**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

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2011 AUG -8 PM 12: 08
CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ______ DEPUTY

**BIZWARE SOFTWARE SOLUTIONS, INC. and DATAMAX GROUP, INC.,**
**Plaintiffs,**

**-vs-** **Case No. A-11-CA-316-SS**

**GROUPE COUNSEIL GABRIEL AMAR ET ASSOCIÉS INC.,**
**Defendant.**

# ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Defendant Groupe Counseil Gabriel Amar Et Associés Inc.'s Motion to Dismiss [#7], Plaintiffs' response [#11] thereto, Defendant's reply [#13], and Plaintiffs' surreply [#14]; Plaintiffs' Motion to Remand [#9], Defendant's response [#10] thereto, and Plaintiffs' reply [#12]; and Defendant's Motion for Sanctions [#15], Plaintiffs' response [#18] thereto, and Defendant's reply [#21]. Having reviewed the documents, the relevant law, and the file as a whole, the Court now enters the following opinion and orders DENYING Plaintiffs' motion to remand, GRANTING Defendant's Motion to Dismiss, and DENYING Defendant's motion for sanctions.

## Background

At times, the Court suspects there must be a popular rumor, surreptitiously circulated amongst lawyers and litigants, that this Court's highest pleasure lies in reading endless pages of needless bickering between the parties and counsel. Although the Court is reluctant to dispel what must be an exceptionally pervasive and hallowed myth, in candor it must admit it actually prefers

the quaint charms offered by simple competence and common courtesy. Given the Court's pedestrian preferences, it is regrettable these latter features are in short supply in this case.

## I. Factual Background

This lawsuit is the latest in a trilogy of disputes between the parties relating to a 2008 "Service Agreement,"[1] and the second time this Court has been called upon to resolve the parties' differences. The first case, Cause Number A-10-CA-112-SS, was an action filed by Plaintiffs against Defendant for fraudulent inducement, breach of contract, fraudulent misrepresentation, and for a declaratory judgment based on the contract. Although the Court determined it had personal jurisdiction over the suit and therefore denied Defendant's motion to dismiss on that ground, the Court granted Defendant's motion to dismiss for lack of proper venue because of a mandatory forum selection clause in the Service Agreement. Accordingly, the Court dismissed Plaintiffs' suit without prejudice to refiling in Quebec, the mandated forum.

According to Plaintiffs' state court petition in this suit, however, Defendant beat them to the filing-a-Canadian-lawsuit punch. Elevating the squabble to an international level, Defendant allegedly filed a suit against Plaintiffs in Quebec, "wherein it alleged, among other things, that the lawsuit filed by Plaintiffs in the Western District of Texas constituted defamation of Defendant's character . . . ." Notice of Removal [#1], Att. 1 at 7. Although Plaintiffs claim they told Defendant its defamation claim was frivolous, and Defendant's counsel allegedly acknowledged this fact, Defendant continued to pursue the claim. Plaintiffs allege Defendant brought the defamation claim "to harass Plaintiffs, increase the costs of the litigation, and attempt to negotiate a larger settlement

[1] The general purpose of the 2008 Service Agreement was for Defendant to obtain Canadian tax credits for Plaintiffs. The heart of the dispute between the parties in the first suit was whether Plaintiffs agreed to pay Defendant a percentage of all tax credits obtained, or only those in the form of cash reimbursements.

because of the costs associated with litigating in a foreign jurisdiction." *Id.* Plaintiffs further claim Defendant engaged in a variety of harassing tactics before dropping its defamation claim, "conceding it was frivolous in nature." *Id.* at 9.

Finally, we come to the current suit. Plaintiffs allege four causes of action based on both Defendant's conduct related to the 2008 Service Agreement, and Defendant's "knowingly frivolous civil proceeding in Canada." *Id.* at 12. Specifically, with respect to the 2008 Service Agreement, Plaintiffs allege fraud, violations of the Texas Deceptive Trade Practices Act, and violations of provisions of the Texas Business and Commerce Code related to telephone solicitation; with respect to the Canadian litigation, Plaintiffs bring a claim for malicious prosecution. Against all odds, the parties have somehow managed to raise their spat to a whole new level of contentiousness this third time around—not only are they still fighting about their ill-fated 2008 contract, but now they are also fighting about their previous fights. If a certain popular rumor was true, the undersigned might expire on the spot from happiness.

## II. Procedural Background

On March 30, 2011, Plaintiffs filed suit in the 277th Judicial District Court, Williamson County, Texas. On April 19, 2011, Defendant removed to this Court on the basis of diversity. On May 5, 2011, Defendant filed a motion to dismiss for lack of jurisdiction, improper venue, or failure to state a claim.

The following day, Plaintiffs filed a motion to remand, arguing this Court lacks jurisdiction because the amount in controversy is less than $75,000. Finally, and entirely unsurprisingly, on June 2, 2011, Defendant filed a motion for sanctions against Plaintiffs for—perhaps ironically—harassing Defendant with litigation.

Now, for the following reasons, the Court denies Plaintiffs' motion to remand, grants Defendant's motion to dismiss, and denies Defendant's motion for sanctions.

**Analysis**

**I. Motion to Remand [#9]**

Because Plaintiffs' motion to remand challenges the jurisdiction of the Court to hear this case, the Court addresses it first. The dispositive question is whether Defendant has proved by a preponderance of the evidence the amount in controversy is greater than $75,000. Asked another way, has Defendant shown it is facially apparent from Plaintiffs' complaint the claims are likely above this figure? The Court finds Defendant has met its burden and therefore denies Plaintiffs' motion to remand.

**A. Legal Standard**

"The party seeking to invoke federal diversity jurisdiction bears the burden of establishing both that the parties are diverse and that the amount in controversy exceeds $75,000." *Garcia v. Koch Oil Co. of Tex. Inc.*, 351 F.3d 636, 638 (5th Cir. 2003). "When the plaintiff's complaint does not allege a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds" the jurisdictional amount. *De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir. 1993). "This burden may be fulfilled in one of two ways," only one of which is relevant to this case: "jurisdiction will be proper if it is facially apparent from the plaintiffs' complaint that their claims are likely above $75,000." *Garcia*, 351 F.3d at 639 (quotations and alterations omitted). However, "[b]ecause removal raises significant federalism concerns, the removal statute is strictly construed and any doubt as to the propriety of removal should be resolved in favor of remand." *Gutierrez v. Flores*, 543 F.3d 248, 251 (5th Cir. 2008) (quotation omitted).

**B. The Parties' Arguments**

In its notice of removal, Defendant argues the amount in controversy requirement has been met in several ways. First, it notes the parties' dispute over the 2008 Service Agreement itself exceeds $75,000, whether viewed as a breach of contract or a fraud claim. Second, Defendant argues the economic damages for Plaintiffs' DTPA claim are also measured by the disputed contract amount and therefore also exceed $75,000, particularly because Plaintiffs seek treble damages. Third, Defendant notes Plaintiffs seek treble damages for their telephone solicitation claims. Finally, Defendant observes Plaintiffs are seeking both compensatory and punitive damages in their claim for malicious prosecution. Defendant concludes these damages, taken together, exceed $75,000.

In their motion to remand, Plaintiffs argue they are not seeking any damages related to the value of the contract because those claims are being pursued via litigation in Quebec. Rather, Plaintiffs argue, because their actual damages are nominal and their statutory damages are capped at $5,000 per violation, their claims are for less than $75,000.

**C. Analysis**

The Court concludes it is apparent from the face of Plaintiffs' complaint their claims likely exceed $75,000. Plaintiffs' arguments notwithstanding, the Court must make its determination of the amount in controversy based on their complaint, not their subsequent explanation of it. As Defendant notes, Plaintiffs' maximum statutory damage award for their telephone solicitation claim, trebled, equals $15,000—leaving $60,000 to be accounted for between Plaintiffs' three other claims.

Even if the Court credits Plaintiffs' argument they are not seeking the amount disputed under the Service Agreement—an argument the Court finds dubious, because it seems any contract dispute would necessarily be an injury suffered by Plaintiffs as a result of Defendant's alleged fraud in

obtaining the contract—the Court is still persuaded Plaintiffs' claims exceed $75,000. Most significantly, Plaintiffs seek both compensatory and punitive damages for their malicious prosecution claim. Although the record is not clear regarding the length or full extent of the Canadian litigation, if the parties' conduct in Canada is (or was)[2] anything like their prior and current behavior here, many hours have likely been wasted making bombastic accusations, with a somewhat smaller number devoted to actual legal analysis and argument. Time is money, and lawyers do not come cheap. It does not seem beyond the realm of possibility the compensatory damages alone on this claim are, or will be, in excess of $60,000.

The factor that most convinces this Court Plaintiffs' claims are in excess of $75,000, however, is the fact they seek punitive damages for Defendant's allegedly malicious prosecution. In their complaint, Plaintiffs paint a picture of Defendant's deliberate, ongoing, and petty use of litigation tactics to harass Plaintiffs and force them into a Defendant-favorable settlement. Moreover, Plaintiffs claim Defendant's improper actions led to a Canadian court's entry of default against Plaintiffs' subsidiary. Under these circumstances, it seems likely Plaintiffs' punitive damages would at least equal their compensatory damages and, in all probability, far exceed them.

**D. Conclusion — Amount in Controversy**

Although there is uncertainty about the precise measure of the damages in each of Plaintiffs' claims, the Court is convinced from the face of the complaint it is likely the aggregate value of Plaintiffs' claims exceeds $75,000. Accordingly, the Court denies Plaintiffs' motion to remand.

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[2] Although it appears undisputed the Canadian litigation is ongoing, the parties—shockingly—disagree whether Plaintiffs' malicious prosecution claims apply only to the dismissed defamation action, or to the entirety of the litigation. The Court need not resolve this issue, however, because it finds Plaintiffs' claims exceed $75,000 under either scenario.

## II. Motion to Dismiss [#7]

### A. The Parties' Arguments

Defendant argues Plaintiffs' claims should be dismissed for three reasons. First, it argues this Court lacks personal jurisdiction over Defendant because requiring it to defend suit in Austin, Texas, would "offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945) (quotation omitted). Second, Defendant contends Plaintiffs' fraud, DTPA, and telephone solicitation claims must be dismissed for the same reason this Court dismissed Plaintiffs' claims in its original breach of contract suit; namely, the mandatory forum selection clause in the 2008 Service Agreement. Finally, Defendant argues Plaintiffs' telephone solicitation and malicious prosecution claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be granted.

In response, Plaintiffs first argue Defendant has failed to meet its burden of demonstrating the exercise of personal jurisdiction by this Court would offend traditional notions of fair play and substantial justice. Second, Plaintiffs contend this Court is the proper venue for their suit under 28 U.S.C. § 1392(a)(2) because "a substantial part of the events giving rise to Plaintiffs' claims occurred in Williamson County and Plaintiffs' claims are independent of the claims being litigated in Canada." Pls.' Resp. [#11] at 1. Third, Plaintiffs argue their telephone solicitation and malicious prosecution claims plausibly state a claim upon which relief can be granted.

With respect to Plaintiffs' fraud, DTPA, and telephone solicitation claims, the Court agrees they fall within the scope of the Service Agreement's forum selection clause and therefore must be dismissed for improper venue. With respect to Plaintiffs' malicious prosecution claim, the Court

dismisses it for lack of personal jurisdiction.

**B. Improper Venue**

**1. Legal Standard**

"Federal law applies to determine the enforceability of forum selection clauses in both diversity and federal question cases." *Alliance Health Grp., LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 399 (5th Cir. 2008). "Under federal law, forum-selection clauses are presumed enforceable, and the party resisting enforcement bears a heavy burden of proof." *Ginter ex rel. Ballard v. Belcher, Prendergast & Laport*, 536 F.3d 439, 441 (5th Cir. 2008). The Supreme Court and the Fifth Circuit both have made clear this presumption applies with particular force in international contracts:

> Public policy weighs strongly in favor of [the presumption of enforceability], because uncertainty as to the forum for disputes and applicable law will almost inevitably exist with respect to any contract touching two or more countries. That is, the elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. As we recently stated in a case implicating these concerns, the Supreme Court has therefore instructed American courts to enforce forum selection and choice of law clauses in the interests of international comity and out of deference to the integrity and proficiency of foreign courts.

*Haynsworth v. The Corporation*, 121 F.3d 956, 962 (5th Cir. 1997) (alteration added; quotations, citations, and alteration in original omitted).

That said, "[t]he presumption of enforceability may be overcome . . . by a clear showing that the clause is unreasonable under the circumstances." *Id.* at 963 (quotation omitted).

> Unreasonableness potentially exists where (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement will for all practical purposes be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a

> remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state.

*Id.* (quotation omitted).

**2. Interpreting the Forum Selection Clause**

The forum selection clause in the Service Agreement reads:

> The laws in force in the province of Quebec rule the interpretation and application of the present agreement, and all legal proceedings which could follow must necessarily take place in the legal jurisdiction of Montreal, province of Quebec, and submitted to the courts of this same legal jurisdiction, which will have exclusive jurisdiction to hear and adjudicate all litigation related to the present agreement.

Def.'s Mot. Dismiss [#7], Ex. E at 4.

The Fifth Circuit has interpreted the term "related to" broadly in the context of arbitration clauses: "[C]ourts distinguish 'narrow' arbitration clauses that only require arbitration of disputes 'arising out of' the contract from broad arbitration clauses governing disputes that 'relate to' or 'are connected with' the contract." *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998). "Broad arbitration clauses . . . are not limited to claims that literally 'arise under the contract,' but rather embrace all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute." *Id.*

Although this language refers explicitly to arbitration clauses, the Court is persuaded the principles apply with equal force to forum selection clauses generally for two reasons. First, the Supreme Court has stated: "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 519 (1974); *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995) ("[F]oreign

arbitration clauses are but a subset of foreign forum selection clauses in general . . . ."). Second, in *Haynsworth v. The Corporation*, the Fifth Circuit noted it had, in a prior case, "rebuffed [an] attempt to distinguish between arbitration and forum selection/choice-of-law clauses for enforceability purposes, noting that . . . 'in relevant aspects, there is little difference between the two.'" 121 F.3d 956, 963 (5th Cir. 1997) (quoting *Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33, 36 (5th Cir. 1997)).

A broad forum selection clause such as this one applies not only to contract claims, but also potentially applies to tort claims and state statutory causes of action, even when the complained-of conduct occurred prior to the formation of the contract. In *Braspetro Oil Svcs. Co. v. Modec (USA), Inc.*, an unpublished opinion, the Fifth Circuit explained:

> [T]o the extent that the plaintiffs assert that the alleged acts occurred before the execution of the Conversion Contract and therefore did not arise out of the execution of the contract, this argument is foreclosed by our circuit's precedent. In *Haynsworth v. Lloyd's of London*, the plaintiffs alleged fraud, breach of fiduciary duty, and violations of the Texas Deceptive Trade and Practice Consumer Protection Act and the Texas Securities Act based on the defendants' alleged efforts to induce the plaintiffs to unwittingly underwrite high-risk insurance policies. 121 F.3d 956, 960–61 (5th Cir.1997). As here, the alleged fraudulent acts underlying the claims in *Haynsworth* occurred before the parties entered into the agreement with the forum selection clause, and the district court enforced the forum selection clause. *Id.* at 963–64. On appeal, the plaintiffs asserted that the defendants made certain misrepresentations to lure them into agreeing to the forum selection clause, and that they entered into the agreements based on the alleged fraud. *Id.* The court rejected that argument, holding that any misrepresentations that were made related to the contract as a whole. *Id.* at 963.

240 F. App'x 612, 616 (5th Cir. 2007) (unpublished).

**3. Analysis**

Here, Plaintiffs' claims "relate to" the 2008 Service Agreement and therefore are covered by the forum selection clause. Plaintiffs' fraud and DTPA claims in this case are very similar to those

the Fifth Circuit found were covered by the forum selection clause in *Haynsworth*: both cases contain claims of alleged misrepresentations intended to induce formation of a contract. And while Plaintiffs' telephone solicitation claims are somewhat less directly associated with the Service Agreement, it would be disingenuous to suggest the phone calls between the parties—phone calls that apparently initiated the business relationship between the parties and ultimately led to the signing of the Service Agreement—were not "related to" to the contract. In short, the Court concludes these claims all bear a "significant relationship to the contract," *Pennzoil*, 139 F.3d at 1067, and therefore fall under the forum selection clause.

Plaintiffs make no serious attempt to demonstrate enforcement of the forum selection clause would be unreasonable under the circumstances. Accordingly, the Court finds Plaintiffs have not met their heavy burden on this point.

**4. Conclusion — Improper Venue**

This contract was freely negotiated between two presumably sophisticated business entities, both of which had experience in international commerce. When they agreed to "adjudicate all litigation related to" the Service Agreement exclusively in Quebec, they expressed their intent to have the courts of that forum (and only those courts) resolve disputes about their business relationship. Such a broad agreement inevitably contemplates not only the contract itself, but also some expanse of issues surrounding it; and while the outer limits of the latter region are indefinite, the Court finds Plaintiffs' fraud, DTPA, and telephone solicitation claims fall within it. Accordingly, the Court dismisses these claims.[3]

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[3] Although the Court uses the parties' "improper venue" language, it notes Fifth Circuit law seems unsettled on whether a dismissal based on a forum selection clause is one for improper venue or lack of subject matter jurisdiction. *See Noble Drilling Svcs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 472 n.3 (5th Cir. 2010) (noting the "court has not

**C. Malicious Prosecution Claim**

Although Plaintiffs' malicious prosecution claim has an indirect relationship to Texas, the Court finds the connection is too tenuous to justify the exercise of personal jurisdiction over Defendant on this cause of action. Accordingly, the Court dismisses it.

**1. Personal Jurisdiction — Legal Standard**

The Federal Rules of Civil Procedure allow a defendant to assert lack of personal jurisdiction as a defense to suit. FED. R. CIV. P. 12(b)(2).

To determine whether a federal district court sitting in diversity has personal jurisdiction over a nonresident defendant, the district court considers first whether exercising jurisdiction over the defendant comports with due process. *Religious Tech. Ctr. v Liebreich*, 339 F.3d 369, 373 (5th Cir. 2003). If the requirements of due process are satisfied, the court then determines whether the exercise of jurisdiction is authorized by the jurisdictional "long-arm" statute of the state in which the court sits. *Id.* Because the Texas long-arm statute has been interpreted as extending to the limit of due process, the two inquiries are the same for district courts in Texas. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.001–17.093.

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). One requirement of due process is the nonresident defendant must be properly subject to the personal jurisdiction of the court in which the defendant is sued. *Id.*

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previously definitively decided whether Rule 12(b)(1) or Rule 12(b)(3) is the proper rule for motions to dismiss based on an arbitration or forum-selection clause," and continuing the tradition of not deciding the issue).

The Supreme Court has articulated a two-pronged test to determine whether a federal court may properly exercise jurisdiction over a nonresident defendant: (1) the nonresident must have minimum contacts with the forum state, and (2) subjecting the nonresident to jurisdiction must be consistent with "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Freudensprung v. Offshore Technical Svcs., Inc.*, 379 F.3d 327, 343 (5th Cir. 2004).

A defendant's "minimum contacts" may give rise to either specific personal jurisdiction or general personal jurisdiction, depending on the nature of the suit and the defendant's relationship to the forum state. *Freudensprung*, 379 F.3d at 343. "A court may exercise specific jurisdiction when (1) the defendant purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there; and (2) the controversy arises out of or is related to the defendant's contacts with the forum state." *Id.* Even when the controversy is not related to the defendant's contacts with the forum state, however, a court may nevertheless exercise general jurisdiction over the defendant if the defendant has engaged in "continuous and systematic contacts" in the forum. *Id.* Of course, if a defendant satisfies neither of these tests, the exercise of personal jurisdiction is not proper. *International Shoe*, 326 U.S. at 316.

The plaintiff has the burden of making a prima facie case that a defendant has sufficient "minimum contacts" with the forum state to justify that state's exercise of either specific or general jurisdiction. *Freudensprung*, 379 F.3d at 343. If the plaintiff does so, the burden shifts to the defendant to show that such an exercise offends due process because it is not consistent with traditional notions of fair play and substantial justice. *Id.* Finally, when a court rules on a 12(b)(2) motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, it must

accept the non-moving party's jurisdictional allegations as true and resolve all factual disputes in its favor. *Guidry v. U.S. Tobacco Co., Inc.*, 188 F.3d 619, 625 (5th Cir. 1999).

**2. Analysis**

Neither party argues Defendant is subject to general jurisdiction in Texas, and the Court agrees it is not. However, the parties disagree whether this Court can properly exercise specific jurisdiction over Defendant. Plaintiffs argue because their malicious prosecution claim could not exist in the absence of Defendant's initial phone calls into Texas, the claim necessarily arises out of Defendant's contact with Texas. Defendant, on the other hand, argues the phone calls are tangential to an otherwise entirely Canada-centric dispute and therefore this Court lacks personal jurisdiction over the malicious prosecution claim. The Court agrees with Defendant.

As the Court noted in its April 21, 2010 Order in Cause Number A-10-CA-112-SS, the only reason the Court has personal jurisdiction over this Canadian contract dispute at all is because Defendant allegedly committed fraud by intentionally directed misleading communications into Texas. Quoting *Wien Air Alaska, Inc. v. Brandt*, the Court observed: "When the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment," because "[t]he defendant is purposefully availing himself of the privilege of causing a consequence in Texas." 195 F.3d 208, 213 (5th Cir. 1999) (quotation omitted). Accordingly, although the Court found it "unfortunate Fifth Circuit law allows Defendant to be haled into court in the Western District of Texas on such a slim reed," it nevertheless concluded it had personal jurisdiction over Defendant. *Bizware Software Solutions, Inc. v. Groupe Conseil Gabriel Amar Et Associes, Inc.*, No. A-10-CA-112-SS, slip op. at 7 (W.D. Tex. Apr. 21, 2010).

Plaintiffs now ask the Court to extend its reluctant finding of personal jurisdiction over

Defendant to encompass not only claims related to the alleged fraud itself, but also claims related to Defendant's decision to sue Plaintiffs for their decision to sue Defendant over the fraud. In short, Plaintiffs ask the Court to exercise personal jurisdiction over a lawsuit, which was itself based on a lawsuit, which was based on something over which the Court had personal jurisdiction. Although six degrees of separation may be the norm for a certain actor, the Court finds two is too many for the exercise of personal jurisdiction in this case. *See Allred v. Moore & Peterson*, 117 F.3d 278, 286 (5th Cir. 1997) ("That the 'effects' test of *Calder* [*v. Jones*, 465 U.S. 783 (1984)] applies outside of the defamation context is clear; but the effects test is not a substitute for a nonresident's minimum contacts that demonstrate purposeful availment of the benefits of the forum state.").

### 3. Conclusion — Malicious Prosecution Claim

Although Defendant's contacts with Texas are sufficient for personal jurisdiction over Plaintiffs' fraud, DTPA, and telephone solicitation claims, those contacts are too attenuated to support Plaintiffs' malicious prosecution claim. It strains credulity to suggest Defendant "purposefully availed" itself of the privileges of conducting business in Texas by filing a lawsuit in Canada. Accordingly, the Court dismisses Plaintiffs' malicious prosecution claim for lack of personal jurisdiction.

## III. Motion for Sanctions [#15]

Defendant argues the Court should sanction Plaintiffs for harassing Defendant by filing a lawsuit without any reasonable basis in law or fact. Plaintiffs respond that because they recited the entire saga of litigation between the parties in their complaint, they clearly were not attempting to trick the Court into engaging in duplicative litigation or being an unwitting tool of harassment.

For those keeping count at home, Defendant is inviting the Court to add a fourth level to the

already formidable mountain of arguments in this case: a motion to sanction Plaintiffs for wrongfully bringing a suit for malicious prosecution against Defendant for its lawsuit against Plaintiffs for their lawsuit concerning Defendant's alleged fraud.

The Court declines this invitation: it has better things to do than decide which party has acted more unprofessionally, a question which may in fact be unanswerable. In any event, the Court is advised the Canadian litigation is ongoing, and the Court simply cannot conceive of a sanction more unpleasant for each party than having to deal with the other. Accordingly, Defendant's motion is denied.

**Conclusion**

To the extent Plaintiffs' claims relate to the 2008 Service Agreement, contractual provisions require all such claims be brought in Canada. To the extent Plaintiffs' claims do not relate to the Service Agreement, Defendant's contacts with Texas are too attenuated for this Court to exercise personal jurisdiction over Defendant. Accordingly, Plaintiffs claims are dismissed without prejudice to refiling in the appropriate court.

Finally, to the extent either party contemplates filing another lawsuit in this Court in the future, that party is advised to think very hard before doing so. If the suit is another in the series of disputes collateral to the 2008 Service Agreement, or is otherwise not meritorious, the Court will—contrary to the conventional wisdom—be very unhappy. But not as unhappy as the plaintiff in that suit is likely to be.

Accordingly,

IT IS ORDERED that Plaintiffs' Motion to Remand [#9] is DENIED;

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss [#7] is GRANTED;

IT IS FINALLY ORDERED that Defendant's Motion for Sanctions [#15] is DENIED.

SIGNED this the 6th day of August 2011.

SAM SPARKS
UNITED STATES DISTRICT JUDGE