

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

ARMENIAN LIBRARY AND MUSEUM OF
AMERICA, INC.,

Plaintiff,

Case No.: 11-cv-11862

v

Hon. Mark L. Wolf

MAYER MORGANROTH,

Defendant.

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**DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION PURSUANT TO FED. R. CIV. P. 12(b)(2)**

STATEMENT OF FACTS

Defendant, Mayer Morganroth (“Morganroth”), is a resident of the State of Michigan, and a licensed attorney in the State of Michigan¹. Exh. 1 at ¶ 2 (ALMA’s Complaint); Exh. 2 at ¶¶ 1-2 (Affidavit of Morganroth). Morganroth was the attorney for the late Dr. Jack Kevorkian². Exh. 2 at ¶ 6.

In July 1999, Dr. Kevorkian permitted the exhibition of certain of his art work, including, without limitation, seventeen paintings, writings, musical compositions and some personal effects (the “Kevorkian Art Work”) at the Armenian Library and Museum of America, Inc. (“ALMA”) located in Watertown, Massachusetts. Exh. 1 at ¶ 5; Exh. 3.

In connection with the exhibition of the Kevorkian Art Work, ALMA, by and through its curator, Sinanian, and Dr. Kevorkian, through his representative, the Ariana Gallery, entered into a fully integrated written agreement (the “Agreement”) in the State of Michigan wherein, among other things, ALMA expressly agreed that: (1) it would pick up the Kevorkian Art Work from the State of Michigan; (2) it would be responsible for the cost of transportation of the Kevorkian Art Work “to and from Royal Oak, Michigan and Watertown, Massachusetts”; (3) it would be responsible for insurance for the Kevorkian Art Work from the time ALMA assumed possession of the Kevorkian Art Work until it was returned to Dr. Kevorkian in the State of Michigan; (4) the Kevorkian Art Work remained “the exclusive property of Dr. Kevorkian”; and (5) it would return the Kevorkian Art Work “upon the request of Dr. Kevorkian.” Exh. 3 at ¶¶ 2-4, 8, 10; Exh. 1 at ¶ 6.

¹ ALMA appears to have sued Morganroth personally. *See*, Compl. However, even if ALMA sued Morganroth in his capacity as personal representative of the Estate of the late Dr. Jack Kevorkian, this Court still lacks jurisdiction because the Estate, like Morganroth personally, has had no contacts with the Commonwealth of Massachusetts which would support the jurisdiction of this Court, as fully set forth herein.

² At all times relevant hereto, Dr. Kevorkian resided in the State of Michigan, including a period of time during which Dr. Kevorkian was incarcerated pursuant to the authority of the Michigan Department of Corrections.

Dr. Kevorkian passed away in June 2011 in Michigan. Exh. 1 at ¶ 2; Exh. 2 at ¶ 13.

Pursuant to the directions in Dr. Kevorkian's Last Will and Testament (the "Will"), which was prepared and executed in Michigan and is governed by the laws of the State of Michigan, Morganroth is the personal representative of the Estate of Dr. Kevorkian (the "Estate"). Exh. 2 at ¶ 14.

On September 23, 2011, Morganroth, on behalf of the Estate, demanded the return of the Kevorkian Art Work to the State of Michigan in accord with the terms of the Agreement. Exh. 1 at ¶ 17; Exh. 2 at ¶¶ 17-18.

ALMA has refused to return the Kevorkian Art Work, and, on October 13, 2011, filed the instant Complaint against Morganroth personally in the Superior Court for the Commonwealth of Massachusetts, which has since been removed to this Court. *See, e.g.*, Exh. 1 ; Exh. 2 at ¶ 19.

This Court lacks personal jurisdiction over Morganroth inasmuch as he has had no contacts with the Commonwealth of Massachusetts in any capacity. Exh. 2 at ¶ 20-21. In addition, the Estate has had no contacts with the Commonwealth of Massachusetts. *Id.* at ¶ 22. Thus, the exercise of jurisdiction by this Court over Morganroth (or the Estate) would violate the Due Process clause of the United States Constitution.

ARGUMENT

I. STANDARD OF REVIEW.

The First Circuit has held that "[t]he burden of proving the facts necessary to sustain jurisdiction is on the plaintiff." *American Express Internat'l, Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1178 (1st Cir. 1989), *quoting*, *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 904 (1st Cir. 1980). For there to be personal jurisdiction over an out of state defendant, his contacts must "represent a purposeful availment of the privilege of conducting activities in [Massachusetts],

thereby invoking the benefits and protections of [Massachusetts's] laws and making [his] presence before [Massachusetts'] courts foreseeable.” *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 60 (1st Cir. 2002). *See also, J. McIntyre Mach., Ltd. v. Nicastro*, ___ U.S. __; 131 S. Ct. 2780; 180 L. Ed. 2d 765, 775 (2011) (Kennedy, J.), *quoting, Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, n. 8; 104 S. Ct. 1868; 80 L. Ed. 2d 404 (1984) (specific jurisdiction calls for the plaintiff to establish that the defendant “engaged in conduct purposefully directed at the forum.”).

When a defendant challenges personal jurisdiction, the burden of proof is on the plaintiff to “establish sufficient facts to support a *prima facie* case authorizing personal jurisdiction over the defendant under both the forum’s long-arm statute and the due process clause of the Constitution.” *U.S.S. Yachts, Inc. v. Ocean Yachts, Inc.*, 894 F.2d 9, 11 (1st Cir. 1990). *See also American Express*, 889 F.2d at 1178; *Ealing Corp. v. Harrods Ltd.*, 790 F.2d 978, 979 (1st Cir. 1986). In making out his *prima facie* case, however, the plaintiff can not rest upon the mere allegations in his complaint. Instead, it “must go beyond the pleadings and make affirmative proof.” *Chlebda v. H.E. Fortna & Brother, Inc.*, 609 F.2d 1022, 1024 (1st Cir. 1979). *See also, Salvador v. Meese*, 641 F. Supp. 1409, 1412 (D. Mass. 1986); *Palandjian v. Pahlavi*, 586 F. Supp. 671, 672 (D. Mass. 1984), *appeal denied*, 782 F.2d 313 (1986). The Court must accept the plaintiff’s properly supported allegations as true and resolve all factual disputes in his favor. *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661, 663 (1st Cir. 1972) (“[The Court is] required, in the absence of convincing evidence to the contrary, to accept these allegations as true.”); *Palandjian*, 586 F. Supp. at 672 (“The Court must treat the facts contained in plaintiffs’ . . . affidavits as true, and it must resolve any dispute in the facts in favor of the plaintiff”).

A federal district court may exercise jurisdiction to the same extent as the state in which

it sits; a state, in turn, may exercise jurisdiction over a non-resident defendant pursuant to its “long-arm statute.” The First Circuit has “construed the Massachusetts long-arm statute³ as being coextensive with the limits permitted by the Constitution.” *Adelson v. Hananel*, 652 F.3d 75; 2011 U.S. App. LEXIS 14300, *6 (1st Cir. 2011) (attached hereto as Exh. 4). Thus, this Court must look to Federal constitutional doctrine to determine whether personal jurisdiction exists over a defendant. *Id.*

The Due Process Clause of the Fourteenth Amendment allows a court to exercise personal jurisdiction over a defendant only if the defendant has “minimum contacts” with the state in which the court sits, sufficient that haling the defendant into that state does not offend traditional notions of fair play and substantial justice. *LSI Indus. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1375 (Fed. Cir. 2000), quoting, *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The requirement of minimum contacts tends to provide non-residents (such as Morganroth here) with a fair warning that their activities may subject them to litigation in the forum state. *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1565 (Fed. Cir. 1994), citing, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472; 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297; 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980).

A defendant can be shown to have sufficient “minimum contacts” for the court to exercise personal jurisdiction in two different ways: specific jurisdiction and general jurisdiction. *Helicopteros Nacionales*, 455 U.S. at 414-16.

The due process clause imposes several requirements on the exercise of personal jurisdiction over out-of-state defendants. First, the defendant must have sufficient “minimum contacts” with

³ The statute provides that “[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person’s transacting any business in this commonwealth.” Mass. Gen. Laws ch. 223A, § 3(a).

the state. For specific jurisdiction, the plaintiff's claim must be related to the defendant's contacts. For general jurisdiction, in which the cause of action may be unrelated to the defendant's contacts, the defendant must have continuous and systematic contacts with the state. Second, for either type of jurisdiction, the defendant's contacts with the state must be purposeful. And third, the exercise of jurisdiction must be reasonable under the circumstances.

Harlow v. Children's Hosp., 432 F.3d 50, 57 (1st Cir. 2005) (emphasis added).

As fully set forth below, ALMA has not met, and can not meet, its evidentiary burden of establishing specific personal jurisdiction over Morganroth. In fact, the Complaint does not even allege any basis for personal jurisdiction over Morganroth at all. Accordingly, the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(2).

II. THERE IS NO BASIS FOR THIS COURT TO EXERCISE SPECIFIC PERSONAL JURISDICTION OVER MORGANROTH.

Because Morganroth does not fall within any of the provisions of the Massachusetts long-arm statute, Mass. Gen. Laws ch. 223A, § 3 (1994), this Court may not assert personal jurisdiction over him. In order to exercise personal jurisdiction over a defendant, “(1) the Massachusetts long-arm statute must grant jurisdiction over each defendant, and (2) the exercise of jurisdiction must comport with Constitutional Due Process.” *Northern Light Tech. v. Northern Lights Club*, 97 F. Supp. 2d 96, 104 (D. Mass. 2000). Because the long-arm statute of Massachusetts reaches the outer limits of due process, this Court may sidestep the first inquiry and focus exclusively on the constitutional analysis. See, *Berklee Coll. of Music, Inc. v. Music Indus. Educators, Inc.*, 2010 U.S. Dist. LEXIS 106272, *9 (D. Mass. 2010) (attached hereto as Exh. 5); *Gather, Inc. v. Gatheroo, LLC*, 443 F. Supp. 2d 108, 113 (D. Mass. 2006).

Due process requires that the defendant has maintained “minimum contacts” with Massachusetts “such that maintenance of the suit does not offend traditional notions of fair play

and substantial justice.” *International Shoe*, 326 U.S. at 316. The Court must look to the quality and quantity of the potential defendant’s contacts with the forum. *See, Gather*, 443 F. Supp. at 113, *citing, Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 288 (1st Cir. 1999)).

The Court may exercise either general or specific jurisdiction over a defendant. Where, as here, the defendant is not even alleged to have continuous and systematic activity in Massachusetts, the inquiry will focus on whether the due process requirements for specific jurisdiction have been met. *See, Berklee College of Music*, 2010 U.S. Dist. LEXIS 106272, *9.

The First Circuit has developed a three-part inquiry to assess specific jurisdiction. The court must ask (1) whether the claims are “related to” defendant’s activities in Massachusetts; (2) whether the defendants have purposefully availed themselves of the laws of Massachusetts; and (3) whether the exercise of jurisdiction would be reasonable. *Platten v. HG Bermuda Exempted Ltd.*, 437 F.3d 118, 135 (1st Cir. 2006). This due process inquiry is rooted in principles of fairness so that courts exercise jurisdiction only over those defendants who could reasonably anticipate being “haled into court.” *Venture Tape Corp. v. McGills Glass Warehouse*, 292 F. Supp. 2d. 230, 233 (D. Mass. 2003).

Because Morganroth and the Estate have had no contacts with Massachusetts, and simply could not have expected to be haled into court in this jurisdiction, no personal jurisdiction exists over Morganroth or the Estate, the instant Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(2).

A. Neither Morganroth Nor the Estate Have Conducted Any Activity In Massachusetts.

In a personal jurisdiction inquiry, the first step is to ask whether the claims are related to defendant’s activity in the forum. *Berklee College of Music*, 2010 U.S. Dist. LEXIS 106272,

*11. To determine whether the action “arises from” defendant’s activities in this forum, the Supreme Judicial Court of Massachusetts applies the “but for” test, *i.e.*, Would the plaintiff bring the action but for the defendant’s activities within the state? *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 768 (Mass. 1994).

It is unclear what activities ALMA even contends occurred in Massachusetts. The precipitating act for ALMA’s instant Complaint appears to be the demand made by Morganroth, in his capacity as Personal Representative of the Estate, issued from Michigan, for the return of the Kevorkian Art Work to Michigan. Exh. 1 at ¶¶ 17-21. Thus, the Complaint does not even allege any act by Morganroth or the Estate in Massachusetts which could support jurisdiction in this Court.

In any event, Morganroth, in his personal capacity and his capacity as personal representative of the Estate, has not had any contacts with Massachusetts other than his communications, sent from Michigan, to ALMA demanding the return of the Kevorkian Art Work. Exh. 2 at ¶¶ 17-22. Thus, Plaintiff has not and can not meet this prong which is necessary to establish personal jurisdiction and therefore the instant Complaint should be dismissed.

B. Neither Morganroth Nor the Estate Purposefully Availed Themselves of the Laws of Massachusetts.

Even if Morganroth’s mere demands, on behalf of the Estate, for the return of the Kevorkian Art Work, issued from the State of Michigan, did somehow constitute an activity in Massachusetts for the purpose of prong one, which they do not, ALMA still must show that Morganroth somehow purposefully availed himself of the law of Massachusetts⁴. *See, Platten,*

⁴ Morganroth has not and could not sought to avail himself of the laws of Massachusetts. It is clear that, even under Massachusetts choice of law rules, Michigan law would govern any dispute over the terms of the Agreement inasmuch as the Agreement was entered into in the State of Michigan, the subject property (the Kevorkian Art

437 F.3d at 135. Plaintiff apparently alleges that Morganroth's communications, in his capacity as Personal Representative of the Estate, somehow satisfy this requirement, which they clearly do not.

In *Sterilite Corp. v. Spectrum Internat'l, Inc.*, 1997 U.S. Dist. LEXIS 11151 (D. Mass. 1997) (attached hereto as Exh. 6), this Court declined to subject the defendant to personal jurisdiction where the defendant had sent a letter to the plaintiff in the forum seeking to clarify a potential patent infringement. *Id.* at *15 (“[S]ubjecting [the defendant] to jurisdiction in Massachusetts on these grounds provides a disincentive for parties to ever attempt to seek information or reconcile claims through written communications.”).

Morganroth's letter to ALMA, and his electronic communication, on behalf of the Estate, simply do not amount to “purposeful availment.” Such communications merely sought to enforce the rights of the Estate and were an attempt to resolve and reconcile the disagreement between the Estate and ALMA as to the ownership of the Kevorkian Art Work.

A letter sent into the forum that seeks to clarify or make note of a potential conflict does not constitute purposeful availment, particularly where the defendant has few other activities in the forum (in this case, Morganroth and the Estate have no other activities in the forum). *Id.* The communications by Morganroth, on behalf of the Estate, are analogous to the mailing or emailing of “cease and desist” letters. It is well settled that the mailing of cease and desist letters alone can not constitute purposeful availment under Due Process. *See, Measurement Computing Corp. v. General Patent Corp. Internat'l*, 304 F. Supp. 2d. 176, 181 (D. Mass. 2004), *quoting, Red Wing Shoe, Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1361 (Fed. Cir. 1998) (“A patentee should not subject itself to personal jurisdiction in a forum solely by informing a party

Work) was located in the State of Michigan at the time the Agreement was executed and Dr. Kevorkian was, at all times relevant hereto, a resident of the State of Michigan. *See, Nile v. Nile*, 432 Mass. 390, 401; 734 N.E.2d 1153 (2000) (Massachusetts applies the law of the state which had the most significant connection to the transaction).

who happens to be located there of suspected infringement.”).

C. **Even If There Was Some Contact With Massachusetts, Which There Was Not, It Would Still Be Unreasonable to Subject Morganroth or the Estate to the Jurisdiction of This Court.**

Even if ALMA somehow could demonstrate that Morganroth or Estate met the first two prongs of this analysis, which it has not and can not do, it would still be entirely unreasonable to exercise personal jurisdiction over Morganroth or the Estate.

In *Burger King*, 471 U.S. at 476-477, the United States Supreme Court held:

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with “fair play and substantial justice.” Thus courts in “appropriate [cases]” may evaluate “the burden on the defendant,” “the forum State’s interest in adjudicating the dispute,” “the plaintiff’s interest in obtaining convenient and effective relief,” “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and the “shared interest of the several States in furthering fundamental substantive social policies.” These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. (emphasis added, citations omitted).

Because none of the *Burger King* factors support exercising personal jurisdiction over Morganroth or the Estate, the instant Complaint should be dismissed.

1. **It Would Be Burdensome for Morganroth and/or the Estate to Defend this Matter in Massachusetts.**

Morganroth resides in the State of Michigan. Exh. 2 at ¶ 1. The Estate has been established in the State of Michigan, pursuant to Dr. Kevorkian’s wishes as set forth in his Will. *Id.* at ¶ 14. The Estate has limited financial resources, which should not have to be expending upon litigating this matter in another jurisdiction.

In addition, many of the witnesses and documents relevant to this claim are located in

Michigan. Specifically, Morganroth resides in Michigan, the Ariana Gallery is located in Michigan, and all the documents of the Estate are located in Michigan. *Id.* at ¶¶ 14, 23. The only witness with personal knowledge of the transaction at issue who is located in Massachusetts is, upon information and belief, ALMA's curator.

Thus, it would extremely burdensome for Morganroth and/or the Estate to have to defend this action in this Court in light of the fact that none of Defendant's likely witnesses reside in Massachusetts, and none of the documents upon which Defendant is likely rely is located in Masschusetts. *Id.* at ¶ 24.

2. **Massachusetts's Interest in Adjudicating this Dispute is Minimal while Michigan's Interest is Great.**

Massachusetts's interest in adjudicating this controversy is relatively minimal. The Kevorkian Art Work was undisputedly created by Dr. Kevorkian and owned by him. Exh. 3 at ¶ 4. ALMA only recently asserted its claim of ownership as to the Kevorkian Art Work. *See, e.g.*, Exh. 1. In any event, ALMA is a museum which owns many pieces of art. *Id.* at ¶ 3. The Estate of Dr. Kevorkian seeks the return of work created by its decedent, which is extremely valuable to it. Exh. 2 at ¶¶ 25, 26.

On the other hand, Dr. Kevorkian was a prominent and highly controversial public figure in the State of Michigan. *See, e.g., Id.* at ¶ 6. Dr. Kevorkian resided in Michigan for many years (including the entire time period relevant here) until his death in 2011, and established his Will under the laws of the State of Michigan. *Id.* at ¶¶ 6-7. Therefore, Michigan has the most substantial interest in adjudicating all controversies related to the Estate.

3. **ALMA Can Obtain Convenient and Effective Relief Elsewhere.**

On October 21, 2011, the Estate filed a complaint against ALMA and its curator in the Oakland County Circuit Court in the State of Michigan (the "Estate's Complaint") (attached

hereto as Exh. 7), wherein the Estate alleges, among other things, breach of the Agreement by ALMA, and wherein the Estate demands the return of the Kevorkian Art Work. *See generally*, Exh. 7. There is no dispute that the Oakland County Circuit Court has personal jurisdiction over both the Estate and ALMA inasmuch as the Agreement was entered into in the State of Michigan, and the Kevorkian Art Work was loaned to ALMA in the State of Michigan. *See*, Mich. Comp. L. § 600.705 (“The existence of any of the following relationships between an individual or his agent and the state shall constitute a sufficient basis of jurisdiction to enable a court of record of this state to exercise limited personal jurisdiction over the individual and to enable the court to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships: (1) The transaction of any business within the state[.]” (emphasis added)). Thus, ALMA must defend against the Estate’s Complaint in the Oakland County Circuit Court, which is a viable and superior forum for the resolution of this entire matter, and a forum which can provide all the relief ALMA seeks (although the relief requested by ALMA is entirely without merit).

4. **The Interstate Judicial System’s Interests in Obtaining Efficient Resolution of this Controversy Can Best Be Met in the State of Michigan.**

The Estate has filed its Complaint in the Oakland County Circuit Court in the State of Michigan. Thus, the most efficient resolution of this matter would be to have ALMA’s claim that it somehow has an ownership interest in the Kevorkian Art Work resolved in conjunction with the Estate’s Complaint filed in Michigan wherein the Estate asserts that it is the sole owner of the Kevorkian Art Work and demands the return thereof. Exh. 7. *See also*, Exh. 3 at ¶ 4. There is simply no reason these matters should be litigated in separate jurisdictions, especially inasmuch as this Court lacks personal jurisdiction over Morganroth and the Estate for the reasons stated herein, while the Oakland County Circuit Court in Michigan unquestionably has personal

jurisdiction over all parties, and especially since Michigan law clearly governs the claims in the two matters.

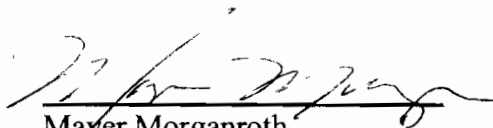
5. **The States' Shared Interest in Furthering Fundamental Substantive Social Policies Can Best Be Met by Adjudicating this Matter in the State of Michigan.**

It is undisputed that both Michigan and Massachusetts have substantive social policies that favor the resolution of claims by decedents who died in each respective state to be resolved in the courts of such state. *See, e.g.*, Mich. Comp. L. § 700.1303(1)(a) (Michigan Courts have jurisdiction to “[d]etermine a property right or interest” of a Michigan decedent’s estate); Mass. Gen. Laws ch. 190B, § 1-302 (Massachusetts Courts have jurisdiction to determine a property right or interest of a Massachusetts decedent’s estate). Because Dr. Kevorkian died in Michigan, Massachusetts should respect and defer to Michigan’s substantive social policy favoring that disputes regarding the affairs of its decedents be settled in Michigan Courts, just as controversies involving the estates of Massachusetts decedents should be resolved in Massachusetts Courts.

CONCLUSION

For all the foregoing reasons, Defendant respectfully requests that this Honorable Court grant the instant Motion, and enter an order dismissing Plaintiff’s Complaint.

Respectfully submitted,



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