

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

GLOBAL HEALTH ALTERNATIVES,)
INC., et al.,)
)
Plaintiffs)
)
v.)
)
ELLON U.S.A., INC., et al.,)
)
Defendants)

Docket No. 98-365-P-C

**RECOMMENDED DECISION ON DEFENDANTS’ MOTIONS TO DISMISS
OR FOR CHANGE OF VENUE**

The defendants, Ellon U.S.A., Inc. (“Ellon USA”), Leslie J. Kaslof and Ralph Kaslof move to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction or pursuant to Fed. R. Civ. P. 12(b)(3) due to improper venue. In the alternative, they ask this court to transfer this action to the Eastern District of New York, where their lawsuit against the plaintiffs in this action is currently pending. Finding that the action is subject to dismissal under both sections of Rule 12 invoked by the defendants, I nonetheless recommend in the interest of justice that the court transfer this action to the Eastern District of New York for possible consolidation with the action pending there.

I. Applicable Legal Standards

The defendants seek dismissal pursuant to Fed. R. Civ. P. 12(b)(2) and (3). A motion to

dismiss for lack of personal jurisdiction raises the question whether the controversy or the defendant has sufficient contact with the forum to give the court the right to exercise judicial power over the defendant. *See, e.g., Hancock v. Delta Air Lines, Inc.*, 793 F. Supp. 366, 367 (D. Me. 1992). The burden is on the plaintiff to establish jurisdiction, *Talus Corp. v. Browne*, 775 F. Supp. 23, 25 (D. Me. 1991), but where, as here, the court rules on the Rule 12(b)(2) motion without holding an evidentiary hearing, a *prima facie* showing is sufficient, *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 712 (1st Cir. 1996) (*prima facie* standard preferred where jurisdictional facts are undisputed); *Archibald v. Archibald*, 826 F. Supp. 26, 28 (D. Me. 1993). For the purposes of such a review, the plaintiffs may not rely on unsupported allegations in their pleadings to make the *prima facie* showing. *Boit v. Gar-Tec Prod., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). The court accepts properly supported proffers of evidence by a plaintiff as true. *Boit*, 967 F.2d at 675.

A motion to dismiss for lack of venue under Rule 12(b)(3) puts the burden on the plaintiff to demonstrate that it has met its obligation to institute its action in a permissible forum. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1352 at 264-65 (2d ed. 1990). The procedure for analysis of such a motion is the same as that for a motion under Rule 12(b)(2). *M.K.C. Equipment Co. v. M.A.I.L. Code, Inc.*, 843 F. Supp. 679, 682-83 (D. Kan. 1994).

II. Factual Background

The following facts are relevant to consideration of the pending motions. The plaintiffs are two Delaware corporations. Complaint (Docket No. 1) ¶¶ 1-2; Declaration of Ralph Kaslof (“Ralph Dec.”) (Docket No. 5) ¶ 16. Plaintiff Global Health Alternatives, Inc. (“GHA”) has its principal place of business in Portland, Maine. Complaint ¶ 1. Plaintiff Ellon, Inc. is a wholly-owned

subsidiary of GHA. Complaint ¶ 2; Ralph Dec. ¶ 5. Defendant Ellon USA is a New York corporation that formerly had a principal place of business in Lynbrook, New York. Complaint ¶ 3; Ralph Dec. ¶ 2. It was owned by the individual defendants, both of whom are citizens of New York. Complaint ¶¶ 4-5; Ralph Dec. ¶ 2; Declaration of Leslie J. Kaslof (“Leslie Dec.”) (Docket No. 6) ¶ 1.¹ Ellon USA has been inactive since October 15, 1996, when its assets were sold to the plaintiffs. Leslie Dec. ¶ 1.

On or about October 15, 1996 GHA and Leslie Kaslof entered into a written employment agreement and GHA and Ralph Kaslof entered into a written consulting agreement. Complaint ¶¶ 10, 18. Some, but not all, of the payments that appear on the face of the agreements to have been due, Ralph Dec. ¶¶ 27-31, 34, 37-38; Leslie Dec. ¶¶ 5, 9, 11, have been made, Complaint ¶¶ 14, 21. The plaintiffs allege that Ralph and Leslie Kaslof have breached these agreements; the defendants

¹ The plaintiffs have moved to strike the declarations of Ralph and Leslie Kaslof on the grounds that (i) they do not contain jurats, making anything stated therein inadmissible because not given under oath and (ii) “material portions” of the declarations are not based on the declarants’ personal knowledge, contain statements that the declarants are not competent to make, and state facts not admissible in evidence. Plaintiff’s [sic] Motion to Strike the Declarations of Defendants Ralph and Leslie Kaslof (Docket No. 9) at 2. The declarations at issue each state, in the first paragraph, that the declarant “affirms the truth of the following under the penalty of perjury.” Ralph Dec. at 1; Leslie Dec. at 1. Unsworn declarations made under penalty of perjury are acceptable “with like force and effect” as sworn declarations by virtue of 28 U.S.C. § 1746. *Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int’l, Inc.*, 982 F.2d 686, 689-90 (1st Cir. 1993). While the declarations at issue here do not use the form set forth in the statute, they are “in substantially the [same] form,” which is all that the statute requires. 28 U.S.C. § 1746; *see also Kersting v. United States*, 865 F.Supp. 669, 676 (D. Haw. 1994). The declarations are not submitted in connection with a motion for summary judgment and therefore the requirements of Fed. R. Civ. P. 56(e), the authority upon which the plaintiffs rely, are not applicable. Some of the alleged defects in the declarations identified by the plaintiffs have been remedied by the supplemental declaration filed by Leslie Kaslof. Supplemental Affirmation of Leslie J. Kaslof in Further Support of Motion to Dismiss, etc. (Docket No. 12). The motion to strike is denied. My recommended decision does not rely on any statements included in these declarations other than those identified in the text.

allege that the plaintiffs have breached them.² The complaint in this action was filed on October 27, 1998, but not served on defendants Ralph Kaslof and Ellon USA until December 3, 1998. Affidavits of Service. Service was made upon Leslie Kaslof on November 24, 1998 by delivery to the receptionist at the building where he resides. Affidavit of Service.³

On December 4, 1998 the defendants in this action filed suit in the United States District Court for the Eastern District of New York against the plaintiffs in this action. Complaint, *Leslie J. Kaslof, et al. v. Global Health Alternatives, Inc., et al.*, Docket No. 98-7477 (Schedule I to Ralph Dec.) at 1. The complaint alleges breach of the written agreements at issue in the instant action, fraud, unjust enrichment, and abuse of process. *Id.* at 10-14. GHA has moved to dismiss the New York action, primarily on the ground that the instant action was filed first.⁴ Defendants' Memorandum in Support of Motion to Dismiss or, Alternatively, Stay Case or Transfer Venue Thereof Pursuant to Prior Action Pending Rule, excerpts attached as Exhibit III to Affirmation of

² The only claim made against Ellon USA in the complaint — also asserted against the individual defendants — is for indemnification under the asset purchase agreement between the plaintiffs and the defendants, also dated October 15, 1996, for losses arising out of the alleged breaches by the individual defendants of the employment and consulting agreements. Complaint ¶¶ 30-33.

³ Ralph Kaslof disputes the dates of service contained in the affidavits of the person who made service. He states that Leslie Kaslof was served on December 4, 1998 and that he and Ellon USA were served on December 7, 1998. Ralph Dec. ¶ 6.

⁴ GHA's dismissal motion and supporting memorandum have been served on the plaintiffs in the New York action (the defendants here) even if not yet formally filed with that court. The district judge to whom the case is assigned is nevertheless aware of the motion papers. *See* Report of Conference of Counsel and Order (Docket No. 14); letter from Michael R. Perle, Esq. to this court dated March 18, 1999; and Transcript of Proceedings Before the Honorable Eugene H. Nickerson, *Kaslof v. Global Health*, Docket No. 98 Civ. 7477, United States District Court, Eastern District of New York (March 18, 1999), copy attached to letter from Robert J. Keach, Esq. to this court dated March 23, 1999.

Michael R. Perle (Docket No. 13), at 1, 6-7.

The agreements at issue are governed by New York law. Employment Agreement (Exh. A to Complaint) ¶ 12; Consulting Agreement (Exh. B to Complaint) ¶ 9. They were negotiated in New York. Ralph Dec. ¶ 18. The consulting agreement also includes a clause waiving objection to personal jurisdiction in any state or federal court in New York. Consulting Agreement ¶ 9. Both agreements give a London address for GHA and require written notification of a change in address. *Id.* ¶ 13; Employment Agreement ¶ 16. Neither Leslie nor Ralph Kaslof ever received any notification of a change in this address. Leslie Dec. ¶ 7. The parties have attended two mediation sessions in New York concerning the agreements at issue. Ralph Dec. ¶ 10. These sessions were held in late 1997 and were initiated by an attorney representing GHA and Ellon, Inc. *Id.* The mediation was unsuccessful. “[J]ust weeks prior to this Maine court action,” Leslie Kaslof made another settlement proposal to the chairman of GHA. Leslie Dec. ¶ 12. During what was apparently the last of the ensuing discussions, Leslie Kaslof told the chairman of GHA that “barring settlement . . . Ralph and I would have to take legal action.” *Id.* Leslie Kaslof was served with the complaint in this action within two weeks thereafter. *Id.*

Prior to October 1996 GHA’s principal place of business was located in London, England. Affidavit of John Eldredge (“Eldredge Aff.”) (Docket No. 8) ¶ 2. On or about October 15, 1996, at approximately the same time that it acquired the assets of Ellon USA, GHA, through its subsidiary Ellon, Inc., also acquired the assets of Downeast Cranberry Company, Inc., the principal place of business of which was located in South Portland, Maine. *Id.* ¶ 3. GHA established its principal place of business in South Portland, Maine at some time thereafter, although its chairman continued to work out of the London, England office. *Id.* ¶ 6. In or about August 1997 Ellon, Inc. closed the

business location in Lynbrook, New York that it had taken over from Ellon USA and thereafter operated from a location in Portland, Maine. Eldredge Aff. ¶ 7; Ralph Dec. ¶ 50; Leslie Dec. ¶ 8. Leslie and Ralph Kaslof contacted officers of Ellon, Inc. and GHA in Maine by letter and telephone in efforts to obtain payment under the agreements at issue and, in the case of Leslie Kaslof, to obtain work assignments. Eldredge Aff. ¶¶ 8-9; Leslie Dec. ¶¶ 5-7. Ellon USA received some inventory from Ellon, Inc. after August 31, 1997. Eldredge Aff. ¶ 11. Neither Ralph nor Leslie Kaslof went to Maine to deal with either of the plaintiffs. Ralph Dec. ¶¶ 44-46; Leslie Dec. ¶ 2. Ralph Kaslof states that he is physically unable to travel to Maine. Ralph Dec. ¶ 4.

III. Discussion

A. Personal Jurisdiction

In this case in which the court's jurisdiction is based upon the diverse residence of the parties, the court's personal jurisdiction over a non-resident defendant is governed by the forum state's long-arm jurisdiction statute. *American Express Int'l, Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1178 (1st Cir. 1989). Maine's long-arm jurisdiction statute, which declares that it is to be applied "so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the United States Constitution, 14th Amendment," 14 M.R.S.A. § 704-A(1), provides, in relevant part:

2. Causes of action. Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated in this section thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing to any of such acts:

- A. The transaction of any business within this State;
- B. Doing or causing a tortious act to be done, or causing the consequences of a tortious act to occur within this State;
- C. The ownership, use or possession of any real estate situated in this State;

* * *

- F. Contracting to supply services or things within this State;

* * *

- H. Acting as a director, manager, trustee or other officer of a corporation incorporated under the laws of, or having its principal place of business within, this State[;]

- I. Maintain any other relation to the State or to persons or property which affords a basis for the exercise of jurisdiction by the courts of this State consistent with the Constitution of the United States.

* * *

4. Jurisdiction based upon this section. Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

14 M.R.S.A. § 704-A.

A court may have general or specific personal jurisdiction over the defendants in an action. General jurisdiction arises when the defendant has engaged in substantial or systematic and continuous activity, unrelated to the subject matter of the action, in the forum state. *Scott v. Jones*, 984 F.Supp. 37, 43 (D. Me. 1997). Specific jurisdiction is based on a relationship between the forum and the particular acts or injuries that provide the basis for the action, that is, “where the cause of action arises directly out of, or relates to, the defendant’s forum-based contacts.” *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1088-89 (1st Cir. 1992). The Maine long-arm statute provides only for the exercise of specific jurisdiction, *Lorelei Corp. v. County of Guadalupe*, 940 F.2d 717, 720 (1st Cir. 1991), and the plaintiffs here have disavowed any intention to assert general jurisdiction, *Objection of Global Health Alternatives, Inc. and Ellon, Inc.*

to Defendants' Motion to Dismiss ("Plaintiffs' Obj.") (Docket No. 7) at 5 n.2.

The First Circuit has developed the following test to evaluate the exercise of specific jurisdiction:

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

163 Pleasant St., 960 F.2d at 1089. The "Gestalt factors" include

(1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

Id. at 1088.

The claims asserted in the complaint are that Leslie Kaslof breached the employment agreement (Count I), Ralph Kaslof breached the consulting agreement (Count II), Ralph Kaslof breached his fiduciary duty as a director of Ellon, Inc. by sexually harassing one of its employees (Count III) and Ellon USA, Leslie Kaslof and Ralph Kaslof must indemnify the plaintiffs under the asset agreement for any losses incurred by the plaintiffs in connection with Counts I-III (Count IV). Complaint ¶¶ 9-33. The plaintiffs do not seriously contend that any of the claims in the first three counts directly arose out of the defendants' contacts with Maine, which were limited to Ralph and Leslie Kaslof's letters and telephone calls demanding work and payment and Ellon USA's receipt of inventory shipped from Maine after August 3, 1997, following communication between GHA's officers and Maine and the individual defendants "concerning the liquidation of the inventory."

Eldredge Aff. ¶ 11. They rely instead on the assertion that these contacts were “related to” their claims because they “arise out of” the contracts that form the basis of their claims. Plaintiffs’ Obj. at 5. They rely solely on *Pritzker v. Yari*, 42 F.3d 53, 61 (1st Cir. 1994), as authority for their position.

Pritzker is readily distinguishable from the instant case. There, the contract at issue, while executed outside Puerto Rico by defendants who were not residents of Puerto Rico, concerned the purchase of an interest in litigation proceeding in the District of Puerto Rico. *Id.* at 59 n.4. While finding in a summary fashion that the contract, “the very document that represents [the defendant’s] forum-related activity[,] is itself the cause and object of the lawsuit,” making a dispute over the legal status of the contract “related to” Puerto Rico, *id.* at 61, the First Circuit also stated that “[a] contract conferring an interest in ongoing litigation that touches upon the legal status of real property situated in the forum establishes, by its very nature, a significant relationship with the forum and its legal system,” *id.* at 63. Here, the contracts at issue, negotiated in New York at a time when none of the parties was a resident of Maine, contemplated personal services to be performed, when any location was specified, in New York.⁵ Employment Agreement ¶ 1; Consulting Agreement ¶ 1. The contracts do not concern real property or litigation in Maine.

The facts here are quite different from those in *Pritzker* and other First Circuit authority is

⁵ The employment agreement provides that Leslie Kaslof “shall work at his home office and go, as needed, to the principal office of the Company located in or near Lynbrook, New York or at such other location in or near the New York, New York metropolitan area as the Board of Directors, in its discretion, may select. However, [Leslie Kaslof] shall also render services at such other place or places within or without the United States as the Board of Directors may direct from time to time.” Employment Agreement ¶ 1. The consulting agreement provides that Ralph Kaslof “agrees to be physically present at the executive offices of New Ellon (on Long Island, New York), at such times, as New Ellon, the Company and/or the Board of Directors, Chairman or President of either may reasonably request. . . .” Consulting Agreement ¶ 1.

more directly applicable. While the transmission of information by telephone or mail into the forum state is a contact for purposes of personal jurisdiction analysis, *Sawtelle v. Farrell*, 70 F.3d 1381, 1389-90 (1st Cir. 1995), those communications must not be ancillary to the plaintiffs' claims in order that they form the basis for the exercise of personal jurisdiction. Rather, they must "form an important or [at least] material, element of proof in the plaintiff's case." *163 Pleasant St.*, 960 F.2d at 1089 (internal quotation marks and citation omitted). Here, it is readily apparent that the plaintiffs may prove the alleged breaches of contract by Leslie and Ralph Kaslof without reference to the Kaslofs' calls or letters to GHA in Maine. Ralph Kaslof's alleged breach of fiduciary duty could only have occurred outside Maine, as the plaintiffs have made no showing that either he or the Ellon, Inc. employee he is alleged to have sexually harassed has ever been in Maine.⁶ See Affirmation of Lorraine Lanzilotta, Exh. I to Perle Aff., & Ralph Aff. ¶ 44. In addition, "in a contract case, the defendant's forum-based activities must be instrumental in the formation of the contract," *163 Pleasant St.*, 960 F.2d at 1089 (internal quotations marks and citation omitted), a factor clearly not present here, where the contract was formed in New York without any apparent mention of Maine.

I conclude that the plaintiffs have not met the "relatedness" requirement for the exercise of this court's personal jurisdiction over the defendants. Even if that were not the case, the plaintiffs have also failed to establish a *prima facie* case of purposeful availment by the defendants, that is, that

⁶ This fact also makes specific personal jurisdiction over Count III untenable under Maine's long-arm jurisdiction statute. While the complaint sufficiently alleges that Ralph Kaslof was a director of Ellon, Inc. when he committed the harassment that is alleged to have constituted a breach of his fiduciary duty, the Maine statute requires that a cause of action arise from his acting as a director. 14 M.R.S.A. § 704-A(2)(H) & (4). There is no sense in which sexual harassment of an employee is within the scope of the actions of a director of a corporation. Significantly, the allegation is one of breach of the duties of that position. In addition, the commission outside the forum state of an act that may have consequences inside the forum state is by itself an insufficient contact to establish personal jurisdiction under the Maine statute. *Lorelei Corp.*, 940 F.2d at 721.

their contacts with Maine were not based on the unilateral actions of another party or third person and that the contacts were such that the defendants should reasonably anticipate being held into a Maine court. *Nowak* 94 F.3d at 716. The defendants' contacts with Maine occurred only because the plaintiffs unilaterally chose to move their operations to Maine after the contracts at issue were executed. The defendants had to contact the plaintiffs in order to attempt to receive payment under the contracts or to arrange for recovery of inventory.⁷ The plaintiffs moved to Maine, and the defendants therefore could only contact them in Maine. That appears to be the classic case of the contacts at issue for personal-jurisdiction analysis being based on the unilateral actions of a party other than the defendants.

Because the plaintiffs have demonstrated neither relatedness nor purposeful availment, it is unnecessary to consider the reasonableness of this court's exercise of personal jurisdiction over the defendants in this case, although a consideration of the gestalt factors, on balance, would lead me to the conclusion that exercise of this court's personal jurisdiction would not be reasonable under the circumstances presented. The defendants are entitled to dismissal of this action under Rule 12(b)(2).

B. Venue

I also conclude that the defendants are entitled to dismissal of this action on the ground that venue in this court is not proper. Venue is governed by 28 U.S.C. § 1391, which provides in relevant part:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1)

⁷ Because the claim against Ellon USA as set forth in Count IV is only derivative of the other counts, the court need not consider the contacts of Ellon USA with Maine in this analysis.

a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is not district in which the action may otherwise be brought.

The plaintiffs obviously have not brought this action in the district in which the defendants reside. The action could have been brought in the appropriate judicial district in New York, so subsection (3) does not apply. There is no property that is the subject of this action. Accordingly, the plaintiffs can only be proceeding under that portion of subsection (2) that makes venue proper in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.

The plaintiffs contend that the communications transmitted into Maine by Leslie and Ralph Kaslof satisfy the standard of subsection (2). Plaintiffs' Obj. at 9. They also rely on GHA's payments to Leslie and Ralph Kaslof from its Maine office. The case law upon which the plaintiffs rely is distinguishable. In *ESI, Inc. v. Coastal Power Prod. Co.*, 995 F.Supp. 419 (S.D.N.Y. 1998), the court held that "[v]enue may be proper in the district where the contract was substantially negotiated, drafted, and/or executed, even if the contract was not to be performed in that district and the alleged breach occurred elsewhere." *Id.* at 425. Here, the contracts at issue were negotiated in New York, and there is no indication in the record that they were not drafted and executed there as well. There is certainly no suggestion in the record that they were drafted or executed in Maine. The *ESI* court based its holding that venue was proper in the Southern District of New York on the ground that the contracts at issue were substantially negotiated in that district, *id.*, and so is of limited value for the case presented here. I do note, however, that any breaches of the contracts at issue by the Kaslofs could only have taken place outside Maine, and that the only specific location for

performance by the Kaslofs contemplated in the contracts at issue was New York.

In *Neill v. Laifer*, 1996 WL 460076 (E.D.Pa. 1996), the allegation at issue was one of intentional interference with prospective contractual relationships. *Id.* at *1. The mechanism of interference was correspondence from the defendant, who was outside the forum, to the plaintiff in the forum. *Id.* at *2. The court held that this correspondence formed a substantial part of the events giving rise to the claim and that its direction to the forum district was sufficient for purposes of venue. *Id.* Here, the correspondence from Ralph and Leslie Kaslof directed to the plaintiffs in Maine did not itself constitute a breach of either of the contracts; the alleged breach was their failure to perform. The correspondence itself, unlike that in *Neill*, does not give rise to the claim.

The final case upon which the plaintiffs rely is *F.A.I. Elec. Corp. v. Chambers*, 944 F. Supp. 77 (D. Mass. 1996). In that case, a Massachusetts corporation contracted with the defendants as employees in Colorado and Texas. *Id.* at 79. The contracts included non-competition agreements. *Id.* The corporation sued in the federal district court in Massachusetts, alleging breach of the agreements. *Id.* The court decided that venue in Massachusetts was not improper, relying on its finding that the defendants had substantial contacts with Massachusetts sufficient to support the exercise of personal jurisdiction over them. *Id.* at 80. While all of the factors upon which the court relied in this regard may not be set forth in the opinion, *id.*, those listed include the fact that the defendants entered into contracts with the plaintiff knowing it to be a Massachusetts corporation; they placed orders that were processed, distributed and administered in Massachusetts; and the plaintiff paid their salary and benefits and administered their benefit plans, presumably from Massachusetts, *id.* Of these facts, the only one in common with the facts in the case at hand is that one or both of the plaintiffs made some payments of salary, benefits or consulting fees to each of the

defendants after the plaintiffs had moved to Maine, but other payments were made from their earlier offices in New York. That fact alone is not a sufficient basis for venue under section 1391(a)(2). The plaintiffs' payments to the defendants are not the events that give rise to the plaintiffs' claims of breach. At most, they provide the basis for some portion of the plaintiffs' damages claims.

Accordingly, the defendants are also entitled to dismissal of this action due to improper venue. *See, e.g., Rosenfeld v. S.F.C. Corp.*, 702 F.2d 282, 284 (1st Cir. 1983); *Tischio v. Bontex, Inc.*, 16 F.Supp.2d 511, 516-17 (D.N.J. 1998).

C. Transfer to the Eastern District of New York

The defendants seek transfer of this action to the Eastern District of New York only in the event that their motion to dismiss is not granted. Defendants' Motions, etc. (Docket No. 4) at 1; Defendants' Mem. at 20. The plaintiffs' opposition to the request for transfer assumes that the motion to dismiss will not be granted. Plaintiffs' Obj. at 10-12. To that end, the plaintiffs refer only to 28 U.S.C. § 1404(a), which allows a district court to transfer an action "for the convenience of parties and witnesses, in the interest of justice." More appropriate under the circumstances present here, where I have concluded that venue is improper in this district, is 28 U.S.C. § 1406(a), which provides:

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

The parties do not dispute that this action could have been brought in the Eastern District of New

York.⁸

The decision whether to dismiss an action or transfer it under these circumstances is within the sound discretion of the district court. *First of Michigan Corp. v. Bramlet*, 141 F.3d 260, 262 (6th Cir. 1998); *see Freund v. Fleetwood Enter., Inc.*, 745 F.Supp. 753, 755 (D. Me. 1990). The court may also transfer this action in the absence of personal jurisdiction over the defendants. 28 U.S.C. § 1631. Because there is no indication in the materials submitted to the court in connection with the pending motion that the action currently pending in the Eastern District of New York includes either the breach-of-fiduciary-duty claim or the indemnification claims asserted here by the plaintiffs, and because the breach of contract claims asserted here may serve in some sense as defenses to the claims of breach raised in the New York action by the Kaslofs, *see generally* Complaint and Jury Demand, *Leslie J. Kaslof, et al. v. Global Health Alternatives, Inc., et al.*, Civil Action No. 98-7477, United States District Court, Eastern District of New York, Schedule I to Ralph Dec., I conclude that transfer of this action to the Eastern District of New York, rather than dismissal, would best serve the interest of justice.

IV. Conclusion

For the foregoing reasons, I recommend that this action be transferred to the United States

⁸ The plaintiffs based their argument opposing transfer in large part on the “first to file” rule, under which the earlier filed of two cases involving the same parties and the same subject matter is to be preferred. Application of this rule would make no sense where the court in which the earlier filing takes place has no personal jurisdiction over the defendants or is one in which venue is not proper. Even if that were not the case, the First Circuit has noted that “[w]hile the first-filed rule may ordinarily be a prudent one, it is so only because it is sometimes more important that there be a rule than that the rule be particularly sound.” *Codex Corp. v. Milgo Elec. Corp.*, 553 F.2d 735, 737 (1st Cir. 1977).

District Court for the Eastern District of New York pursuant to 28 U.S.C. §§ 1406(a) and/or 1631. If the court declines to adopt this recommendation, I recommend in the alternative that the defendants' motion to dismiss for lack of personal jurisdiction and improper venue be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge'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 this 24th day of March, 1999.

*David M. Cohen
United States Magistrate Judge*