

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NEW ENGLAND SALES, INC.,)
)
 Plaintiff)
)
 v.) **Civil No. 89-0029 P**
)
 CREATIVE DISTRIBUTION, INC.,)
 et al.,)
)
 Defendants)

DECISION AND ORDER ON PLAINTIFF'S MOTION TO STRIKE/ALTERNATIVE MOTION FOR EVIDENTIARY HEARING; RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS

The plaintiff, New England Sales, Inc. ("NES"), is a Maine corporation which purchases and distributes food products at discounts throughout the country. It has brought a civil RICO (Racketeer Influenced and Corrupt Organizations Act) claim under 18 U.S.C. § 1964(c) as well as several tort and contract claims against Creative Distribution, Inc. ("CDI") and Daniel B. Goldberg.

I. MOTION TO DISMISS

The defendants have moved to dismiss this action on the grounds of lack of personal jurisdiction and improper venue. The relevant facts are as follows. The individual defendant, Daniel B. Goldberg, is a resident of Illinois and a stockholder, director and the president of CDI. March 20, 1989 Affidavit of Daniel B. Goldberg && 1-2. CDI is an Illinois corporation with its principal place of business in Des Plaines, Illinois. *Id.* & 3. On April 21, 1986, CDI entered into a contract with NES by which CDI became an exclusive agent of NES for the purpose of arranging the purchase and sale of grocery products. *Id.* && 4, 7, 8 & Exhibit A; Exhibit A to Complaint. The record discloses a conflict

in the evidence as to where this contract was executed. March 20, 1989 Affidavit of Daniel B. Goldberg & 11 (contract executed by all parties in Illinois); Affidavit of Ronald C. Giguere & 6, attached to Plaintiff's Memorandum in Opposition to Motion to Dismiss/Alternative Motion for Leave to Amend Complaint ("I was the last person to sign the contract, and I did so in Maine.").

This contract included a list of customers with whom CDI had the exclusive right to do business; none of these customers did business in Maine. March 20, 1989 Affidavit of Daniel B. Goldberg & 5-6. After entering into the agency agreement with NES, all of CDI's contacts with its customers took place in Illinois and in other midwestern states. *Id.* & 3. None of CDI's transactions during its relationship with NES involved products from Maine. *Id.* & 9. NES maintained sales records for CDI by a computer located in Maine. April 11, 1989 Affidavit of Robert Brooks & 11, attached to Plaintiff's Memorandum in Opposition to Motion to Dismiss/Alternative Motion for Leave to Amend Complaint. However, Goldberg states that "[a]ll of the records of [CDI] and all of the records of its customers pertaining to the transactions at issue in this litigation are located in Illinois and other Midwestern states." March 20, 1989 Affidavit of Daniel B. Goldberg & 16.

Goldberg travelled to Maine several times each year for sales meetings and to discuss other matters with NES related to their agency agreement. *Id.* & 12; April 11, 1989 Affidavit of Robert Brooks & 24. On even more occasions, Officers of NES travelled to Illinois to discuss the details of their contract. March 20, 1989 Affidavit of Daniel B. Goldberg & 12. During the course of their business relationship, including the winding-up period, CDI regularly made CDI telephone and wire communications to NES in Maine. Affidavit of Robert Brooks & 18. CDI has no agents or employees residing in Maine or doing business here and has no office, real estate or tangible property in Maine. March 20, 1989 Affidavit of Daniel Goldberg & 10. In addition, the plaintiff submitted evidence that defendant Goldberg filed papers with the Maine Secretary of State to incorporate a

business in Maine, Master Franchise, Inc.; one of the plaintiff's officers acted as an officer of this entity. Affidavit of Robert J. Daviau (referenced document attached to copy of affidavit submitted with Plaintiff's Memorandum in Opposition to Motion to Dismiss/Alternative Motion for Leave to Amend Complaint); April 11, 1989 Affidavit of Robert Brooks & 19.

On October 28, 1988, the parties entered into a Rescission and Termination Agreement in Portland, Maine. Exhibit C to Complaint; March 20, 1989 Affidavit of Daniel B. Goldberg & 11. The rescission agreement provided that the winding-up period would terminate on October 28, 1989, the day that agreement was executed. Exhibit C & 5 to Complaint. That agreement also provided that NES would pay the defendants \$51,000 for past orders plus any monies to become due for orders currently in the system. *Id.* & 3. Goldberg travelled to Maine three times to negotiate this agreement. Affidavit of Ronald C. Giguere && 3, 4. In making this agreement, neither Goldberg nor any other person disclosed that CDI had rebilled or planned to rebill the customers of NES in its own name. *Id.* at 5. In December of 1988, NES officers discovered that the defendants had breached the termination agreement by diverting certain funds belonging to NES by rebilling NES customers in the name of CDI. April 11, 1989 Affidavit of Robert Brooks & 4. In addition, after the termination agreement, NES learned that CDI had not delivered a large shipment of Pam spray purchased by NES to the customer NES intended, but instead had sold it to another customer. *Id.* && 2, 3, 6-8, 15-16. CDI had sent facsimiles to NES concerning the planned shipment of Pam which induced NES to wire payment for the shipment. *Id.* & 16.

The defendants assert that it will be necessary for witnesses in Illinois and the Midwest to testify in this case. March 20, 1989 Affidavit of Daniel B. Goldberg & 16. The plaintiff asserts that in a trial in this case it will require the testimony of at least six NES employees who reside in Maine, and the testimony of only one or two witnesses located in Illinois. April 11, 1989 Affidavit of Robert Brooks

& 9. The plaintiff filed an action in the Northern District of Illinois on February 27, 1989 against Quality Distribution Systems, Inc. (a warehouse used by CDI) and another defendant based on the Pam spray transaction. *Id.* && 3, 14; March 20, 1989 Affidavit of Daniel B. Goldberg && 15.

In addition to these facts, the defendants submitted a second affidavit by Goldberg with their reply memorandum in support of their motion to dismiss. The affidavit disputes the plaintiff's assertion that the defendants intended to divert customers' payments and the shipment of Pam spray either at the time of the rescission agreement or at the time it sent the plaintiff facsimiles of information on the Pam shipment. April 21, 1989 Affidavit of Daniel B. Goldberg && 14, 17. Further, in this second affidavit Goldberg disputes that the defendants kept their records in a computer in Maine; instead, he states that these were separate records kept by NES for its own purposes but used for convenience by CDI to obtain certain information more quickly than by searching its own files. *Id.* & 20.

The plaintiff has moved to strike this affidavit on the ground that it improperly introduces new material that should have been submitted with the original motion to dismiss. *See* Fed. R. Civ. P. 6(d); Local Rule 19(a). Although in some circumstances "for cause shown" the court may permit affidavits in support of a motion to be filed with a reply memorandum, *see* Fed. R. Civ. P. 6(b); *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 409 (1st Cir. 1985), here the defendants have not sought leave of the court to file the second Goldberg affidavit. Therefore, the plaintiff's motion to strike this affidavit is granted.

In addition, the plaintiff moves to strike portions of the defendants' reply memorandum on the ground that it introduces new arguments that should have been raised in the defendants' first memorandum in support of the motion to dismiss. Local Rule 19(d) requires that a reply memorandum "be strictly confined to replying to new matter raised in the objection or opposing

memorandum." Portions of the defendants' reply memorandum which the plaintiff has moved to strike discuss the timing of the defendants' plans to rebill the plaintiff's customers. Because this discussion addresses the affidavits submitted by the plaintiff in opposition to the motion to dismiss, it is proper under Local Rule 19 and should not be stricken. *See* Defendants' Reply Memorandum in Support of Motion to Dismiss, pp. 3, 5. In addition, the plaintiff challenges the defendants' discussion of issues of forum convenience in the conclusion of the reply memorandum. This argument is not in response to new material introduced in the plaintiff's objection, but instead was raised in the defendants' first memorandum in support of their motion to dismiss. *See* Defendants' Motion to Dismiss and Supporting Memorandum p. 5; March 20, 1989 Affidavit of Daniel B. Goldberg & 16. Therefore, this portion of the reply memorandum violates Local Rule 19(d) and must be stricken.

The plaintiff's claims based on the diversion of payments due from the plaintiff's customers and the fraudulent sale of the shipment of Pam spray consist of the following: conversion (Count I); civil RICO (Count II); breach of the duty of good faith and fair dealing under the agency contract and the rescission agreement (Count III); breach of fiduciary duty (Count IV); and intentional interference with prospective contractual relations (Count VI). In addition, the plaintiff asserts claims of fraud (Count V) based on the defendants' alleged nondisclosure of the diversion of funds at the time the plaintiff paid the defendants \$51,000 pursuant to the rescission agreement. In Count VII, the plaintiff has brought an additional conversion claim based on CDI's alleged refusal to release reimbursements mistakenly paid to CDI by suppliers of NES and CDI's refusal to issue proofs of delivery for shipments received by customers of NES. Finally, the plaintiff has brought two additional breach of contract claims based on the defendants' failure to render an accounting pursuant to the rescission agreement (Count VIII), and the defendant's alleged failure to attempt a good faith settlement of a transportation claim as required by the rescission agreement (Count IX).

A. Personal Jurisdiction

Subject matter jurisdiction in this case is based on a federal question (the RICO claim) as well as diversity of citizenship. In a federal question case, "jurisdiction over the person of the defendant is limited by the scope of the process available to the Court." *Merrill v. Zapata Gulf Marine Corp.*, 667 F. Supp. 37, 39 (D. Me. 1987). Congress can provide for nationwide service of process, *see* Fed. R. Civ. P. 4(e); if it does so, constitutional due process requirements are satisfied by "minimum contacts" with any part of the United States. *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 950 (1st Cir. 1984). Without such a statute, the long-arm statute of the forum state governs service of process. Fed. R. Civ. P. 4(e); *Omni Capital International v. Rudolf Wolff & Co.*, 484 U.S. 97, ___, 108 S. Ct. 404, 411 (1987). Maine's long-arm statute, 14 M.R.S.A. § 704-A, permits the exercise of jurisdiction over nonresidents to the same extent allowed by the due process clause of the Fourteenth Amendment. *Triple-A Baseball Club Assoc. v. Northeastern Baseball, Inc.*, 655 F. Supp. 513, 534 (D. Me. 1987), *rev'd on other grounds*, 832 F.2d 214 (1st Cir.), *cert. denied*, 108 S. Ct. 1111 (1988). To meet the requirements of the due process clause, the defendants must have minimum contacts with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

The RICO statute authorizes nationwide service of process if the "ends of justice" so require and if the court already has personal jurisdiction over one defendant. 18 U.S.C. § 1965(b); *Butcher's Union Local No. 498 v. SDC Investment, Inc.*, 788 F.2d 535, 538-39 (9th Cir. 1986); *Anchor Glass Container Corp. v. Stand Energy Corp.*, 711 F. Supp. 325, 330-31 & n.10 (S.D. Miss. 1989). *But see* *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F. Supp. 1040, 1055 (S.D.N.Y. 1987) (§ 1965(d) confers personal jurisdiction; requirements of § 1965(b) apply to venue). Therefore, here it

is necessary to examine whether either defendant satisfies the minimum contacts requirement as to Maine.

This is a case of specific jurisdiction because the cause of action arises from the defendants' contacts with the state. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984); *Ealing Corp. v. Harrods Ltd.*, 790 F.2d 978, 983 (1st Cir. 1986). The claims all stem from the relationship between the parties established by the agency agreement that the defendants entered into with the plaintiff, a Maine corporation. Several of the claims specifically involve the rescission agreement, which was negotiated and executed in Maine. The defendants made numerous communications and visits to Maine related to these contracts.

The record shows that the defendants not only contracted with a Maine corporation, but also engaged in a series of negotiations and visits in Maine and in actions that affected a Maine corporation. Through these activities, the defendants have purposefully established sufficient contacts within Maine such that they reasonably could expect to be haled into court here. *See Burger King*, 471 U.S. at 478-82; *Dupont Tire Service Center, Inc. v. North Stonington Auto-Truck Plaza, Inc.*, 659 F. Supp. 861, 863-64 (D.R.I. 1987). Therefore, this court has personal jurisdiction over the defendants.

B. Venue

Venue in this case is governed by 28 U.S.C. § 1391(b) which requires that a civil action wherein jurisdiction is not based exclusively on diversity of citizenship be brought in the district where all defendants reside or in which the claim arose, and by the special RICO venue provision, 18 U.S.C. § 1965, which establishes venue in “any district in which [the defendant] resides, is found, has an agent, or transacts his affairs.”¹

Since the defendants reside in Illinois, the plaintiff must show that its claims arose in Maine to establish that venue is proper under § 1931(b). To determine where a claim arose for purposes of § 1391(b), courts commonly look to the weight of the contacts between the claim and the forum state. *See Rosenfeld v. S.F.C. Corp.*, 702 F.2d 282, 284 (1st Cir. 1983); *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F. Supp. at 1057; *Abeloff v. Barth*, 119 F.R.D. 315, 329 (D. Mass. 1988). If the contacts with a forum are only minor or peripheral, venue is not proper in that forum. *See Rosenfeld*, 702 F.2d at 284; *Dody v. Brown*, 659 F. Supp. 541, 550 (W.D. Mo. 1987). If substantial contacts exist between the claim and more than one forum, venue is proper in the forum with the most significant contacts. *Anchor Glass Container Corp. v. Stand Energy Corp.*, 711 F. Supp. at 328; *Dody v. Brown*, 659 F. Supp. at 550. If it is unclear which forum has the most substantial contacts, the next inquiry is

¹ Jurisdiction in this case was originally based only on diversity, and the complaint asserted that venue was proper under 28 U.S.C. § 1391(a) and (c). The plaintiff then amended the complaint to add the RICO claim, making § 1391(a) inapplicable because it governs venue for cases where jurisdiction is founded solely on diversity. The plaintiff initially filed an alternative motion for leave to amend its complaint to drop the RICO claim if venue is not proper otherwise, but then withdrew this alternative motion. Notice of Withdrawal of Alternative Motion (Docket Item #18).

whether the forums with substantial contacts are approximately equal in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but *not* of the plaintiff)." *Leroy v. Great Western United Corp.*, 443 U.S. 173, 183-85 (1979) (emphasis in original); *Anchor Glass*, 711 F. Supp. at 328.

Generally, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy*, 443 U.S. at 183-84 (emphasis in original). The residence of the plaintiff should be of little consequence to a finding of where the claim arose." *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d at 955.

The claims in this case clearly have substantial contacts with Illinois, where CDI conducted its business under its contracts with the plaintiff and where many of the actions and decisions which led to these claims took place. *See Wool Masters*, 745 F.2d at 955-56. Significant contacts with Maine also exist. These include telephone and wire communications and visits by CDI to NES in Maine to discuss the details of their agency agreement, negotiation and execution of the rescission agreement in Maine, and alleged misrepresentations made in Maine or sent to Maine. Several phone or mail communications with a district along with a few visits would not in themselves constitute significant contacts for purposes of 1391(b). *Rosenfeld*, 702 F.2d at 284. *See Dody v. Brown*, 659 F. Supp. at 551.

The plaintiff contends the contacts with Maine are substantial because two of its claims are based on misrepresentations occurring in Maine: fraud based on nondisclosure in entering into the rescission agreement (Count V) and fraud based on the diverted Pam shipment, which was accomplished by misrepresentations in two telefax transmissions sent to Maine.² *See So-Comm, Inc. v.*

² The plaintiff has not submitted any evidence clearly showing that the defendants intended these diversions at the time of the termination agreement or at the time CDI sent NES the facsimiles

Reynolds, 607 F. Supp. 663, 666 (N.D. Ill. 1985) (RICO claim arose in Illinois, where misrepresentations occurred, even though parties were Ohio residents and subject matter of transactions was Ohio business).

Even assuming the misrepresentations involved in Counts I, II, and V occurred in Maine, the weight of the contacts with Illinois are greater. The actions and decisions perpetrating the alleged fraud occurred in that state.³ Moreover, the contacts with Illinois compared to Maine are even stronger for the claims that do not involve misrepresentations arguably occurring in Maine. Even if the contacts with Maine and Illinois were to be seen as relatively equal, the additional factor of convenience to the defendants would favor Illinois.

Venue for a RICO claim may be based either on ' 1391(b) or the RICO venue provision, 18 U.S.C. ' 1965(a). *Wichita Federal Savings & Loan Ass'n v. Landmark Group, Inc.*, 674 F. Supp. 321, 329 (D. Kan. 1987). A defendant transacts its affairs in a district for purposes of the RICO venue

regarding the Pam shipment. The only evidence in support of this claim is a statement by the plaintiff's chief financial officer that he ``discussed the Pam transaction with a former employee of [CDI]. The circumstances he describes suggest that Goldberg personally planned to and arranged to hijack the shipment of Pam before [CDI] obtained the wire transfer from [NES] that released the shipment into [CDI's] custody." April 11, 1989 Affidavit of Robert Brooks & 15.

³ Although sending a fraudulent misrepresentation into the state may be sufficient to satisfy the ``minimum contacts" due process requirement for asserting personal jurisdiction over a defendant, see *Ealing Corp. v. Harrods Ltd.*, 790 F.2d 978, 983 (1st Cir. 1986), the requirements for showing that a claim ``arose" in a district under ' 1931(b) are different. See *Wool Masters*, 743 F.2d at 950-51.

provision if it ``regularly carries on business of a substantial and continuous character within that district." *Abeloff v. Barth*, 119 F.R.D. 315, 326 (D. Mass. 1988), quoting *King v. Vesco*, 342 F. Supp. 120, 124 (N.D. Ca. 1972).

Phone and mail communications to a district are not enough to satisfy the requirement of transacting affairs within that district. *Population Planning Associates, Inc. v. Life Essentials, Inc.*, 709 F. Supp. 342, 344 (S.D.N.Y. 1989). For example, in a RICO case based on an allegedly fraudulent scheme to sell distributorships in Missouri, the court found that the defendants, who were out-of-state residents and an out-of-state corporation, did not transact their affairs in Missouri even though they made numerous phone calls involving misrepresentations about the scheme to the plaintiffs in Missouri, payments were effectuated from Missouri and the effects of the fraud were felt in that state. *Dody v. Brown*, 659 F. Supp. at 545. Similarly, occasional travel to a district is insufficient to establish that a defendant transacts affairs in that district. *Sunray Enterprises, Inc. v. David C. Bouza & Assoc.*, 606 F Supp. 116, 119 (S.D.N.Y. 1984).

However, a defendant was found to transact his affairs within the meaning of the RICO venue provision where he made several trips to the state to set up businesses which gave rise to the suit. *So-Comm*, 607 F.Supp. at 666. In addition, a defendant's frequent purchases and monthly travel in a district amounted to transacting affairs in that district. *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F. Supp. at 1058. In a securities case, the court found that defendants transacted their affairs in Massachusetts because the defendants solicited business there, made frequent telephone calls to that district regarding the business, accepted money from Massachusetts residents, held meetings there and registered a number of limited partnerships in that state. *Abeloff v. Barth*, 119 F.R.D. at 326.

In this case, the defendants not only sent communications to Maine, but also regularly visited the state to discuss details of their business relationship with the plaintiff, used some business records

kept in Maine, attempted to incorporate a business in Maine⁴ and travelled to Maine on three occasions to negotiate and execute a rescission agreement with the plaintiff. Taken together, these actions support the argument that the defendants had substantial and continuous business activity in this district.

The defendants argue that venue is not proper under ' 1965(a) because their business activity in Maine was not directly related to the RICO claim. *See Follett College Stores Corp. v. Fernandez*, 587 F. Supp. 1051 (N.D. Ill. 1984). In *Follett*, the plaintiff brought a RICO action as well as tort and contract claims based on fraud. Using a "weight of the contacts" test, the court found that venue was not proper because the only contacts with the district directly related to the claims were telephone calls and mailings. *Id.* at 1053. However, the "weight of the contacts" test applies to determine where a claim arose under the general venue provision of ' 1391(b); venue may be proper under the more liberal specific provision in ' 1965(a) if the defendant simply transacts its affairs in the district. The court in *Follett* decided that, although the weight of the contacts favored another district, venue for the RICO claim might be proper under ' 1965(a). *Id.* In that case, the court decided to transfer all the claims to the district with the most significant contacts, since venue there was unquestionable. *Id.*

Generally, venue must be proper as to each claim. *Wichita Federal Savings & Loan Ass'n v. Landmark Group, Inc.*, 674 F. Supp. at 329. Some courts have adopted a rule allowing "pendent venue" over claims arising out of a common nucleus of operative facts and where judicial economy,

⁴ The individual defendant (Goldberg) is a director and the president of CDI. March 20, 1989 Affidavit of Daniel B. Goldberg & 1. For this reason, CDI's affairs in this case are in reality Goldberg's affairs as well, and the analysis for determining venue of the corporate and the individual defendant is the same. *See Abeloff v. Barth*, 119 F.R.D. at 328.

convenience, avoidance of piecemeal litigation and fairness to the litigants favors venue over all the claims. *Beattie v. United States*, 756 F.2d 91, 100-03 (D.C. Cir. 1984). *See also Wichita Federal Savings & Loan Ass'n*, 674 F. supp. at 329-30. Because the non-RICO claims have stronger ties to Illinois than Maine, fairness and convenience does not support the exercise of pendent venue over those claims in this district.

Nevertheless, trying the RICO claim separately from the other claims would not be in the interests of justice, since the RICO claim is based on facts common to the other claims. Venue is clearly proper for all the claims in the Northern District of Illinois. Under 28 U.S.C. ' 1404(a), a transfer to another district may be made on the court's own motion for the convenience of parties and witnesses, in the interest of justice. *See* 5 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ' 1352 at p. 393 (Supp. 1989); *Lead Industries Ass'n v. Occupational Safety and Health Administration*, 610 F.2d 70, 79 n.17 (2d Cir. 1979); *Montgomery Ward & Co. v. Anderson Motor Service, Inc.*, 339 F. Supp. 713, 718 & n.3 (W.D. Mo. 1971). I conclude that, pursuant to ' 1404(a), it would be in the interests of justice to transfer this case as a whole to the Northern District of Illinois, the district where the claims have the strongest contacts and where much of the evidence is located.

II. CONCLUSION

For the foregoing reasons, the plaintiff's motion to strike the second affidavit of Daniel B. Goldberg and certain portions of the Defendants' Reply Memorandum in Support of Motion to Dismiss is ***GRANTED***. I recommend that the defendants' motion to dismiss be ***DENIED*** and that the case be transferred to the United States District Court for the Northern District of Illinois under 28 U.S.C. ' 1406(a). Since I recommend that the case be transferred, I do not reach the plaintiff's motion for partial summary judgment.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 28th day of August, 1989.

*David M. Cohen
United States Magistrate*