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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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MOHIT RANDHAWA aka HARPAL SINGH,

NO. CIV. 09-2304 WBS DAD

Plaintiff,

v.

MEMORANDUM AND ORDER RE: MOTIONS TO DISMISS

SKYLUX INC., INTERACTIVE INTELLIGENCE, INC., MUJEEB PUZHAKKARAILLATH, and DOES 1 through 20, inclusive,

Defendants.

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Plaintiff Mohit Randhawa aka Harpal Singh filed this action in state court against defendants Skylux Inc. ("Skylux"), Interactive Intelligence, Inc. ("Interactive"), and Mujeeb Puzhakkaraillath alleging various state claims relating to a contract for calling center software. All defendants removed the action to federal court. Skylux and Puzhakkaraillath now move to dismiss plaintiff's First Amended Complaint ("FAC") pursuant to Federal Rules of Civil Procedure 12(b)(2) for lack of personal

1 jurisdiction, 12(b)(3) for improper venue, and 12(b)(6)¹ for
2 failure to state a claim upon which relief can be granted.

3 I. Factual and Procedural Background

4 Skylux is a New York corporation of which
5 Puzhakkaraillath, a New York resident, is President and CEO.
6 (First Amended Complaint ("FAC") ¶¶ 4, 15; Decl. Puzhakkaraillath
7 ¶ 7.) In April 2005, Skylux and Puzhakkaraillath allegedly
8 contacted plaintiff, a resident of California, advertising
9 software for an integrated calling center. (FAC. ¶¶ 1, 8.) The
10 software was manufactured by Interactive, an Indiana corporation,
11 and Skylux acted as authorized reseller and service provider.
12 (Id. ¶¶ 3, 8, 17.) On May 27, 2005, representatives for
13 plaintiff entered into a written Memorandum of Understanding
14 ("MOU") with Skylux Telelink Pvt. Ltd. ("STPL"), an Indian
15 company also owned by Puzhakkaraillath, to set up the Interactive
16 software for an inbound and outbound Indian calling center for
17 plaintiff's future company. (FAC Ex. A; FAC ¶ 9; Decl.
18 Puzhakkaraillath ¶ 4.) Skylux and Puzhakkaraillath allegedly
19 represented to plaintiff that Skylux would be responsible for
20 implementing the Interactive software and calling system. (Id. ¶
21 27.) Plaintiff also tendered approximately \$207,000.00 to
22 Skylux to purchase the software and licenses to use the software,
23 and hired employees for the calling center. (FAC ¶¶ 10, 11.)
24 Plaintiff alleges that Skylux has not overseen the finalization
25

26 ¹While defendants Skylux and Puzhakkaraillath originally
27 moved to dismiss the entirety of plaintiff's FAC pursuant to
28 12(b)(6), they have since withdrawn their 12(b)(6) motion with
respect to plaintiff's sixth and seventh causes of action.
(Skylux Reply 8.)

1 of the call center project as required by the MOU. (Id. ¶ 20.)

2 Beginning around September 2005 and ending in May 2009,
3 plaintiff had technical difficulties using the Interactive
4 software. (Id. ¶ 13.) Plaintiff alleges he purchased software
5 for inbound and outbound calls, but the licenses he received were
6 only for outbound calls. (Id.) Plaintiff alleges that Skylux
7 refused to provide him with the correct inbound/outbound licenses
8 or respond to his complaints for four years, and represented that
9 they had no record that plaintiff had purchased Interactive
10 licenses through them. (Id. ¶¶ 17, 24, 27.) Skylux allegedly
11 refused to acknowledge that plaintiff has purchased the licenses.
12 (Id. ¶ 20.)

13 One of plaintiff's employees, Amit Aurora, allegedly
14 worked as an agent for Skylux and intentionally damaged
15 plaintiff's Interactive software and property so that plaintiff
16 would have to pay Skylux repair and consultation fees. (Id. ¶¶
17 12, 48.) Skylux allegedly hired Aurora after his employment with
18 plaintiff ended. (Id.)

19 II. Discussion

20 On a motion to dismiss, the court must accept the
21 allegations in the complaint as true and draw all reasonable
22 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
23 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
24 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
25 (1972). To survive a motion to dismiss, a plaintiff needs to
26 plead "only enough facts to state a claim to relief that is
27 plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct.
28 1955, 1974 (2007). This "plausibility standard," however, "asks

1 for more than a sheer possibility that a defendant has acted
2 unlawfully," and where a complaint pleads facts that are "merely
3 consistent with" a defendant's liability, it "stops short of the
4 line between possibility and plausibility." Ashcroft v. Iqbal,
5 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at
6 556-57).

7 In general, the court may not consider materials other
8 than the facts alleged in the complaint when ruling on a motion
9 to dismiss. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir.
10 1996). The court may, however, consider additional materials if
11 the plaintiff has alleged their existence in the complaint and if
12 their authenticity is not disputed. See Branch v. Tunnell, 14
13 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds by
14 Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir.
15 2002). Here, plaintiff and defendants Skylux and
16 Puzhakkaraillath have provided the court with a copy of the MOU
17 (Removal Ex. A; FAC Ex. A) and no party has questioned its
18 authenticity. Accordingly, the court will consider this document
19 in deciding defendants' motion to dismiss.

20 Upon granting a motion to dismiss, Federal Rule of
21 Civil Procedure 15(a) "advises the court that 'leave shall be
22 freely given when justice so requires,'" and the court should
23 grant leave under Rule 15(a) "'with extreme liberality.'" Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052
24 (9th Cir. 2003). "Absent prejudice, or a strong showing of any
25 [other relevant] factor[], there exists a presumption under Rule
26 15(a) in favor of granting leave to amend." Id. "Dismissal with
27 prejudice and without leave to amend is not appropriate unless it
28

1 is clear . . . that the complaint could not be saved by
2 amendment." Id. Defendants have failed to show that they will
3 suffer prejudice if plaintiff is allowed to file a second amended
4 complaint. Accordingly, upon dismissing any claims, the court
5 must grant plaintiff leave to amend his FAC unless the futility
6 of amendment warrants dismissing a claim with prejudice.

7 A. Motion to Dismiss for Lack of Personal Jurisdiction

8 A plaintiff has the burden of establishing that the
9 court has personal jurisdiction over a defendant. Doe v. Unocal
10 Corp., 248 F.3d 915, 922 (9th Cir. 2001) (citing Cabbage v.
11 Merchant, 744 F.2d 665, 667 (9th Cir. 1984)). On a motion to
12 dismiss, a plaintiff "need make only a prima facie showing of
13 jurisdictional facts That is, the plaintiff need only
14 demonstrate facts that if true would support jurisdiction over
15 the defendant." Id. (quoting Ballard v. Savage, 65 F.3d 1495,
16 1498 (9th Cir. 1995)). When not directly controverted, a
17 plaintiff's version of the facts must be taken as true and
18 conflicts between the facts contained in the parties' affidavits
19 should be resolved in favor of the plaintiff. Id. at 922. Once
20 a defendant has contradicted the allegations contained in the
21 complaint, however, a plaintiff may not rest on the pleadings,
22 but must present admissible evidence which, if true, would
23 support the exercise of personal jurisdiction. Harris Rutsky &
24 Co. Ins. Svcs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1129
25 (9th Cir. 2003).

26 "Personal jurisdiction over a nonresident defendant is
27 tested by a two-part analysis. First, the exercise of
28 jurisdiction must satisfy the requirements of the applicable

1 state long-arm statute. Second, the exercise of jurisdiction
2 must comport with federal due process." Dow Chem. Co. v.
3 Calderon, 422 F.3d 827, 830 (9th Cir. 2005) (quoting Chan v.
4 Soc'y Expeditions, Inc., 39 F.3d 1398, 1404-05 (9th Cir. 1994)).
5 "California [law] permits the exercise of personal jurisdiction
6 to the full extent permitted by due process." Bancroft &
7 Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th
8 Cir. 2000); see also Cal. Civ. Pro. Code § 410.10 ("A court of
9 this state may exercise jurisdiction on any basis not
10 inconsistent with the Constitution of this state or of the United
11 States."). Therefore, the governing standard in this case is
12 whether the court's exercise of personal jurisdiction over
13 defendant comports with federal due process. See Calderon, 422
14 F.3d at 831.

15 The exercise of personal jurisdiction over a defendant
16 comports with federal due process only if the defendant "has
17 certain minimum contacts with the relevant forum such that the
18 maintenance of the suit does not offend traditional notions of
19 fair play and substantial justice." Yahoo! Inc. v. La Ligue
20 Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1205 (9th
21 Cir. 2006) (en banc) (quoting Int'l Shoe Co. v. Washington, 326
22 U.S. 310, 316 (1945)) (internal quotation marks omitted). In
23 turn, sufficient "minimum contacts" can give rise to "general
24 jurisdiction" or "specific jurisdiction." Unocal Corp., 248 F.3d
25 at 923. General jurisdiction applies if the defendant's
26 activities in the forum "are substantial, continuous and
27 systematic," whereas specific jurisdiction applies if a
28 defendant's "less substantial contacts with the forum give rise

1 to the cause of action before the court." Unocal Corp., 248 F.3d
2 at 923. Because plaintiff has not presented any argument in
3 support of general jurisdiction over defendants in this action,
4 the court will limit its analysis to determining whether specific
5 jurisdiction exists.

6 The Ninth Circuit analyzes specific jurisdiction
7 according to a three-prong test:

8 (1) The non-resident defendant must purposefully direct
9 his activities or consummate some transaction with the
10 forum or resident thereof; or perform some act by which
11 he purposefully avails himself of the privilege of
12 conducting activities in the forum, thereby invoking the
13 benefits and protections of its laws;

14 (2) the claim must be one which arises out of or relates
15 to the defendant's forum-related activities; and

16 (3) the exercise of jurisdiction must comport with fair
17 play and substantial justice, i.e. it must be reasonable.

18 Yahoo! Inc., 433 F.3d at 1205-06 (quoting Schwarzenegger v. Fred
19 Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004)). The
20 plaintiff bears the burden of satisfying the first two prongs of
21 the test. Menken v. Emm, 503 F.3d 1050, 1057 (9th Cir. 2007).
22 If the plaintiff succeeds in satisfying both of the first two
23 prongs, "the burden then shifts to the defendant to 'present a
24 compelling case' that the exercise of jurisdiction would not be
25 reasonable." Id. (quoting Schwarzenegger, 374 F.3d at 802).

26 1. Purposefully Avail/Direct

27 The purposeful availment prong of the specific
28 jurisdiction test has been further subdivided into two distinct
questions: whether Skylux and Puzhakkarailath either (1)
"purposefully availed" themselves of the privilege of conducting
activities in the forum, or (2) "purposefully directed" their

1 activities toward the forum. See Schwarzenegger, 374 F.3d at 802
2 ("We often use the phrase 'purposeful availment,' in shorthand
3 fashion, to include both purposeful availment and purposeful
4 direction, but availment and direction are, in fact, two distinct
5 concepts. A purposeful availment analysis is most often used in
6 suits sounding in contract. A purposeful direction analysis, on
7 the other hand, is most often used in suits sounding in tort.")
8 (internal citations omitted). Because plaintiff in this case
9 alleges tort and contract claims, an analysis of both purposeful
10 availment and purposeful direction is appropriate.

11 a. Purposeful Availment

12 A showing that a defendant purposefully availed itself
13 of the privilege of doing business in a forum state typically
14 consists of evidence of the defendant's contacts or actions in
15 the forum. By making such contacts or taking such actions, a
16 defendant "purposefully avails itself of the privilege of
17 conducting activities within the forum State, thus invoking the
18 benefits and protections of its laws." Hanson v. Denckla, 357
19 U.S. 235, 253 (1958). In return for these "benefits and
20 protections," a defendant must "submit to the burdens of
21 litigation in that forum." Burger King Corp. v. Rudzewicz, 471
22 U.S. 462, 476, (1985); see also Cote v. Wadel, 796 F.2d 981, 984
23 (7th Cir. 1986) ("[P]ersonal jurisdiction over nonresidents of a
24 state is a quid pro quo that consists of the state's extending
25 protection or other services to the nonresident.").

26 Contract negotiations are classic examples of the sort
27 of contact that can give rise to in personam jurisdiction. See
28 Burger King, 471 U.S. at 473. "A nonresident defendant's act of

1 soliciting business in the forum state will generally be
2 considered purposeful availment if that solicitation results in
3 contract negotiations or the transaction of business.”
4 Smith+Noble v. S. Jersey Vinyl Inc., No. 97-7473, 1998 WL 650079,
5 at *2 (C.D. Cal. May 11, 1998) (quoting Sinatra v. Nat’l
6 Enquirer, Inc., 854 F.2d 1191, 1195 (9th Cir. 1988)); see also
7 McGee v. Int’l Life Insur. Co., 355 U.S. 220, 221-23 (1957)
8 (holding that a Texas insurance corporation had minimum contacts
9 with California when the insurance corporation mailed an
10 insurance contract to California and received premium payments
11 from their insured customer who resided in California).

12 However, forming a contract with a forum-state party
13 does not alone create jurisdiction over a nonresident defendant.
14 Burger King, 471 U.S. at 478 (“If the question is whether an
15 individual’s contract with an out-of-state party alone can
16 automatically establish sufficient minimum contacts in the other
17 party’s home forum, we believe the answer clearly is that it
18 cannot.”) (emphasis removed); see also Boschetto v. Hansing, 539
19 F.3d 1011, 1016-17 (9th Cir. 2008) (same); Unocal Corp., 248 F.3d
20 at 924 (citing McGlinchy v. Shell Chem. Co., 845 F.2d 802, 816
21 n.9 (9th Cir. 1988)). Rather, contracts often give rise to
22 personal jurisdiction because they “create continuing
23 relationships and obligations” within the forum state. Travelers
24 Health Ass’n v. Commonwealth of Va., 339 U.S. 643 (1950); see
25 also Burger King, 471 U.S. at 478 (“[W]e have emphasized the need
26 for a highly realistic approach that recognizes that contract is
27 ordinarily but an intermediate step serving to tie up prior
28 business negotiations with future consequences which themselves

1 are the real object of the business transaction.").

2 Courts evaluating whether contracts give rise to
3 personal jurisdiction, therefore, look to the qualitative nature
4 of the forum contacts created by the contract. Boschetto, 539
5 F.3d at 1017 n.3 (discussing McGee, 355 U.S. at 223). This
6 evaluation "ensures that a defendant will not be haled into a
7 jurisdiction solely as a result of random, fortuitous, or
8 attenuated contacts or of the unilateral activity of another
9 party o[r] a third person." Unocal Corp., 248 F.3d at 924
10 (quoting Burger King, 471 U.S. at 475).

11 Plaintiff in this case alleges that personal
12 jurisdiction over Skylux arises from telephone calls made by
13 Skylux to plaintiff advertising calling center software. (FAC ¶
14 8; Opp. Mot. to Dismiss Skylux 3:9-11.) According to plaintiff
15 and unchallenged by defendants, Skylux knew plaintiff was in
16 California and affirmatively sought out his business by making
17 contact with him. Skylux entered into contract negotiations with
18 plaintiff, and plaintiff allegedly paid Skylux approximately
19 \$207,000.00 to purchase the software and licenses to use the
20 Interactive software. (FAC ¶¶ 10, 11.) As a result of these
21 discussions with Skylux and Puzhakkaraillath, plaintiff entered
22 into the MOU with STPL. Furthermore, Skylux allegedly
23 represented that it would be responsible for implementing the
24 Interactive software and calling system. (Id. ¶ 27.) These are
25 precisely the sorts of contacts contemplated in Burger King that
26 give rise to a finding of purposeful availment. See Burger King,
27 471 U.S. at 473.

28 Furthermore, as alleged, the contacts and negotiations

1 between plaintiff and Skylux led not only to memorializing an
2 agreement with STPL, but also to continued relations with Skylux
3 as the party responsible for implementing the software and
4 calling system. See Smith+Noble, No. 97-7473, 1998 WL 650079, at
5 *2. As in McGee, 355 U.S. at 221-23, defendant Skylux allegedly
6 accepted payment from plaintiff in California. All of these
7 facts indicate that Skylux "purposefully avail[ed] itself of the
8 privilege of conducting activities" in California, and that it
9 should therefore be subject to jurisdiction within the state.
10 See Hanson, 357 U.S. at 253.

11 b. Purposeful Direction

12 Purposeful direction analysis is generally applied to
13 tort cases, in which a court "appl[ies] an 'effects' test that
14 focuses on the forum in which the defendant's actions were felt,
15 whether or not the actions themselves occurred within the forum."
16 Yahoo! Inc., 433 F.3d at 1206 (citing Schwarzenegger, 374 F.3d at
17 803); see also Calder v. Jones, 465 U.S. 783 (1984) (finding
18 personal jurisdiction where defendant writers knew that an
19 article written and edited by them in Florida and published in
20 the National Enquirer would have an effect in California where
21 plaintiff lived and worked). Purposeful direction requires that:
22 "the defendant allegedly [must] have (1) committed an intentional
23 act, (2) expressly aimed at the forum state, (3) causing harm
24 that the defendant knows is likely to be suffered in the forum
25 state." Schwarzenegger, 374 F.3d at 803 (quoting Dole Food Co.
26 v. Watts, 303 F.3d 1101, 1111 (9th Cir. 2002)). However, courts
27 applying the purposeful direction prong "evaluate all of a
28 defendant's contacts with the forum state, whether or not those

1 contacts involve wrongful activity by the defendant." Yahoo!
2 Inc., 433 F.3d at 1206.

3 Plaintiff here alleges that Skylux contacted him and
4 made intentional misrepresentations when advertising Skylux's
5 calling center services. (Opp. Mot. to Dismiss 3-4; FAC ¶ 27.)
6 As alleged, plaintiff satisfies the first two elements of
7 purposeful direction because the misrepresentations allegedly
8 made before the MOU was signed were clearly targeted at plaintiff
9 personally, as a potential business partner. That plaintiff and
10 STPL later consummated these negotiations by signing the MOU is
11 irrelevant; at that point defendants were in contact with
12 plaintiff as an individual. As to the third element of harm,
13 defendant Skylux and Puzhakkaraillath were aware that plaintiff
14 resided in California when they made the misrepresentations to
15 him. Furthermore, plaintiff alleges that he paid Skylux
16 approximately \$207,000.00 of his own money, before his Indian
17 company, Shannon Callnet, was created. Any harms that flowed
18 from these misrepresentations necessarily flowed to plaintiff in
19 California. Furthermore, because plaintiff was the primary
20 financial backer of Shannon Callnet and the India call center
21 project, the defendants should have foreseen that any intentional
22 torts to him or his proposed company would be felt personally by
23 plaintiff in California.

24 The other misrepresentations and intentional acts
25 allegedly made by defendants occurred after plaintiff's India
26 company was formed and STPL started to work directly with Shannon
27 Callnet. (See FAC. ¶¶ 13-14, 20, 27.) According to the terms of
28 the MOU, STPL would provide calling center services and equipment

1 to plaintiff's proposed company in India, not to plaintiff
2 personally. (FAC Ex. A.) Yet plaintiff, not Shannon Callnet,
3 was a party to the MOU, and STPL remained accountable to
4 plaintiff in California for the representations contained in the
5 MOU. The totality of Skylux's contacts with plaintiff support a
6 finding of purposeful direction. Skylux allegedly repeatedly
7 misrepresented to plaintiff its future obligations and
8 liabilities to plaintiff, and directed these misrepresentations
9 personally to plaintiff in California. At this juncture, no more
10 is required to support a finding of purposeful direction.

11 2. Claims Arise from Forum-Related Activities

12 The second prong to establish whether Skylux and
13 Puzhakkaraillath have sufficient minimum contacts so to establish
14 specific personal jurisdiction is that the plaintiff must show
15 that his claims arise out of or relate to the defendants'
16 forum-related activities. Yahoo! Inc., 433 F.3d at 1205-06
17 (quoting Schwarzenegger, 374 F.3d at 802. "This step explores
18 the relationship between the cause of plaintiff's harm and the
19 defendant's acts identified as creating purposeful contacts with
20 the forum state." Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir.
21 1987). Courts evaluate this relationship along a continuum. On
22 one end, where a defendant has multiple and significant contacts
23 to support general jurisdiction, no relationship is needed
24 between the contacts and the cause of action. On the other end,
25 where there is only one contact with the forum state, "the cause
26 of action must arise out of that particular purposeful contact of
27 the defendant with the forum state." Id.

28 Plaintiff here alleges defendants had multiple contacts

1 with him in California, placing this court's analysis of the
2 relationship between defendant's contacts and plaintiff's claims
3 somewhere in the middle of the continuum described above. See
4 Id. Plaintiff alleges various tort and contract claims arising
5 out of his negotiations with Skylux and Puzhakkaraillath and his
6 MOU with STPL. Plaintiff's third, sixth, seventh causes of
7 action claim against Skylux for alleged misrepresentations to
8 plaintiff in California, and are therefore clearly related to
9 Skylux's contacts with California.

10 Plaintiff's first, second, fourth, and fifth causes of
11 action involve STPL's subsequent breaches of the MOU allegedly
12 felt by plaintiff in California. (See generally FAC.) While
13 these claims do not arise out of particular purposeful contacts
14 with California, they do relate to and are a part of a common
15 series of events springing from Skylux's California contacts.
16 Skylux made representations to and negotiated a contract with
17 plaintiff, and plaintiff and STPL eventually formalized these
18 communications by entering into the MOU. The court also notes
19 that MOU itself states that STPL has an office at Skylux in New
20 York, implying there is a connection between the two companies in
21 the provision of software licenses and call center services.
22 (FAC Ex. A.) Plaintiff's claims, therefore, relate to Skylux's
23 forum contacts with plaintiff in California.

24 3. Comport with Fair Play and Substantial Justice

25 Because plaintiff has satisfied the first two prongs of
26 the test for specific jurisdiction, the burden shifts to
27 defendant "to 'present a compelling case' that the exercise of
28 jurisdiction would not be reasonable." Menken, 503 F.3d at 1060

1 (quoting Schwarzenegger, 374 F.3d at 802). To determine the
2 reasonableness of exercising jurisdiction over a defendant, the
3 court considers the following factors:

4 (1) the extent of the defendant's purposeful interjection
5 into the forum state's affairs; (2) the burden on the
6 defendant of defending in the forum; (3) the extent of
7 conflict with the sovereignty of the defendant's state;
8 (4) the forum state's interest in adjudicating the
9 dispute; (5) the most efficient judicial resolution of
10 the controversy; (6) the importance of the forum to the
11 plaintiff's interest in convenient and effective relief;
12 and (7) the existence of an alternative forum.

13 Id. (quoting CE Distrib., LLC v. New Sensor Corp., 380 F.3d 1107,
14 1112 (9th Cir. 2004)). Defendants contend that each factor
15 establishes that the exercise of personal jurisdiction over them
16 would be unreasonable. (Mot. to Dismiss Skylux 13-16.)

17 As to the first factor, some cases in the Ninth Circuit
18 "have suggested that once the minimum contacts threshold is met
19 the degree of intrusion into the forum becomes irrelevant."
20 Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1488 (9th Cir.
21 1993) (citing Corporate Inv. Bus. Brokers v. Melcher, 824 F.2d
22 786, 787 (9th Cir. 1987)); see Menken, 503 F.3d at 1062 (Bybee,
23 J., concurring). Nonetheless, other cases provide that "[e]ven
24 if there is sufficient 'interjection' into the state to satisfy
25 the [purposeful availment prong], the degree of interjection is a
26 factor to be weighed in assessing the overall reasonableness."
27 Core-Vent Corp., 11 F.3d at 1488 (9th Cir. 1993) (quoting Ins.
28 Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1271 (9th
Cir. 1981)) (alterations in original).

In this case, defendants' contacts with the state of
California appear limited to isolated communications in 2005 with

1 plaintiff to advertise Skylux's or STPL's calling center services
2 and negotiate potential contract terms with plaintiff.

3 Defendants also provide that they do not do any business in
4 California. (Mot. to Dismiss Skylux 5.) Overall, defendant's
5 contacts with the forum appear attenuated, and therefore this
6 factor weighs against the reasonableness of exercising personal
7 jurisdiction over defendant. Nonetheless, this factor does not
8 "weigh heavily" in defendant's favor since defendant's contacts
9 "were sufficient to meet the purposeful availment prong."

10 Core-Vent Corp., 11 F.3d at 1488.

11 Regarding the second factor, the court acknowledges
12 that defendants, a New York corporation and a New York resident,
13 would be burdened by litigating this case in California.

14 However, "with the advances in transportation and
15 telecommunications and the increasing interstate practice of law,
16 any burden is substantially less than in days past." Menken, 503
17 F.3d at 1062 (quoting CE Distrib., LLC, 380 F.3d at 1112).

18 Indeed, the Ninth Circuit provides that even where a defendant
19 must travel from a foreign country, "this factor is not
20 dispositive" as to the reasonableness of exercising personal
21 jurisdiction. Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1115
22 (9th Cir. 2002) (citing Sinatra v. Nat'l Enquirer, 854 F.2d 1191,
23 1199 (9th Cir. 1988)); see, e.g., Harris Rutsky & Co. Ins.
24 Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1132-33 (9th
25 Cir. 2003); Core-Vent Corp., 11 F.3d at 1488. Therefore,
26 although this factor weighs in defendant's favor, the court does
27 not find it wholly persuasive.

28 The third factor concerns the extent to which the

1 district court's exercise of jurisdiction in California would
2 conflict with the sovereignty of New York, Skylux's state of
3 incorporation and Puzhakkaraillath's state of residence.
4 Defendants contend that the forum selection clause in the MOU
5 designating India as the mandatory forum for disputes presents a
6 conflict of sovereignty with India. This factor, however,
7 involves only conflicts "with the sovereignty of the defendant's
8 state." Menken, 503 F.3d at 1060. Core-Vent, 11 F.3d at 1489.
9 To the extent that any actions of STPL might be imputed to
10 Skylux, courts evaluating this factor "have focused on the
11 presence or absence of connections to the United States in
12 general, not just to the forum state." Core Vent., 11 F.3d at
13 1489. Defendants have not shown the presence of any sovereignty
14 conflict with the state of New York. Therefore, the court finds
15 this factor to be neutral.

16 As to the fourth factor, defendants contend that
17 California does not have a strong interest in providing redress
18 for plaintiff's tort claims because the facts surrounding the
19 claims involved plaintiff's Indian company setting up a calling
20 center in India. However, "California maintains a strong
21 interest in providing an effective means of redress for its
22 residents [who are] tortiously injured." Sinatra, 854 F.2d at
23 1200. While defendants contend that California lacks a strong
24 interest in providing a means of redress because plaintiff's
25 company is located in India, plaintiff has alleged individual as
26 well as corporate harms sufficient to invoke California's
27 interests. Therefore, this factor weighs in favor of exercising
28 personal jurisdiction over defendants.

1 The fifth factor concerns the efficiency of the forum.
2 In evaluating this factor, courts look primarily at where the
3 witnesses and the evidence are likely to be located. Sinatra,
4 854 F.2d at 1200. "It is no longer weighed heavily given the
5 modern advances in communication and transportation." Caruth, 59
6 F.3d at 129. Defendants are both located in New York, and
7 plaintiff resides in California. Defendants contend that
8 exhibits and witnesses are primarily located in India, as the
9 bulk of plaintiff's claims against them are based on the MOU
10 between plaintiff and STPL to set-up an Indian call center and
11 later disputes in India between Shannon Callnet and STPL.
12 Therefore, this factor weighs slightly in favor of defendants.

13 In evaluating the convenience and effectiveness of
14 relief for the plaintiff, courts have given little weight to the
15 plaintiff's inconvenience. Ziegler, 64 F.3d at 476. Nothing
16 indicates that relief is not available to plaintiff in India.
17 Because the burden on plaintiff would be relatively slight, this
18 factor is essentially neutral.

19 Regarding the final reasonableness factor, the court
20 agrees with defendants that alternative fora exist to adjudicate
21 this dispute, as plaintiff could bring this action in New York or
22 India. Because the court will not, at this juncture, enforce the
23 MOU's forum selection clause choosing India as the preferred
24 forum for resolving disputes, this factor weighs only slightly
25 against exercising personal jurisdiction over defendants.

26 Ultimately, although several of the foregoing factors
27 favor defendant, the court concludes that defendant has not
28 presented a "compelling case" that the exercise of personal

1 jurisdiction over it would be unreasonable. See Panavision
2 Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1324 (9th Cir. 1998)
3 (“[W]e conclude that although some factors weigh in [defendant’s]
4 favor, he failed to present a compelling case that the district
5 court’s exercise of jurisdiction . . . would be unreasonable.”).
6 Indeed, “[t]he only case in which the Supreme Court has held that
7 these factors determined the question of personal jurisdiction
8 was in a suit between two foreign corporations in which the Court
9 divided evenly over whether the minimum contacts were
10 sufficient.” Menken, 503 F.3d at 1063 n.1 (9th Cir. 2007)
11 (Bybee, J., concurring) (citing Asahi Metal Indus. Co., Ltd. v.
12 Superior Court of Cal., 480 U.S. 102, 107 (1987)).

13 4. Personal Jurisdiction over Puzhakkaraillath

14 Plaintiff also asserts that this court has personal
15 jurisdiction over Puzhakkaraillath as CEO of Skylux. (FAC ¶ 15.)
16 However, the fiduciary shield doctrine provides that “a person’s
17 mere association with a corporation that causes injury in the
18 forum state is not sufficient in itself to permit that forum to
19 assert jurisdiction over the person.” Davis v. Metro Prods.,
20 Inc., 885 F.2d 515, 520 (9th Cir. 1989). In other words, “[t]he
21 mere fact that a corporation is subject to local jurisdiction
22 does not necessarily mean its nonresident officers, directors,
23 agents, and employees are suable locally as well.” Colt Studio,
24 Inc. v. Badpuppy Enter., 75 F. Supp. 2d 1104, 1111 (C.D. Cal.
25 1999). Though employees are not necessarily subject to liability
26 in a given jurisdiction due to the contacts of their employers,
27 “their status as employees does not somehow insulate them from
28 jurisdiction. Each defendant’s contacts with the forum State

1 must be assessed individually." Calder v. Jones, 465 U.S. 783,
2 790 (1984) (finding jurisdiction proper over non-resident
3 corporate employees where the employees were the primary
4 participants in an alleged wrongdoing intentionally directed at a
5 California resident).

6 The fiduciary shield doctrine may be ignored in two
7 circumstances: (1) where the corporation is the agent or alter
8 ego of the individual defendant; or (2) by virtue of the
9 individual's control of, and direct participation in the alleged
10 activities. Transgo, Inc. v. Ajac Transmission Parts Corp., 768
11 F.2d 1001 (9th Cir. 1985); Wolf Designs, Inc. v. DHR Co., 322 F.
12 Supp. 2d 1065, 1072 (C.D. Cal. 2004).

13 Plaintiff's allegations against Puzhakkaraillath do not
14 adequately describe the kind of conduct needed to allege an alter
15 ego. However, plaintiff also argues that Puzhakkaraillath
16 participated directly in the actions which give rise to this
17 suit. "A corporate officer or director is, in general,
18 personally liable for all torts which he authorizes or directs or
19 in which he participates, notwithstanding that he acted as an
20 agent of the corporation and not on his own behalf.'" Wolf
21 Designs, 322 F. Supp. 2d at 1072 (quoting Coastal Abstract Serv.,
22 Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 734 (9th Cir.
23 1999) (corporate officers cannot "hide behind the corporation
24 where [the officer was] an actual participant in the tort")).
25 Generally, "[c]ases which have found personal liability on the
26 part of corporate officers have typically involved instances
27 where the defendant was the 'guiding spirit' behind the wrongful
28 conduct, . . . or the 'central figure' in the challenged

1 corporate activity." Davis v. Metro Prods., Inc., 885 F.2d 515,
2 524 (9th Cir. 1989) (citations omitted).

3 Puzhakkaraillath is the President and CEO of both
4 Skylux and STPL, and owns a majority of the shares in both
5 companies. (Mot. to Dismiss Puzhakkaraillath Decl. ¶¶ 7, 12, 17.)
6 In his declaration, Puzhakkaraillath admits to speaking with
7 plaintiff on the telephone about plaintiff's plan to set up a
8 call center in India and STPL's interest in acting as a
9 consultant. (Id. ¶ 19.) Plaintiff's FAC alleges that "SKYLUX
10 and PUZHAKKARAILLATH made material misrepresentations to
11 Plaintiff, specifically that [listing three Skylux
12 misrepresentations]" (FAC ¶ 27), and that "Puzhakkaraillath had
13 knowledge of the conduct of Skylux and its agents and encouraged,
14 aided, and or agreed to the conduct of defrauding Plaintiff of
15 substantial sums of money." (FAC ¶ 50.)² Defendants do not
16 dispute the allegation that Puzhakkaraillath personally contacted
17 plaintiff to advertise his company's calling center services.
18 Rather, they allege that "most of the discussions were between
19 Plaintiff's employees" in India and STPL's employees (Mot. to
20 Dismiss 12:6-8) (emphasis added) and assert that there were no
21 in-person meetings between Puzhakkaraillath and anyone at
22 plaintiff's company. (Id. 12:4-5.) Regardless of whether the
23 statements were in-person, or by phone, plaintiff's allegations
24 against Puzhakkaraillath are sufficient at this stage to find
25

26 ²Plaintiff also alleges that Puzhakkaraillath, on behalf of
27 Skylux, entered into the MOU with Plaintiff. (FAC ¶ 9.)
28 However, this is clearly controverted by the MOU itself (FAC Ex.
A), and plaintiff appears to correct this allegation in his
Opposition. (Opp. Mot. to Dismiss 3-4.)

1 that Puzhakkarailath personally and purposefully directed
2 tortious conduct toward plaintiff in California and that this
3 court has personal jurisdiction over him.

4 B. Motion to Dismiss for Improper Venue

5 Federal law applies to interpret a forum selection
6 clause, because forum selection is primarily a venue matter.
7 See, e.g., Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d
8 509, 512 (9th Cir. 1988). In resolving motions to dismiss for
9 improper venue based on a forum selection clause, the pleadings
10 are not accepted as true, as would be required under a Rule
11 12(b)(6) analysis. See, e.g., Murphy v. Schneider Nat'l Inc.,
12 362 F.3d 1133, 1137 (9th Cir. 2004). The court must, however,
13 draw all reasonable inferences in favor of the non-moving party
14 and resolve all factual conflicts in favor of the non-moving
15 party. Id. at 1138. "[I]f the facts asserted by the non-moving
16 party are sufficient to preclude enforcement of the forum
17 selection clause, the non-moving party is entitled to remain in
18 the forum it chose for suit unless and until the district court
19 has resolved any material factual issues that are in genuine
20 dispute." Id. at 1139.

21 1. Standing

22 The court must first decide whether Skylux and
23 Puzhakkarailath have standing to enforce the forum selection
24 clause. It is undisputed that neither Skylux nor
25 Puzhakkarailath signed the MOU containing the clause. (See FAC
26 Ex. A.) Nevertheless, both defendants seek to enforce the forum
27 selection clause against plaintiff and force plaintiff to bring
28 his claims against them in the courts of India. The Ninth

1 Circuit allows non-parties to enforce a forum selection clause
2 where "the alleged conduct of the nonparties is closely related
3 to the contractual relationship." Holland America Line Inc. v.
4 Wartsila North America, Inc., 485 F.3d 450, 456 (9th Cir. 2007);
5 see also Manetti-Farrow Inc., 858 F.2d at 514 n.5 ("[A] range of
6 transaction participants, parties and non-parties, should benefit
7 from and be subject to forum selection clauses."). In Holland
8 America, a forum selection clause was found to apply to nonparty
9 defendants because "any transactions between those entities and
10 Holland America took place as part of the larger contractual
11 relationship between Holland America and [another party to the
12 forum selection clause]." 485 F.3d at 456.

13 Plaintiff here alleges a close relationship among
14 Skylux, STPL, and Puzhakkaraillath, and seeks to impute STPL's
15 alleged torts and contract violations to Skylux. (FAC ¶ 17; Opp.
16 Mot. to Dismiss Skylux 3-4.) Furthermore, like in Holland
17 America and Manetti-Farrow, Inc., the alleged misrepresentations
18 of Skylux and Puzhakkaraillath are intimately tied to the
19 eventual contract that plaintiff signed with STPL. Therefore,
20 defendants Skylux and Puzhakkaraillath may invoke the forum
21 selection clause of the MOU.

22 2. Enforcement of the Forum Selection Clause

23 A contractual forum selection clause is "prima facie
24 valid and should be enforced unless enforcement is shown by the
25 resisting party to be 'unreasonable' under the circumstances."
26 The Bremen v. Zapata Offshore Co., 407 U.S. 1, 10 (1972). While
27 The Bremen involved admiralty law, its standard has been widely
28 applied to forum selection clauses in other contexts, and governs

1 international contracts specifying forum and applicable law. See
2 Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir. 1998);
3 Manetti-Farrow, Inc., 858 F.2d at 512. For a forum selection
4 clause to be deemed "unreasonable" so as to require setting aside
5 the clause, the opposing party must show that its enforcement
6 would contravene strong public policy of the forum in which the
7 suit was brought, or be the result of fraud, undue influence,
8 overweening bargaining power, or be so gravely difficult and
9 inconvenient that the complaining party will for all practical
10 purposes be deprived of its day in court. See The Bremen, 407
11 U.S. at 18.

12 A showing of fraud requires proof that the plaintiff
13 relied on the misrepresentations or fraudulent omissions of a
14 defendant. See In re Estate of Young, 160 Cal. App. 4th 62, 79
15 (2008) (finding the essential elements of a claim for fraud are
16 "(a) a misrepresentation (false representation, concealment, or
17 nondisclosure); (b) knowledge of falsity (or 'scienter'); (c)
18 intent to defraud, i.e., to induce reliance; (d) justifiable
19 reliance; and (e) resulting damage"); Blickman Turkus, LP v. MF
20 Downtown Sunnyvale, LLC, 162 Cal. App. 4th 858, 868 (2008)
21 (stating that "the plaintiff must have been unaware of the fact
22 and would not have acted as he did if he had known of the
23 concealed or suppressed fact" in an action for fraud based on
24 concealment).

25 The MOU contains a forum selection clause which states:
26 "All disputes of any nature will be settled under the
27 jurisdiction of Ludhiana (Punjab) court only." (FAC Ex. A ¶ 11.)
28 Plaintiff contends that the forum selection clause should not be

1 enforced because is the result of fraud. According to plaintiff,
2 he was unable to review the MOU before it was signed by his
3 father-in-law in India, despite his repeated requests for a copy
4 of the MOU. (Opp. Mot. to Dismiss Skylux 5.) In his
5 supplemental declaration, the plaintiff further asserts that he
6 orally negotiated over the terms of the MOU with defendants, and
7 that the defendants never mentioned their intention to insert a
8 forum selection clause binding plaintiff to litigating any
9 disputes in India. (Supp. Decl. Randhawa Sur-Reply Mot. to
10 Dismiss Skylux ¶ 3.) Had he known the defendants intended to
11 insert the forum selection clause, the plaintiff asserts he would
12 not have accepted the agreement. (Id.) Plaintiff alleges that
13 when he did see a copy of the signed MOU approximately three to
14 four days after it was executed, he immediately contacted
15 defendants to object to the forum selection clause present in
16 paragraph eleven of the MOU. (Id. ¶ 4.) Plaintiff alleges that
17 Skylux assured him the clause was deleted, and that a new MOU
18 would be executed. (Id.)

19 The defendants describe a different series of events,
20 and allege that they did provide the plaintiff with a copy of the
21 MOU that included the forum selection clause before the MOU was
22 signed by plaintiff's father-in-law. (Supp. Decl.
23 Puzhakkaraillath Response to Surreply ¶ 5.) Defendants further
24 allege that the plaintiff first objected to the forum selection
25 clause in 2009 in response to the defendants' motion to dismiss.
26 (Id. ¶¶ 6, 8.) Finally, defendants allege that neither they nor
27 any agents of Skylux or STPL told the plaintiff that the forum
28 selection clause would be deleted. (Id. ¶ 7.)

1 As alleged, the plaintiff has stated facts sufficient
2 to preclude enforcement of the forum selection clause under the
3 fraud exception to The Bremen. In short, plaintiff alleges that
4 he had negotiated an agreement with the defendants, that
5 defendants inserted the forum selection clause into the MOU
6 without his knowledge or consent, and that had he been aware that
7 defendants intended to insert the clause he would not have agreed
8 to the MOU. Plaintiff alleges at the very least that the
9 defendants failed to disclose the inclusion of a material term to
10 the MOU and misled plaintiff into believing the clause was
11 subsequently deleted. Accepting plaintiff's assertions of fact
12 as true and giving him all reasonable inferences, plaintiff
13 further alleges a broader scheme by defendants to make plaintiff
14 believe he was dealing with Skylux, an American company, and to
15 surreptitiously bind him to litigating any disputes that arose
16 out of the MOU in India.

17 This Rule 12(b)(3) motion comes very early in the
18 litigation when the factual record remains undeveloped. While
19 the defendants request an evidentiary hearing to resolve the many
20 factual issues that remain in genuine dispute surrounding the
21 inclusion of the forum selection clause, the parties will
22 undoubtedly need discovery before such a hearing could be
23 conducted. Should the factual record regarding the inclusion of
24 the forum selection clause be further developed during the
25 ordinary discovery process, defendants may renew their motion to
26 dismiss for lack of improper venue.

27 C. Motion To Dismiss for Failure To State a Claim upon
28 Which Relief Can Be Granted

1 As a preliminary matter, defendants have withdrawn
2 their motion to dismiss with respect to plaintiff's sixth and
3 seventh causes of action. (Skylux Reply 8.)

4 Plaintiff's Opposition makes no arguments with respect
5 to the defendants' motion to dismiss plaintiff's first, second,
6 fourth and fifth causes of action. Those causes of action--
7 breach of contract, breach of duty of good faith and fair
8 dealing, breach of express warranty, and breach of the implied
9 warranty for fitness for a particular purpose--are all based on
10 the MOU that plaintiff concedes is with STPL and not Skylux or
11 Puzhakkarailath personally. (Opp. Skylux Mot. to Dismiss 3.)
12 Plaintiff has not shown if or why these parties should be exposed
13 to liability under the MOU for STPL's alleged breaches of the
14 contract itself and of express and implied warranties present in
15 the MOU. Plaintiff admits that he was aware that Skylux and STPL
16 were in fact legally distinct, and believed Skylux to be the
17 parent company to STPL. (Supp. Decl. Randhawa Sur-Reply Mot. to
18 Dismiss Skylux ¶ 2.) Taking plaintiff's assertions as true,
19 plaintiff presents no reason why the alleged parent company
20 Skylux should be sued instead of STPL, or why Puzhakkarailath
21 should be liable on the contract claims as if he were a signatory
22 and party to the MOU. Accordingly, the court must dismiss
23 plaintiff's first, second, fourth, and fifth causes of action.

24 Plaintiff's third cause of action for misrepresentation
25 is subject to the heightened pleading standards of Federal Rule
26 of Civil Procedure 9(b). Under Rule 9(b), "a party must state
27 with particularity the circumstances constituting the fraud."
28 Fed. R. Civ. P. 9(b). The plaintiffs must include the "who,

1 what, when, where, and how" of the fraud. Vess v. Ciba-Geigy
2 Corp. USA, 317 F.3d 1097, 1006 (9th Cir. 2003) (citation
3 omitted). "The plaintiff must set forth what is false or
4 misleading about a statement, and why it is false." Decker v.
5 Glenfed, Inc., 42 F.3d 1541, 1548 (9th Cir. 1994). Additionally,
6 "[w]here multiple defendants are asked to respond to allegations
7 of fraud, the complaint must inform each defendant of his alleged
8 participation in the fraud." Ricon v. Reonstrust Co., No.
9 09cv937, 2009 WL 2407396, at *3 (S.D. Cal. Aug. 4, 2009) (quoting
10 DiVittorio v. Equidyne Extractive Indus., 822 F.2d 1242, 1247 (2d
11 Cir. 1987)). The plaintiff must plead each element of fraud,
12 which are: (1) misrepresentation; (2) scienter; (3) intent to
13 induce reliance; (4) justifiable reliance; and (5) resulting
14 damages. In re Estate of Young, 160 Cal. App. 4th 62, 79 (2008).

15 Plaintiff's third cause of action fails to meet the
16 heightened pleading standard articulated in Rule 9(b). Plaintiff
17 alleges that Skylux and Puzhakkarailath made material
18 misrepresentations to plaintiff that: (1) Skylux would be
19 responsible for implementing the Interactive software and calling
20 system; (2) that Skylux had no record that plaintiff had
21 purchased Interactive licenses from it; and (3) that Skylux could
22 not help plaintiff solve the problems with the Interactive
23 software until a record of plaintiff's purchase could be found.
24 (FAC ¶ 27.) Plaintiff does not distinguish between Skylux and
25 Puzhakkarailath as to these representations, or identify any
26 other Skylux agents that made representations to plaintiff.
27 Rather, plaintiff merely alleges that "SKYLUX demanded proof of
28 purchase from Plaintiff . . . and subsequently SKYLUX refused to

1 provide the correct licenses to Plaintiff." (FAC ¶ 14.)

2 Contrary to plaintiff's assertion, paragraphs 8 to 15
3 of the FAC do not meet the requirements of Rule 9(b). (Opp. Mot.
4 to Dismiss Skylux 6.) Plaintiff must put each defendant on
5 notice as to their alleged participation in the fraudulent
6 misrepresentations, and specify with particularity who made the
7 statements at issue and when they were made. Furthermore,
8 plaintiff must show why the statements are false. Specifically,
9 plaintiff has not shown what is misleading about alleged
10 misrepresentations (2) and (3) above, or why they those alleged
11 statements are false or misleading.

12 Finally, plaintiff's third cause of action repeatedly
13 recites the elements of fraud rather than alleging specific facts
14 to support the legal conclusions that plaintiff asserts. "[T]he
15 tenet that a court must accept a complaint's allegations as true
16 is inapplicable to threadbare recitals of a cause of action's
17 elements, supported by mere conclusory statements." Iqbal, 129
18 S. Ct. at 1940 (citing Twombly, 550 U.S. at 555).

19 IT IS THEREFORE ORDERED that defendants Skylux and
20 Puzhakkarailath's motion to dismiss plaintiff's first, second,
21 third, fourth, and fifth causes of action under Rule 12(b)(6) of
22 the Federal Rules of Civil Procedure be, and the same hereby is,
23 GRANTED.

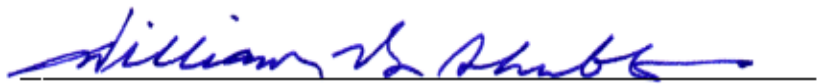
24 IT IS FURTHER ORDERED that defendants Skylux and
25 Puzhakkarailath's motions to dismiss be and the same hereby are,
26 DENIED in all other respects.

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1 Plaintiff has thirty days from the date of this Order
2 to file an amended complaint consistent with this Order.

3 DATED: December 18, 2009

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6 WILLIAM B. SHUBB
7 UNITED STATES DISTRICT JUDGE
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