

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT CUTLER and NANCY
CUTLER, a married couple; and
ROBERT TICE, an individual,

3:18-cv-01692-BR

OPINION AND ORDER

Plaintiffs,

v.

TYTUS HARKINS, an individual
and citizen of the State of
Montana; JASON WHITE, an
individual and citizen of the
State of Washington; HARTMAN
WRIGHT, LLC, a Georgia Limited
Liability Company; HARTMAN
WRIGHT GROUP, LLC, a Colorado
Limited Liability Company;
HARTMAN WRIGHT PROJECT
MANAGEMENT, a Colorado Limited
Liability Company; PLEASANT
HILL MHP HOLDING, LLC, a
Georgia Limited Liability
Company; KEVIN T. CAIACCIO, a
citizen of the State of
Georgia; the CAIACCIO LAW
FIRM, LLC; and JOHN & JANE
DOES, 1-10, who are either
natural persons or legal
entities which are currently
unknown to the Plaintiffs,

Defendants.

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BROWN, Senior Judge.

This matter comes before the Court on the Second Renewed Motion (#45) to Dismiss for Lack of Personal Jurisdiction filed by Defendants Kevin T. Caiaccio and the Caiaccio Law Firm, LLC (the Caiaccio Defendants). The Court concludes the record is sufficiently developed, and, therefore, oral argument is not required to resolve this Motion.

For the reasons that follow, the Court **GRANTS** Defendants' Motion and dismisses Plaintiffs' claims against the Caiaccio Defendants for lack of personal jurisdiction.

BACKGROUND

The following facts are taken from the Second Amended

Complaint (#13) filed by Plaintiffs Robert Cutler, Nancy Cutler, and Robert Tice; the Motion to Dismiss filed by the Caiaccio Defendants; Plaintiffs' Response (#50); and the accompanying Declarations. The facts are construed in the light most favorable to Plaintiffs for purposes of this Motion. See *Harris Rutsky & Co. Ins. Serv., Inc. v. Bell & Clements LTD*, 328 F.3d 1122, 1129 (9th Cir. 2003).

On September 21, 2018, Plaintiff filed a Complaint (#1) in this Court and alleged two claims for Oregon securities fraud against all Defendants. On January 25, 2019, Plaintiffs filed an Amended Complaint (#8). On February 14, 2019, Plaintiffs filed a Second Amended Complaint (#13) in which they allege a claim of Oregon securities fraud against all Defendants, including the Caiaccio Defendants, and additional claims against the other Defendants that are not alleged against the Caiaccio Defendants.

Plaintiffs are residents of Oregon. The Caiaccio Defendants, consisting of an attorney and his law firm, are residents of Georgia. Defendant Tytus Harkins is a resident of Montana, and Defendant Jason White is a resident of Washington. Plaintiffs allege Harkins and White formed Defendants Hartman Wright, LLC; Hartman Wright Group, LLC; Hartman Wright Project Management; and Pleasant Hill MHP Holding, LLC, in order to

"develop affordable housing development[s] in Georgia and other states."

Between May 2015 and October 2015 Harkins and White sought investors, including Plaintiffs, to invest in "various Hartman Wright entities and projects." Harkins and White told Plaintiffs that they "would be investing in specific properties and that their investment funds would be used for the sole purpose of investing in those specific properties." In addition, they told Plaintiffs that "their funds would be secured by deeds of trust and . . . would only be used for a specific property." Plaintiffs made investments in the Hartman Wright projects in Georgia based on those representations.

Plaintiffs allege the representations of Harkins and White were false and misleading and that Harkins and White "either spent the investment funds for their own purposes or to fund their own projects in which the investors did not have a stake. In addition, to the extent the Hartman Wright Defendants purchased any properties they did so at prices that were either represented to be higher than they actually were or not disclosed to the investors and sold to the investors at vastly inflated prices."

Plaintiffs also allege the Caiaccio Defendants "materially aided and abetted in the sale of securities sold to the

Plaintiffs by doing the work to prepare documents that were critical to the formation of the various entities as well as the sale of actual securities that were sold to the Plaintiffs," "directly or indirectly accepted money from the various investors into [their] office account and/or trust account . . . for the sale of the securities when the investors were not clients" of the Caiaccio Defendants, and "used phones and wire communication to contact the Plaintiffs in the State of Oregon for the purposes of having the Plaintiffs invest in the Hartman Wright securities."

On March 15, 2019, the Caiaccio Defendants filed a Motion (#25) to Dismiss for Lack of Jurisdiction.

On May 1, 2019, the Court denied the Caiaccio Defendants' Motion as premature with leave to renew following completion of jurisdictional discovery.

On July 22, 2019, the Caiaccio Defendants filed a Second Renewed Motion (#45) to Dismiss for Lack of Jurisdiction. On August 26, 2019, the Court took the Second Renewed Motion under advisement.

STANDARDS

The party seeking to invoke the personal jurisdiction of the federal court has the burden to establish jurisdiction

exists. *Melendres v. Maricopa County*, 815 F.3d 645, 649 (9th Cir. 2016) (citing *Data Disc, Inc. v. Sys. Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). When "a defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is appropriate." *Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1141 (9th Cir. 2017) (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004)).

"The court may consider evidence presented in affidavits to assist it in its determination and may order discovery on the jurisdictional issues." *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (citing *Data Disc, Inc. v. Sys. Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). If the court makes a jurisdictional decision based only on pleadings and any affidavits submitted by the parties, "the plaintiff need make only a *prima facie* showing of jurisdictional facts."

Schwarzenegger, 374 F.3d at 800 (citing *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990)). In determining whether the plaintiff has met the *prima facie* showing, the court must assume the truth of uncontroverted allegations in the complaint. *Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287 F.3d 1182, 1187 (9th Cir. 2002). When the court rules on a defendant's motion to dismiss for lack of personal jurisdiction without holding an

evidentiary hearing, the plaintiff's version of the facts, unless directly contravened, is taken as true, and the court must resolve factual conflicts in the parties' affidavits in the plaintiff's favor. *Harris Rutsky & Co. Ins. Serv., Inc. v. Bell & Clements LTD*, 328 F.3d 1122, 1129 (9th Cir. 2003).

DISCUSSION

I. The Court lacks personal jurisdiction over the Caiaccio Defendants.

A. Standards

"Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over [the defendants]." *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014)). "Oregon law authorizes personal jurisdiction over defendants to the full extent permitted by the United States Constitution." *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015) (citation omitted). The court, therefore, must inquire whether its exercise of jurisdiction over the defendants "comports with the limits imposed by federal due process." *Id.*

"Due process requires that the defendant 'have certain minimum contacts' with the forum state 'such that the maintenance of the suit does not offend traditional notions of

fair play and substantial justice.'" *Picot*, 780 F.3d at 1211 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "The strength of contacts required depends on which of the two categories of personal jurisdiction a litigant invokes: specific jurisdiction or general jurisdiction." *Ranza*, 793 F.3d at 1068.

In this case Plaintiffs invoke specific jurisdiction. See Pls.' Opp'n (#50) at 3. The Ninth Circuit employs a three-prong test to determine whether a defendant has sufficient minimum contacts to be subject to specific personal jurisdiction:

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

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

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

Picot, 780 F.3d at 1211 (quoting *Schwarzenegger*, 374 F.3d at 802).

Plaintiffs bear the burden of proving the first two

prongs. *Id.* If the plaintiffs fail “to satisfy either of these prongs, personal jurisdiction is not established in the forum state.” *Morrill*, 873 F.3d at 1142 (citation omitted). If the plaintiffs satisfy both of the first two prongs, the burden shifts to the defendants to “set forth a compelling case that the exercise of jurisdiction would not be reasonable.” *Picot*, 780 F.3d at 1212 (quoting *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1076 (9th Cir. 2011)).

The Ninth Circuit applies a three-part “effects” test to determine whether the court has specific personal jurisdiction over a tort claim. *Picot*, 780 F.3d at 1213-14 (citing *Calder v. Jones*, 465 U.S. 783 (1984)). Pursuant to this test a defendant purposefully directed his activities at the forum if he: “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Id.* at 1214. When applying this test, the court must “look[] to the defendant's contacts with the forum State itself, not the defendant's contacts with the persons who reside there,” and “mere injury to a forum resident is not a sufficient connection to the forum.” *Id.* (citing *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)). “[A]n injury is jurisdictionally relevant insofar as it shows that the defendant has formed a

contact with the forum State." *Id.*

B. Analysis

Plaintiffs allege the Caiaccio Defendants drafted promissory notes, subscription agreements, and deeds that other Defendants used to sell securities in Oregon, and the Caiaccio Defendants acted as the escrow agents for the associated property transactions. Plaintiffs contend the alleged violation of Oregon securities laws by the Caiaccio Defendants is sufficient to satisfy personal jurisdiction requirements. Plaintiffs also contend the Caiaccio Defendants "participated or materially aided" other Defendants in the sale of securities in Oregon and, therefore, the Caiaccio Defendants are jointly liable, which subjects them to the personal jurisdiction of this Court. See Or. R. Civ. P. 4J(2).

The Caiaccio Defendants contend Plaintiffs ignore the issue of jurisdiction. The Caiaccio Defendants note they did not have any business contacts with Oregon, did not prepare any prospectus or investment circulars, and were not involved in the investments. The Caiaccio Defendants also point out that the conduct on which Plaintiffs base their claims against the Caiaccio Defendants (preparing loan documents, being a registered agent, being an attorney, and acting as an escrow officer) all occurred in Georgia rather than Oregon. The

Caiaccio Defendants, therefore, assert there is not any evidence of "continuous and systematic" contacts with Oregon sufficient to invoke specific personal jurisdiction over them.

In *Mann v. St. Laurent* this Court stated:

The requirement of purposeful availment ensures that a defendant cannot be sued in a jurisdiction based on only fortuitous or attenuated contacts with that jurisdiction. A defendant's conduct and connection with the forum state must be such that the defendant can reasonably anticipate being haled into court there. Purposeful availment analysis examines whether the defendant's contacts with the forum are attributable solely to his own actions or are solely the actions of the plaintiff. Therefore, a defendant must have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state.

229 F. Supp. 2d 1133, 1136 (D. Or. 2002) (citations and quotations omitted).

Here the Caiaccio Defendants are a Georgia firm that was retained in Georgia to perform legal services related to real-estate transactions in Georgia. The Caiaccio Defendants admit they prepared documents related to real-estate transactions in Georgia, but there is not any evidence that the Caiaccio Defendants performed any of these services in Oregon.

Although Plaintiffs acknowledge the Caiaccio Defendants did not solicit funds from them and that Plaintiffs never met Defendant Kevin Caiaccio, they point to the wiring

instructions attached as an exhibit to Plaintiffs' Second Amended Complaint as support to their claims. These instructions, however, were directed to Wells Fargo Bank in San Francisco, California, rather than to anyone in Oregon. The Caiaccio Defendants acknowledge they had communications with Plaintiffs by telephone or email in Oregon to confirm receipt of escrow funds and to advise where to send final documents. Nevertheless, the Caiaccio Defendants contend, and this Court agrees, such communications were a *de minimus* part of the transactions.

Even if the minimal contacts in this case were sufficient to establish purposeful availment, the Court concludes the balancing of the other factors that determine whether it is reasonable to exercise personal jurisdiction over the Caiaccio Defendants would establish such exercise of jurisdiction over the Caiaccio Defendants is unreasonable. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985). See also *Collegesource, Inc. v. Academyone, Inc.*, 653 F.3d, 1066, 1079 (9th Cir. 2011).

On this record the Court concludes Plaintiffs have failed to prove the Caiaccio Defendants purposefully directed their activities, consummated transactions, or performed any act in Oregon by which they availed themselves of the privilege of

conducting business in Oregon. Accordingly, this Court concludes it does not have personal jurisdiction over the Caiaccio Defendants.

CONCLUSION

For these reasons, the Court **GRANTS** the Caiaccio Defendants' Second Renewed Motion (#45) to Dismiss and **DISMISSES** Plaintiffs' claims alleged against them.

IT IS SO ORDERED.

DATED this 10th day of September, 2019

/s/ Anna J. Brown

ANNA J. BROWN
United States Senior District Judge