

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

5EI, LLC,)	
)	
Plaintiff,)	
)	
v.)	1:12cv492 (JCC/TRJ)
)	
TAKE ACTION MEDIA, INC.,)	
<i>et al.</i> ,)	
)	
Defendants.)	

M E M O R A N D U M O P I N I O N

This matter is before the Court on Defendants Tamara Lowe and Mitchell A. Steitz's Motion to Dismiss the Complaint and to Quash Service (the "Motions"). [Dkt. 74.] For the following reasons, the Court will deny Defendants' Motions.

I. Background

This case arises out of a contractual relationship between Plaintiff 5EI and Defendants, which, allegedly unbeknownst to 5EI, was in furtherance of Defendants' scheme to misappropriate a domain name and other property.

A. Factual Background

5EI, a Virginia limited liability company headquartered in Virginia, provides, among other things, web design and web hosting services. (Compl. ¶¶ 2, 11.) Defendants in this action include Take Action Media, Inc., ("TAM") and Get

Motivated Seminars, Inc. ("GMS"), both Florida corporations headquartered in Florida. (Compl. ¶¶ 3-4.) GMS and TAM organize business, motivational, and educational seminars. (Compl. ¶ 15.) Also named as Defendants are Tamara Lowe, Mitchell Steitz, Brian Forte, and Kathleen Gose, all of whom are officers or employees of TAM and/or GMS, and residents of Florida. (Compl. ¶¶ 5-8). GMS was founded by Lowe and her husband, while TAM was founded by Lowe.¹ (Compl. ¶¶ 12-13.)

On January 25, 2012, Steitz and Lowe contacted 5EI about designing, developing, and hosting a website and e-mail exchange for GMS on an emergency basis. (Compl. ¶ 16.) 5EI was told that the emergency was due to technicians who were attempting to hostilely take over GMS's website and e-mail exchange, getmotivated.com. (*Id.*) 5EI agreed to work on the project on an emergency basis and accordingly canceled all of its other business appointments. (Compl. ¶ 18.)

The following day, 5EI prepared a written agreement providing that 5EI would (1) create, plan, design, produce, and implement a website for \$33,500, (2) host the website for \$800 per month (subject to change based on bandwidth usage and scalability), (3) produce and host an e-mail exchange for \$2,500 per month, and (4) that Defendants would pay additional costs,

¹ Another entity relevant to this action, though not named as a Defendant, is Life Win, Inc. ("Life Win"), a Florida corporation founded by Lowe and her husband. (Compl. ¶ 14.) Life Win does business as "Get Motivated" and shares a domain name with GMS, getmotivated.com. (*Id.*)

expenses, and fees for non-web contract services. (Compl. ¶ 21.) Steitz and Lowe decided to name the new website and e-mail exchange, yourbreakthrough.com. (Compl. ¶ 22.) They also requested that 5EI substitute TAM, another company owned by Lowe, for GMS in the written agreement, which 5EI did. (*Id.*) Steitz then approved the terms of the contract. (Compl. ¶ 24.)

Over the next several days, 5EI received a number of "change orders," and consequently made changes to the getmotivated.com website design, which it incorporated into yourbreakthrough.com. (Compl. ¶¶ 27-28.) On January 31, 2012, 5EI verified that yourbreakthrough.com was live and that the shopping cart feature was working. (Compl. ¶ 30.) At Steitz's request, 5EI purchased an SSL certificate to redirect getmotivated.com traffic to yourbreakthrough.com. (Compl. ¶¶ 34, 36.)

Defendants represented to 5EI that the new website and e-mail exchange allowed Defendants to regain control of GMS's domain name, e-mail exchange, and, consequently, its business affairs, and that Defendants were the owners of GMS with authority to act on its behalf. (Compl. ¶¶ 41-42.) 5EI alleges that these representations were false, as was the representation that technicians were attempting to hostilely take over GMS's website and e-mail exchange. (Compl. ¶¶ 43-44.)

Defendants allegedly concealed various facts from 5EI, which reflected that they did not possess 100% ownership of GMS. On January 6, 2011, Lowe filed for divorce from her husband, but claimed only a 50% marital interest in GMS and Life Win. (Compl. ¶ 46.) Lowe and Forte allegedly attempted to purchase a 50% interest in GMS and/or Life Win from Lowe's husband, but were unsuccessful in doing so. (Compl. ¶ 47.) On December 19, 2011, GMS and Life Win filed an action in Florida state court against Forte and TAM and obtained a preliminary injunction that, among other things, enjoined them from taking, destroying, hiding, altering, or otherwise compromising the integrity of GMS and Life Win's records, including but not limited to e-mails, computer files or other electronic data, and trade secrets. (Compl. ¶ 50.) On January 9, 2012, Lowe's husband allegedly sold GMS and Life Win to an entity controlled by a former Life Win employee, Joseph Johnson, who then became the companies' sole owner. (Compl. ¶ 51.)

On January 20, 2012, GMS and Life Win filed an action in the District Court for the Middle District of Florida, requesting a preliminary injunction against Lowe, Forte, and TAM. (Compl. ¶ 54.) GMS and Life Win alleged conversion of their property, including their domain name, getmotivated.com, misappropriation of trade secrets, cyber piracy, tortious interference with contractual relations, false designation, and

deceptive and unfair trade practices. (*Id.*) That same day, TAM allegedly filed an action against Lowe's husband and Johnson in Florida state court alleging, among other things, defamation and tortious interference. (Compl. ¶ 55.) On February 23, 2012, after 5EI had performed its contractual obligations, the parties allegedly settled these lawsuits, as well as the divorce action. (Compl. ¶ 58.) Among other things, TAM agreed to return to GMS's control its domain name and e-mail addresses, including getmotivated.com, electronic data, IT outlets, and intellectual property. (*Id.*) Lowe agreed to transfer all of TAM's assets to GMS and to dissolve TAM. (*Id.*) Lowe, in return, was paid approximately \$5,000,000. (*Id.*)

Defendants' employment of 5EI was allegedly in furtherance of a scheme to unlawfully take over GMS and Life Win's domain name and website and to begin conducting business using the Get Motivated brand name. (Compl. ¶ 53.) Defendants allegedly concealed their scheme from 5EI. (*Id.*) Defendants also allegedly failed to pay 5EI despite 5EI's performance of its contractual obligations. (Compl. ¶¶ 59-60.)

B. Procedural Background

Plaintiff filed suit in this Court on May 2, 2012, seeking damages based on theories of breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, conspiracy to interfere with business and contractual relations,

business with 5EI (the formation of the contract, and Defendants' representations accompanying the formation and 5EI's performance of the contract) directly forms the basis of Plaintiff's multiple contract and tort claims against Defendants. (See Compl. ¶¶ 73-116.)

Second, regarding factor (4), by virtue of entering into this contract with 5EI, Defendants deliberately engaged in a significant and long-term business activity in Virginia. The contract formed following Lowe and Steitz's contacts with 5EI created a continuing obligation for 5EI to host GMS's website and email exchange after it had developed and implemented the site and exchange, and for GMS to pay 5EI on a monthly basis for this ongoing service. (Compl. ¶¶ 16-18, 21.); *Burger King*, 471 U.S. at 476.

Third, regarding factor (8), performance of the contractual duties was to, and indeed did, occur in Virginia. Defendants engaged the services of 5EI, a Virginia company, with a principal place of business in Fairfax County, Virginia. (Compl. ¶ 2). Thus, given the location of its place of business, the performance of 5EI's contractual duties occurred in Virginia via 5EI's employees' work to develop, implement, modify, and conduct training for the website and email exchange, even though the final product (the completed and hosted website

and email exchange) was located on the web. (Compl. ¶¶ 26-28, 30-32, 60.)

Finally, for the reasons discussed under factors (3), (4), and (8), the nature, quality, and extent of Lowe and Steitz's communications with 5EI to form and carry out a contract for web services (factor (7)) also supports finding Defendants purposefully availed themselves of Virginia.² This contract, and the surrounding communications, gave rise to a substantial and unattenuated connection between Defendants and Virginia.

Based on the above analysis of these factors, the Court finds that Plaintiff has satisfied the first prong of the specific personal jurisdiction analysis.

b. Whether Plaintiff's Claims Arise Out of Defendants' Virginia Activities

The second prong of the Fourth Circuit's due process test requires a plaintiff's claims to arise out of the defendant's contacts with the forum state. Based on the following allegations, the Court finds that Defendants' contacts with Virginia, through the formation and performance of the

² Regarding factor (5), whether the parties contractually agreed that Virginia law would govern disputes, Plaintiff asserts in its opposition brief that the contract contains a choice of law provision stating that Virginia law would apply. (Pl. Opp. [Dkt. 78] at 8.) Plaintiff, however, fails to assert this allegation in its Complaint and did not attach a copy of the contract to its Complaint. The Court, therefore, cannot consider this assertion in analyzing this motion. It is "axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Elliot v. Great Point Partners, LLC*, 2011 WL 6365, at *3, n.4 (E.D. Va. Jan. 5, 2011) (Cacheris, J.).

contract and the surrounding representations, form the basis of 5EI's claims.

5EI asserts seven causes of action against Defendants Lowe and Steitz (See Compl. ¶¶ 73-116.) These claims directly arise out of the contract for 5EI to perform web services for GMS, a contract that resulted from Lowe and Steitz's contacts to 5EI and that produced subsequent numerous contacts by Lowe and Steitz during 5EI's performance of these services. 5EI asserts that it has not been paid for any part of the services that it performed. (Compl. ¶ 59.) As a result, 5EI argues that Lowe and Steitz breached their express contract with it (Count Three), breached their implied-in-fact contracts with it (Count Four), and were unjustly enriched by receiving 5EI's services without paying for them (Count Five).

5EI also asserts that during the course of the contract formation and performance, Lowe and Steitz repeatedly made false representations regarding (a) the emergency need to develop and implement a new website and email exchange in order to regain control of GMS's domain name, e-mail exchange, and ultimately its business affairs, due to "technicians"' alleged attempted electronic hostile takeover of GMS's business (Compl. ¶¶ 41-43), (b) their right to, ownership of, or authority to act on behalf of GMS (Compl. ¶¶ 41-44), and (c) their intent to pay 5EI for its web services (Compl. ¶¶ 45). In reliance on these

representations, 5EI cancelled all of its other business appointments to work on the project. (Compl. ¶ 18.) 5EI devoted "virtually its entire business attention" to the project and proceeded to forego "virtually all other business opportunities" during the project. (Compl. ¶ 97.) 5EI also has not received the benefit of its bargain from the contract because it has not been paid for its services. (Compl. ¶ 59.)

Based on these false statements, omissions, and 5EI's resulting reliance and subsequent injury, 5EI brings claims against Lowe and Steitz for breach of implied covenant of good faith and fair dealing (Count Six), for fraud (Count Seven), for conspiracy to interfere with and harm business and contract relations (Count Eight), and for imposition of constructive trust (Count Nine).

As a result of the above review of the allegations on which Plaintiff's claims are based, the Court concludes that these claims directly arise out of Lowe and Steitz's alleged contacts with Virginia surrounding the formation and implementation of the contract with 5EI.

c. Whether the Exercise of Personal

Jurisdiction is Constitutionally Reasonable

Finally, under the third prong of the Fourth Circuit's test, the Court may consider "additional factors to ensure the appropriateness of the forum once it has determined that a

defendant has purposefully availed itself" of the forum. *Consulting Eng'rs Corp.*, 561 F.3d at 279. Such factors include: (1) "the burden on the defendant of litigating in the forum;" (2) "the interest of the forum state in adjudicating the dispute;" (3) the plaintiff's interest in obtaining convenient and effective relief;" (4) "the shared interest of the states in obtaining efficient resolution of disputes;" and (5) "the interests of the states in furthering substantive policies." *Id.* at 277 (citing *Burger King*, 471 U.S. at 477; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Upon assessing each of these factors, the Court finds that the exercise of personal jurisdiction over Lowe and Steitz would not be constitutionally unreasonable.

First, litigating in Virginia would not cause an excessive burden on Defendants Lowe and Steitz. Defendants do not allege any such burden in their Motion to Dismiss. In addition, although there would be some burden on Defendants to litigate outside of their home state of Florida, Defendants have retained local counsel here. Thus, any resulting burden does not appear to preclude the fair resolution of this suit.

Second, Virginia has a significant interest in adjudicating this dispute regarding alleged harm to a Virginia company. A state has a "'manifest interest' in providing its residents with a convenient forum for redressing injuries

inflicted by out-of-state actors." *Burger King*, 471 U.S. at 473 (citations omitted).

Third, 5EI's interest in obtaining convenient and effective relief weighs strongly in favor of the appropriateness of the Court's jurisdiction over Defendants. Virginia is the most convenient forum for 5EI as it is a Virginia company, its principal place of business is in Fairfax County, where its employees work, and its counsel are located in or around Northern Virginia. (Compl. ¶ 2, 60). Moreover, 5EI chose to bring this suit in Virginia and a plaintiff's choice of forum generally is "entitled to substantial weight." *Acterna, L.L.C. v. Adtech, Inc.*, 129 F.Supp.2d 936, 938 (E.D.Va.2001) (citations omitted).

Finally, neither of the parties asserts any particular facts with regards to the factors of the states' shared interest in efficient resolution of disputes and in furthering substantive social policies.

As a result, the Court concludes that its exercise of specific personal jurisdiction over Defendants is constitutionally reasonable.

2. Applicability of Fiduciary Shield Doctrine as Defense against Jurisdiction

As established in the previous section, the Court concludes that Plaintiff's allegations satisfy the due process

requirements to exercise specific personal jurisdiction over Defendants. The Court now will consider whether its jurisdiction nonetheless should be limited due to Defendants' assertion that they were acting solely in their corporate capacity.

In their opposition, Defendants argue that their alleged contacts with Virginia only were in the performance of their official capacities as officers and employees of TAM and GMS. (Def. Opp. [Dkt. 78] at 3.) As such, they argue that they are not subject to personal jurisdiction in their individual capacity. Such an argument invokes the theory underlying the fiduciary shield doctrine. In support of their argument, Defendants cite *Columbia Briargate Co. v. First Nat. Bank in Dallas*, 713 F.2d 1052 (4th Cir. 1983). Defendants, however, misread the Fourth Circuit's holding in this case and misapply the case to the facts alleged here.

In *Columbia Briargate*, the Fourth Circuit examined the fiduciary shield doctrine and the issue of when a defendant could be subject to personal jurisdiction in his individual capacity based on acts he undertook in his corporate capacity. Under the fiduciary shield doctrine, "the acts of a corporate officer or employee taken in his corporate capacity within the jurisdiction generally do not form the predicate for jurisdiction over him in his individual capacity." *Id.* at 1055-

56 (quoting *Bulova Watch Co. v. K. Hattori & Co., Ltd.*, 508 F. Supp. 1322, 1347 (E.D.N.Y.1981)). This doctrine, however, "is not a constitutional principle, but is rather a doctrine based on judicial inference as to the intended scope of the long arm statute." *Id.* at 1056 (quoting *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899 (2d Cir. 1981)). As a result, the Fourth Circuit concluded in *Columbia Briargate* that because the fiduciary shield doctrine is "simply a rule of statutory construction where the [state long arm] statute concededly does not seek to go to the utmost limits of due process—it is without application in this case where service was had under [a] long-arm statute, which . . . extends the amenability of a non-resident to jurisdiction 'to the outer perimeter allowed by due process.'" *Id.* at 1057.

Given the inapplicability of the doctrine under such a state long arm statute, the Fourth Circuit advanced an alternative rule for addressing when a corporate agent was subject to personal jurisdiction in his individual capacity, adopting the rule applied in *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902 (1st Cir. 1980). The Fourth Circuit concluded that "when a non-resident corporate agent is sued for a tort committed by him in his corporate capacity in the forum state in which service is made upon him without the forum under the applicable state long-arm statute as authorized by Rule

4(e), he is properly subject to the jurisdiction of the forum court, provided the long-arm statute of the forum state is co-extensive with the full reach of due process." *Columbia Briargate*, 713 F.2d at 1064. That is, if the corporate agent "has a 'direct personal involvement' in a tort committed in the forum state, the agent is subject to jurisdiction in that state under its long-arm statute." *Id.* at 1064. Jurisdiction is appropriate where there is "some showing of direct, personal involvement by the corporate officer in some decision or action which is causally related to the plaintiff's injury," such as "where the defendant [agent] was the 'guiding spirit' behind the wrongful conduct . . . or the 'central figure' in the challenged corporate activity." *Id.* at 1063 (*quoting Ortho*, 619 F.2d at 902, 907).

If, however, "the claim against the corporate agent rests on *nothing more* than that he is an officer or employee of the non-resident corporation and if any connection he had with the commission of the tort occurred without the forum state," the Fourth Circuit stated "that, under sound due process principles, the nexus between the corporate agent and the forum state is too tenuous to support jurisdiction over the agent personally by reason of service under the long-arm statute of the forum state." *Id.* at 1064-65 (*emphasis added*).

In their argument that *Columbia Briargate* indicates that they should not be subject to personal jurisdiction here, Defendants cite only the latter part of the above test and rely solely on their assertion that they were acting on behalf of the corporation. (Def. Opp. [Dkt. 78] at 3.) Not only does this argument overlook much of the Fourth Circuit's actual holding, it also mistakenly relies on which capacity Defendants allegedly were acting in their interactions with 5EI regarding the contract for web services. That is not the relevant issue. In *Columbia Briargate*, the Fourth Circuit specifically rejected the fiduciary shield doctrine, the idea that the fact that an agent was acting in his corporate capacity while carrying out a tort was sufficient *alone* to shield him from jurisdiction, when dealing with a state long arm statute that extends personal jurisdiction to the fullest extent permitted by due process. *Id.* at 1057. Virginia possesses such a long arm statute. *Metzger*, 901 F.2d at 38; Va. Code Ann. § 8.01-328.1. Thus, the key question instead is whether Plaintiff's claims rely on allegations that Defendants had "direct personal involvement" in the alleged torts occurring in Virginia and that these claims are brought against Lowe and Steitz "for a tort *committed by [them]* . . . in the forum state" despite them operating on behalf of their company during the commission of the tort. *Id.* at 1063-64 (emphasis added).

Based on the allegations supporting specific personal jurisdiction discussed in Section III.B.1, the Court finds that 5EI's claims involve the direct, personal contacts that Lowe and Steitz made with Virginia from the formation and implementation of the contract with 5EI and the representations that Lowe and Steitz made to 5EI during that process. 5EI alleges that Lowe and Steitz personally made false representations in their communications with 5EI and its employees. (See Compl. ¶¶ 16, 20, 23, 34, 41-45.) These allegedly false representations, and the 5EI's resulting reliance and subsequent inquiry to its business, form the foundation of the several tort claims that 5EI asserts against Lowe and Steitz, including fraud. (See Compl. ¶¶ 93-116). Thus, Plaintiff's allegations, assumed to be true, show that Lowe and Steitz had "direct personal involvement" and were the "central figure[s]" in the commission of the alleged torts, and that their actions were causally related to 5EI's injury. *Columbia Briargate*, 713 F.2d at 1063.

Moreover, 5EI alleges that these false representations were made to 5EI against the backdrop of Lowe's acrimonious divorce, connected litigation over the ownership of GMS, and Lowe and TAM's resulting attempts to circumvent several preliminary injunctions preventing them from taking, altering, or otherwise comprising the integrity of any GMS records, including emails and electronic information. (Compl. ¶¶ 46-55.)

5EI alleges that Lowe and Steitz were using its services to gain control of GMS's business affairs through its website and email, effectively allowing them to take GMS hostage electronically and facilitating Lowe's subsequent settlement of the litigation for over \$5,000,000 in exchange for returning control of GMS.

(Compl. ¶¶ 53, 57-58, 61.) These allegations indicate that Defendants, motivated by this alleged scheme, were the "'guiding spirit[s]' behind the wrongful conduct." *Columbia Briargate*, 713 F.2d at 1063.

The Court therefore concludes that Plaintiff's allegations satisfy the Fourth Circuit's test for imposing jurisdiction over defendant who caused a tort in the forum state while acting in his corporate capacity. Thus, it remains appropriate for the Court to exercise specific personal jurisdiction over Defendants Lowe and Steitz.

Accordingly, the Court denies the Defendants' motion to dismiss for lack of personal jurisdiction.

IV. Conclusion

For these reasons, the Court will deny Defendants' Motions.

An appropriate Order will issue.

September 17, 2012
Alexandria, Virginia

/s/

James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE