum state-related transaction, was not alleged to have engaged in any wrongful conduct within the forum state. Most significantly, in LaVallee v. Parrot-Ice Drink Prods. of Amer., Inc., 193 F.Supp.2d 296 (D.Mass. 2002), the United States District Court for the District of Massachusetts held that no personal jurisdiction existed under either G.L. c. 223A or was permissible under the Federal Constitution over an out of state employee of the defendant who transmitted allegedly fraudulent

misrepresentations—even though jurisdiction existed over its employee. Noting that "many employees, including junior business associates, do not personally benefit from actions in a foreign forum", 193 F.Supp. at 301, the Court concluded that the employee did not transact business in Massachusetts so as to confer jurisdiction under G.L. c. 223A, §3(c) when he was not alleged "to have derived any personal benefit from his contacts in the Commonwealth nor to have acted beyond the scope of his employment." 193 F.Supp.2d at 302. The exercise of personal jurisdiction over the employee was also found to be improper as a Constitutional matter, insofar as the employee's transmission of information to the plaintiffs in Massachusetts was not deemed to be a "purposeful availment" of the protections of Massachusetts law and courts so as to permit the foreseeable and Constitutional exercise of personal jurisdiction. Id. at 303-04, quoting World-Wide Volkswagen, 444 U.S. at 292, 297. Unlike the defendant-employee in LaVallee, Mr. Kelly's alleged transmissions of misrepresentations as an agent of John Hancock were made entirely in Georgia to the plaintiff, then a Georgia resident. Under the rule of LaVallee, where the only benefit Mr. Kelly received for his conduct was payment of his ordinary commissions in Georgia, this case must be dismissed for lack of personal jurisdiction.

The First Circuit reached a similar result under New Hampshire law and the Due Process Clause in Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284 (1st Cir. 1999), holding that personal jurisdiction under a long-arm statute comparable to G.L. c. 223A could not be Constitutionally exercised over a Florida land manager managing land in Florida whose only contact with the proposed forum state was to mail checks and financial reports to the plaintiff. The Court explained:

> Indeed, the annual payments sent to Exeter [the plaintiff] in New Hampshire comprise the [defendant] Fund's only pertinent contacts with that state-- and there is not so much as a hint that the Fund benefitted [sic] in any way from the protections of New Hampshire law in making these payments. The very exiguousness of these contacts suggests that the Fund could not reasonably have foreseen its susceptibility to suit in a New Hampshire court.
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> 196 F.3d at 292 (citations and footnote omitted).

On this basis, the Court held claims of breach of fiduciary duty to the New Hampshire plaintiff could not be heard in New Hampshire. If the out-of-state intermediary in Phillips Exeter could not be sued in the plaintiff's home forum for its conduct as financial adviser, neither can Mr. Kelly, who in fact could not legally engage in any insurance or securities-related sales activities in Massachusetts during the period in which the events in issue took place.

The Appeals Court reached a similar result when it held that New York lawyers who delivered an allegedly erroneous opinion to Massachusetts recipients were not subject to Massachusetts personal jurisdiction in Fern v. Immergut, 55 Mass.App.Ct. 577, 773 N.E.2d 972 (Mass.App. 2002). In that case, the defendant New York lawyers were sued for legal malpractice when they drafted language to be employed in plaintiff's opinion to the New York lawyer's clients and failed to detect that the opinion finally delivered to New York counsel was a forgery.[1] The Appeals Court affirmed Superior Court's entry of summary judgment, finding that

> the sending of a draft letter and forms to Massachusetts could not conceivably have caused the alleged negligent representation consisting of [the defendant's] failure to discover that the opinion letter issued by [plaintiff] was false.

55 Mass.App.Ct. at 584, 773 N.E. 2d at 978, and thus defendants had engaged in no activities permitting the exercise of jurisdiction under G.l. c. 223A. Similarly, as Mr. Kelly's alleged conduct for which the Complaint seeks to hold him liable all took place in Georgia, Fern prohibits the exercise of jurisdiction merely because Mr. Kelly was simultaneously working with a Massachusetts entity to document the insurance and

[1] The plaintiff in Fern was the law firm on whose letterhead the forged opinion was issued; as a technical matter, it was seeking indemnification for its own payment of damages to the defendant's client to whom the forged opinion was transmitted.

annuity agreements which were the subject of his alleged misconduct. The Federal and Massachusetts cases squarely stand for the proposition that Massachusetts courts are without jurisdiction over claims arising out of Mr. Kelly's acts in Georgia as an intermediary for Massachusetts financial service providers.

II.

EVEN IF PERSONAL JURISDICTION EXISTS, THIS COURT HAS DISCRETION TO DISMISS THIS ACTION AS AGAINST MR. KELLY FOR FORM NON CONVENIENS

During oral argument on June 23, the Court suggested that it would not dismiss this case under G.L. c. 223A, §5 (codifying the common law doctrine of forum non conveniens). It suffices to state that Massachusetts courts have often exercised their discretion under §5 to direct the trial of cases in the jurisdiction where allegedly tortuous conduct took place. See Green v. Manhattanville College, 40 Mass.App.Ct. 76, 80, 661 N.E.2d 123, 126 (1996); see also Owen Joseph Sec. Inc. v. Mcdermott, Will & Emery, reported at 62 Mass.App.Ct. 1115, 819 N.E.2d 196 (Mass.App. unpublished opinion pursuant to Rule 1:28, December 15, 2004)(available as WESTLAW Case 2004 WL 29022460)(affirming forum non conveniens dismissal of legal malpractice claim arising out of arbitration case tried in California by California counsel). Here, where, notwithstanding plaintiff's move after the events in issue to Massachusetts, all

material parties, potential witnesses, and documents resided or were created in Georgia[2], this is an appropriate case for dismissal under G.L. c. 223A, §5.

CONCLUSION

The relevant case law confirms the fact that Mr. Kelly is not subject to the jurisdiction of any Massachusetts Court in this case, and, even if jurisdiction exists, this case can more conveniently be tried in Georgia rather than Massachusetts. Accordingly, Mr. Kelly respectfully submits this Court should allow his motion to dismiss for lack of jurisdiction under Mass.R.Civ.P. 12(b)(2), or, in the alternative, pursuant to G.L. 223A, §5.

WILLIAM KELLY
By his attorney,

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Dated: June 30, 2005

[2] It is more than noteworthy that the plaintiff in Owen Joseph Sec., Inc., like Ms. Khalsa, moved to Massachusetts before instituting the action subsequently dismissed on grounds of forum non conveniens. See slip op. (as published by WESTLAW) at 1 & n.3.

CERTIFICATE OF SERVICE

I hereby certify that I served this document by causing a true and genuine copy thereof to be delivered first class mail, postage prepaid, all counsel of record in this action this 30th day of June, 2005. .

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EDWARD R. WIEST