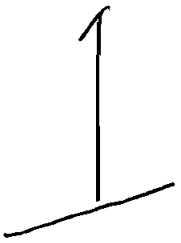


COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
CIVIL ACTION NO.
11-3635

ARMENIAN LIBRARY AND MUSEUM OF AMERICA, INC.,

Plaintiff,

v.

MAYER MORGANROTH,

Defendant.

FILED
IN THE OFFICE OF THE
CLERK OF COURTS
FOR THE COUNTY OF MIDDLESEX
OCT 13 2011
CLERK

COMPLAINT

The Armenian Library and Museum of America, Inc., as its Complaint for Declaratory Relief against Mayer Morganroth, states as follows:

PARTIES

1. Plaintiff Armenian Library and Museum of America, Inc. ("ALMA") is a duly organized and existing Chapter 180 corporation and is qualified as tax-exempt under the Internal Revenue code. Plaintiff has a principal place of business in Watertown, Middlesex County, Massachusetts.

2. Defendant Mayer Morganroth, an attorney, is the Personal Representative of the will of the late Jack Kevorkian of Royal Oak, County of Oakland, State of Michigan, who died on June 3, 2011.[1]

FACTS AND ALLEGATIONS

3. Plaintiff ALMA is a nationally known ethnic Armenian museum with an extensive collection of paintings and artifacts and a substantial library of books and other publications.

[1] The original named Personal Representative, Flora Holzheimer, Dr. Kevorkian's sister, declined to serve and authorized Dr. Kevorkian's niece, Ava Janus, to act in Ms. Holzheimer's place. Ms. Janus apparently is not, however, the Personal Representative.

4. Dr. Kevorkian is the creator of seventeen paintings that are the subject of this action (collectively "the Art Work," which expression also includes writings, some musical compositions, a sweater, and a hat).

5. In 1999, a representative of the Ariana Gallery in Royal Oak, Michigan and Gary Lind-Sinanian, who was and still is Plaintiff's curator, discussed the mounting of an exhibit of the Art Work at Plaintiff's main gallery. As a result of that discussion, Mr. Lind-Sinanian drove to Michigan to receive the Art Work.

6. In Michigan, a representative of the Ariana Gallery unexpectedly presented Mr. Lind-Sinanian with a document dated July 26, 1999 that outlined certain terms of the proposed exhibition of the Art Work at ALMA. Mr. Lind-Sinanian had no authority to sign such a document without consulting his superiors. He did sign it and a copy is attached hereto as Exhibit A.

7. Thereafter, beginning in September 1999 and following for about two months, Plaintiff exhibited the Art Work ("First Exhibit") in its main gallery. Because of Dr. Kevorkian's notoriety for advocating assisted suicide, the First Exhibit received considerable attention.

8. Upon information and belief, at the time of the First Exhibit, Dr. Kevorkian was in prison in Michigan.[2] At Dr. Kevorkian's request, his sister, Flora Holzheimer, a resident of Germany, attended the opening of the First Exhibit.

9. At the reception for the opening of that Exhibit, Ms. Holzheimer announced that Dr. Kevorkian had instructed her to inform Plaintiff that the Art Work was a gift to Plaintiff from Dr. Kevorkian. She announced the gift of the Art Work to a substantial audience at the opening reception.

[2] Dr. Kevorkian served time in prison from 1999 to 2007.

10. On September 23, 1999, a local newspaper published an article, attached hereto as Exhibit B, about the First Exhibit entitled "Kevorkian donates his artwork to ALMA." The article quotes Ms. Holzheimer as saying, "[Dr. Kevorkian's] paintings shall become the permanent possession of this museum." Ex. B.

11. In reliance upon this gift, Plaintiff maintained and continued to maintain the Art Work as part of its permanent collection during the twelve years that have since elapsed. Plaintiff expended considerable time, effort, and expense to preserve and maintain the Art Work in a climate-controlled vault.

12. Plaintiff has a policy never to retain paintings or collections unless they have been donated outright to Plaintiff. This policy has existed for at least thirty years.

13. During the twelve years since Plaintiff's acquisition of the Art Work, the paintings have remained part of the permanent collection of ALMA.

14. In October 2008, Plaintiff again exhibited all of the Art Work in its main gallery ("Second Exhibit").

15. Dr. Kevorkian attended the opening of the Second Exhibit and, before a large audience, with microphone in hand, explained the meaning of each painting. During the intermission, Dr. Kevorkian stated that he was very pleased that he had donated his entire collection to Plaintiff. A newspaper article, attached as Exhibit C, explained that "[Dr. Kevorkian] donated all of them to the museum, and its Executive Director Mariam Stepanyan decided to show them [all] for the second time in the museum's history."

16. Dr. Kevorkian's will was purportedly executed on May 16, 2011, about seventeen days before his death on June 3, 2011. Plaintiff has no knowledge of whether the will was validly executed without undue duress or influence nor whether Dr. Kevorkian was legally

competent. Nevertheless, the Michigan court allowed the will, of which Plaintiff had no advance knowledge.

17. Defendant sent Plaintiff a letter dated September 23, 2011. In the letter, Defendant stated, "All of Dr. Kevorkian's assets and estate, including the paintings on display and exhibition at your museum, were left to his niece, Ava Janus."

18. Also in the letter, Defendant stated that the Art Work was scheduled for a public auction at the New York Institute of Technology on or about October 27, 2011. Concurrently, Plaintiff's staff was surprised to see email reports that the Art Work was scheduled for auction in New York in October 2011. Upon information and belief, Defendant had attended the opening of the First Exhibit and was aware that the Art Work was a gift to Plaintiff.

19. Defendant apparently arranged for an auction of Plaintiff's Art Work to occur in New York City in October 2011 without any prior communication to Plaintiff.

20. By email, Plaintiff's Acting Director, Berj Chekijian, requested that Defendant, the Personal Representative of the estate, provide Plaintiff with a copy of Dr. Kevorkian's will.

21. In response, Defendant immediately telephoned Mr. Chekijian and demanded that all of the Art Work be sent to New York. Defendant threatened during the telephone call to instruct the police to remove the Art Work if Plaintiff did not send it. Thereafter, in an October 4, 2011 email to Mr. Chekijian, attached hereto as Exhibit D, Defendant accused Plaintiff of "theft of the estate's property."

COUNT I
(Declaratory Judgment)

22. ALMA realleges and incorporates by reference its allegations in paragraphs 1 through 21 above.

23. An actual controversy exists between Plaintiff and Defendant as to their respective rights concerning the Art Work.

24. Resolution of this dispute by the entry of judgment declaring the rights of the parties is necessary and appropriate under the existing facts and circumstances.

25. Judgment will serve a useful purpose in clarifying and settling the parties' legal rights in the Art Work and will terminate the controversy giving rise to this action.

PRAYERS FOR RELIEF

26. WHEREFORE, Plaintiff ALMA prays that this Court grant the following relief:

a) Enter a final judgment declaring that:

i. Defendant has no legal right to the Art Work, and

ii. Plaintiff is the sole owner of the Art Work;

b) Award Plaintiff all costs, including attorneys fees, that it has incurred in this matter;

c) Award Plaintiff such other relief as the Court may deem just and proper.

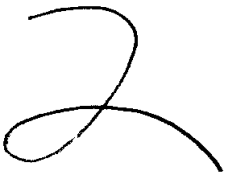
Respectfully submitted,

ARMENIAN LIBRARY AND MUSEUM OF AMERICA, INC.

By its attorneys,

Harold W. Potter (BBO No. 404240)
harold.potter@hklaw.com
Zsaleh E. Harivandi (BBO No. 678891)
zsaleh.harivandi@hklaw.com
HOLLAND & KNIGHT LLP
10 St. James Avenue, 15th Floor
Boston, MA 02116
(617) 523-270 0

Dated: October 13, 2011
Boston, Massachusetts



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.

/

Harold W. Potter, Jr.
Attorney for Plaintiff
HOLLAND & KNIGHT
10 St. James Avenue
Boston, MA 02116
617-523-2700

Mayer Morganroth
In Pro Per
344 North Old Woodward Avenue, Suite 200
Birmingham, MI 48009
248-864-4000

/

AFFIDAVIT OF MAYER MORGANROTH

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

MAYER MORGANROTH, being first duly sworn, deposes and states as follows:

1. I reside in the State of Michigan.

2. I am an attorney licensed to practice in the State of Michigan.

3. I am not licensed, and do not practice, in the Commonwealth of Massachusetts, although I have previously practiced in Massachusetts state and/or Federal courts based upon my limited admission in certain matters on a *pro hac vice* basis. I have not practiced in Massachusetts on a *pro hac vice* basis, nor in other capacity, since 1994.

4. I am the Defendant in this action.

5. I have personal knowledge of the facts set forth herein, and I am able to testify thereto if called as a witness.

6. I served as personal attorney to the late Dr. Jack Kevorkian for many years until Dr. Kevorkian's death in June 2011. During that time, I represented Dr. Kevorkian in a number of criminal and civil matters, transactional matters and business dealings.

7. At all times relevant hereto, and until his death, Dr. Kevorkian resided in the State of Michigan

8. As it relates to this matter, I represented Dr. Kevorkian's interests in lending certain of Dr. Kevorkian's art work (the "Kevorkian Art Work") to the Armenian Library and Museum of America, Inc. ("ALMA"), the Plaintiff in this matter.

9. Pursuant to an agreement dated July 27, 1999 (the "Agreement") entered into between ALMA and Dr. Kevorkian's representative, the Ariana Gallery, which is located in Royal Oak, Michigan, Dr. Kevorkian agreed to, and did in fact, loan the Kevorkian Art Work to

ALMA with the express condition that such art work be returned to Dr. Kevorkian upon his demand.

10. The Agreement expressly states that it could only be modified in writing signed by me. I have never signed any modification, amendment or supplement to the Agreement.

11. Upon information and belief, ALMA exhibited the Kevorkian Art Work in September 1999 (the "First Exhibition"). I did not attend the First Exhibition.

12. ALMA, with the consent of Dr. Kevorkian, conducted a second exhibition of the Kevorkian Art Work in October 2008 (the "Second Exhibition"). I did attend the Second Exhibition, as did Dr. Kevorkian.

13. Dr. Kevorkian passed away on June 3, 2011.

14. Pursuant to the terms of Dr. Kevorkian's Last Will and Testament (the "Will"), which was prepared and executed under the laws of the State of Michigan, I am the personal representative of Dr. Kevorkian's estate (the "Estate").

15. In my capacity as personal representative of the Estate, I am responsible for marshaling the property of the Estate and distributing same in accord with Dr. Kevorkian's wishes as set forth in his Will.

16. Based upon the Agreement, it is clear that the Kevorkian Art Work was owned by Dr. Kevorkian at the time of his death, and therefore became the property of the Estate upon Dr. Kevorkian's passing. As such, the Kevorkian Art Work must be distributed in accord with Dr. Kevorkian's wishes as set forth in his Will.

17. In accord with my duties as personal representative of the Estate, I demanded the return of the Kevorkian Art Work on September 23, 2011 by letter sent to ALMA inasmuch as Dr. Kevorkian's Will explicitly grants all his personal possessions, including, without limitation,

the Kevorkian Art Work, to his heirs.

18. I, in my capacity as personal representative of the Estate, once again demanded the return of the Kevorkian Art Work on October 4, 2011 by e-mail to ALMA's Executive Director, Berj Chekijian.

19. To date, ALMA has refused to return the Kevorkian Art Work.

20. Other than representing Dr. Kevorkian's interest in lending the Kevorkian Art Work to ALMA in 1999, which representation occurred entirely in the State of Michigan, and demanding the return of the Kevorkian Art Work via communications set from the State of Michigan in September and October 2011, I have had no other contacts within the Commonwealth of Massachusetts in any way related to this matter (other than attending the Second Exhibition of the Kevorkian Art Work in October 2008 at ALMA as a guest of Dr. Kevorkian).

21. I conduct no business in the Commonwealth of Massachusetts either personally or in my capacity as personal representative of the Estate.

22. The Estate has had no contacts with the Commonwealth of Massachusetts, other than the aforementioned demands for the return of the Kevorkian Art Work.

23. All documents of the Estate are located in the State of Michigan.

24. It would be extremely burdensome for me and/or the Estate to defend this matter in Massachusetts.

25. On October 21, 2011, the Estate filed a complaint against ALMA and its curator in the Oakland County Circuit Court, State of Michigan. Therein, among other things, the Estate alleges that ALMA is in breach of the Agreement, and the Estate demands the return of the Kevorkian Art Work.

26. The Kevorkian Art Work has great value to the Estate and the heirs set forth in the Will.

Further deponent sayeth not.

MAYER MORGANROTH

Subscribed and sworn to before
me this 7th day of November 2011

Notary Public

SHAREE' HALL
NOTARY PUBLIC, STATE OF MI
COUNTY OF OAKLAND
MY COMMISSION EXPIRES Nov 9, 2014
ACTING IN COUNTY OF

Ariana Gallery
119 South Main
Royal Oak
Michigan 48067
Tel: (248) 546-8810
Fax: (248) 546-6194

July 26, 1999

Gary Lind-Sinanian, Curator
Armenian Library and Museum of America, Inc.
65 Main Street
Watertown, MA 02172

Re. Dr. Jack Kevorkian Exhibition

Dear Gary:

1) The opening of the show is scheduled for Saturday, September 18, 1999 and the show will run through the end of October. I will arrive in Boston on Friday, the 17th of September.

2) We anticipate that the paintings will be picked up by you or a member of your staff and driven directly to your gallery/museum in Watertown. ALMA will be responsible for the cost of transportation of the artworks as required to and from Royal Oak, Michigan and Watertown, Massachusetts.

3) From the time that a representative of the Armenian Library and Museum of America, Inc. (which shall be referred to as ALMA for the remainder of this contract) assumes possession of the paintings to their return to us, the paintings must be covered by ALMA's insurance.

4) Dr. Jack Kevorkian hereby warrants that he created and possesses the unencumbered title to any works of art inventoried in ALMA's possession. The Kevorkian artworks are entrusted to ALMA but shall remain the exclusive property of Dr. Kevorkian.

5) ALMA has the right to copy, photograph or reproduce any of Dr. Kevorkian's artworks in its possession for the purpose of appearance in a catalogue or advertisement.

6) We understand that publicity will be arranged as outlined in your letter.

7) ALMA will be entitled to a 20% sales commission on all sales of Dr. Kevorkian's signed and numbered posters and giclee prints during the term of this agreement.

8) Security is a prime concern surrounding Dr. Kevorkian's artwork. A professional security guard must be present for the entire duration of the show with perhaps additional security for the show opening.

9) This agreement constitutes the entire understanding between Dr. Kevorkian and ALMA. Its terms cannot be modified except in writing that is signed by all parties - ALMA, Dr. Kevorkian and/or his attorney Mayer Morganroth.

10) The paintings will be returned upon the request of Dr. Kevorkian at the close of the exhibition at the end of October, or at such further extended date that would be agreeable between the parties, with reasonable time for them to be packaged and prepared for transportation

11) If any part of this agreement is held to be illegal, void or unenforceable for any reason, such holding shall not affect the validity and enforceability of any other part.

Please contact me to confirm the proposals listed above.

Received from:

Ariana Gallery

Ariana Gallery

Date

Delivered to:

Armenian Library &
Museum of America, Inc.

27 July 99

Date

*652 F.3d 75; 2011 U.S. App. LEXIS 14300, *;*
32 I.E.R. Cas. (BNA) 860

SHELDON G. ADELSON, Plaintiff, Appellee, v. MOSHE HANANEL, Defendant, Appellant.

No. 09-2231

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

652 F.3d 75; 2011 U.S. App. LEXIS 14300; 32 I.E.R. Cas. (BNA) 860

July 13, 2011, Decided

SUBSEQUENT HISTORY: As Amended August 16, 2011.

PRIOR HISTORY: [*1]
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.
Hon. Patti B. Saris, U.S. District Judge.
Adelson v. Hananel, 641 F. Supp. 2d 65, 2009 U.S. Dist. LEXIS 70126 (D. Mass., 2009)

CASE SUMMARY

PROCEDURAL POSTURE: Appellee businessman filed a declaratory action to determine rights under an oral contract with appellant employee, who claimed that their agreement entitled him to a 12 percent investment in a casino while appellee claimed that their agreement entitled appellant to 12 percent of net profits of projects that appellant initiated. The U.S. District Court for the District of Massachusetts ruled in appellee's favor. Appellant filed an appeal.

OVERVIEW: The court was not persuaded that the facts as found at trial undermined its previous decision in a first appeal that the district court had personal jurisdiction over appellant. Given the reasonableness of exercising jurisdiction, the relatedness to the forum of the dispute which arose out of appellant's employment contract, and his many contacts with the forum, the exercise of jurisdiction over appellant was proper. Although he did not file the action, appellant sought an interpretation of the agreement to permit him to assert a contractual right of recovery, and as a plaintiff, he would have had the burden of proving his affirmative claim; thus, there was no impropriety in assigning to him the burden of proof. In any event, any error was harmless since the outcome would not have changed. The district court's findings that there was no "meeting of the minds," and that appellant failed to "initiate" any investments, were not clearly erroneous. Finally, the district court was under no obligation to draw an adverse inference regarding a missing witness, and appellant did not show the necessity for applying the rule since he did not show that he could not have called the witness.

OUTCOME: The court affirmed the judgment of the district court.

CORE TERMS: personal jurisdiction, burden of proof, relatedness, missing, purposeful, citation omitted, reasonableness, availment, resident, factfinder, sovereign, declaratory action, net profits, employment contract, adverse inference, internal quotation marks, initiated, regular, disputed, prima facie, minimum contacts', foreign jurisdiction, declaratory, recommended, peculiarly, formation, assigning, long-arm, initiate, subpoena

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Challenges

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 An appellate court reviews a jurisdictional issue de novo. More Like This Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Due Process

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Long-Arm Jurisdiction

HN2 To establish specific personal jurisdiction over a nonresident defendant, a plaintiff must demonstrate that the forum state's long-arm statute grants jurisdiction over the defendant and that the exercise of that jurisdiction comports with the Due Process Clause of the Fifth Amendment. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Long-Arm Jurisdiction

HN3 The Massachusetts long-arm statute as being coextensive with the limits permitted by the Constitution. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Due Process

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Purposeful Availment

HN4 The constitutional test for determining specific jurisdiction has three distinct components, namely, relatedness, purposeful availment (sometimes called minimum contacts), and reasonableness. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Long-Arm Jurisdiction

HN5 See Mass. Gen. Laws ch. 223A, § 3(a).

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Due Process

HN6 To demonstrate relatedness for purposes of personal jurisdiction, a plaintiff must show a demonstrable nexus between his claims and a nonresident defendant's forum-based

activities, such that the litigation itself is founded directly on those activities. The relatedness test is a flexible, relaxed standard, and the analysis focuses on the relationship between the defendant and the forum. More Like This Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Due Process

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts

Contracts Law > General Overview

HN7 In a contract dispute in examining a nonresident defendant's relationship to the forum, courts look to whether the defendant's activity in the forum state was instrumental either in the formation of the contract or its breach. Courts may also consider whether the defendant was subject to substantial control and ongoing connection to the forum state in the performance of the contract. More Like This Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Purposeful Availment

HN8 For there to be personal jurisdiction over a nonresident 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. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Due Process

HN9 To examine reasonableness of the exercise of personal jurisdiction over a nonresident defendant, courts consider the gestalt factors: (1) the defendant's burden of appearing, (2) the forum's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Procedural Considerations > Burdens of Proof > Allocation

HN10 An appellate court reviews de novo the placement of the burden of proof. More Like This Headnote

Civil Procedure > Declaratory Judgment Actions > General Overview

Evidence > Procedural Considerations > Burdens of Proof > Allocation

HN11 Massachusetts law governs the issue of the burden of proof and it does not call for the burden of proof to automatically be borne by a filing party in a declaratory action. Instead, Massachusetts looks to which party would be seeking damages had the matter been filed as a standard suit rather than as a declaratory action. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

Evidence > Procedural Considerations > Burdens of Proof > Allocation

HN12 Any error in assigning the burden of proof is harmless unless the court's decision at the end of the trial turned on burden of proof rules rather than on the weight of the evidence in the record. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > Fact & Law Issues

HN13 An appellate court reviews a district court's findings of fact for clear error. More Like This Headnote

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > Fact & Law Issues

HN14 In actions that are tried to a court, the judge's findings of fact are to be honored unless clearly erroneous, paying due respect to the judge's right to draw reasonable inferences and to gauge the credibility of witnesses. A corollary of this proposition is that, when there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. When a case has been decided on the facts by a judge, an appellate court must refrain from any temptation to retry the factual issues anew. More Like This Headnote

Civil Procedure > Trials > Bench Trials

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN15 After a jury trial, a claim about failure to give a missing witness instruction indeed would be reviewed for abuse of discretion. In a bench trial, however, an appellate court reviews for clear error a decision not to draw the missing witness inference. More Like This Headnote

Civil Procedure > Trials > Bench Trials

Evidence > Testimony > Presentation of Evidence

HN16 A district court, as factfinder, is under no obligation to draw an adverse missing witness inference, for the missing witness rule permits, rather than compels, the factfinder to draw the inference, particularly where the factfinder concludes that the party who requested the inference failed to subpoena a witness otherwise available to testify. More Like This Headnote

Civil Procedure > Trials > Jury Trials > Jury Instructions > Requests for Instructions

Evidence > Testimony > Presentation of Evidence

HN17 The missing witness rule permits an adverse inference only when witness is peculiarly available to the party not seeking a missing witness instruction or favorably disposed to him. More Like This Headnote

COUNSEL: Lawrence G. Green, with whom Lynn C. Norton and Burns & Levinson LLP were on brief, for appellant.

Andrew H. Schapiro, with whom Christopher J. Houpt and Mayer Brown LLP were on brief, for appellee.

JUDGES: Before Boudin and Howard, Circuit Judges and Barbadoro,* District Judge.

* Of the District of New Hampshire, sitting by designation.

OPINION BY: HOWARD

OPINION

HOWARD, Circuit Judge. Appellee Sheldon Adelson brought this declaratory action to determine rights under an oral contract that he had negotiated with appellant Moshe Hananel. In the district court Hananel argued that the agreement, pursuant to which he was employed by a company owned by Adelson, entitled him to obtain a twelve percent investment in Adelson's casino venture in Macau. Adelson claimed that their agreement was not so broad as to contemplate the Macau investment option. Rather, the contract limited Hananel to reaping twelve percent of net profits from high-tech sector investments in Israel that had been discovered, recommended and supervised by Hananel, and that were realized while he was employed by Adelson's company.

In a **[*2]** prior appeal of this matter, Adelson v. Hananel, 510 F.3d 43 (1st Cir. 2007) ("Adelson I"), we reversed the district court's forum non conveniens dismissal, but we did uphold the court's determination that, under the prima facie standard, Hananel was subject to specific personal jurisdiction. After a three-week bench trial on remand, the district court ruled in favor of Adelson, declaring that Hananel did not hold an option to obtain a twelve percent interest in Adelson's Macau casino. Adelson v. Hananel, 641 F.Supp.2d 65 (D. Mass. 2009) ("Adelson II"). Hananel appeals from this judgment, arguing that the district court lacked personal jurisdiction, erroneously assigned to him the burden of proof, abused its discretion regarding a missing witness, and made factual errors regarding the formation and performance of the contract. We affirm.

I. Background

Hananel is a native, citizen, and resident of Israel. Adelson is a U.S. citizen and a permanent resident and domiciliary of Nevada, where he votes, owns property, and holds a driver's license. Adelson is also a native of Massachusetts and a current Massachusetts homeowner. He has worldwide business connections and investments, and he owns **[*3]** a warren of businesses known as the "Interface Group."

On the basis of the disputed oral contract negotiated with Adelson, Hananel worked for one of Adelson's companies, Interface Partners International, Ltd. ("IPI"), from approximately 1996 to 2000. IPI is a Delaware corporation that Adelson founded in 1994 for the purpose of investing in Israel, with a particular focus on Israel's high-tech sector.

During the time period relevant to this case, IPI had offices in Needham, Massachusetts, and Ramat Gan, Israel. Hananel was based in Israel and was responsible for seeking investment opportunities there. Although IPI did not have regular employees working in Needham, it received ongoing legal and financial advice through frequent communications with one of the Interface Group companies co-located there, Interface Group Massachusetts ("IGM"). IGM personnel in the Needham office who provided such advice included IGM's general counsel Paul Roberts, who also described himself as "counsel to IGI", and IGM's CFO Stephen O'Connor. There was testimony at

trial that IPI's funding customarily came from Adelson's personal account in Las Vegas, Nevada, but not before passing through the IPI Massachusetts **[*4]** "office" as a capital contribution to IPI Massachusetts that was then "lent" to IPI Israel. Hananel made periodic calls to the Needham office and sent fax transmissions there at least monthly, including budget proposals for approval. He made one brief visit to the Needham office in late 1995, just before commencing his duties for IPI, and he later attended a meeting in Massachusetts to seek business opportunities in his role as chairman of a company in which IPI had invested.

The parties' evidence about the terms of Hananel's compensation was irreconcilable. As the district court accurately described the testimony:

> In the discussions regarding Hananel's employment, it is undisputed that Adelson and Hananel agreed he would have a salary of $100,000 a year. They also agreed that Hananel would somehow receive 12% of the investments with which he was involved while at IPI . . . . Adelson and Hananel have different memories of the details of the twelve percent. Adelson testified that they agreed that Hananel would receive 12% of the net profits only of high tech investments in Israel that Hananel found, recommended, and supervised and which came to fruition while he was employed by IPI, but **[*5]** only so long as he remained employed there. Hananel testified that they agreed that he would receive "options" of up to 12 percent on any investment he or the Israeli office "initiated" outside the United States without any other geographic or time limitations so long as Hananel put up the proportionate costs of the investment at any point.

Adelson II, 641 F.Supp.2d at 72.

In this appeal, Hananel argues, as to jurisdiction, that differences between the prima facie facts determined before the first appeal and the facts as later found by the district court at the merits trial undermine our previous decision on personal jurisdiction. He draws attention to prior references, by both the district court and by us, to Adelson being a resident of Massachusetts when in fact he was a resident of Nevada, and he emphasizes that at trial the district court concluded that the contract was formed in Israel rather than in Massachusetts. As noted, Hananel also presses claims that the district court erred in assigning the burden of proof to him rather than to Adelson; that it should have ordered an adverse inference based on the "missing witness" rule; and that the court misapprehended the facts surrounding **[*6]** both the formation of and his performance under the contract.

II. Jurisdiction

General jurisdiction over Hananel was not alleged, and he argues that the district court also lacked specific jurisdiction over him. *HN1* We review the jurisdictional issue de novo. Barrett v. Lombardi, 239 F.3d 23, 27 (1st Cir. 2001). We concluded in Adelson I that the district court had personal jurisdiction over Hananel under the prima facie standard, and that Massachusetts was not an inconvenient forum. Adelson I, 510 F.3d 43. We are not persuaded that the facts as found at trial undermine our previous decision, and we conclude that Hananel's Massachusetts contacts support the district court's exercise of personal jurisdiction.

HN2 To establish specific personal jurisdiction over Hananel, Adelson "must demonstrate that the Massachusetts long-arm statute grants jurisdiction over Hananel and that the exercise of that jurisdiction comports with the Due Process Clause of the Fifth Amendment." Adelson I, 510 F.3d at 48 (internal citation omitted). We have construed *HN3* the Massachusetts long-arm statute[1] as being coextensive with the limits permitted by the Constitution. We thus turn directly to *HN4* the constitutional test for **[*7]** determining specific jurisdiction, see Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 52 (1st Cir. 2002), which has "three distinct components, namely, relatedness, purposeful availment (sometimes called 'minimum contacts'), and reasonableness," Hannon v. Beard, 524 F.3d 275, 282 (1st Cir. 2008) (internal citation omitted). See also Astro-Med, Inc., v. Nihon Kohden America, Inc., 591 F.3d 1, 9 (1st Cir. 2009).

FOOTNOTES

1 The statute provides that HN5"[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).

A. Relatedness

HN6To demonstrate "relatedness," Adelson must show "'a demonstrable nexus between [his] claims and [Hananel's] forum-based activities, such . . . [that] the litigation itself is founded directly on those activities.'" Hannon, 524 F.3d at 280 (quoting Mass. Sch. of Law at Andover v. Am. Bar Ass'n, 142 F.3d 26, 34 (1st Cir. 1998)). "[T]he relatedness test is a 'flexible, relaxed standard,'" N. Laminate Sales, Inc. v. Davis, 403 F.3d 14, 25 (1st Cir. 2005) (quoting Pritzker v. Yari, 42 F.3d 53, 61 (1st Cir. 1994)), **[*8]** and the analysis focuses on the relationship between the defendant and the forum. Hannon, 524 F.3d at 283 (citing Sawtelle v. Farrell, 70 F.3d 1381, 1389 (1st Cir. 1995)); see also Goodyear Dunlop Tires Operations S.A. v. Brown, 131 S. Ct. 2846, 180 L. Ed. 2d 796, 803, 2011 WL 2518815, at *3 (U.S. 2011) ("Specific jurisdiction . . . depends on an 'affiliatio[n] between the forum and the underlying controversy'"); J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 180 L. Ed. 2d 765, 775, 2011 WL 2518811, at *6 (U.S. 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)) ("submission through contact with and activity directed at a sovereign may justify specific jurisdiction 'in a suit arising out of or related to the defendant's contacts with the forum'"). HN7Because this is a contract dispute, in examining the defendant's relationship to the forum "we look to whether 'the defendant's activity in the forum state was instrumental either in the formation of the contract or its breach.'" Adams v. Adams, 601 F.3d 1, 6 (1st Cir. 2010) (quoting Adelson I, 510 F.3d at 49). We may also consider whether the defendant was "subject to substantial **[*9]** control and ongoing connection to [Massachusetts] in the performance of the contract." Id. (internal quotation marks and citations omitted); cf. Hahn v. Vermont Law School, 698 F.2d 48, 49 (1st Cir. 1983) ("less [than substantial contacts are] required to support jurisdiction when the cause of action arises from the defendant's contacts with the forum . . . than when it does not.").[2]

FOOTNOTES

2 Although, as Hananel points out, the district court concluded that the agreement was governed by Israeli law, this conclusion does not affect the outcome of our jurisdictional analysis because the issue before us is one of personal jurisdiction, not choice of law. J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 180 L. Ed. 2d 765, 777, 2011 WL 2518811, at *9 (U.S. 2011) (Kennedy, J.) (citing Hanson v. Denckla, 357 U.S. 235, 254, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)); see also Cambridge Literary Properties, Ltd. v. W. Goebel Porzellanfabrik G.m.b.H, 295 F.3d 59, 64 (1st Cir. 2002) (contrasting personal jurisdiction analysis with choice of law analysis).

Here, Hananel's contacts to the forum are directly related to his fulfillment of the terms of his employment contract as he claims them to be. As the district court recognized:

> [R]egardless **[*10]** of the contract's core terms, the parties' actual course of dealing connects the contract to Massachusetts: Hananel was in regular contact with Interface employees in Massachusetts, the money that funded Hananel's work came through Massachusetts, and Hananel's budgets were routinely faxed to the office in Massachusetts. . . . This is enough to satisfy the relatedness prong.

Adelson II, 641 F.Supp.2d at 78.

In addition, the record shows that Hananel visited the Massachusetts Interface office prior to beginning formal, full time employment with IPI in January 1996. Later, while employed by IPI, Hananel attended a board meeting in Massachusetts as a direct result of an IPI investment.[3]

FOOTNOTES

3 During his tenure with IPI, Hananel recommended that it invest in the tech company, IMDSoft. After the investment Hananel was named chairman of the board of IMDSoft and traveled to Andover, Massachusetts, in that capacity with the goal of advancing business partnership opportunities for IMDSoft.

Although Hananel does not deny that as manager of the IPI Israel office he had regular contact with the Needham office, he argues that his Massachusetts "activities were minor administrative tasks insufficient to warrant **[*11]** jurisdiction." This argument understates his managerial role in IPI and the importance of the Massachusetts funding connection to the finances of IPI Israel. As discussed in greater detail below, we disagree with Hananel's characterization of his Massachusetts activities as "purely incidental contacts" and agree with the district court that they evince the relationship between Hananel's actions under the oral contract and the forum of Massachusetts.

B. Purposeful Availment

HN8 For there to be personal jurisdiction over Hananel, 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, 290 F.3d at 60; see also J. McIntyre Machinery, 180 L. Ed. 2d 765, 776, 2011 WL 2518811, at *9 (specific jurisdiction calls for plaintiff to establish that defendant "engaged in conduct purposefully directed at the forum"); id. ("The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has **[*12]** the power to subject the defendant to judgment concerning that conduct.").

Hananel directed regular administrative and financial conduct toward Massachusetts, and his contacts with the state were voluntary and the result of more than just a single event or transaction. We see no reason to deviate from our previous conclusion that "given that it was Hananel who sought this employment contract with a company whose key officers were all located in Massachusetts and whose financial accounts were all administered out of Massachusetts, the court properly concluded that Hananel had purposefully availed himself of Massachusetts law." Adelson I, 510 F.3d at 50; cf. J. McIntyre Machinery, 180 L. Ed. 2d 765, 776, 2011 WL 2518811, at *9 (no specific jurisdiction where defendant had no office in the forum, never "sent any employees to[] the [forum]" and "does not have a single contact with [the forum] short of the" sole piece of equipment at issue in the suit).

That Hananel's December 1995 trip to Massachusetts was brief and its purpose was not found to be substantially related to negotiation of the agreement does not detract from the conclusion that the exercise of jurisdiction is appropriate. Hananel "need **[*13]** not have been physically present in [Massachusetts] in order to have 'transacted business' there" for purposes of establishing minimum contacts. Hannon, 524 F.3d at 281 (citing Fairview Mach. & Tool Co., Inc. v. Oakbrook Intern., Inc., 56 F.Supp.2d 134, 138 (D. Mass. 1999)) (holding that even though defendant had not been physically present in Massachusetts, "contacts that [he] would have had to make to arrange for [prisoner's] transfer . . . to Massachusetts are sufficient to constitute 'transacting business' under the broadly-construed long-arm statute").[4]

FOOTNOTES

4 We have construed the Massachusetts statute broadly and "'do[] not require that the defendant have engaged in commercial activity. [The] language is general and applies to any purposeful acts by an individual, whether person, private, or commercial.'" Hannon, 524 F.3d at 280 (quoting Ealing Corp. v. Harrods Ltd., 790 F.2d 978, 982 (1st Cir. 1986)).

Here, as in Hannon, there was purposeful availment where Hananel's business activities for IPI involved, inter alia, "communication and interaction between [him] in [Israel] and [staff] in Massachusetts." See Hannon, 524 F.3d at 281. Affirming the district court's relevant factual findings, **[*14]** we conclude that Hananel's faxes, money transfers, and meetings demonstrate sufficient communications and interactions with Massachusetts to satisfy us that Hananel had at least minimum contacts with the forum and that these contacts were not "random, isolated or fortuitous." See Adelson I, 510 F.3d at 50.

C. Reasonableness

HN9 To examine reasonableness, we consider the gestalt factors: "(1) [Hananel's] burden of appearing, (2) [Massachusetts's] interest in adjudicating the dispute, (3) [Adelson's] interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and [5] the common interests of all sovereigns in promoting substantive social policies." Adelson I, 510 F.3d at 51; see also N. Laminate Sales, 403 F.3d at 26 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

First, because Hananel has not demonstrated a "special or unusual burden" in staging a defense in Massachusetts over and above that of doing so in any foreign jurisdiction, we conclude that this factor does not weigh against jurisdiction. See Pritzker, 42 F.3d at 64 ("[I]nsofar as staging a defense in a foreign jurisdiction **[*15]** is almost always inconvenient and/or costly, we think this factor is only meaningful where a party can demonstrate some kind of special or unusual burden.").[5]

FOOTNOTES

5 As we have recognized, Hananel has certain health issues that affect his lifestyle, such as his diabetes and legal blindness. Adelson I, 510 F.3d at 51. But, these issues would affect him no matter where this dispute were tried. Based on the evidence presented at trial, we do not see reason to deviate from our prior conclusion that these issues would not make defense in Massachusetts a "special or unusual" burden compared to other foreign jurisdictions. Id.

Second, Hananel emphasizes the fact that both the district court and this court in the previous appeal were mistaken when they concluded that Adelson was a Massachusetts resident and domiciliary, when in fact he was a resident and domiciliary of Nevada. In presenting this argument, Hananel stakes too much on the importance of Adelson's state of residence to the personal jurisdiction analysis. Although this factual conclusion may have contributed to our original weighing of Massachusetts' interest in hearing the matter, Adelson's residency and domicile are not alone dispositive **[*16]** of personal jurisdiction and there are other facts that support Massachusetts' interests in the matter.

When previously we connected Adelson's assumed Massachusetts residency with Massachusetts' interests in the case, we also noted that "[Massachusetts'] interest . . . is further heightened by the involvement of IPI's executive officers who are employed in Massachusetts and of funds which are held and managed in Massachusetts." Adelson I, 510 F.3d at 51. Besides, given the relatedness and purposeful availment demonstrated here, the weight of this one factor within "reasonablenss" is slight. Sawtelle, 70 F.3d at 1394 (internal quotation marks omitted) ("[T]he

weaker the plaintiff's showings on the first two prongs (relatedness and purposeful availment), the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: an especially strong showing of reasonableness may serve to fortify a borderline showing of relatedness and purposefulness.").

Third, Adelson demonstrated his interest in obtaining convenient and effective relief through the federal courts in Massachusetts by bringing his suit there, and "nothing about this case suggests that **[*17]** those courts will have any difficulty rendering effective relief" if Adelson's declaratory action is affirmed. See Jet Wine & Spirits, Inc. v. Bacardi & Co., Ltd., 298 F.3d 1, 12 (1st Cir. 2002).

Fourth, although the district court noted that "the existence of prior lawsuits in Israel . . . make this case an inefficient burden on the judicial system," it concluded that "this is 'insufficient to tip the constitutional balance on the facts of this case.'" Adelson II, 641 F.Supp.2d at 79 (quoting Adelson I, 510 F.3d at 52).[6] We agree.

FOOTNOTES

6 Subsequent to briefing and argument in this case, Adelson informed us of a decision by the Tel Aviv District Labor Court addressing claims that mirror some of those presented here. We have no occasion to consider that decision. We review this appeal based on the record before us.

As to the fifth and final factor, we do not see how a finding of jurisdiction here would speak one way or another to the common interests of all sovereigns in advancing a particular social policy.

Even if the last two factors weighed against jurisdiction, this alone would be "insufficient to tip the constitutional balance" on the facts presented here. Adelson I, 510 F.3d at 51; see **[*18]** also Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994) ("the reasonableness prong of the due process inquiry evokes a sliding scale"). We conclude that the sum of the gestalt factors weigh in favor of jurisdiction.

Given the reasonableness of exercising jurisdiction, the relatedness of the dispute to the forum, and Hananel's contacts with the forum, we affirm the district court's assertion of personal jurisdiction over Hananel.

III. Burden of Proof

HN10 We review de novo the placement of the burden of proof. Estate of Abraham v. C.I.R., 408 F.3d 26, 35 (2005).[7] *HN11* Massachusetts law governs this issue, Palmer v. Hoffman, 318 U.S. 109, 117, 63 S. Ct. 477, 87 L. Ed. 645 (1943), and it does not call for the burden of proof to automatically be borne by the filing party in a declaratory action (here, Adelson). Foley v. McGonigle, 3 Mass. App. Ct. 746, 326 N.E.2d 723, 724 (Mass. App. Ct. 1975) (internal quotation marks omitted) (stating the "fact that the plaintiff initiated this proceeding for declaratory relief does not shift th[e] burden to him"); accord Cardarelli Constr. Co. v. Froton-Dunstable Reg'l Sch. Dist., 4 Mass. App. Ct. 823, 349 N.E.2d 383, 384 (Mass. App. Ct. 1976) (citing Stop & Shop, Inc. v. Ganem, 347 Mass. 697, 200 N.E.2d 248, 252 (Mass. 1964)) ("It **[*19]** is well settled that a party asserting the illegality of a contract has the burden of proving the facts necessary to establish such illegality."). Instead, Massachusetts looks to which party would be seeking damages had the matter been filed as a standard suit rather than as a declaratory action. Stop & Shop, 200 N.E.2d at 252 (in a lease dispute, "[h]ad the lessors brought an action for damages for breach of an implied covenant to continue operations they would, of course, have had the burden of showing the covenant. That the lessee initiated the proceeding for declaratory relief does not shift that burden to the lessee.").

FOOTNOTES

7 Hananel asserts that Adelson waived any right to argue that the burden of proof was Hananel's. In light of our disposition of the issue, we need not address this argument.

Here, Hananel seeks an interpretation of the agreement that would permit him to assert a contractual right of recovery. As the natural plaintiff who would have had the burden of proving his affirmative claim to the twelve percent option in a damages action, we see no impropriety in assigning the burden of proof to him. See Markley v. Semle, 1998 ME 145, 713 A.2d 945, 947 (Me. 1998) (internal citation omitted) **[*20]** ("In a declaratory judgment action, . . . [t]he party who asserts the affirmative of the controlling issues in the case, whether or not he is the nominal plaintiff in the action, bears the risk of non-persuasion."); Am. Eagle Ins. Co. v. Thompson, 85 F.3d 327, 331 (8th Cir. 1996) (internal quotation marks omitted) ("It is a fundamental rule that the burden of proof in its primary sense rests upon the party who, as determined by the pleadings, asserts the affirmative of an issue and it remains there until the termination of the action. It is generally upon the party who will be defeated if no evidence relating to the issue is given on either side.").

Regardless, HN12 any error in assigning the burden of proof is harmless unless "the court's . . . decision at the end of the trial turned on 'burden of proof' rules rather than on the weight of the evidence in the record." Applewood Landscape & Nursery Co., Inc. v. Hollingsworth, 884 F.2d 1502, 1506 (1st Cir. 1989). The district court's ruling indicates that it did not consider the burden of proof issue to be dispositive: after weighing evidence in the record, the district court concluded that "it is clear" that the parties did not reach "a meeting **[*21]** of the minds." In any event, no matter who bore the burden of proof, as discussed below the finding that Hananel failed to "initiate the investment" prohibits a holding in favor of Hananel's exercise of the option.

IV. The Contract's Terms

HN13 We review the district court's findings of fact for clear error. Williams v. Poulos, 11 F.3d 271, 278 (1st Cir. 1993). The district court concluded that there was no "meeting of the minds" about the meaning of the "option" in the contract, and even "[i]n Hananel's best case" his work "[was] insufficient to constitute initiating the investment, under any reasonable understanding of the term." Adelson II, 641 F.Supp.2d at 84.

It is not disputed that Hananel and Adelson spoke several times between August 1995 and December 1995 regarding Hananel's employment with IPI. As noted, however, what they agreed to is disputed. Hananel testified that the intention was for him to have an option covering any investment proposed by him, except for investments in the United States. Adelson's position has been that they agreed that Hananel would receive a portion of net profits from a much narrower category of investments.

It is also not disputed that Hananel, Adelson, **[*22]** and Roberts (IGM's general counsel) were present in the Needham, Massachusetts, office on December 5, 1995. But, the parties greatly dispute the exact contents and nature of that office visit. Adelson testified that the employment contract's final details were hammered out in that December meeting, including the meaning of alleged contract terms such as the share of "net profits minus losses." In stark contrast, Hananel testified that the contract was finalized in Israel, the employment contract was not discussed during the December office visit, and, in any event, that visit did nothing to change the substance of the contract.

The district court found that "while a meeting [in Massachusetts] may have taken place, it was at most a rehash of the terms of Hananel's contract, which had already been finalized with Adelson in Israel." Adelson II, 641 F.Supp.2d at 73. It then concluded: "As to the extent and meaning of the term at the center of the dispute, the option in projects initiated by Hananel, it is clear that there

was simply no meeting of the minds." Id. at 83 (emphasis added). We have scoured the record and have discovered no basis on which to upset that determination. As we have **[*23]** noted:

> HN14 In actions that are tried to the court, the judge's findings of fact are to be honored unless clearly erroneous, paying due respect to the judge's right to draw reasonable inferences and to gauge the credibility of witnesses. A corollary of this proposition is that, when there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. . . . [W]hen a case has been decided on the facts by a judge . . . an appellate court must refrain from any temptation to retry the factual issues anew.

Johnson v. Watts Regulator Co., 63 F.3d 1129, 1138 (1st Cir. 1995).

In sum, the district court's finding that there was no "meeting of the minds," was grounded in the record and not clearly erroneous. See United States v. Lara, 181 F.3d 183, 195 (1st Cir. 1995) ("After all, when the evidence gives rise to competing interpretations, each plausible, the factfinder's choice between them cannot be clearly erroneous.").

Moreover, even accepting Hananel's argument that there was a "meeting of the minds" about the existence and scope of the twelve percent option clause, the district court's finding that Hananel failed to "initiate" whatever investment(s) Adelson **[*24]** subsequently made in Macau was also not clearly erroneous.

As the district court noted, there were questions of veracity in both parties' accounts of the employment contract, the "option," and the discussions of Macau. But, even viewing Hananel's account in the most favorable light, a reasonable observer applying practical business sense and plain meaning could conclude easily that satisfying the "initiate" requirement of the option — on what would become a $7 billion project — would have required Hananel to do more than what his evidence showed: discuss Macau during a few 1999 meetings; prepare limited materials on Macau for Adelson's review; "research[] Macau generally" and potential investments in Macau; give Adelson some third-party maps and brochures; and urge him to visit Macau. As the district court described it, "Hananel may have gotten Adelson's wheels spinning, but he never got anything in gear." Adelson II, 641 F.Supp.2d at 84.

V. The Missing Witness Rule

Hananel's final argument is that the district court abused its discretion when it denied him a "missing witness" inference, because Adelson did not call an Israeli witness, Danny Raviv, as Hananel had expected. HN15 After a jury trial, **[*25]** a claim about failure to give a missing witness instruction indeed would be reviewed for abuse of discretion. Latin Am. Music Co. v. Am. Soc. of Composers, Authors & Publishers, 593 F.3d 95, 101 (1st Cir. 2010) (instructing jury on "missing witness" rule reviewed for abuse of discretion). As this was a bench trial, however, we review for clear error the decision not to draw the inference. See Bogosian v. Woloohojian Realty Corp., 323 F.3d 55, 68 (1st Cir. 2003). We conclude that HN16 the district court, as factfinder, was under no obligation to draw the adverse inference, for the "'missing witness' rule permits, rather than compels, the factfinder to draw [the] inference . . . , particularly where the factfinder concludes that the party who requested the . . . inference failed to subpoena a witness otherwise available to testify." Id. at 67 (internal citations omitted) (emphasis added) (no error in bench trial where district court did not draw adverse inference from absence of witnesses).

Hananel has not shown the necessity for applying the missing witness rule here. First, he offers no concrete evidence that demonstrates that Raviv was peculiarly available or obviously partial to Adelson. **[*26]** United States v. Spinosa, 982 F.2d 620, 631-32 (1st Cir. 1999) (HN17 missing witness rule permits adverse inference only when witness is "peculiarly available to" to party not seeking the instruction or "favorably disposed" to him); Steinhilber v. McCarthy, 26 F.Supp.2d 265, 280 (D. Mass. 1998). Second, he has not provided a satisfactory explanation for why, if Raviv's testimony was so essential, he failed to take any action to compel the witness's appearance in

court. According to Hananel, other witnesses in Israel for whom he had obtained letters rogatory were not as important to the disposition of this action as Raviv. Yet, he failed to pursue similar action to depose Raviv, and he offers no proof that obtaining a subpoena or letter rogatory would have been impossible. See United States v. Anderson, 452 F.3d 66, 82 (1st Cir. 2006) (denying instruction, stating, "The fact that [the party] was able to subpoena [the witness] yet failed to do so gives us additional reason to believe that the district court was correct in finding that [the witness] was not 'peculiarly available' to the [opposing party]").

As the district court stated:

> In this case, however, there is no reason to believe that **[*27]** Raviv was not available to testify if called by the Defendant. Defendant made no effort to call him to testify or to depose him. In this case, where Raviv's testimony would likely cut both ways, the Court is unwilling to allow Defendant the dual benefit of avoiding Raviv's potentially damaging testimony by purposely failing to call him, while simultaneously giving him the benefit of a negative inference for Plaintiff's failure to call him.

Adelson II, 641 F.Supp.2d at 77 n.3 (internal citation omitted). This finding was not erroneous. The appellant's argument appears to be a manifestation of his regret at his decision not to confront Raviv in court. Regret is not a ground for reversal.

VI. Conclusion

For the reasons set forth above, we **affirm** the judgment of the district court.

*2010 U.S. Dist. LEXIS 106272, **

View Available Briefs and Other Documents Related to this Case

SPORTSCHANNEL NEW ENGLAND LIMITED PARTNERSHIP d/b/a Comcast SportsNet New England, Plaintiff, v. FANCASTER, INC. and CRAIG KRUEGER, Defendants.

Civ. Action No. 09cv11884-NG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2010 U.S. Dist. LEXIS 106272

October 1, 2010, Decided

CORE TERMS: fancaster, website, personal jurisdiction, trademark, email, resident, user, interactive, video, site's, purposefully, purposeful, interactivity, infringement, availment, sports, spectrum, availed, patent, com, conducting business, universal, team, forum state, threatening, accessible, moderately, construe, internet, long-arm

Available Briefs and Other Documents Related to this Case:

U.S. District Court Motion(s)
U.S. District Court Pleading(s)

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JUDGES: NANCY GERTNER, U.S.D.J.

OPINION BY: NANCY GERTNER

OPINION

MEMORANDUM AND ORDER RE: MOTION TO DISMISS

Fancaster, Inc. ("Fancaster") has filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and

(2) or, in the alternative, to stay or transfer. It claims that the Court lacks subject matter and personal jurisdiction. Craig Krueger ("Krueger") moves for dismissal pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim against him in his personal capacity. If the Court does not grant the motion to dismiss, Fancaster moves for a stay pending resolution of a related case in the District of New Jersey or a transfer to the District of New Jersey.

Plaintiff Sportschannel New England ("Sportschannel") brings this action **[*2]** seeking a declaration of its rights in connection with the use of the word FANCASTER, which Fancaster, Inc. ("Fancaster") had trademarked. It brings this suit in Massachusetts principally because Fancaster's website, like all websites, is accessible in the Commonwealth.

For the reasons below, defendant's Motion to Dismiss on personal jurisdiction (**document #17**) is **ALLOWED**. I need not address the other grounds offered.

I. BACKGROUND[1]

FOOTNOTES

1 On a motion to dismiss for personal jurisdiction, the court may consider facts outside of the complaint. It will accept the facts alleged by the plaintiff in the complaint and subsequent pleadings as true and consider the facts presented by the defendant to the extent that they are undisputed. See Platten v. HG Bermuda Exempted Ltd., 437 F.3d 118, 135 (1st Cir. 2006) ("We . . . take those 'specific facts affirmatively alleged by the plaintiff as true . . . and construe them in the light most congenial to the plaintiff's jurisdictional claim.' We also 'add to the mix the facts put forward by the defendants, to the extent that they are uncontradicted.'") (quoting Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 34 (1st Cir. 1998)).

The dispute **[*3]** centers around the trademark "FANCASTER." Krueger is the President of Fancaster, a company that has been in the business of providing wireless broadcasting services related to sports and entertainment since the 1980s. Fancaster currently offers sports-related information and videos through its website, Fancaster.com. In 1988, Krueger trademarked "FANCASTER" and assigned his interest in the trademark to Fancaster in 2007.

SportsNet is a Boston-based cable sports network. In 2001, it began a public service program called the "New England FanCaster Program" to educate local students aged 13-18 about careers in broadcasting. Recently it has taken steps to expand the use of its FanCaster name. It has been in negotiations with a major retailer to become a corporate sponsor of the program, and last year it began making videos of its FanCaster program available on Video On Demand.

On July 18, 2006, Krueger sent an email to SportsNet through the comments section of SportsNet's website. He asserted ownership over the fancaster trademark and told SportsNet that if it wanted to license the fancaster mark, it should contact Fancaster's counsel, or else stop use of the trademarked name. Email from **[*4]** Craig Krueger to Peter Weissman (July 18, 2006) (document #23-1). A few days later, Krueger also wrote to Richard Amann, the Chief Executive Officer of Canteen Media, to state that he intended to "secure a cease & desist or an injunction" against SportsNet and to "secure damage payment for unauthorized use" from SportsNet. Email from Craig Krueger to Richard Amann (July 22, 2006) (document #23-2). On July 27, 2006, SportsNet's attorney contacted Fancaster asking for further information about its use of the trademark. Letter from Maren C. Perry to Craig Krueger (document #23-3). Fancaster did not provide the requested information, but instead responded that after review of SportsNet's use of the fancaster mark, it would not take further action so long as SportsNet limited its use to the community service program. Fancaster warned that if SportsNet expanded its use of the mark, or if Fancaster became aware of any confusion caused by the mark, it reserved its right to pursue legal remedies. Letter from Barbara J. Grahn to Maren C. Perry (Nov. 22, 2006) (document #23-5).

Fancaster recently contacted several website operations about their reporting on SportsNet's FanCaster program. It sent **[*5]** "cease and desist" letters to SchoolTube.net and emails to the Maynard, Massachusetts, Beacon Villager (at WickedLocal.com) requesting they remove content referring to the FanCaster program. Letter from Craig Krueger to Andrew Arizpe (Sept. 3, 200) (document #23-9); email from Craig Krueger to Mr. Floyd and Mr. Hastings (Sept. 3, 2009) (document #23-11).

In 2008, Fancaster filed suit in the United States District Court for the District of New Jersey against Comcast Corp. and several Comcast affiliates alleging their use of the mark "FANCAST" in connection with the website www.fancast.com infringed their trademark. Dickstein Decl. Ex. 16 (document #23-16). Comcast counter-claimed against Fancaster and Krueger for declarations of non-use and abandonment. The action is pending, and discovery is almost complete.

SportsNet asserts that there is no relation between Comcast's FANCAST service and SportsNet's FanCaster program. Both are independently operated by separate subsidiaries of Comcast Corp. Larkin Aff. 15 (document #24). During a deposition in the New Jersey suit, Krueger testified that he believed that SportsNet had expanded its use of the mark beyond what it was at the time of the **[*6]** 2006 letter. Krueger Dep. vol. 3, 746:18, Oct. 15, 2009 (document #23-12). He also stated that he thought SportsNet had changed its logo to look more like that of Fancaster. Id. vol. 3, 747:14-16. As a result of Krueger's statement, SportsNet filed this suit for declaratory judgment.

Defendant Krueger has moved to dismiss for failure to state a claim because he does not have ownership over the trademark and would not have standing to bring an infringement suit. Fancaster has moved to dismiss for lack of personal jurisdiction on the grounds that their internet presence is not sufficient to confer jurisdiction over it in Massachusetts. Fancaster has also moved to dismiss for lack of subject matter jurisdiction, or in the alternative, to stay or transfer.

II. CLAIMS AGAINST KRUEGER

Defendants state that since Krueger assigned his right in the Fancaster mark to Fancaster in 2007, only Fancaster, and not Krueger in his personal capacity, has the right to bring a suit for infringement. SportsNet does not contest this point, and therefore, any claims against Krueger individually are **DISMISSED**.

III. STANDARD OF REVIEW

When analyzing a motion to dismiss for lack of personal jurisdiction, the court **[*7]** "accept[s] the allegations in the complaint as true and construe[s] the facts in the light most favorable to the plaintiff." Phillips v. Prairie Eye Ctr., 530 F.3d 22, 24 (1st Cir. 2008). The court "accepts properly supported proffers of evidence by a plaintiff as true, provided that plaintiffs' jurisdictional pleadings do not rely on unsupported allegations." Newman v. Eur. Aeronautic Def. & Space Co. Eads N.V., 700 F. Supp. 2d 156 (D. Mass. 2010) (internal citations omitted). "[A] plaintiff must proffer 'evidence of specific facts' with properly documented evidence." Moore v. S. N.H. Med. Ctr., No. 08-11751, 2009 U.S. Dist. LEXIS 123887, 2009 WL 5214879, at *1 (D. Mass. 2009).

The Court may consider evidence that plaintiff provided subsequent to the complaint and construe it in the light most favorable to the plaintiff. Platten v. HG Berm. Exempted Ltd., 437 F.3d 118, 135 (1st Cir. 2006). The Court may also consider evidence provided by the defendant in subsequent pleadings, so long as it is uncontested. Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 34 (1st Cir. 1998) ("We then add to the mix facts put forward by the defendants to the extent that they are uncontradicted.").

Although the court **[*8]** will construe the facts in the light most favorable to the plaintiff in a motion to dismiss, the plaintiff still has the burden to demonstrate every criteria required to establish jurisdiction. See U.S. v. Swiss Am. Bank, Ltd., 274 F.3d 610, 618 (1st Cir. 2001).

IV. PERSONAL JURISDICTION

The issue is whether this Court in the District of Massachusetts has personal jurisdiction over Fancaster, a South Dakota corporation with its principal place of business in New Jersey that operates a website accessible in Massachusetts. Fancaster asserts that the Court lacks personal jurisdiction because it does not fall within any of the provisions of the Massachusetts long-arm statute, Mass. Gen. Laws ch.223A, § 3 (1994). It has not alleged to have contracted to supply services or goods to Massachusetts or caused any tortious injury in Massachusetts.

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." N. Light Tech. v. N. Lights Club, 97 F. Supp. 2d 96, 104 (D. Mass. 2000). Because the long-arm statute of Massachusetts reaches the outer **[*9]** limits of due process, the Court may sidestep the first inquiry and focus exclusively on the constitutional analysis. See Berklee Coll. of Music, Inc. v. Music Indus. Educators, Inc., No. 09-11627, 733 F. Supp. 2d 204, 2010 U.S. Dist. LEXIS 78970, 2010 WL 3070150, at *2 (D. Mass. 2010); 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." Int'l Shoe Co. v. Wash., 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). 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 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 Coll. of Music, 2010 U.S. Dist. LEXIS 78970, 2010 WL 3070150, at *2.

The First Circuit has developed a three-part inquiry to assess specific **[*10]** jurisdiction. The court must ask (i) whether the claims are "related to" defendant's activities in Massachusetts; (ii) whether the defendants have purposefully availed themselves of the laws of Massachusetts; and (iii) whether the exercise of jurisdiction would be reasonable. Platten, 437 F.3d at 135. 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).

Applying this analysis to Fancaster, the Court holds that exercising jurisdiction over Fancaster would violate due process. Plaintiff alleges that three elements combine to establish personal jurisdiction: (i) Fancaster's interactive website accessible to Massachusetts residents, (ii) Fancaster's correspondence with SportsNet reserving its right to file suit, and (iii) Fancaster's recent email to a Massachusetts newspaper about an article on SportsNet's FanCaster program. For the reasons below, the Court disagrees and finds that this evidence does not establish that Fancaster sought to do business in Massachusetts, nor **[*11]** that it claimed the protections of Massachusetts law. See Sterilite Corp. v. Spectrum, Inc., No. 94-10320, 1997 U.S. Dist. LEXIS 11151, 1997 WL 398036, at *6 (D. Mass. 1997). Fancaster could not have expected to be haled into court in every jurisdiction in which its website is accessed or in every jurisdiction in which it sends a letter to enforce its trademark.

A. Relatedness

In a personal jurisdiction inquiry, the first step is to ask whether the claims are related to defendant's activity in the forum. To determine whether the action "arises from" defendant's activities in this forum, the Supreme Judicial Court of Massachusetts applies the "but for" test. Would the plaintiff bring the action but for the defendant's activities within the state? Tatro v. Manor Care, Inc., 416 Mass. 763, 768, 625 N.E.2d 549 (Mass. 1994). In this case, "but for" the Fancaster website, the letter to the plaintiff threatening suit in the event of expansion of its use, and email to a local newspaper, the plaintiff claims, it would not have brought this declaratory

judgment action.

Defendants counter that the source of this controversy is not the accessibility of Fancaster's website, but rather the issuance of the trademark. They cite to Sterilite, where **[*12]** the court allowed the defendant's motion to dismiss for lack of personal jurisdiction on the grounds that the "real transaction" at issue in the lawsuit was the grant of a patent rather than the sales of infringing products. 1997 U.S. Dist. LEXIS 11151, 1997 WL 398036, at *4. But the instant trademark case is different. The principle issue here is the likelihood of confusion between SportsNet's FanCaster Program and Fancaster.com. To the extent that the SportsNet program principally operates in Massachusetts, the Court will be asked to determine the likelihood that Massachusetts residents are or will be confused between Fancaster.com and SportsNet's program. The action therefore "arises from" the exposure of Massachusetts residents to the Fancaster website.

The Court thus finds that the trademark action is related to Fancaster's presence in the forum.

B. Purposeful Availment

That the action is related to the presence of the website in the forum, however, is not sufficient to satisfy due process. Plaintiff must show that defendants purposefully availed themselves of the law of Massachusetts. See Platten, 437 F.3d at 135. Plaintiff alleges that defendant's interactive website, as well as two emails and one letter into **[*13]** the forum regarding its trademark, satisfy this requirement. I disagree.

1. Website

The key issue, and one that has not been addressed by the First Circuit or the Supreme Court, is whether a website located outside of the forum and which forum residents can access satisfies the purposeful availment test for personal jurisdiction. See Broadvoice v. TP Innovations, No. 10-10229, 733 F. Supp. 2d 219, 2010 U.S. Dist. LEXIS 88702, 2010 WL 3377328, at *3 (D. Mass. 2010). Does a website owner purposefully avail itself of conducting business in Massachusetts when its website is accessed in Massachusetts or even interacts with Massachusetts residents?

Most circuits and lower courts have adopted a test developed in 1997 in a trademark infringement case involving an internet domain name. Zippo Mfg. Co. v. Zippo Dot Com, 952 F. Supp. 1119 (W.D.Pa. 1997). Zippo creates a sliding scale in which the likelihood of personal jurisdiction is "directly proportionate" to the level of interactivity of the website. Id. at 1124; Gather, 443 F. Supp. 2d at 115; Jagex Ltd. v. Impulse Software, No. 10-10216, 2010 U.S. Dist. LEXIS 84201, 2010 WL 3257919, at *3 (D. Mass. 2010). At one end of the spectrum, personal jurisdiction is clearly established where a defendant conducts regular business **[*14]** over the internet, for example by entering into contracts with foreign users to transmit files to their home computers for a fee. Zippo, 952 F. Supp. at 1124 (citing Compuserve, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)). At the other end of the spectrum are passive websites that do no more than share information. Id. at 1124.

And in the middle of the spectrum are interactive websites where a user exchanges information with a host computer. Id. Here, the Zippo court examines the "level of interactivity" and the "commercial nature of the exchange of information" on the site. Id. Mere interactivity is not enough. Something more is required. Id. at 1124 (finding that defendant's electronic commerce with residents of the forum constitutes purposeful availment). See also McBee v. Delica Co., Ltd., 417 F.3d 107, 124 (1st Cir. 2005) ("[s]omething more . . . such as interactive features which allow the successful online ordering of the defendant's products" is sufficient to establish personal jurisdiction).

Zippo and its progeny do not provide much guidance to courts in determining what kind of "something more" is required to render an interactive website subject to a court's personal **[*15]** jurisdiction. While courts have found that passive websites do not expose themselves to jurisdiction of every forum, they have been less clear about how much interactivity does. The

Seventh Circuit explains,

> With the omnipresence of the Internet today, it is unusual to find a company that does not maintain at least a passive website. Premising personal jurisdiction on the maintenance of a website, without requiring some level of "interactivity" between the defendant and consumers in the forum state, would create almost universal personal jurisdiction because of the virtually unlimited accessibility of websites across the country.

Jennings v. AC Hydraulic, 383 F.3d 546, 550 (7th Cir. 2004) (declining to determine how much "interactivity" would be sufficient to establish personal jurisdiction). In the era of Facebook, where most websites now allow users to "share" an article, choose to "like" a particular page, add comments, and email the site owners, the Jennings reasoning may now extend to moderately interactive sites as well. If virtually every website is now interactive in some measure, it cannot be that every website subjects itself to litigation in any forum — unless Congress dictates **[*16]** otherwise. Interactivity alone cannot be the linchpin for personal jurisdiction.

In this case, Fancaster describes its website as passive, while plaintiff describes the website as a new media platform that directly markets itself to and invites Massachusetts residents to interact with each other and the site. The website is, in fact, somewhere in between, and at best moderately interactive at the time of filing. It allowed individuals to register to receive emails and updates; users could in turn email the site operator. Users could play basic trivia and "vote" on videos. While Fancaster aspired to allow users to upload their own videos, it did not yet have this capability. Every video had been posted by an administrator.

Plaintiff argues that any one of these features renders the site subject to jurisdiction in Massachusetts. Indeed, courts in the past have found the ability to email the site owner sufficient to establish personal jurisdiction. See Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34, 45 (D. Mass. 1997) (exercising jurisdiction over a Colorado company whose website encouraged users, including Massachusetts residents, to email the company). Thirteen years after Hasbro, **[*17]** however, virtually every website has a "contact us" page. Similarly, most websites now ask users to "register" and provide their basic contact information. Websites often allow users to view videos posted by administrators and "fan" a page, article, or video. I refuse to find that every website with these characteristics subjects itself to universal jurisdiction.

Another place to look for "something more" is the more traditional approach, which looks to the defendant's acts to determine whether he purposefully availed himself of Massachusetts protection through his business activities, activities that suggest he foresaw being "haled into court" here. See Venture Tape, 292 F. Supp. 2d. at 233. In that event, the Court will consider not only the level of "interactivity" of the website — as all websites are now at least moderately interactive — but also the "commercial nature" of the exchange of information. See Zippo, 952 F. Supp. at 1124. The Court will ask whether the website purposefully directs its business towards forum residents. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); Toys "R" Us, Inc. v. Step Two, 318 F.3d 446, 454 (3d Cir. 2003) ("[T]he mere operation of **[*18]** a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world. Rather, there must be evidence that the defendant 'purposefully availed' itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts.")

Plaintiff further points to the fact that some of the videos on Fancaster.com were "tagged" with labels that included "Boston" and "Red Sox" along with other cities and sports teams. These tags, it suggests, indicate that Fancaster is directly targeting forum residents. See Burger King, 471 U.S. at 476. They cite to Sports Auth. Mich., Inc. v. Justballs, Inc., where the court found that a New Jersey website purposefully availed itself of business in Michigan when it targeted Michigan residents by selling sports memorabilia with logos of Michigan athletic teams, such as the Detroit Lions, the Detroit Tigers, and the University of Michigan. 97 F. Supp. 2d 806, 812 (E.D. Mich. 2000).

In this case, however, Fancaster is not selling a product. In fact, the website is not — at least at the time of **[*19]** filing — a commercial enterprise at all. See Broadvoice, 2010 U.S. Dist. LEXIS 88702, 2010 WL 3377328, at *4 (defendant's website not subject to personal jurisdiction of Massachusetts where it is not of a commercial nature nor aimed at Massachusetts residents any more than the rest of the world.). Fancaster labels its videos with the name of sports teams around the country to allow users, including Massachusetts residents, to find teams. It is not specifically reaching out into the forum to attract users. The site does not, for example, use the registration information to email users about their local team or provide information specifically about Massachusetts to Massachusetts users. Cf. Gather, 443 F. Supp. 2d. at 116. The Court finds therefore that Fancaster has not substantially directed its activities to the forum state to constitute purposeful availment. See Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997).

Like the Jennings court, this Court declines to decide exactly how much interactivity or commercial activity directed to a forum is required to establish personal jurisdiction. See 383 F.3d at 550. I hold merely that a website with the features that are now common, including a registration **[*20]** page, simple trivia, ability to email the website operators, stream-line video, and "fan" or "share" a page or video, cannot be sufficient to enable the site's owners to be haled into court in any forum in which it's accessible. Such a result would render virtually every website subject to universal personal jurisdiction. See Jennings, 383 F.3d at 550 ("This scheme would go against the grain of the Supreme Court's jurisprudence which has stressed that, although technological advances may alter the analysis of personal jurisdiction, those advances may not eviscerate the constitutional limits on a state's power to exercise jurisdiction over nonresident defendants.") (citing Hanson v. Denckla, 357 U.S. 235, 250-51, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). Fancaster has not — at least through its website — purposefully availed itself of conducting business in Massachusetts to satisfy the requirements of personal jurisdiction.

2. Letters

The next question, then, is whether Fancaster's correspondence with SportsNet reserving the right to enforce the trademark and their more recent email to the publishers of the Maynard, Massachusetts, Beacon Villager about SportsNet's FanCaster program constitute purposeful availment of conducting **[*21]** business in the forum.

Plaintiff cites to the First Circuit's decision in Nova Biomedical Corp. v. Moller to support its contention that Fancaster's communications into the forum about their trademark constitute purposeful acts sufficient to subject itself to personal jurisdiction. 629 F.2d 190, 197 (1st Cir. 1980). Nova, however, is inapposite. Nova held only that sending a threatening patent infringement letter can in some instances constitute the transaction of business within the meaning of the long arm statute — not that the letter alone satisfies the due process requirements for personal jurisdiction. Nova, 629 F.2d at 197 (holding that sending threatening patent infringement letters "can, in certain circumstances, constitute the transaction of business within the meaning of the Massachusetts' long arm statute" but that "[w]hether a patentee is thereafter subject to jurisdiction will depend on whether he possesses sufficient contacts with the forum to satisfy due process."); GSI Lumonics, Inc. v. BioDiscovery, Inc., 112 F. Supp. 2d 99, 110 (D. Mass. 2000) (an infringement letter into a forum may constitute transaction of business under the long-arm statute but is not enough to **[*22]** satisfy due process). In Nova, unlike here, the defendant was already conducting patent-related activity in the forum, including selling products involving the patent in the suit to other companies in the forum and entering into a cross-licensing agreement about the patent with another Massachusetts corporation. These other activities amounted to sufficient contacts to satisfy due process, and the threatening letters arose from these patent-related activities. See Sterilite, 1997 U.S. Dist. LEXIS 11151, 1997 WL 398036, at *4 n.2.

This case is closer to Sterilite than to Nova. In Sterilite, this Court declined to subject the defendant Spectrum to personal jurisdiction where Spectrum had sent a letter to Sterilite in the forum seeking to clarify a potential patent infringement. 1997 U.S. Dist. LEXIS 11151, 1997 WL

398036, at *5 ("[S]ubjecting Spectrum to jurisdiction in Massachusetts on these grounds provides a disincentive for parties to ever attempt to seek information or reconcile claims through written communications."). Apart from the letter, Sterilite had only indirect contacts with the state through freight-on-board ("F.O.B.") shipments and retailers' sales of their product. 1997 U.S. Dist. LEXIS 11151, [WL] at *6.

In this case, Fancaster corresponded with SportsNet **[*23]** and ultimately decided to allow SportsNet to use the name. Fancaster's counsel wrote a letter to SportsNet's counsel in New York: [2]

> Upon further review of your client's limited use of the FANCASTER mark, our client has determined that it will take no further action at this time. So long as your client limits its use of the FANCASTER mark to a "community service program that educates young new England sports fans about careers in sports television," as described on your client's website, our client is willing to forego any further action at this time. However, should your client expand its use of the FANCASTER mark, or if our client becomes aware of any actual confusion caused by your client's use of the FANCASTER mark, Fancaster, Inc. and Mr. Krueger reserve the right to assert their trademark rights against your client, and to pursue all legal remedies available to them.

Letter from Barbara J. Grahn to Maren C. Perry (Nov. 22, 2006) (document #23-5). This letter does not comprise "purposeful availment." It merely reserves the right to enforce a trademark at some point in the future. As I articulated in Sterilite, a letter sent into the forum that seeks to clarify or make note of a potential **[*24]** conflict does not constitute purposeful availment, particularly where the defendant has few other activities in the forum. 1997 U.S. Dist. LEXIS 11151, 1997 WL 398036, at *5.

FOOTNOTES

2 Note that the fact that the letter was sent to New York, and not to Massachusetts, is irrelevant. The letter was sent to a resident of Massachusetts via its agent or counsel. See Inamed Corp. v. Kuzmak, 249 F.3d 1356, 1361 (Fed. Cir. 2001) ("[B]ecause [plaintiff's] attorney was [plaintiff's] agent for the purpose of receiving the correspondence, the fact that he was located in New York is immaterial.")

To be sure, the email to the Massachusetts Beacon Villager does go one step further to ask the newspaper to either remove the use of the name "Fancaster" as a noun or to delete the article. See email from Craig Krueger to Mr. Floyd and Mr. Hastings (Sept. 3, 2009) (document #23-11). However, this email is still not sufficient to establish personal jurisdiction. These activities amount to the mailing (or emailing) of "cease and desist" letters, which alone cannot constitute purposeful availment under due process. See Measurement Computing Corp., 304 F. Supp. 2d. at 181 (quoting Red Wing Shoe, Inc. v. Hockerson-Halberstadt, Inc., 148 F.3d 1355, 1361 (Fed. Cir. 1998) **[*25]** ("A patentee should not subject itself to personal jurisdiction in a forum solely by informing a party who happens to be located there of suspected infringement.")). Such a result would imply that a holder of a national trademark is subject to universal personal jurisdiction if he wants that trademark to be enforced.

The Court therefore finds that the holder of a trademark has the right to enforce his trademark without subjecting himself to personal jurisdiction in forums in which he has limited or no substantial contacts otherwise. GSI Lumonics, 112 F. Supp. 2d at 110 (noting "that the mailing of an infringement notice standing alone has rarely been deemed sufficient to satisfy the constitutional standard." After sending a letter, whether a "patentee is thereafter subject to jurisdiction will depend on whether he possesses sufficient contacts with the forum to satisfy due process."). Here, the plaintiff does not allege that Fancaster has presence in the forum other than its website.

Plaintiff suggests that the *combination* of Fancaster's web presence in the state and the letters to the forum constitute purposeful availment to satisfy due process. As described above, I find that Fancaster **[*26]** is not purposefully availing itself of conducting business in the forum through its relatively interactive non-commercial website. Likewise, I find that the holder of a trademark may send letters to notify others of its ownership without subjecting itself to personal jurisdiction in forums in which he has no or limited contact otherwise. It logically follows, then, that the operator or owner of a moderately interactive website with a trademark name may send letters to enforce its trademark without subjecting itself to universal personal jurisdiction. To hold Fancaster subject to jurisdiction in Massachusetts would violate due process.

C. Reasonableness

In the final analysis of personal jurisdiction, the Court would ask whether exercising jurisdiction would be reasonable. Since I have found no personal jurisdiction because the defendant did not purposefully avail itself of conducting business in the forum, I need not reach the question of whether the Gestalt factors have been met.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to File a Reply Brief is **GRANTED** (**document #41**); Fancaster's Motion for Protective Order Barring Depositions and for Partial Stay of Discovery (**document [*27] #46**) is **MOOT**. Defendant's Motion to Dismiss (**document #17**) is **ALLOWED**.

SO ORDERED.

Date: October 1, 2010

/s/ Nancy Gertner

NANCY GERTNER, U.S.D.C.

*1997 U.S. Dist. LEXIS 11151, *; 43 U.S.P.Q.2D (BNA) 1198*

STERILITE CORP., Plaintiff, v. SPECTRUM INTERNATIONAL, INC., Defendant.

Civ. Action No. 94-10320-NG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

1997 U.S. Dist. LEXIS 11151; 43 U.S.P.Q.2D (BNA) 1198

February 28, 1997, Decided

DISPOSITION: [*1] Defendant's motion to dismiss ALLOWED.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant patent owner filed a motion to dismiss for lack of personal jurisdiction an action filed by plaintiff corporation for a declaration of patent invalidity and infringement. The owner filed a complaint in a federal district court in New York charging the corporation with willful patent infringement, and the corporation filed a motion for an injunction against continued prosecution of that action.

OVERVIEW: The owner, a New Jersey based-business, had a patent on a stackable crate. The corporation's attorney contacted the owner regarding some art the corporation knew of which could have affected the validity of the patent. The corporation filed an action for declaratory judgment and the owner filed a motion to dismiss for lack of personal jurisdiction, and the court allowed the motion. The court found that the corporation did not produce any evidence that the owner's activities "so affected the transaction" as to make Massachusetts the proper forum. The court determined that Mass. Gen. Laws ch. 223A, § 3, did not apply because sales of the owner's products to Massachusetts retailers actually occurred in New Jersey and there was no evidence that the alleged patent invalidity "arose from" the sale of the owner's products within the state. The court concluded that as a matter of due process, sales to Massachusetts retailers, shipped FOB New Jersey, combined with letters seeking clarification regarding a patent, but without any threat to litigate, did not warn the owner that it could reasonably anticipate being haled into a Massachusetts court.

OUTCOME: The court allowed the owner's motion to dismiss the corporation's action for lack of personal jurisdiction.

CORE TERMS: patent, personal jurisdiction, retailers, infringement, forum state, purposeful, crate, patent infringement, shipment, exercise of jurisdiction, prima facie, transacting business, soliciting, stackable, charging, customer, storage, prong, cart, attorney wrote, prior art, business activities, place of business, total sales, appropriate forum, re-examination, patent-

related, advertising, invalidity, transacted

LEXISNEXIS® HEADNOTES Hide

Commercial Law (UCC) > Sales (Article 2) > Performance > Risk of Loss

Commercial Law (UCC) > Sales (Article 2) > Title, Creditors & Good Faith Purchasers > General Overview

Contracts Law > Sales of Goods > Title, Creditors & Good Faith Purchasers > Passing of Title

HN1 When goods are shipped F.O.B., the seller bears the cost of shipment and the risk of loss only to the destination indicated. Title to goods typically passes from seller to buyer at the F.O.B. location. U.C.C. § 2-319(1). More Like This Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss

Evidence > Inferences & Presumptions > General Overview

HN2 The plaintiff in an action under Fed. R. Civ. P. 12(b)(2) bears the burden of establishing that the court has jurisdiction over the defendant. To establish jurisdiction over the defendant, the plaintiff must demonstrate both that the defendant's conduct satisfies Massachusetts' Long-Arm statute, Mass. Gen. Laws ch. 223A, § 3, and that the exercise of jurisdiction pursuant to the statute comports with the strictures of the constitution. More Like This Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview

HN3 The prima facie standard obliges the plaintiff to adduce evidence of specific facts essential to establishing personal jurisdiction. The prima facie approach is particularly appropriate when the facts which would support personal jurisdiction are not disputed. This showing satisfies Fed. R. Civ. P. 12(d). More Like This Headnote | *Shepardize:* Restrict By Headnote

Business & Corporate Law > Foreign Businesses > General Overview

Insurance Law > Industry Regulation > Insurance Company Operations > Conducting Business > Foreign Insurers

HN4 Mass. Gen. Laws ch. 223, § 38, provides: In an action against a foreign corporation, except an insurance company, which has a usual place of business in the commonwealth, or, with or without such usual place of business, is engaged in soliciting business in the commonwealth, permanently or temporarily, service may be made in accordance with the provisions of the preceding section relative to service on domestic corporations in general, instead of on the state secretary under § 15 of chapter 181. This "soliciting business" statute, requires that the defendant's activities have affected Massachusetts substantially or so affected the transaction at issue as to make Massachusetts an appropriate forum. More Like This Headnote

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview

Torts > Procedure > Commencement & Prosecution > General Overview

HN5 The Massachusetts Long-Arm statute, Mass. Gen. Laws ch. 223A, § 3, provides several bases for asserting jurisdiction. Jurisdiction must be analyzed under § 3 before proceeding to the constitutional analysis. Section 3 reads, in pertinent part: 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 (a) transacting any business in this commonwealth; (b) contracting to supply services to things in this commonwealth; (c) causing tortious injury by an act or omission in this commonwealth; (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth. Mass. Gen. Laws. ch. 223A, § 3. More Like This Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview

HN6 Although an isolated (and minor) transaction with a Massachusetts resident may be insufficient to satisfy Mass. Gen. Laws ch. 223A, § 3(a), generally the purposeful and successful solicitation of business from residents of the commonwealth, by a defendant or its agent, will suffice to satisfy this requirement. Section 3(a) applies to "any purposeful act." More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview

HN7 In order for jurisdiction to exist under Mass. Gen. Laws ch. 223A, § 3(a), the facts must meet two criteria: (1) the defendant must have transacted business in Massachusetts and (2) the plaintiff's claim must have arisen from the defendant's transaction of business. More Like This Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overv ew

Civil Procedure > Venue > General Overview

Contracts Law > Sales of Goods > Performance > Seller's Delivery & Shipment of Goods

HN8 Generally, shipments F.O.B., standing alone, do not create jurisdiction under Mass. Gen. Laws ch. 223A, §§ 3(b) or 3(a).However, if a defendant makes substantial sales on a continuous basis within a forum district, he cannot escape jurisdiction and venue in that district simply by requiring shipments to be made F.O.B. outside the forum. It is one factor to be considered in analyzing a defendant's manner of doing business. More Like This Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview

HN9 The mere act of placing a product into the stream of commerce is not an act purposefully directed toward the forum state. More Like This Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview

HN10 The test for the "arising from" prong of the Long-Arm statute, Mass. Gen. Laws ch. 223A, § 3, is a liberal "but for" test. More Like This Headnote

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN11 Communications between the parties relating to a resolution of the patent dispute does not cause the patent infringement. The existence of the disputed patent rights does not pertain to the defendant's actions in the forum. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview

HN12 The constitutional restraints on the assertion of personal jurisdiction involves a three-part analysis for determining the existence of specific personal jurisdiction when plaintiffs do not allege general personal jurisdiction. The tests to ascertain whether specific jurisdiction complies with due process requirements are: 1) the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum state activities; 2) the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable; and 3) the exercise of jurisdiction must, in light of the gestalt factors, be reasonable. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: For STERILITE CORP., Plaintiff: Donald Brown, Ernest V. Linek, Dike, Bronstein, Roberts & Cushman, Boston, MA.

For SPECTRUM INTERNATIONAL INCORPORATED, Defendant: Alan B. Clement, Ropes & Gray, Boston, MA. James M. Kelley, Boston, MA.

JUDGES: NANCY GERTNER, U.S.D.J.

OPINION BY: NANCY GERTNER

OPINION

MEMORANDUM AND DECISION

February 28, 1997

I. *INTRODUCTION*

Before me is a motion to dismiss for lack of personal jurisdiction filed by defendant Spectrum International, Inc. ("Spectrum") against plaintiff Sterilite Corp. ("Sterilite"). For the reasons stated below, the defendant's motion is **ALLOWED**.

II. *FACTS*

This dispute centers around U.S. Patent Number 4,971,202 (hereinafter "the 202 patent"). In January and February 1994, a Spectrum attorney contacted Sterilite concerning some prior art known to Sterilite which could have affected the validity of the 202 patent. A series of letters

ensued.

On February 16, 1994, Sterilite instituted this declaratory action against Spectrum for a declaration of invalidity and infringement on the 202 patent. I granted a stay of the case on February 16, 1995, when the parties **[*2]** advised me that the U.S. Patent and Trademark Office ("PTO") was performing a re-examination of the 202 patent, pursuant to a request by Spectrum under 35 U.S.C. § 302. A status report filed by the parties on January 29, 1996 indicated that the PTO re-examination was still proceeding. On July 26, 1996, however, the PTO Board of Patent Appeals issued a decision. The PTO confirmed the patentability of the 202 patent.

On October 24, 1996, Spectrum filed a complaint in the Southern District of New York, charging Sterilite with willful infringement of the 202 patent. The plaintiff has moved for an injunction against continued prosecution of the New York action, claiming the benefits of the "first filed" rule. Before proceeding to this issue, however, I must first resolve the defendant's motion to dismiss, which was not resolved before the stay was granted.

The facts are not in dispute. Spectrum is currently the record owner for the 202 patent, which covers a stackable crate. Spectrum manufactures a variety of home and office organization products and owns a number of patents. It is a New Jersey corporation and its only manufacturing facility is in Edison, New Jersey. Spectrum conducts **[*3]** all its business from New Jersey; it receives orders from customers at its headquarters in Shrewsbury, New Jersey. After receiving the orders, Spectrum places the shipment with a carrier in New Jersey, or waits for the customer to come and pick up the products. All the products are sold "F.O.B. New Jersey" which means "free on board." HN1 When goods are shipped F.O.B., the seller bears the cost of shipment and the risk of loss only to the destination indicated. Title to goods typically passes from seller to buyer at the F.O.B. location. See U.C.C. § 2-319(1).

Sales of Spectrum products to Massachusetts businesses constitute approximately 5% of its total sales. Spectrum does not maintain any facilities in Massachusetts; Spectrum does not employ any sales representatives or other persons in Massachusetts; Spectrum does not maintain a bank account or own property in Massachusetts; and Spectrum does not advertise directly in Massachusetts.

III. *PERSONAL JURISDICTION*

A. *Burden of Proof*

Spectrum has moved this Court under Fed. R. Civ. P. 12(b)(2) to dismiss for lack of personal jurisdiction. HN2 As the plaintiff, Sterilite bears the burden of establishing that this Court **[*4]** has jurisdiction over Spectrum. *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 145 (1st Cir. 1995) ("the plaintiff...bears the burden of proving the existence of *in personam* jurisdiction"). To establish jurisdiction over Spectrum, Sterilite must demonstrate both that Spectrum's conduct satisfies Massachusetts' Long-Arm statute, and that the exercise of jurisdiction pursuant to this statute "comports with the strictures of the Constitution." *Id.* at 144 (citations omitted).

The First Circuit has outlined three procedural standards, or levels of analyses, "that might usefully be employed when a trial court comes to grips with a motion to dismiss for want of personal jurisdiction." *Foster-Miller*, 46 F.3d at 145. The first of these, known as HN3 the *prima facie* standard, obliges the plaintiff "to adduce evidence of specific facts" essential to establishing personal jurisdiction. *Id.* The *prima facie* approach is particularly appropriate when the facts which would support personal jurisdiction are not disputed. *See id.; Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 676 (1st Cir. 1992). This *prima facie* showing has been held in this Circuit to **[*5]** satisfy Fed.R.Civ.P. 12(d).

Sterilite contends that jurisdiction is appropriate under Mass. Gen. L. ch. 223, § 38 ("Section 38"), which deals with foreign corporations, and under Mass. Gen. L. ch. 223A, § 3 ("Section 3"), the

Long-Arm statute.

1. *Section 38*

HN4 Section 38 reads as follows:

> In an action against a foreign corporation, except an insurance company, which has a usual place of business in the commonwealth, or, with or without such usual place of business, is engaged in soliciting business in the commonwealth, permanently or temporarily, service may be made in accordance with the provisions of the preceding section relative to service on domestic corporations in general, instead of on the state secretary under section fifteen of chapter one hundred and eighty one.

This section does not aid Sterilite's cause. Section 38, the "soliciting business" statute, requires that the defendant's activities have "affected Massachusetts substantially or so affected the transaction at issue as to make Massachusetts an appropriate forum . . ." *Mas Marques v. Digital Equipment Corp.*, 637 F.2d 24, 28 (1st Cir. 1980) (citing **[*6]** *Caso v. Lafayette Radio Electronics Corp.*, 370 F.2d 707, 712 (1st Cir. 1966)).

The plaintiff's lawsuit concerns one product sold by Spectrum, the stackable crate; the product is one of many sold by Spectrum. Only 5% of Spectrum's total sales of all products can be attributed to sales in Massachusetts. The plaintiff has not produced any evidence that Spectrum seeks purchase orders from Massachusetts retailers, through direct requests or through advertising. Consequently, I decline to find jurisdiction under Section 38 since there is no evidence that Spectrum's activities "so affected the transaction" as to make Massachusetts the appropriate forum. *Id.*

2. *The Massachusetts Long-Arm Statute*

HN5 The Massachusetts Long-Arm statute, Mass. Gen. L. ch. 223A, § 3 ("Section 3"), provides several bases for asserting jurisdiction. Jurisdiction must be analyzed under Section 3 before proceeding to the constitutional analysis. *Keds Corp. v. Renee Int'l Trading Corp.*, 888 F.2d 215, 218 (1st Cir. 1989). Section 3 reads, in pertinent part:

> 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 (a) transacting any **[*7]** business in this commonwealth; (b) contracting to supply services to things in this commonwealth; (c) causing tortious injury by an act or omission in this commonwealth; (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth.

Mass. Gen. L. ch. 223A, § 3.

Sterilite contends that Section 3(a), the "transacting business" prong, applies to Spectrum's conduct. The Massachusetts Supreme Judicial Court has noted that Section 3(a) "has been construed broadly." *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 767, 625 N.E.2d 549 (1994) (citation and internal quotation marks omitted). That court held that HN6 "although an isolated (and minor) transaction with a Massachusetts resident may be insufficient [to satisfy Section 3(a)], generally the purposeful and successful solicitation of business from residents of the Commonwealth, by a defendant or its agent, will suffice to satisfy this requirement." *Id.* Section 3(a) applies to "any purposeful act." **[*8]** *Ross v. Ross*, 371 Mass. 439, 441, 358 N.E.2d 437 (1976).

HN7 In order for jurisdiction to exist under Section 3(a), the facts must meet two criteria: (1) the

defendant must have transacted business in Massachusetts and (2) the plaintiff's claim must have arisen from the defendant's transaction of business. *Tatro*, 416 Mass. at 767.

Spectrum's relevant contacts with Massachusetts include the following: (1) sales of Spectrum products to Massachusetts retailers; (2) sales of Spectrum products by Massachusetts retailers; and (3) sending letters to Sterilite concerning the 202 patent.

a. *Sales of Spectrum Products to Massachusetts Retailers*

Spectrum argues these sales do not create jurisdiction under Section 3(b) because they are not contracts to supply goods or services in Massachusetts. Spectrum is correct; HN8 generally, shipments F.O.B., standing alone, do not create jurisdiction under Section 3(b) or 3(a). *See Buckeye Assoc. v. Fila Sports, Inc.*, 616 F. Supp. 1484, 1492 (D. Mass. 1985) (citing *Droukas v. Divers Training Academy, Inc.*, 375 Mass. 149, 376 N.E.2d 548 (1978)). [1] The sales actually occurred in New Jersey, where the goods were placed with New Jersey **[*9]** carriers for delivery or picked up by the buyers. These sales do not constitute business transacted in Massachusetts.

FOOTNOTES

1 *Buckeye Assoc.* notes, however, that: "If a defendant makes substantial sales on a continuous basis within a forum district, he cannot escape jurisdiction and venue in that district simply by requiring shipments to be made F.O.B. outside the forum. *See State of Illinois v. Harper & Row Publishers, Inc.*, 308 F. Supp. 1207, 1209 n. 7 (N.D. Ill. 1969). However, it is one factor to be considered in analyzing a defendant's manner of doing business." 616 F. Supp. at 1490 n. 7. In *Harper & Row*, the court found that despite the F.O.B. labelling, the defendants had made substantial sales to persons in the forum state for many years. The defendants were also represented by salesmen who visited the forum state and sent catalogs to the forum state, as well as other promotional and advertising material. *Harper & Row*, 308 F. Supp. at 1209.

Sterilite argues the "stream of commerce" test provides **[*10]** an adequate basis for jurisdiction. The First Circuit, however, has explicitly rejected this theory as a viable means of obtaining jurisdiction. *See Boit*, 967 F.2d at 682-83 (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987) (O'Connor, J., plurality opinion)). Even if Spectrum knew products would end up in Massachusetts, jurisdiction is lacking because HN9 "the mere act of placing the product into the stream" is not "an act purposefully directed toward the forum state." *Boit*, 967 F.2d at 682.

b. *Sales of Spectrum Products by Massachusetts Retailers*

These sales are indirect; Spectrum does not maintain any offices or stores in Massachusetts. It sells products to retailers, who then in turn stock the shelves of their stores in Massachusetts with Spectrum products. All of Spectrum's sales occur in New Jersey; any sales in Massachusetts are the retailers' sales. Spectrum itself is not directly soliciting business from citizens of the Commonwealth. In addition, the percentage of its goods sold to Massachusetts businesses is relatively small.

Under *Tatro*, HN10 the test for the "arising from" prong of the Long-Arm statute **[*11]** is a liberal "but for" test. 416 Mass. at 770. Even assuming these sales are enough to meet the "transacting business" prong, Sterilite has not shown that the alleged patent invalidity "arises from" the sale of Spectrum products *in* Massachusetts. In fact, the real "transaction" at issue in Sterilite's lawsuit is the grant of the patent by the PTO. *See KVH Indus., Inc. v. Moore*, 789 F. Supp. 69, 71-72 (D.R.I. 1992) (holding that HN11 communications between the parties relating to a resolution of the patent dispute "did not cause the patent infringement"; "the existence of the disputed patent rights does not pertain to the defendant's actions in the forum.")

Further, since Spectrum's products are sold nationwide, Sterilite's "harm," if any, occurs in every store in the United States where the allegedly infringing Spectrum stackable crate is sold. Sterilite has failed to show how many of these crates, if any, are even sold in Massachusetts; perhaps most of the crates are sold in West Virginia or Hawaii.

c. *Letters Sent by Spectrum to Sterilite*

Sterilite argues that the letters sent by Spectrum to its office in Townsend, Massachusetts constitute "purposeful acts" which **[*12]** support the exercise of jurisdiction. In support, the plaintiff cites *Nova Biomedical Corp. v. Moller*, 629 F.2d 190 (1st Cir. 1980). In *Nova Biomedical*, the court held that the "mailing of a letter charging patent infringement and threatening litigation is clearly a 'purposeful' act by the defendant." *Id.* at 195. [2] In *Nova*, however, the court did not hold that in *all* circumstances, a letter can constitute transacting business under Section 3; rather, the court held that the defendant's "charge of infringement as an extension or a component of the defendant's patent-related business activities in the forum." *Id.* at 195. The analogy to *Nova Biomedical* does not aid Sterilite's claims.

FOOTNOTES

2 It is worth noting, however, that the court also found several other significant contacts in *Nova*: The defendant had a cross-licensing agreement with another Massachusetts corporation, covering the patent in suit; the defendant sold products to another Massachusetts corporation, one of which involved the patent in suit; and the defendant had negotiated with yet another Massachusetts corporation regarding the licensing of the patent in suit. In *Nova*, the claims "arose from" the defendant's conduct in the forum. If Sterilite is right, then its claims could conceivably arise from Spectrum's conduct in every jurisdiction in which the 202 patent products are sold.

[*13] Not only were Spectrum's letters not part of its patent-related business activities in Massachusetts *vel non*, they also failed to charge patent infringement and threaten litigation. Instead, the letters appear to be an effort simply to discuss the differences and similarities between the Sterilite and Spectrum products in an effort to ascertain any *potential* infringement. *Cf. Morrill v. Tong*, 390 Mass. 120, 131-32, 453 N.E.2d 1221 (holding that defendant's letter, sent in response to a letter from the plaintiff's attorney, in which he stated an intent to go to court to modify a child support decree and to protect his paternal rights).

On January 3, 1994, Thomas Gibson ("Gibson"), Spectrum's attorney, wrote to David Stone ("Stone") at Sterilite, enclosing a copy of the 202 patent and seeking an opportunity to discuss the 202 patent and the Sterilite storage cart. On January 17, 1994, after a reply letter from Sterilite, Alan Clement ("Clement"), another Spectrum attorney, wrote to Stone, enclosing a pictorial comparison of the 202 patent and the Sterilite stacking bin and storage cart. Clement asked that Sterilite provide Spectrum with the prior art it believed was related **[*14]** to the patent. Finally, on February 8, 1994, after another response from Sterilite, Clement wrote to Stone again. Clement stated that he had reviewed the materials sent by Sterilite, and he closed by saying:

> Accordingly, it remains our opinion that the Sterilite Storage Cart product literally reads on each and every element of Claim 1 of United States Patent 4,971,202.

It is difficult to see how these letters "threaten litigation" and "charge patent infringement." While the letters were obviously written in the context of possible infringement, few outright charges were made, and no litigation was ever threatened. Moreover, the last sentence of the last Spectrum letter, while it reiterates Spectrum's position that the 202 patent trumps the Sterilite

product, is not even close to a threat of litigation. *See Concord Labs, Inc. v. Ballard Med. Products*, 701 F. Supp. 272, 274-76 (D.N.H. 1988) (holding defendant's letter, sent to the plaintiffs and to the plaintiffs' customers, which claimed that plaintiffs' product infringed upon certain of defendant's patents, requested that plaintiff cease all manufacturer and sale, and threatened litigation if cessation did not occur **[*15]** suffices under New Hampshire Long-Arm statute). [3]

FOOTNOTES

3 Part of *Concord Labs*' rationale, as well as the rationale of *Lex Computer & Mgmt. Corp. v. Eslinger & Pelton, P.C.*, 676 F. Supp. 399, 403 (D.N.H. 1987), was that the letters charging infringement could be defamatory. Here, Clement's letter clearly indicated that the infringement charge *vel non* was "our opinion."

Clement's last letter was also sent in response to a series of letters, as was the case in *Morrill*. Subjecting Spectrum to jurisdiction in Massachusetts on these grounds provides a disincentive for parties to ever attempt to seek information or reconcile claims through written communications. I conclude that jurisdiction under the Massachusetts Long-Arm statute has not been shown.

B. *Constitutional Due Process Concerns*

1. *The Test For Specific Personal Jurisdiction*

Although I have found no jurisdiction under the Massachusetts Long-Arm statute, I also find the assertion of jurisdiction would not comport with the **[*16]** Constitution's guarantee of due process. HN12 The constitutional restraints on the assertion of personal jurisdiction involves a three-part "analysis for determining the existence of specific personal jurisdiction ([when] plaintiffs do not allege general personal jurisdiction)." *Nowak v. Tak How Inv., LTD.*, 94 F.3d 708, 712 (1st Cir.), *reh'g denied, en banc* (1996). The tests to ascertain whether specific jurisdiction complies with due process requirements are:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant s forum state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the gestalt factors, be reasonable.

United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir. 1992). These three tests have been called relatedness, purposeful availment, and reasonableness respectively. *See Burger* **[*17]** *King v. Rudzewicz*, 471 U.S. 462, 472-78, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).

Even assuming that the plaintiff has made out a prima facie case for jurisdiction under the Massachusetts Long-Arm statute, Spectrum cannot constitutionally be subjected to suit in a Massachusetts court. Sales to Massachusetts retailers, shipped F.O.B. New Jersey, combined with letters seeking clarification regarding a patent (without any corresponding threat to litigate) would not warn Spectrum that it could "reasonably anticipate being haled into court" in Massachusetts. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980). It did not seek to do business in Massachusetts, nor did it seek the benefits or protections of Massachusetts law. I must consider "the quality and nature of [Spectrum's] activity in relation to the fair and orderly administration of the laws. . ." *International Shoe Corp. v. Washington*, 326 U.S. 310, 319, 90 L. Ed. 95, 66 S. Ct. 154 (1945). While Spectrum may sell a certain quantity of products into the Massachusetts market, through its sales to retailers, the quality of those sales do not subject Spectrum to jurisdiction **[*18]** in Massachusetts courts.

IV. *CONCLUSION*

For the above reasons, the defendant's motion to dismiss is **ALLOWED**.

SO ORDERED.

Dated: February 28, 1997

NANCY GERTNER, U.S.D.J.

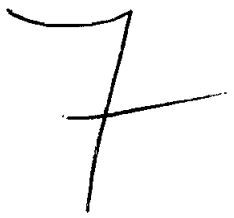
ORDER

For the reasons set forth in the accompanying Memorandum and Order, the defendant's motion to dismiss, filed May 31, 1994 [docket entry # 5], is **ALLOWED**.

SO ORDERED.

Dated: February 28, 1997

NANCY GERTNER, U.S.D.J.



STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MAYER MORGANROTH, as personal representative of
ESTATE OF DR. JACK KEVORKIAN,

Plaintiff,

v

OAKLAND COUNTY 11-122542-CK

JUDGE MARTHA D. ANDERSON
MORGANROTH,MA v ARMENIAN LIBR

___-CK

ARMENIAN LIBRARY AND MUSEUM OF
AMERICA, INC., a foreign non-profit corporation, and
GARY LIND-SINANIAN,

Defendants.
_____/

MAYER MORGANROTH (P17966)
JEFFREY B. MORGANROTH (P41670)
JASON R. HIRSCH (P58034)
MORGANROTH & MORGANROTH, PLLC
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_____/

There is another civil action arising out of the same transaction or occurrence as alleged in this Complaint currently pending in the United States District Court for the District of Massachusetts.

COMPLAINT AND JURY DEMAND

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NOW COMES Mayer Morganroth ("Morganroth") as personal representative of the Estate of Dr. Jack Kevorkian (the "Estate"), by and though his attorneys, Morganroth & Morganroth, PLLC, and for his Complaint against Defendants, the Armenian Library and Museum of America, Inc. ("ALMA") and Gary Lind-Sinanian ("Sinanian"), states as follows:

JURISDICTION AND PARTIES

1. Plaintiff, Morganroth, is an attorney licensed to practice in the State of Michigan

2. Morganroth is the personal representative of the Estate.

3. At all times relevant hereto, the late Dr. Jack Kevorkian ("Dr. Kevorkian") was an individual who resided in the City of Royal Oak, County of Oakland, State of Michigan.

4. Defendant, ALMA, is Massachusetts non-profit corporation whose principal place of business is Watertown, Massachusetts.

5. Defendant, Sinania, is the curator of ALMA.

6. The underlying events and occurrences in this matter took place in the County of Oakland, State of Michigan.

7. The damages and harm suffered by the Estate occurred and continue to occur in the County of Oakland, State of Michigan.

8. The amount in controversy is in excess of $75,000, exclusive of interest, costs and attorney fees.

GENERAL ALLEGATIONS

ALMA's Desire to Exhibit the Kevorkian Art Work

9. Dr. Kevorkian was an artist who created a number of creative works including, without limitation, paintings, musical compositions and written works.

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10. In mid-1999, ALMA contacted Dr. Kevorkian and expressed an interest in hosting exhibitions of Dr. Kevorkian's works.

11. Dr. Kevorkian and ALMA agreed that ALMA would host an exhibition (the "Exhibition") of certain of Dr. Kevorkian's works (the "Kevorkian Art Work") to be held in September 1999 at ALMA.

12. On July 27, 1999, Dr. Kevorkian's representative, the Ariana Gallery, entered into a fully integrated agreement with ALMA which set forth the terms and conditions by which ALMA would borrow the Kevorkian Art work for the Exhibition (the "Agreement") (attached hereto as Exh. A).

13. The Agreement was signed by Sinanian, the curator of ALMA, on behalf of ALMA, and by Anne Kuffler ("Kuffler"), on behalf of Ariana Gallery, the representative of Dr. Kevorkian, at the direction of Dr. Kevorkian and his attorney, Morganroth.

14. Pursuant to the terms of the Agreement, ALMA expressly agreed, without limitation, that: (1) it would pick up the Kevorkian Art Work in 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 in the State of Michigan until it was returned to 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."

15. The fully integrated Agreement was executed in the State of Michigan at the time Sinanian was present in the State of Michigan to take custody of the Kevorkian Art Work, pursuant to the terms of the Agreement, and transport the Kevorkian Art Work to ALMA in

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Massachusetts for the Exhibition.

16. ALMA did in fact host the Exhibition beginning in September 1999 for about two months.

17. Dr. Kevorkian permitted ALMA to retain the Kevorkian Art Work following the Exhibition.

18. In October 2008, Dr. Kevorkian consented to a second exhibition of the Kevorkian Art Work by ALMA (the "Second Exhibition").

19. The Second Exhibition took place in October 2008.

20. Dr. Kevorkian passed away on June 3, 2011.

The Estate's Demand for the Return of the Kevorkian Art Work

21. Prior to his death, Dr. Kevorkian executed a Last Will and Testament (the "Will") wherein he bequeathed all of his tangible personal property, including, without limitation, the Kevorkian Art Work, to two heirs, one of whom disclaimed her interest to the sole remaining heir, Ava Janus, Dr. Kevorkian's niece.

22. In accord with Dr. Kevorkian's wishes, as set forth in his Will, Morganroth, as personal representative of the Estate, contacted ALMA on September 23, 2011 and demanded the return of the Kevorkian Art Work, which was now the property of the Estate, and which was to be distributed in accord with the wishes of Dr. Kevorkian as expressed in his Will.

23. Notwithstanding the Estate's proper demand for the return of the Kevorkian Art Work, ALMA expressly refused to return the Kevorkian Art Work and, in direct derogation of the fully integrated Agreement, has falsely asserted that it somehow owns the Kevorkian Art Work.

24. A public auction of Dr. Kevorkian's works is scheduled to take place on October

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27 and 28, 2011 (the "Auction") at substantial cost to the Estate.

25. The Auction was to include the Kevorkian Art Work which ALMA has refused to return to the Estate despite the Estate's demands made for the return of the Kevorkian Art Works.

26. The Estate will suffer substantial harm if the Kevorkian Art Work is not immediately returned because the Kevorkian Art Work, which ALMA has refused to return to the Estate despite the Estate's demands that it do so, will not be available for display and/or sale at the Auction.

COUNT I – BREACH OF CONTRACT BY ALMA

27. Plaintiff hereby incorporates by reference and realleges Paragraphs 1 through 26 of this Complaint as if fully restated herein.

28. Pursuant to the terms of the Agreement, among other things, Dr. Kevorkian agreed to, and did in fact, lend the Kevorkian Art Work to ALMA for the Exhibition and the Second Exhibition, and ALMA agreed that it would return the Kevorkian Art Work upon demand from Dr. Kevorkian.

29. Although the Estate has demanded the return of the Kevorkian Art Work in accord with the terms of the Agreement, ALMA has refused to return the Kevorkian Art Work in derogation of the Agreement.

30. By virtue of the foregoing, ALMA breached its obligations under the Agreement.

31. As a direct, natural, proximate and foreseeable consequence of the foregoing, the Estate has suffered damages for which it is entitled to recover, including, but not, limited to, compensatory damages, consequential damages, interest, costs and attorney fees.

WHEREFORE, Plaintiff requests that this Court: (1) enter an order requiring ALMA to

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specifically perform its obligations under the Agreement and immediately return the Kevorkian Art Work to the Estate; and/or (2) grant the following relief in favor of the Estate and against ALMA:

A. Compensatory damages in an amount in excess of $75,000;

B. Consequential damages in an amount in excess of $75,000;

C. Interest, costs and attorney fees to be assessed; and

D. Such other and further relief as is appropriate or warranted.

COUNT II – PROMISSORY ESTOPPEL AGAINST ALMA

32. Plaintiff hereby incorporates by reference and realleges Paragraphs 1 through 31 of this Complaint as if fully restated herein.

33. On July 27, 1999, ALMA, through its representative, Sinanian, made clear, definite and unambiguous promises and representations that ALMA would return the Kevorkian Art Work upon demand from Dr. Kevorkian.

34. ALMA made the aforementioned promises and representations with the knowledge, understanding and expectation that Dr. Kevorkian would rely thereupon.

35. Dr. Kevorkian did in fact reasonably rely upon the promises and representations of ALMA to his substantial detriment.

36. In reliance upon the promises and representations of ALMA that ALMA would return the Kevorkian Art Work to Dr. Kevorkian upon his demand, Dr. Kevorkian loaned the Kevorkian Art Work to ALMA for the Exhibition and the Second Exhibition with the understanding, belief and expectation and that the Kevorkian Art Work would be returned to him upon his demand, and that he remained the sole and exclusive owner of the Kevorkian Art Work.

37. As a direct, natural, proximate and foreseeable consequence of the foregoing, the

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Estate has suffered damages for which it is entitled to recover, including, but not, limited to, compensatory damages, consequential damages, interest, costs and attorney fees.

WHEREFORE, Plaintiff respectfully requests that judgment be entered against ALMA as follows:

A. Compensatory damages in an amount in excess of $75,000;

B. Consequential damages in an amount in excess of $75,000;

C. Interest, costs and attorney fees; and

D. Such other and further relief as is warranted and appropriate.

COUNT III - CONVERSION BY ALMA

38. Plaintiff hereby incorporates by reference and realleges Paragraphs 1 through 37 of this Complaint as if fully restated herein.

39. Without any right or authorization, ALMA wrongfully appropriated and converted the Kevorkian Art Work without providing any consideration therefor.

40. ALMA has taken a valuable benefit from the Estate valued in excess of $75,000.

41. ALMA has wrongfully exercised dominion and control over the Kevorkian Art Work since the Estate demanded the return of the Kevorkian Art Work in accord with the terms of the Agreement, and ALMA has not provided any consideration therefor to the Estate.

42. The Estate has made repeated demand upon ALMA to return the Kevorkian Art Work, which ALMA has wrongfully retained, to the Estate, but ALMA has failed and refused to do so.

43. By virtue of the foregoing, ALMA's actions constitute acts of conversion in derogation of the Estate's right, title and interest in the Kevorkian Art Work.

44. ALMA intentionally, maliciously and in bad faith converted the valuable

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Kevorkian Art Work for its own use and benefit.

45. By virtue of the intentional, malicious and bad faith acts of conversion perpetrated by ALMA, the Estate is entitled to recover treble damages pursuant to MCL § 600.2919(a), as well as exemplary damages.

46. As a direct, natural, proximate, and foreseeable consequence of the foregoing, the Estate has suffered damages which it is entitled to recover, including, but not limited to, compensatory damages, consequential damages, exemplary damages, treble damages, interest, costs and attorney fees.

WHEREFORE, Plaintiff respectfully requests that judgment be entered against ALMA as follows:

A. Compensatory damages in an amount in excess of $75,000;

B. Consequential damages in an amount in excess of $75,000;

C. Exemplary damages in an amount to be determined;

D. Treble damages pursuant to MCL § 600.2919(a);

E. Cost and attorney fees pursuant to MCL § 600.2919(a);

F. Interest; and

G. Such other and further relief as is warranted and appropriate.

COUNT IV – CLAIM AND DELIVERY PURSUANT TO MCL § 600.2920 AGAINST ALMA WITH RESPECT TO ALMA'S OBLIGATION UNDER THE AGREEMENT TO IMMEDIATELY RETURN THE KEVORKIAN ART WORK UPON DEMAND

47. Plaintiff hereby incorporates by reference and realleges Paragraphs 1 through 46 of this Complaint as if fully restated herein.

48. ALMA has continued to hold the Kevorkian Art Work belonging to the Estate without any right or interest.

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49. Since Dr. Kevorkian's death, the Estate has had full and exclusive ownership, right, title and interest in the Kevorkian Art Work.

50. The Estate has the right to possess the Kevorkian Art Work.

51. The Estate demanded the return of the Kevorkian Art Work on several occasions, including, but not limited to, September 23, 2011 and October 4, 2011.

52. To date, ALMA has refused to return the Kevorkian Art Work, and has affirmatively stated that it will not do so.

53. The Estate is entitled to recover possession of the Kevorkian Art Work which has been unlawfully detained and withheld, and to recover damages sustained by the unlawful detention of the Kevorkian Art Work by ALMA, pursuant to MCL § 600.2920.

WHEREFORE, Plaintiff seeks the following relief against ALMA for claim and delivery of the Kevorkian Art Work:

A. That the Kevorkian Art Work be delivered into the possession of the personal representative of the Estate immediately pursuant to MCL § 600.2920; and

B. Such other relief as this Court deems just and proper.

COUNT V – FRAUD AND MISREPRESENTATION BY SINANIAN AND ALMA

54. Plaintiff hereby incorporates by reference and realleges Paragraphs 1 through 53 of this Complaint as if fully restated herein.

55. ALMA, by and through its representative, Sinanian, made false, malicious and willful misrepresentations to Dr. Kevorkian's representative in order to trick and deceive Dr. Kevorkian to lend the Kevorkian Art Work to ALMA in July 1999.

56. Specifically, on July 27, 1999, ALMA and Sinanian represented that Sinanian was authorized to execute the Agreement in his capacity as curator of ALMA.

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57. Upon information and belief, ALMA and Sinanian now contend that Sinanian was somehow not authorized to execute the Agreement on behalf of ALMA, and therefore ALMA now contends that it is not bound by the express terms of the Agreement.

58. Based upon the current contention by ALMA and Sinanian that Sinanian was somehow not authorized to execute the Agreement, even though he was responsible for the pick-up and transport of the Kevorkian Art Work, the representations made by ALMA and Sinanian in July 1999 were false, and ALMA and Sinanian knew that such statements were false at the time they made them.

59. ALMA and Sinanian never had any intention of returning the Kevorkian Art Work to Dr. Kevorkian upon his demand, and in fact intended to retain the Kevorkian Art Work permanently in clear derogation of the promises and representations made by ALMA and Sinanian.

60. Dr. Kevorkian relied to his detriment upon the false representations made by ALMA and Sinanian.

61. By virtue of the intentional, malicious and willful misconduct of ALMA and Sinanian, the Estate is entitled to recover exemplary damages.

62. As a direct, natural, proximate and foreseeable consequence of the foregoing, the Estate has suffered damages which he is entitled to recover, including, but not limited to, compensatory damages, consequential damages, exemplary damages, interest, costs and attorneys' fees.

WHEREFORE, Plaintiff respectfully requests that judgment be entered against ALMA and Sinanian as follows:

A. Compensatory damages in an amount in excess of $75,000;

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B. Consequential damages in an amount in excess of $75,000;

C. Exemplary damages in an amount to be assessed;

D. Interest, costs and attorney fees; and

E. Such other and further relief as is warranted and appropriate.

DEMAND FOR JURY TRIAL

NOW COMES Plaintiff, by and through his attorneys, and hereby demands a trial by jury in the above entitled matter.

Respectfully submitted,

MORGANROTH & MORGANROTH, PLLC

By: _____

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Dated: October 21, 2011

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EXHIBIT 

Ariana Gallery
119 South Main
Royal Oak
Michigan 48067
Tel: (248) 546-8810
Fax: (248) 546-6194

July 26, 1999

Gary Lind-Sinanian, Curator
Armenian Library and Museum of America, Inc.
65 Main Street
Watertown, MA 02172

Re: Dr. Jack Kevorkian Exhibition

Dear Gary:

1) The opening of the show is scheduled for Saturday, September 18, 1999 and the show will run through the end of October. I will arrive in Boston on Friday, the 17th of September.

2) We anticipate that the paintings will be picked up by you or a member of your staff and driven directly to your gallery/museum in Watertown. ALMA will be responsible for the cost of transportation of the artworks as required to and from Royal Oak, Michigan and Watertown, Massachusetts.

3) From the time that a representative of the Armenian Library and Museum of America, Inc. (which shall be referred to as ALMA for the remainder of this contract) assumes possession of the paintings to their return to us, the paintings must be covered by ALMA's insurance.

4) Dr. Jack Kevorkian hereby warrants that he created and possesses the unencumbered title to any works of art inventoried in ALMA's possession. The Kevorkian artworks are entrusted to ALMA but shall remain the exclusive property of Dr. Kevorkian.

5) ALMA has the right to copy, photograph or reproduce any of Dr. Kevorkian's artworks in its possession for the purpose of appearance in a catalogue or advertisement.

6) We understand that publicity will be arranged as outlined in your letter.

7) ALMA will be entitled to a 20% sales commission on all sales of Dr. Kevorkian's signed and numbered posters and giclee prints during the term of this agreement.

8) Security is a prime concern surrounding Dr. Kevorkian's artwork. A professional security guard must be present for the entire duration of the show with perhaps additional security for the show opening.

9) This agreement constitutes the entire understanding between Dr. Kevorkian and ALMA. Its terms cannot be modified except in writing that is signed by all parties - ALMA, Dr. Kevorkian and/or his attorney Mayer Morganroth.

10) The paintings will be returned upon the request of Dr. Kevorkian at the close of the exhibition at the end of October, or at such further extended date that would be agreeable between the parties, with reasonable time for them to be packaged and prepared for transportation

11) If any part of this agreement is held to be illegal, void or unenforceable for any reason, such holding shall not affect the validity and enforceability of any other part.

Please contact me to confirm the proposals listed above.

Received from:

Ariana Gallery

Ariana Gallery

Date

Delivered to:

Armenian Library & Museum of America, Inc.

27 July 99

Date

ARIANA Gallery Posters

42 ~~150~~ Nearer My God to Thee
49 Away Still Life
30 Fever
30 Brotherhood
45 Gourmet
30 For He Is Raised