STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2334, A11-2344, A12-0250, A12-2246

Patrick Finn, et al.,
Respondents (A11-2334, A12-0250, A12-2246),
Appellants (A11-2344),

vs.

Walworth State Bank,
Appellant (A11-2334),

American Bank and Trust Company, N.A.,
Respondent (A11-2344),
Cross-Appellant (A12-2246),

Bank of Nevada, et al.
Defendants (A11-2344),

First Bank of Richmond,
Respondent (A11-2344),
Cross-Appellant (A12-2246),

Arvest Bank,
Respondent (A11-2344),

Mercantile Bank,
Appellant (A12-0250),

Community National Bank, et al.,
Appellants (A12-2246).

Filed December 9, 2013
Affirmed in part and reversed in part
Rodenberg, Judge

Dakota County District Court
File No. 19HA-CV-11-2212

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Considered and decided by Smith, Presiding Judge; Ross, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

These consolidated appeals are taken from district court orders granting and denying motions to dismiss, for lack of personal jurisdiction, a receiver's clawback claims against multiple banks that purchased loan participations from a Minnesota entity that has since been determined to have engaged in a massive Ponzi scheme. We conclude

that, through their loan participations, the banks had sufficient minimum contacts with Minnesota to support the exercise of personal jurisdiction and that the exercise of jurisdiction is consistent with traditional notions of fair play and substantial justice. Accordingly, we affirm the denial of motions to dismiss brought by appellants Walworth State Bank, Mercantile Bank, Community National Bank, Unison Bank, American Bank and Trust, and First Bank of Richmond and reverse the grant of respondent Arvest Bank's motion to dismiss.

FACTS

This is the third set of appeals to this court arising from a Ponzi scheme perpetrated by Corey N. Johnston and his company, First United Funding, LLC (First United). *Cmty. First Bank v. First United Funding, LLC*, 822 N.W.2d 306 (Minn. App. 2012); *Finn v. Alliance Bank*, 838 N.W.2d 383, (Minn. App. 2013), *review granted* (Minn. Nov. 13, 2013). First United was a Minnesota limited liability company that officed in Minneapolis and was owned by Johnston, who resided in Lakeville. The scheme involved First United's sale of participations in loans that were, in many cases, oversubscribed or fraudulent. Johnston was charged in federal court with bank fraud and filing a false tax return. *United States v. Johnston*, Criminal No. 10-271, Civil No. 12-152, 2012 WL 2326045, at *1 (D. Minn. June 19, 2012) (denying motion to vacate, set aside, or correct sentence). Johnston pleaded guilty and, in doing so, admitted overselling loans by $79.95 million. *Id.* He is currently serving a six-year prison term. *Id.* at *1-2.

Many of the banks that participated during the early phases of the First United Ponzi scheme were able to recover their investments and make profits, and investors so situated are sometimes referred to as the "winners" in the Ponzi scheme. Banks that have been unable to recoup their investment are referred to as "losers" in the Ponzi scheme. After the First United Ponzi scheme came to light, one of the losing banks successfully sought appointment of Patrick Finn and Lighthouse Management Group, Inc. as receiver for First United.

The first appeal to this court was taken from the district court's approval of the receiver's proposed formula for distribution of funds that it was able to recover. *Cmty. First Bank*, 822 N.W.2d at 310. We affirmed, holding that, "[i]n an equitable proceeding to compensate the victims of a Ponzi scheme, the district court has broad discretion to adopt a method that fairly and reasonably distributes the recovered funds." *Id.* at 307 (syllabus by the court).

Following our decision affirming approval of the distribution formula, the receiver initiated a "clawback" action to recover amounts paid by First United to several banks that had been "winners." Several of the banks brought motions to dismiss and for summary judgment on statute-of-limitations grounds and on the merits. And a number of out-of-state banks moved to dismiss for lack of personal jurisdiction.

The second set of appeals to this court challenged the district court's denial of the winning banks' motions to dismiss on statute-of-limitations grounds, grant of summary judgment to the receiver on its claims against one of the winning banks, and denial of other winning banks' motions to dismiss. We issued a published opinion affirming in

part, reversing in part, and remanding. *Finn*, 838 N.W.2d at 589. We addressed the appropriate statute of limitations for actual- and constructive-fraud claims under the Minnesota Uniform Fraudulent Transfer Act (MUFTA), Minn. Stat. §§ 513.41-.51 (2012), and held that the district court erred by applying the Ponzi scheme presumption to grant summary judgment to one of the banks. *Id.* at 591-92. We remanded for entry of judgment in favor of one of the banks and for further proceedings in the district court to address whether the receiver's actual-fraud claims under the MUFTA are barred by the applicable statute of limitations. *Id.* at 594-95.

In this, the third set of appeals, appellant banks challenge the district court's orders denying their motions to dismiss on personal-jurisdiction grounds. American and Richmond also challenge the district court's grant of reconsideration to consider additional evidence from the receiver after initially granting American's and Richmond's motions to dismiss. By notice of related appeal, the receiver challenges the district court's grant of respondent Arvest Bank's motion to dismiss on personal-jurisdiction grounds.

None of the banks involved in these appeals has any connections to Minnesota other than their participations in the First United loans. Each of the banks purchased at least one loan participation from First United. Several of the participation agreements included choice-of-law provisions designating Minnesota as the governing law.

Under the terms of the participation agreements, which are form documents, First United agreed to "sell" and the banks agreed to "purchase" interests in loans purportedly made by First United. The banks agreed to deposit the amounts of their participations in

First United's "settlement account at Wells Fargo Bank Minnesota, National Association, in federal funds or other funds current in Minneapolis, Minnesota." The banks also agreed that First United would be named as the nominal payee of the loans and would act as an "agent" for the banks in the holding and disposition of the collateral. First United agreed to act as servicer of each loan and to "promptly account for and pay to Participant, by wire to Participant, Participant's portion of any and all such Collections on funds current in Minneapolis, Minnesota." The banks agreed to disgorge any payments received should First United be required to refund payments because of a bankruptcy.

Consistent with the terms of the participation agreements, each bank wired funds in the amounts of their participation(s), in most cases to First United, but in some cases directly to the borrower. First United collected funds paid by the borrowers and distributed those payments or otherwise paid amounts owed to the banks over periods ranging from 15 to 40 months. The specific facts relative to each bank and the district court's analysis as to each bank are summarized and discussed below.

Walworth State Bank

Walworth's principal office is located in Walworth, Wisconsin. Walworth entered into a single participation agreement with First United: a March 27, 2002 40.9% ($1.25 million) participation in a $3.06 million loan to Steven M. Ellman. The participation agreement included a Minnesota choice-of-law provision. Walworth officer Robert Klockers testified by affidavit that Walworth did not solicit the participation and that no Walworth representative travelled to Minnesota in connection with the transaction.

According to the receiver, Walworth wired $1.25 million to First United on March 28, 2002 and received 28 wire transfers from First United between May 1, 2002 and July 8, 2005. In total, Walworth received $1,554,341 in payments from First United, $304,341 of which was profit on its $1.25 million investment.

The district court noted that Walworth's sole contact with Minnesota was the participation agreement and that Walworth did not solicit that transaction. The district court nevertheless concluded that the receiver had "made a prima facie showing" of jurisdiction, reasoning that,

> [t]aken together, the five *Int'l Shoe*[[1]] factors render doubtful the question of whether Walworth purposefully availed itself of the benefits and protections of Minnesota when entering into the participation agreements with [First United] or Johnston. As indicated above, in doubtful cases, courts should lean toward finding jurisdiction. The presence of a Minnesota choice-of-law provision in Walworth's participation agreement, in conjunction with the direct connection between the cause of action and Walworth's contacts with Minnesota, and Minnesota's interest in upholding its own law militate in favor of exercising personal jurisdiction over Walworth. Additionally, because Wisconsin is relatively proximate to Minnesota, the burden placed on Walworth by being brought under Minnesota's jurisdiction is neither unfair nor unjust and comports with Minnesota's long-arm statute.

Arvest Bank

Arvest, an Arkansas state-chartered bank, has its principal offices located in Fayetteville, Arkansas. It has banking locations in Arkansas, Missouri, Oklahoma, and Kansas. Arvest is the successor in interest to Caney Valley National Bank (Caney),

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[1] *Int'l Shoe Co. v. Washington*, 326 U.S. 3310, 66 S. Ct. 154 (1945) is the seminal case concerning the exercise by a state of personal jurisdiction over a nonresident of that state.

which entered into a November 14, 2003 participation agreement with First United. The agreement reflects a 10% participation ($500,000) in a $5 million loan to Jerry and Vickie Moyes. The agreement includes a Minnesota choice-of-law provision. Arvest Community President Don Collier testified by affidavit that the loan documents were executed by a representative of Caney in Kansas.

According to the receiver, Caney wired $500,000 in connection with the participation agreement to First United in Minnesota on November 14, 2003 and received 16 wire transfers from First United's Minneapolis bank account between December 18, 2003 and February 15, 2005. In total, Caney received $538,104.16 in payments from First United, $38,104.16 of which was profit on its $500,000 investment.

The district court concluded that it did not have personal jurisdiction over Arvest because Arvest's "single contact, its attenuated nature, [and] the absence of any forum-selection clause or choice-of-law provision naming Minnesota, and the inconvenience to Arvest Bank all militate against personal exercising jurisdiction over Arvest Bank." The district court was mistaken, however, about the absence of a choice-of-law provision.[2]

Mercantile Bank

Mercantile, an Illinois banking corporation, has its principal place of business in Quincy, Illinois, with eight branches—four in Illinois, three in Missouri, and one in Indiana. Mercantile entered into a participation agreement with First United on

[2] At oral argument, counsel for Arvest asserted that the receiver did not argue Arvest's choice-of-law provision to the district court and that it was not part of the record before this court. Our review of the record satisfies us that the receiver both submitted and argued the provision to the district court in opposing Arvest's motion to dismiss.

December 17, 2003, purchasing a 100% interest in a $5 million loan to Jerry and Vickie Moyes, and a first amendment to that agreement on December 15, 2005. Both the 2003 participation agreement and the 2005 first amendment contained Minnesota choice-of-law provisions. Former Mercantile Bank Vice President Terry L. Embry testified by affidavit that Mercantile did not seek out or solicit the participation and that no representative of Mercantile attended any meetings in Minnesota concerning the transaction.

According to the receiver, Mercantile wired $5 million directly to the borrowers in connection with the participation, and received 45 wire transfers from First United's Minneapolis banking account between February 19, 2004 and May 9, 2007. In total, Mercantile received $6,390,935.40 in payments from First United, $1,390,935.40 of which was profit on its $5 million investment.[3]

In denying Mercantile's motion to dismiss for lack of personal jurisdiction, the district court noted that Mercantile had no contacts with Minnesota other than the 2003 participation agreement and its amendment. Nevertheless, relying in part on the choice-of-law provisions in the agreement and amendment, the district court concluded that the receiver had made a prima facie showing of personal jurisdiction:

> The presence of a Minnesota choice-of-law provision in Mercantile Bank's participation agreement, in conjunction with the direct connection between the cause of action and Mercantile Bank's contacts with Minnesota, and Minnesota's

[3] The receiver's appendix recites a total investment and total receipts regarding this participation which are inconsistent with the amounts recited in the receiver's briefing. Our analysis is not altered by the difference between the appendix and the briefing and we need not determine which amounts are correct.

> interest in upholding its own law militate in favor of exercising personal jurisdiction over Mercantile Bank. Additionally, although Mercantile Bank is a smaller institution, it is nevertheless a bank with significant assets. As a result, the burden placed on Mercantile Bank by being brought under Minnesota's jurisdiction is neither unfair nor unjust and comports with Minnesota's long-arm statute.

American Bank and Trust Company, N.A.

American's principal place of business and home office is in Davenport, Iowa. The record is not well developed with respect to American's participation agreement(s) with the receiver. The complaint alleges, upon information and belief, five agreements: (1) a $3.2 million participation interest in a loan involving Steve Ellman on or around March 11, 2002; (2) a $4.06 million participation interest in a loan involving Interstate Equipment Leasing, with transfers on or around August 15, 2002 and September 3, 2002; (3) a participation interest in a fictional loan involving Moyes Children's Limited Partnership; (4) a $2.766 million participation interest in a loan involving Jerry and Vickie Moyes, with transfers on or around November 6, 2003 and May 3, 2004; and (5) a $1.5 million participation interest or an increase to its primary participation interest in a loan involving Jerry and Vickie Moyes on or around October 4, 2004. The record contains only one copy of a participation agreement between First United and American. That agreement, which is not signed by Johnston or a representative for American, reflects a September 29, 2004 100% interest in a $5.5 million loan to Moyes Children's Limited Partnership and includes a Minnesota choice-of-law provision.[4] Andrew V.

[4] American asserts that the district court erred in relying on an unsigned copy of the agreement to determine that personal jurisdiction exists over American. But "[a]t the

Herrera, an executive vice president for American, testified by affidavit that, "[t]o the best of [his] knowledge and belief, American Bank did not seek out the investment at issue in this litigation." Hererra further averred that no American representative entered Minnesota to negotiate the transactions.

According to the receiver, American wired a total of $15,466,000 to First United and received at least 97 wire transfers from First United's Minneapolis banking account between October 17, 2002 and June 10, 2005. In total, American received $17,113,080 in payments from First United, $1,647,080 of which was profit on its $15,466,000 investment.

The district court initially granted American's motion to dismiss for lack of personal jurisdiction. The district court noted that American's only contact with Minnesota was the five participation agreements that it entered into with First United and that American did not solicit these transactions. The district court concluded that the receiver had not made a prima facie showing of personal jurisdiction:

> Taken together, the five *Int'l Shoe* factors indicate that American Bank did not purposefully avail itself of the benefits and protections of Minnesota when entering into the participation agreements with [First United] or Johnston. The limited number of contacts, their attenuated nature, the absence of any forum selection clause or choice-of-law provision naming Minnesota, and the inconvenience to American Bank all militate against exercising personal jurisdiction over American Bank.

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pretrial stage, a plaintiff need only make a prima facie showing of jurisdiction, and the complaint and supporting evidence will be taken as true." *C.H. Robinson Worldwide, Inc. v. FLS Transp., Inc.*, 772 N.W.2d 528, 533 (Minn. App. 2009).

Neither American nor the receiver had submitted copies of any of the alleged participation agreements between American and First United to the district court at the time that it initially ruled on Richmond's motion to dismiss. The receiver sought reconsideration after locating the unsigned agreement. The district court granted the motion for reconsideration and reversed its earlier dismissal of the claims against American. The district court reasoned that the existence of the choice-of-law provision rendered the second *Int'l Shoe* factor—the nature and quality of the contacts—"neutral." The district court concluded that, "[t]aken together," the *Int'l Shoe* factors "render doubtful the question of whether American Bank purposefully availed itself of the benefits and protections of Minnesota law when entering into the participation agreements" and that the receiver had therefore made a prima facie showing of personal jurisdiction.

First Bank of Richmond

All of Richmond's offices and banking locations are located in Indiana, and its principal place of business and home office is located in Richmond, Indiana. Richmond entered into a participation agreement with First United on July 26, 2004, purchasing a 20% ($1 million) interest in a $5 million loan to Jerry and Vickie Moyes. The participation agreement includes a Minnesota choice-of-law provision. Joseph Chamness, senior vice president and chief lending officer for Richmond, testified by affidavit that "Richmond did not seek out or solicit" its investment with First United.

According to the receiver, Richmond wired $2 million to First United on July 27, 2004 and received 26 payments from First United's Minneapolis banking account

between September 10, 2004 and November 24, 2006. In total, Richmond received $2,390,075 in payments from First United, $390,075 of which was profit on its $2 million investment.

The district court initially granted Richmond's motion to dismiss for lack of personal jurisdiction. The district court noted that Richmond's only contact with Minnesota was the single participation agreement that it had entered into with First United and that Richmond did not solicit that transaction. The district court concluded that the receiver had not made a prima facie showing of personal jurisdiction:

> Taken together, the five *Int'l Shoe* factors indicate that Richmond did not purposefully avail itself of the benefits and protections of Minnesota when entering into the participation agreements with [First United] or Johnston. The limited number of contacts, their attenuated nature, the absence of any forum-selection clause or choice-of-law provision naming Minnesota, and the inconvenience to Richmond all militate against exercising personal jurisdiction over Richmond.

Neither Richmond nor the receiver had submitted a copy of Richmond's participation agreement to the district court at the time that it initially ruled on Richmond's motion to dismiss. The receiver sought reconsideration after locating a partially executed copy of the agreement in First United's records, and Richmond subsequently produced a fully executed version of the agreement. The district court granted the motion for reconsideration and reversed its earlier dismissal of the claims against Richmond. The district court reasoned that the existence of the choice-of-law provision rendered the second *Int'l Shoe* factor—the nature and quality of the contacts—"neutral." And the district court concluded that, "[t]aken together," the *Int'l Shoe* factors

"render doubtful the question of whether Richmond purposefully availed itself of the benefits and protections of Minnesota when entering into the participation agreements" and that the receiver had therefore made a prima facie showing of personal jurisdiction.

Community National Bank

Community is a national bank with its registered address in Waterloo, Iowa, and with all of its banking locations in Iowa. Community entered into three separate participation agreements with First United: (1) an August 7, 2003 participation agreement, purchasing a $2 million interest in a $5 million loan to Jerry and Vickie Moyes; (2) a September 2003 participation agreement, reflecting an unspecified participation in a $5 million loan to Moyes Children's Limited Partnership; and (3) an April 27, 2005 agreement, reflecting a $3 million interest in the $5 million loan to the Moyes Children's Limited Partnership. All three participation agreements included Illinois choice-of-law provisions.[5] Community's assistant vice president of commercial lending, Rhonda J. Hinton, testified by affidavit that Community did not seek out the participation and that no representative of Community traveled to Minnesota in relation to the transaction.

According to the receiver, Community wired First United in Minnesota $2 million on August 7, 2003; $1 million on September 24, 2003; and $2 million on April 29, 2005 and received 95 wire transfers from First United's Minneapolis banking account between

[5] We find no explanation in the record for the choice of Illinois law in some of the participation agreements. In briefing to the district court, the receiver argued that it was an oversight.

August 7, 2003 and May 9, 2007. In total, Community received $6,243,238 in payments from First United, $1,243,238 of which was profit on its $5 million investment.

Community, after some discovery, moved to dismiss for lack of personal jurisdiction. In denying the motion, the district court acknowledged that Community "does not maintain a presence in Minnesota," but nevertheless concluded that personal jurisdiction exists as to Community. The district court explained that

> Community entered into three participation agreements with [First United], which it knew to be a Minnesota LLC. These participation agreements contemplated a regular and ongoing relationship with [First United] in Minnesota with multiple actions and communications in and with Minnesota entities. During deposition, Community admitted that it contemplated substantial and ongoing contacts with Minnesota and that it appointed [First United] as its agency with the understanding that [First United] would perform multiple actions on its behalf in Minnesota. . . . Community's relationship with [First United] involved regular contacts with Minnesota over a four-year period.

Unison Bank

Unison is a national bank with its registered address in Jamestown, North Dakota. In addition to its presence in North Dakota, Unison has locations in Arizona. Unison is the successor in interest to Stutsman County State Bank (Stutsman), which entered into a single participation agreement with First United. The January 30, 2005 participation agreement reflects a 10% ($500,000) participation in a $5 million loan to Jerry and Vickie Moyes. Kelly Rachel, senior vice president and chief loan officer for Unison, testified by affidavit that Johnston initiated the relationship between First United and

Stutsman and that she handled the account. She further averred that she had attempted to visit Johnston in Minnesota but was never able to do so.

According to the receiver, Unison wired $500,000 to First United in Minnesota on January 30, 2003 and received 32 wire transfers from First United between March 10, 2003 and April 4, 2006. In total, Unison received $630,958 in payments from First United, $130,958 of which was profit on its $500,000 investment.

Unison, after some discovery, moved to dismiss for lack of personal jurisdiction. Acknowledging that the participation agreement with First United was Unison's only contact with Minnesota, the district court reasoned that, "[w]hile one participation agreement does not on its face appear to be much, the court must consider all of the conduct associated with the agreement." The district court explained:

> Unison admitted during deposition that it contemplated substantial and ongoing contacts with Minnesota. Through the participation agreement, the parties contemplated a regular and ongoing relationship with [First United] in Minnesota with multiple actions and communications in and with Minnesota entities. The participation agreement was with a Minnesota LLC. Further, Unison admitted that it appointed [First United] as their agent in Minnesota, with the understanding that FUF would perform multiple actions on their behalf in the State of Minnesota. . . . Unison's relationship with FUF involved regular contacts with Minnesota over a three-year period.

D E C I S I O N

This litigation has raised many complex issues, some of which we have addressed in our earlier opinions. But the focus of these appeals is narrow. We are asked to decide just two issues: (1) whether the district court abused its discretion by granting the

receiver's motion for reconsideration with respect to American and Richmond's motion to dismiss and (2) whether the district court erred by concluding that it has personal jurisdiction over appellant banks but not over respondent Arvest. We address each issue in turn.

I.

We first address the arguments of American and Richmond that the district court erred by granting the receiver's motion for reconsideration of its jurisdictional rulings in relation to those two banks. Our review is for abuse of discretion. *See In re Welfare of S.M.E.*, 725 N.W.2d 740, 743 (Minn. 2007) (observing that motions for reconsideration "are considered only at the district court's discretion"); *Peterson v. Hinz*, 605 N.W.2d 414, 417-18 (Minn. App. 2000) (holding that district court did not abuse its discretion by allowing motion to reconsider and reversing its earlier order imposing sanctions). "Motions to reconsider are prohibited except by express permission of the court, which will be granted only upon a showing of compelling circumstances." Minn. R. Gen. Pract. 115.11. The district court determined that compelling circumstances exist under the unique facts in this case, including the sheer volume of documents obtained by the receiver from First United and the fact that American and Richmond did not produce copies of their participation agreements from their own records before the hearing on the motions to dismiss.

American and Richmond rely on the advisory committee comments to rule 115.11 to argue that, because the receiver's request for reconsideration was not based on a change in the law or a palpable error, the district court erred by granting reconsideration.

See id., 1997 advisory comm. cmt. (suggesting that reconsideration may be appropriate when there is an intervening legal development or when a decision is "palpably wrong in some respect"). The comments, however, are not binding on the court. *See Vandenheuvel v. Wagner*, 690 N.W.2d 753, 756 (Minn. 2005) (explaining that "committee comments are included for convenience and are not binding on the court").

Rule 115.11 does not further define "compelling circumstances" and does not otherwise limit the circumstances under which a district court may determine that reconsideration is warranted. Exercising its discretion, the district court here permitted consideration of documents that were not submitted earlier, reasoning that the large volume of documents involved in this litigation warranted reconsideration. The district court was much better situated than are we to determine the diligence of counsel in such a matter. We conclude that the district court did not abuse its discretion by granting the receiver's motion for reconsideration.[6]

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[6] Although the district court did not rely on it as a basis for reconsideration, we also note that the district court's initial order appears to have wrongly determined that American's participation agreements did not contain a choice-of-law provision. In its order granting American's motion to dismiss, the district court noted American's argument that "the participation agreements between [First United] and American Bank contain no forum-selection clause or choice-of-law provision naming Minnesota courts or Minnesota law." American actually noted in its reply brief in support of its motion to dismiss that the receiver had "*not identified* any such 'choice-of-law' or 'forum-selection' clauses in any participation agreement between American Bank and [First United]." (Emphasis added.) Later in its order, the district court unequivocally stated that "Minnesota law was not specified as governing the participation agreements between [First United]and American Bank." Because there was no copy of an American participation agreement before the court at the time, the determination that American's agreement did not contain a choice-of-law clause was incorrect and this also supports the district court's decision to reconsider.

We further observe that American and Richmond fail to identify any legal prejudice stemming from the district court's decision to reconsider the jurisdiction issue on a fuller record. American and Richmond do not challenge the relevance of the choice-of-law provisions to the determination of personal jurisdiction, nor do they cite any authority for the proposition that they were entitled to have the jurisdiction issue decided on a limited record. Moreover, as we explain further below, although the exercise of personal jurisdiction is supported by the existence of Minnesota choice-of-law provisions in some of the agreements, the provisions are not necessary to our determination that personal jurisdiction may be exercised over each bank. Thus, even if we were to conclude that the district court abused its discretion by allowing reconsideration, reversal would not be warranted. *See* Minn. R. Civ. P. 61 (precluding reversal based on errors that do not affect "substantial rights of the parties").

II.

We next address the jurisdiction question on the merits. The existence of personal jurisdiction is a determination of law subject to de novo review. *Juelich v. Yamazaki Optonics Corp.*, 682 N.W.2d 565, 569 (Minn. 2004). Once a defendant has challenged the existence of personal jurisdiction, the plaintiff has the burden to show that the defendant has sufficient contacts with Minnesota to support the district court's exercise of jurisdiction. *Id.* at 569-70. At the pretrial stage, plaintiff's allegations are taken as true for the purposes of determining jurisdiction. *Id.* at 570. Any doubts about jurisdiction should be "resolved in favor of retention of jurisdiction." *Hardrives, Inc. v. City of LaCrosse, Wis.*, 307 Minn. 290, 296, 240 N.W.2d 814, 818 (1976).

In order to be exercised, personal jurisdiction must be both authorized under Minnesota law and consistent with the Due Process Clause of the United States Constitution. *Domtar, Inc. v. Niagara Fire Ins. Co.*, 533 N.W.2d 25, 29 (Minn. 1995). Because Minnesota's long-arm statute is intended to extend jurisdiction to the maximum limits permitted by due process, however, the due process analysis is generally determinative of personal jurisdiction. *See Franklin Mfg. Co. v. Union Pac. R.R. Co.*, 297 Minn. 181, 183, 210 N.W.2d 227, 229 (1973) (explaining that the "crucial issue" is whether assertion of jurisdiction is consistent with due process).

"Due process requires that the defendant have 'certain minimum contacts' with the forum state and that the exercise of jurisdiction over the defendant does not offend 'traditional notions of fair play and substantial justice.'" *Juelich*, 682 N.W.2d at 570 (footnote omitted) (quoting *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 618, 110 S. Ct. 2105, 2114 (1990)). "The nature and quality of the requisite contacts varies depending on whether the type of jurisdiction being asserted is general or specific." *Id.* at 570 n.3. General personal jurisdiction is proper based on a "nonresident defendant's" continuous and systematic contacts with the forum state, even if the contacts are not connected to the particular cause of action asserted. *Id.* "Specific personal jurisdiction exists when the defendant's contacts with the forum state are limited, yet connected with the plaintiff's claim such that the claim arises out of or relates to the defendant's contacts with the forum." *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 2182 (1985); *Helicopteros Nacionales v. Hall*, 466 U.S. 408, 414, 104 S. Ct.

1868, 1872 (1984) (other citation omitted)). In this case, the receiver asserts that specific personal jurisdiction exists over each bank.

Minnesota courts apply a five-factor test to determine whether the exercise of jurisdiction is consistent with due process, evaluating (1) the quantity of contacts with Minnesota; (2) the nature and quality of these contacts; (3) the connection of the cause of action with these contacts; (4) the interest of the state in providing a forum; and (5) the convenience of the parties. *Id.* at 570. "The first three factors determine whether minimum contacts exist and the last two factors determine whether the exercise of jurisdiction is reasonable according to traditional notions of fair play and substantial justice." *Id.* "The first three factors are the primary factors, with the last two deserving lesser consideration." *Dent-Air, Inc. v. Beech Mountain Air. Serv., Inc.*, 332 N.W.2d 904, 907 (Minn. 1983). "The sufficiency of a defendant's contacts with the state must be determined on a case-by-case basis after considering [these foregoing] factors." *Brown Cnty. Family Serv. Ctr. v. Miner*, 419 N.W.2d 117, 119 (Minn. App. 1988).

Quantity of contacts

The quantity-of-contacts factor does not require us to quantify a precise number of contacts with the state of Minnesota, but rather to evaluate in general terms the amount of contact that the banks have had with Minnesota. *See Marquette Nat'l Bank v. Norris*, 270 N.W.2d 290, 295 (Minn. 1978) (declining in single-transaction case to "artificially count[] the number of telephone or mail exchanges required to complete the transaction"); *Hardrives*, 307 Minn. at 294-95, 240 N.W.2d at 817 (characterizing the

contacts as "fairly frequent and regular in occurrence" but acknowledging that the complaint does not identify a precise number).

Five of the banks—Walworth, Arvest, Mercantile, Richmond, and Unison—entered into a single loan-participation agreement with First United and have no other contacts with Minnesota. Community entered into two loan-participation agreements and has no other Minnesota contacts. And American is alleged to have entered into five such agreements, with no other Minnesota contacts. This quantity of contacts is "not great." *Marquette Nat'l Bank*, 270 N.W.2d at 295. But even a single transaction may be sufficient to justify the exercise of jurisdiction if the nature and quality of the contacts is sufficient. *Id.* Accordingly, we turn to that factor.

Nature and quality of contacts

"In reviewing the nature and quality of the contacts, we are attempting to ascertain whether the nonresidents 'purposefully availed' themselves of the benefits and protections of Minnesota law." *Dent-Air*, 332 N.W.2d at 907. It is axiomatic that "[m]erely entering into a contract with a forum resident does not provide the requisite contacts between a [nonresident] defendant and the forum state. *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 603 F.2d 1301, 1303 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980). The United States Supreme Court has explained that a

> contract is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction. It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in

> determining whether the defendant purposefully established minimum contacts with the forum.

Burger King, 471 U.S. at 479, 105 S. Ct. at 2185-86. Thus, "[i]n breach of contract cases, courts assess the purposeful availment component of personal jurisdiction by considering (1) prior negotiations; (2) contemplated future consequences, (3) the terms of the contract, and (4) the parties' actual course of dealing." *St. Paul Fire & Marine Ins. Co. v. Courtney Enters. Inc.*, 108 F. Supp. 2d 1057, 1060-61 (D. Minn. 2000), *aff'd*, (270 F.3d 621 (8th Cir. 2001).

The contracts at issue here relate to loan participations. "A loan participation is a common banking practice in which a bank participant provides funds to a lender, which then lends the funds to a borrower." *Cmty. First Bank*, 822 N.W.2d at 308. One commentator describes participation agreements as "simultaneously an assignment of an interest in an intangible right, a contract that prescribes duties of servicing the loan, and a document that creates an agency." Patrick J. Ledwidge, *Loan Participations Among Commercial Banks*, 51 Tenn. L. Rev. 519, 520 (1984). By their very nature, the loan participations in this case anticipated an ongoing relationship between First United and the participating banks. The banks would initially fund their participations by transferring money to First United or directly to the borrower on arrangements made by First United. First United would then receive principal and interest payments over the life of the loans and distribute the payments received pursuant to the participation agreements.

We conclude that the nature and quality of the contacts between First United and the banks is sufficient to support Minnesota's exercise of jurisdiction over the banks. Each of the banks had an ongoing relationship with First United over a period of at least 15 months. During that time, the participation agreements specifically provided for First United's performance of its obligations under the contract in Minnesota and First United did in fact perform its obligations in Minnesota. This fact distinguishes this case from the isolated-transaction cases on which some of the banks rely. *See, e.g.*, *Digi-Tel Holdings, Inc. v. Proteq Telecomms., Ltd.*, 89 F.3d 519, 521, 523 (8th Cir. 1996) (concluding that jurisdiction did not exist over Singapore company that sold products to Minnesota company, in part because products were delivered F.O.B. Singapore and no performance was required in Minnesota); *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 655 (8th Cir. 1982) (explaining in sale-of-goods case that party's "*unilateral* performance of contract in forum state was not enough to support jurisdiction" (emphasis added); *Walker Mgmt., Inc. v. FHC Enters., Inc.*, 446 N.W.2d 913, 915-16 (Minn. App. 1989) (concluding that jurisdiction did not exist over Illinois resident when Minnesota plaintiff went to Illinois to solicit and negotiate consulting-services contract, "particularly when all of [plaintiff's] services were to be performed in the Chicago area"), *review denied* (Minn. Dec. 15, 1989).

Our conclusion that sufficient minimum contacts exist is also supported by the loan-servicing activities that were contemplated by the agreements and actually performed by First United on behalf of the banks. By the express terms of the participation agreements, each of the banks appointed First United as its agent for

purposes of servicing the loans. As such, First United's activities in servicing the loans created contacts with Minnesota that amounted to a Minnesota agent purposefully acting on behalf of the nonresident banks. *See, e.g.*, *Digi-Tel Holdings*, 89 F.3d at 523-24 (explaining that "[i]n determining whether 'minimum contacts' exist, contacts with the forum state that are made *on behalf of* the defendant by others may be considered" if the defendant "'acted purposefully in directing those activities'" (quoting *Burger King*, 471 U.S. at 479 n.22, 105 S. Ct. 2186 n.22)).

In its initial jurisdiction order, the district court reasoned that servicing the loan did not make First United the banks' agent, relying on *NFD, Inc. v. Stratford Leasing Co.* for the proposition that a plaintiff must "demonstrate specific facts constituting an agency relationship sufficient to allow a court to exercise personal jurisdiction." 433 N.W.2d 905, 910 (Minn. App. 1988), *review granted* (Minn. Feb. 10, 1989), *and appeal dismissed* (Minn. Sept. 8, 1989). In *NFD*, the plaintiff alleged no more than a third-party's representation that it was acting as an agent of the out-of-state defendant. *Id.* This case is readily distinguishable from *NFD*. The participation agreements here expressly provided that First United would act as the banks' agent, and First United did so act.

Although at least two of the banks—Community and Unison—concede that First United acted as their agent, other banks dispute whether First United was actually their agent. These banks argue that they did not exercise control over First United in relation to servicing the loan, relying on Minnesota caselaw identifying right of control as an element of agency. *See, e.g.*, *Jurek v. Thompson*, 308 Minn. 191, 198-99, 241 N.W.2d

788, 791-92 (1976). As that caselaw makes clear, however, it is the principal's *right* of control, rather than its exercise, that determines whether there is an agency. *Id.* at 200-01, 241 N.W.2d at 793 (holding that jury could not have properly found agency because there was no evidence of "right of control"). Moreover, control may be exercised before the agent acts. Restatement (Second) of Agency § 14 cmt. a (1958); *see also Jurek*, 308 Minn. at 198-200, 241 N.W.2d at 791-92 (citing this section). Here, the banks exercised control over First United through the terms of the participation agreements.

Some of the banks also argue that First United's conduct cannot be imputed to them because it was not their general agent. *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977). But the Ninth Circuit in *Wells Fargo* addressed two separate arguments: (1) whether a subsidiary's contacts with the forum state on behalf of its foreign parent company could be imputed to the parent company for purposes of jurisdiction and (2) whether the subsidiary was the parent's general agent, such that the parent was "present" in the forum and thus subject to jurisdiction. *Id.* at 419-20, 422-24. *Wells Fargo* does not hold that only a general agent's activities can be imputed to its principal.

The banks argue that Minnesota cannot constitutionally subject them to jurisdiction because they were not the "aggressors" in their transactions with First United. They rely on caselaw holding that the "aggressor"—the party who solicits or takes more initiative in a transaction—is often subject to jurisdiction in the state of "residency of" the other party to the transaction. *See Dent-Air*, 332 N.W.2d at 907-08 (explaining the "aggressor" analysis). But nothing in this caselaw requires that a party be an "aggressor"

if there are other facts supporting the exercise of jurisdiction. The "aggressor" analysis is not helpful here because in this case there is no indication that either First United or the banks were dominant in the transactions. Although it appears that First United initially solicited the banks' participation in the loans, that conduct is not sufficient to render it an "aggressor" in the transaction. *Cf. id.* at 908 ("Mere inquiry by a prospective buyer or seller, without more, will not sustain jurisdiction."). Moreover, there is no allegation that First United or any employees or officers of the nonresident banks in this case traveled out of state or otherwise pursued the transaction in a manner that would enable us to identify an "aggressor" in the transactions. Attempting to identify an "aggressor" here is of no significant help in assessing the personal-jurisdiction question presented. For these reasons, we reject the banks' "aggressor" arguments.

Further support for the exercise of personal jurisdiction can be found in the existence of Minnesota choice-of-law provisions in agreements executed by five of the banks—Walworth, Arvest, Mercantile, American, and Richmond. Although neither necessary to nor dispositive of the personal-jurisdiction question, these provisions support our determination that personal jurisdiction may be exercised over banks that had the provisions in their participation agreements. *See Burger King*, 471 U.S. at 482, 105 S. Ct. at 2187 (explaining that choice-of-law provision standing alone is "insufficient to confer jurisdiction" but is appropriately considered in combination with other facts regarding the defendant's relationship to the forum state); *see also Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc.*, 65 F.3d 1427, 1434 (8th Cir. 1995) ("The choice-of-law clause, like the mail and telephone contacts, is insufficient standing alone to

confer jurisdiction. However, when these contacts are combined with the other factors, they become wholly relevant and significant.”).[7]

A number of the banks argue that the district court erred by placing dispositive weight on the Minnesota choice-of-law provisions in their agreements. And Community and Unison argue that the district court erred by concluding that they were subject to personal jurisdiction in spite of the fact that their agreements contained Illinois choice-of-law provisions. We are not persuaded that the district court gave inappropriate weight to the choice-of-law provisions or to the absence thereof. Rather, it appears that the district court, consistent with *Burger King*, considered the choice-of-law provisions in combination with the banks’ other contacts with Minnesota. And we agree with the district court that the quality and nature of Community’s and Unison’s contacts with Minnesota are sufficient to support personal jurisdiction, notwithstanding the Illinois choice-of-law provisions in their participation agreements.

In sum, under the totality of the circumstances in this case, we conclude that each of the banks had sufficient minimum contacts with Minnesota to support the existence of personal jurisdiction. *See, e.g.*, *K-Tel Int’l, Inc. v. Tristar Prods., Inc.*, 169 F. Supp. 2d 1033, 1041 (D. Minn. 2011) (concluding that personal jurisdiction existed over party that entered into a contract with a Minnesota entity based in part on facts that contract

[7] We note that, in this respect, the holding in *Burger King* (1985) effectively overrules our supreme court’s reasoning in *Dent-Air* (1983) that a choice-of-law clause was not “an important qualitative factor” because the parties could have “contractually consented to personal jurisdiction in Minnesota.” 332 N.W.2d at 908. We also reject as contrary to *Burger King* the Sixth Circuit’s analysis in *Calphalon Corp. v. Rowlette*, 228 F.3d 718 (6th Cir. 2000), which has been cited by some of the banks.

required "on-going duties from both of the parties" and payments were wired to and from Minnesota entity's Minneapolis office); *St. Paul Fire & Marine Ins. Co.*, 108 F. Supp. 2d at 1061-62 (concluding that personal jurisdiction existed based on contracts that anticipated ongoing relationships with Minnesota entity and included Minnesota choice-of-law clauses).

Connection of contacts to cause of action

"Specific personal jurisdiction, unlike general jurisdiction, requires a relationship between the forum, the cause of action, and the defendant." *Myers v. Casino Queen, Inc.*, 689 F.3d 904, 912 (8th Cir. 2012) (citing *Helicopteros Nacionales*, 466 U.S. at 414, 104 S. Ct. at 1872). More specifically, the cause of action must "'arise out of or relate to'" the defendant's contacts with the forum state. *Id.* (quoting *Burger King*, 471 U.S. at 472-73, 105 S. Ct. at 2182)). "Unfortunately, the Supreme Court has not yet explained the scope of [the arise-out-of or relate-to] requirement." *Id.*

The Eighth Circuit, however, recently addressed the "relatedness" requirement and observed that three different approaches have developed in the federal courts of appeals—a proximate-cause requirement, a but-for requirement, and a hybrid approach. *Id.* The Eighth Circuit rejected a strict proximate-cause requirement in favor of a "flexible approach" under which specific personal jurisdiction is warranted when the defendant directs activities at the forum state and the litigation results from injuries "relating to" those activities. *Id.* at 912-13. The Eighth Circuit emphasizes "the need to consider the totality of the circumstances in deciding whether personal jurisdiction exists." *Id.* (quotation omitted).

We are persuaded that the Eighth Circuit's flexible approach is appropriate here. Under this flexible approach and in consideration of the totality of the circumstances, we conclude that the banks' contacts with Minnesota—their interactions with First United in relation to executing and collecting on the loan participations—are sufficiently related to the receiver's fraudulent-transfer actions to support the existence of personal jurisdiction. Each bank wired large sums of money to an appointed agent in Minnesota, or, in some cases, wired the funds directly to a borrower based on arrangements made by the agent in Minnesota. As discussed, the loan payments were collected and distributed by First United in Minnesota and the profits sought to be recovered in this action were sent to the banks from Minnesota. The activities of First United as the authorized agent of the banks are directly related to this litigation. The totality of the circumstances demonstrates that the receiver's causes of action arise from or relate to the contacts of the nonresident banks with Minnesota, so as to support the exercise of personal jurisdiction.

Interest of state in providing a forum

Minnesota's interest in providing a forum for the litigation, although insufficient by itself to establish jurisdiction, may support the exercise of jurisdiction. *Trident Enters. Int'l, Inc. v. Kemp & George, Inc.*, 502 N.W.2d 411, 416 (Minn. App. 1993). The receiver argues that Minnesota has an interest in providing a forum because the receiver "is seeking to remedy the fraud perpetrated in Minnesota, by a Minnesota resident, and on Minnesota [banks]." We agree that Minnesota has a legitimate interest in providing a forum. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Tz'Doko V'Chesed of Klausenberg*, 543 F. Supp. 2d 424, 431 (E.D. Pa. 2008) (holding in fraudulent-transfer case that state

"has a clear interest in [e]nsuring that fraud does not take place within its borders"); *Marquette Nat'l Bank*, 270 N.W.2d at 295 ("Minnesota obviously has an interest in providing a forum for its resident allegedly wronged.").

Convenience of the parties

"[T]he convenience issue is rarely dispositive." *Marquette Nat'l Bank*, 270 N.W.2d at 295. And we agree with the district court that the convenience factor is neutral here. It will be no more inconvenient for the banks to litigate in Minnesota than it would be for the receiver to litigate in multiple other states. Accordingly, we conclude that this factor weighs neither for nor against the exercise of personal jurisdiction over the banks.

Because we conclude that the banks have sufficient minimum contacts with Minnesota to support the exercise of personal jurisdiction over the nonresident banks and that the exercise of that jurisdiction will not offend traditional notions of fair play and substantial justice, we affirm the denial of the appellant banks' motions to dismiss and reverse the grant of Arvest's motion to dismiss.

Affirmed in part and reversed in part.