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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MANDANA D. FARHANG and M.A. MOBILE,

Plaintiffs,

v.

INDIAN INSTITUTE OF TECHNOLOGY, KHARAGPUR; TECHNOLOGY ENTREPRENEURSHIP AND TRAINING SOCIETY; PARTHA P. CHAKRABARTI; PALLAB DASGUPTA; GURASHISH S. BRAR; RAKESH GUPTA; PRAVANJAN CHOUDHURY; SUBRAT PANDA; ANIMESH NASKAR,

Defendants.

No. C-08-02658 RMW

ORDER GRANTING MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION, DENYING MOTION TO DISMISS FOR FAILURE TO PROSECUTE AND INSUFFICIENT SERVICE, AND DENYING WITHOUT PREJUDICE MOTION FOR AUTHORIZATION OF ALTERNATIVE SERVICE

[Re Docket Nos. 217, 218, 221, and 223]

Defendants Pallab Dasgupta, Animesh Naskar, and Subrat Panda move to dismiss plaintiffs' Second Amended Complaint for lack of personal jurisdiction, for failure to prosecute and for insufficient service of process. Defendants Technology Entrepreneurship and Training Society and Partha Chakrabarti also move to dismiss for failure to prosecute and insufficient service of process. Plaintiffs move to authorize alternative service of the Third Amended Complaint on the unserved defendants. For the reasons set forth below, the court: (1) grants the motions to dismiss for lack of

personal jurisdiction; (2) denies the motion to dismiss for failure to prosecute and insufficient service; and (3) denies without prejudice authorization for alternative service.

I. MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION BY DEFENDANTS DASGUPTA, NASKAR AND PANDA

A. Standard for Motion

Defendants Dasgupta and Naskar jointly move and Panda separately moves to dismiss the action against them on the basis of lack of personal jurisdiction over them. They each claim that their activities do not justify the assertion of specific jurisdiction over them. Plaintiffs contend that defendants consented to jurisdiction by signing a nondisclosure agreement containing a forum selection clause and, in addition, that the three-prong test for the exercise of specific jurisdiction has been met.

When a defendant moves to dismiss a complaint for lack of personal jurisdiction, "the plaintiff bears the burden of demonstrating that jurisdiction is appropriate." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (citing *Sher v. Johnson*, 911 F.2d 126, 128 (9th Cir. 1995). However, because this motion is based on written materials rather than an evidentiary hearing, plaintiffs "need only make a prima facie showing of jurisdictional facts," and the court "only inquire[s] into whether the plaintiff's pleading and affidavits make a prima facie showing of personal jurisdiction." *Id.* (citing *Caruth v. International Psychoanalytical Ass'n*, 59 F.3d 126, 128 (9th Cir. 1995). "Conflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor." *Id.*

B. The Defendants Asserting Lack of Jurisdiction Over Them

Dasgupta, Naskar and Panda are citizens and lifelong residents of India. Dasgupta is a computer science and engineering professor for the Indian Institute of Technology, Kharagpur ("IITK"). He was asked to make himself available for technical guidance if needed with respect to the software at issue. He, however, performed no development work on the software. He did sign a non-disclosure agreement at the request of IIT, but he did not recognize at the time he signed it that he could personally be required to go to California to defend against a lawsuit. In November 2004, Dasgupta traveled to California on business unrelated to IIT's work for Farhang, but he met briefly

with her at IIT's request, at which time Farhang shared her thoughts about revenue that could be generated if an agreement were successfully reached with the Indian Railways. Dasgupta submits that going to California for litigation would be economially difficult for him and take him away from his teaching responsibilities. He owns no property in California, maintains no office in California and pays no California taxes. He asserts that he has not disclosed any confidential information to anyone not entitled to view it.

Naskar was an administrative officer for a research and development group at IITK; he has never left India, does not have a passport, and has no business or personal contacts with California. He did send an email to Cool e-Mobile, a company Farhang claims she formed as a potential joint venture vehicle, which stated:

> On behalf of the competent authority, I am very happy to inform you that based on the recommendations of the technical committee, the TIETS Governing Body [which includes the Deputy Manager of IBM] has ratified inclusion of your proposed technology development under the Incubation programme. . . . In view of the above, you are requested to submit within ten days details of your company including copies of Incorporation Certificate, Memorandum and Articles of Association, available information on intellectual property ownership of the proposed technology, the details of the Company Directors and their ownership.

TAC, Ex. D. Although he sent this email, Naskar is not an engineer and denies any involvement with any of the alleged subject development efforts. He denies signing any nondisclosure agreement. He denies viewing or having access to any confidential information described in the Second Amended Complaint.

Panda was a student working toward advanced degrees at the relevant time. He was asked to work on a team to develop certain markup language. He took direction from a faculty member. He did not know Farhang nor had he heard of M.A. Mobile at the time he was asked to help. He signed the nondisclosure agreement at the request of his faculty advisor because he had access to the source code on which he was asked to work. He has no connections with California. He denies that he disclosed the software to anyone who was not authorized to receive it.

3. The Forum Selection Clause

Plaintiffs assert that defendants consented to jurisdiction in Santa Clara County, California when they executed a nondisclosure agreement with M.S. Mobile containing a forum selection clause specifying that "[each of the parties irrevocably consents to the exclusive personal jurisdiction of the federal and state courts located in Santa Clara County, California, as applicable, for any matter arising out of or related to this Agreement." Dasgupta and Panda admit that they signed the nondisclosure agreement, but argue that its enforcement against them would be unreasonable because they signed the agreement at their employer's direction and did not expect the agreement would subject them personally to suit in California. Naskar states by affidavit that he did not sign the nondisclosure agreement, and the forum selection clause provides no basis for jurisdiction over him.[1]

When contractual forum-selection provisions "have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust,' their enforcement does not offend due process." *Burger King Corp. v. Redzewicz*, 471 U.S. 462, 474 n. 14(1985) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). Although *M/S Bremen* held that forum selection clauses are *prima facie* valid, the opinion pointed out that such clauses can be set aside if the party challenging enforcement shows that it would be unreasonable under the circumstances. *M/S Bremen*, 407 U.S. at 10. This exception to enforcement, however, has been construed narrowly. "A forum selection clause is unreasonable if (1) its incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; . . . (2) the selected forum is so "gravely difficult and inconvenient" that the complaining party will "for all practical purposes be deprived of its day in court" . . .; or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (internal citations omitted).

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[1] Plaintiffs suggest that Naskar must have signed a nondisclosure agreement because Professor Chakrabarti indicated that everyone involved in the joint venture executed it. Ordinarily, "[c]onflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor." *Schwarzenegger*, at 800. In this case, however, it appears that Naskar did not do development work, and plaintiffs' assumptions about who was required to sign the agreement are not sufficient to contradict Naskar's affidavit.

The facts do not suggest that category (1) or (3) apply. The question here is whether defendants have met the heavy burden of showing that trial in state or federal court in Santa Clara County would be so difficult and inconvenient that they would effectively be denied a meaningful day in court. *See Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 281 (9th Cir. 1984). Preliminarily, it should be noted that unlike the situation in *M/S Bremen*, the nondisclosure agreement here was a standard form agreement, and there is no evidence that Dasgupta or Panda had any role in negotiating the terms of the agreement. In other words, there is nothing about the clause that would have called Dasgupta's and Panda's attention to it. Although by its terms it potentially subjects them to litigation in California if sued, it is not surprising that they did not focus on that possibility, but rather viewed the clause as something that would only subject their employer to suit in California if someone on the development team wrongfully disclosed confidential information to someone not authorized to receive it. In light of the limited roles each appears to have played in the conduct about which Farhang complains, the defendants' lack of contact and familiarity with California, defendants' modest financial abilities and the interference participating in litigation in California would have with their job responsibilities, the court finds that defendants Dasgupta, Naskar and Panda have met their burden of showing that responding to litigation in California would unduly risk depriving them of their day in court. Moreover, Dasgupta and Panda's involvement, if any was to work on software in India, for an Indian company as a targeted customer, at the behest of their Indian employer. Naskar was involved with administrative matters and not the development of the technology. Enforcement of the forum selection clause against Dasgupta, Naskar and Panda would be unreasonable.

D. Specific Jurisdiction

The Ninth Circuit has articulated the following three-prong test for analyzing a claim of specific jurisdiction:

(1) The non-resident defendant must purposefully direct activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails

himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protection of its laws;

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

(3) the exercise of jurisdiction must comport with fair play and substantial justice.

See Schwarzenegger, 374 F.3d at 802.

1. Purposeful Availment

Under the first prong of the specific jurisdiction test, plaintiffs must establish that Dasgupta, Naskar, and Panda either purposefully availed themselves of the privilege of conducting activities in the Northern District of California, or purposefully directed their activities toward the Northern District of California. *See id.* "A purposeful availment analysis is most often used in suits sounding in contract. A purposeful direction analysis, on the other hand, is most often used in suits sounding in tort." None of the defendants purposely availed himself of the privilege of conducting activities in Northern California, nor did he personally direct his activities at Northern California.

"A showing that a defendant purposefully availed himself of the privilege of doing business in a forum state typically consists of evidence of the defendant's actions in the forum, such as executing or performing a contract there." *Id.* By taking such actions, a defendant is said to "purposefully avail[s] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.* (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). In return for invoking these "benefits and protections," "'a defendant must submit to the burdens of litigation in that forum.'" *Id.* (citing *Burger King*, 471 U.S. at 476).

Applying the purposeful availment analysis to these facts, none of the defendants received any benefit, privilege, or protection from California. Plaintiffs liken defendants' contacts to those discussed in *Burger King*. That case involved a defendant who "deliberately 'reach[ed] out beyond' Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization. Upon approval, he entered into a carefully structured 20-year relationship that envisioned continuing and wide-

reaching contacts with Burger King in Florida." *Burger King Corp.*, 471 U.S. at 479-80. Such facts do not exist here. These defendants worked for an Indian employer in India, and it was the plaintiffs, not defendants, who reached out to India in order to develop technology in India for use in India. They signed contracts in India at the request of their Indian employer. There is no evidence to support Dasgupta's, Naskar's, or Panda's purposeful availment of California or its laws.

2. Purposeful Direction or Effects

To determine whether there are minimum contacts in cases arising in tort, a court applies the Supreme Court's purposeful direction or "effects" test from *Calder v. Jones*, 465 U.S. 783 (1983). *See Schwarzenegger*, 374 F.3d at 803. The three-part test "requires that the defendant have '(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.'" *Id.* at 805 (quoting *Dole Food*, 303 F.3d at 1111). Such a showing "usually consists of evidence of the defendant's action outside the forum state that are directed at the forum, such as the distribution in the forum state of goods originating elsewhere." *Schwarzenegger*, 374 F.3d at 802.

Plaintiffs do not make a *prima facie* showing that these defendants committed intentional acts aimed at the forum state. Plaintiffs allege that Dasgupta committed intentional acts aimed at California by signing the nondisclosure agreement and by conducting a brief business meeting with Farhang during travel to California for other purposes. They allege that Panda committed intentional acts aimed at California by signing the nondisclosure agreement and by allegedly disclosing the trade secrets of California-based plaintiffs. Naskar allegedly committed intentional acts aimed at California by transmitting confidential information and requesting documents from plaintiffs' agent, which he knew would transmit the message to the plaintiffs in California. None of these acts constitutes intentional acts aimed at the forum state for purposes of establishing constitutionally adequate minimum contacts with California. Dasgupta's meeting in California was merely fortuitous. The other allegations simply state that defendants knew that their work involved a potential plaintiff residing in California. The foreseeability of harm to a potential plaintiff in the forum alone is not enough to establish personal jurisdiction. *See, e.g.*, *Pebble Beach Co. v. Caddy*,

453 F.3d 1151, 1156 (9th Cir. 2006) (requiring "something more" in addition to a mere foreseeable effect–"precisely, whether [defendant's] conduct was expressly aimed at California or alternatively the United States"); *Bancroft & Masters v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (noting that *Calder* "cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state will always give rise to specific jurisdiction.").

Because plaintiffs cannot demonstrate that Dasgupta, Panda, or Naskar availed himself of the benefits of doing business in California or knowingly committed acts aimed at California likely to cause harm to plaintiffs, the court must dismiss the plaintiffs' claims against Dasgupta, Panda, and Naskar for lack of personal jurisdiction.

II. MOTION TO DISMISS FOR FAILURE TO PROSECUTE

A. Standard for Dismissal for Failure to Diligently Prosecute

Dasgupta, Chakrabarti, and Naskar move to be dismissed for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b) and for insufficient service of process pursuant to Federal Rule of Civil Procedure 12(b)(5). Defendants Panda and Technology Entrepreneurship and Training Society ("TIETS") join the motion. Defendants assert that plaintiffs unreasonably delayed in effecting service and then did not serve the Third Amended Complaint, the operative complaint. Plaintiffs respond that they have made reasonable efforts to effect service and to proceed diligently but have been delayed by others including the Central Authority of India.

The Ninth Circuit looks at least five factors in evaluating whether an action should be dismissed for failure to diligently prosecute.

> Under our precedents, in order for a court to dismiss a case as a sanction, the district court must consider five factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic alternatives." *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir.1998) (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir.1986)). We "may affirm a dismissal where at least four factors support dismissal, ... or where at least three factors 'strongly' support dismissal." *Id.* (quoting *Ferdik*, 963 F.2d at 1263).

Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999).

B. Delay in Service

The original complaint was filed on May 27, 2008, apparently immediately before the statute of limitations was to run on several of plaintiffs' claims, unless, as plaintiffs claim, there was justified delay in discovering defendants' alleged wrongdoing. Defendant ITT was served on April 7, 2009. On March 6, 2009, Farhang faxed a request for service of TIETS and the individual Indian defendants to India's Central Authority. Service was not accomplished by this attempt. On October12, 2009 plaintiff attempted to follow-up with the Central Authority pointing out the location of the individual defendant and defendant TIETS. On June 15, 2010 plaintiffs again transmitted materials for service of the Second Amended Complaint to the Central Authority because defendants' counsel had asserted in May 2010 that plaintiffs' previous attempts at service were defective. The package was received by the Central Authority on June 18, 2010. Although it is not clear, the Central Authority appears to have served the individual defendants with the Second Amended Complaint about four months later. Farhang did not request service of the Third Amended Complaint until October 19, 2010. The Central Authority has apparently rejected the papers for reasons not entirely clear.

Farhang blames the Central Authority for ignoring its obligations to accomplish service. Defendants, on the other hand, blame Farhang for not following the rules regarding how to accomplish service and not taking appropriate follow-up action. They claim that plaintiffs did not attempt to correct the defective service until June of 2010 and then served the Second Amended Complaint when the filing of the Third Amended Complaint was imminent. Farhang did not attempt to serve defendants with it until October 19, 2010, because she chose to wait and see the outcome of motions attacking the Third Amended Complaint.

C. Weighing of Factors Relevant to Involuntary Dismissal

Although the public interest in expeditious resolution of litigation and effective case management are relevant considerations that merit some consideration here, the critical issue in this case involves weighing the risk of prejudice to the defendants against the public policy favoring disposition of cases on their merits. The Ninth Circuit "has consistently held that the failure to

prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of a showing of actual prejudice to the defendant from the failure [because the] law presumes injury from unreasonable delay." *Anderson*, 542 F.2d at 524 (citations omitted). This presumption, however, is rebuttable. "Even where a plaintiff has failed to do what he might have done earlier, he may have an explanation that excuses or justifies his failure. It is at this point that the extent of prejudice to the defendant, if any, becomes important. . . . A weak excuse may suffice if there has been no prejudice; an exceedingly good one might still do even when there has been some. *Nealey v. Transportacion Maritima Mexicana, S. A.*, 662 F.2d 1275 (9th Cir. 1980) (internal citation omitted). Here, plaintiffs do offer the delay of service as an excuse. Defendants blame plaintiffs for the initial delay of several months and for additional delay in failing to follow the technical rules to accomplish service in India.

The court agrees that plaintiffs' failure to act more quickly and pay more attention to service requirements significantly contributed to the delay in prosecution. However, the plaintiffs have made some efforts to get everyone served. The Federal Rules of Civil Procedure implicitly recognize that service may take some time by excluding foreign defendants from Rule 4(m)'s requirement that service be made within 120 days. The plaintiffs have offered enough of an excuse to shift the burden to show prejudice back to defendants. *See id.* Defendants have made no showing of actual prejudice. The court concludes based up consideration of the circumstances here, dismissal would be too harsh a remedy.

III. MOTION FOR AUTHORIZATION OF ALTERNATIVE SERVICE

Because the court has granted the defendants' motions to dismiss the claims against Dasgupta, Naskar, or Panda for lack of personal jurisdiction, it does not reach the request of authorization for alternative service of them. With respect to Partha Chakrabarti and TIETS it appears that defendants do not contest that they have now been served with at least the SAC and that further service through the Hague Convention is not required.

The remaining defendants Gupta and Choudhury are, at least at this point, not represented by defendants' counsel and have not joined defendants' opposition. There is not adequate evidence in the

record that the Hague Convention procedures have failed as to them. The Hague Convention of 1965 was intended "to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time." Hague Convention, Preamble. The Hague Convention provides for several alternative methods of service: (1) service through the Central Authority of member states; (2) service through consular channels; (3) service by mail if the receiving state does not object; and (4) service pursuant to the internal laws of the state. *See id.* Arts. 5, 6, 8, 9 & 10.

In this case, plaintiffs elected to serve defendants under the first option: service through the Central Authority. Under this method, process is first sent to the Central Authority of the foreign jurisdiction in which process is to be served. *Id.* Art. 3. The Central Authority must then arrange to have process served on the defendants. *Id.* Art. 5. Upon completion of service, the Central Authority must complete a Certificate detailing how, where, and when service was made, or explaining why service did not occur. *Id.* Art. 6. Finally, the completed Certificate is returned to the applicant. *Id.* The Hague Convention does not require the Central Authority to respond to requests for status updates.

The Central Authority apparently succeeded in serving a number of defendants in this case in accordance with the Hague Convention. The court assumes that Chakrabarti and TIETS will now respond to the Third Amended Complaint since their motion to dismiss for failure to diligently prosecute and for improper service has been denied. Whether the Central Authority succeeded in serving Gupta or Chodhoury with any version of the complaint is unclear. If plaintiffs can show that the Central Authority was provided with addresses for service of Gupta and Chodhoury and that this court has personal jurisdiction over them, the court will consider alternative service. The court notes, however, that plaintiffs do not suggest a viable alternative means of effectuating service on Gupta and Chodhoury, who are not represented by defendants' counsel. The court will require additional evidence that emailing copies of the operative complaint to these defendants is likely to effectuate service.

The motion for an order Pursuant to Fed. R. Civ. P. 403(f)(3) is denied without prejudice.

IV. ORDER

For the foregoing reasons, the court grants the motions to dismiss for lack of personal jurisdiction over Dasgupta, Naskar and Panda and denies the motion to dismiss of Chakrabarti and TIETS for failure to prosecute. The court denies the request for authorization of alternative service, although plaintiffs may make another motion for alternative service at a later date.

DATED: 7/7/2011

RONALD M. WHYTE
United States District Judge