

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**ENVISIONET COMPUTER SERVICES,** )  
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 )  
 **Plaintiff** )  
 )  
 **v.** )  
 )  
 **MICROPORTAL.COM, INC.,** )  
 **WORLDSPY.COM, INC.,** )  
 **ICENTENNIAL VENTURES, LLC,** )  
 **and ICENTENNIAL OVATION I,** )  
 **LP,** )  
 )  
 **Defendants** )

**CIVIL No. 00-225-P**

**RECOMMENDED DECISION**

Defendants WorldSpy.com, iCentennial Ventures, and iCentennial Ovation I move in a joint motion to dismiss Plaintiff EnvisioNet Computer Services’s complaint for lack of personal jurisdiction, Fed. R. Civ. P. 12(b)(2), and for failure to state a claim, Fed. R. Civ. P. 12(b)(6). EnvisioNet’s complaint asserts claims against MicroPortal.com (MicroPortal), the non-moving Defendant, for, *inter alia*, breach of a contractual obligation to pay for technical support services EnvisioNet provided to MicroPortal’s customers, and against the moving defendants, companies allegedly affiliated with MicroPortal, for unjust enrichment. I now recommend that the Court **DENY** the motion with respect to Defendant WorldSpy and **GRANT** the motion with respect to Defendants iCentennial Ventures and iCentennial Ovation I.

## **RULE 12 STANDARDS OF REVIEW**

The facts for purposes of the Rule 12(b)(6) motion are the well-pled facts of EnvisioNet's complaint. *See Lanfadinis v. American Airlines, Inc.*, 199 F.3d 68, 69 (1st Cir. 2000). Both EnvisioNet and Movants have supplemented those facts for purposes of the Rule 12(b)(2) jurisdictional challenge by submitting evidence in the form of affidavits. *See Barrett v. Lombardi*, 2001 WL 29313, at \*3, 2001 U.S. App. LEXIS 610, at \*8 (1st Cir. January 17, 2001) (observing that "the district court [may] restrict its inquiry to whether the plaintiff has proffered evidence which, if credited, suffices to support a finding of personal jurisdiction"); *Mass. Sch. of Law v. ABA*, 142 F.3d 26, 34 (1st Cir. 1998) (permitting movant to supplement the jurisdictional record with uncontroverted evidence). All facts and allegations are construed in the light most favorable to EnvisioNet, although the Court need not credit conclusory allegations or indulge unreasonably attenuated inferences. *See Aybar v. Crispin-Reyes*, 118 F.3d 10, 13 (1st Cir. 1997); *Ticketmaster-NY, Inc. v. Alioto*, 26 F.3d 201, 203 (1st Cir. 1994).

## **BACKGROUND**

### ***EnvisioNet's Claims as Stated in Complaint***

According to EnvisioNet's complaint, on April 21, 2000, EnvisioNet and MicroPortal entered into an "EnvisioNet Support Services Agreement" (Service Agreement) pursuant to which EnvisioNet agreed to provide technical and customer support services to internet users of MicroPortal's computer systems and products in exchange for fees and certain associated costs. (Complaint at ¶ 9.) The parties to the contract understood that most of the support services initially provided would go to customers of WorldSpy.com (WorldSpy). EnvisioNet is a Maine corporation domiciled in Maine. (*Id.* at ¶ 2.) EnvisioNet provides technical and customer support services to computer and Internet companies. (*Id.*) MicroPortal is a Delaware

corporation domiciled in New York. (*Id.* at ¶ 3.) MicroPortal provides Internet related services and products to other companies, including technology such as “servers”<sup>1</sup> and related support services. (*Id.*; Schachar Affidavit at ¶ 5.) In order to offer its customers support services, MicroPortal locates and contracts with providers of various services and bundles those services together to sell to its customers. (Schachar Affidavit at ¶ 5.)<sup>2</sup> Like MicroPortal, WorldSpy is a Delaware corporation domiciled in New York. WorldSpy is a provider of free Internet service and utilized the services of EnvisioNet through some form of arrangement with MicroPortal. (Complaint at ¶¶ 4, 12.) Although not a party to the Service Agreement, WorldSpy was aware of the Service Agreement from its inception and understood that MicroPortal was contracting with EnvisioNet in order to provide support to WorldSpy’s customers. (Complaint ¶ 12.)

The complaint ties MicroPortal and WorldSpy together through their mutual affiliation with iCentennial Ventures (iCV), and iCentennial Ovation I (iCO), and through one Henry Schachar, an officer common to all four entities. (*Id.* at ¶ 12.) The iCentennial entities are registered in Delaware and domiciled in New York. (*Id.* at ¶¶ 5, 6.) ICV is an “incubator,” a venture capital firm that focuses on founding, promoting, and supporting start-up businesses. (*Id.* at ¶ 5.) ICO is a management firm that oversees the operations of venture capital funds, including (if not exclusively) iCV. (*Id.* at ¶ 6.) EnvisioNet alleges, on information and belief, that “iCentennial”<sup>3</sup> has a pecuniary interest in both MicroPortal and WorldSpy, through equity ownership or otherwise, and participates in the management of both. (*Id.* at ¶ 13.) Henry Schachar, co-founder and principal of iCV and general partner in iCO, is also a co-founder of both MicroPortal and WorldSpy. (*Id.*) During the course of contract negotiations with

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<sup>1</sup> A server is a piece of computer hardware that host network activity.

<sup>2</sup> Use of these statements contained in the Schachar Affidavit for background, non-jurisdictional facts, is for clarification only. These background facts do not impact the vitality of EnvisioNet’s claims.

<sup>3</sup> The complaint does not specify which iCentennial firm. Presumably, iCentennial Ventures is meant.

MicroPortal, EnvisioNet communicated with Schachar at times via his email account at WorldSpy. (*Id.* at ¶ 12.) According to the complaint, “iCentennial was aware and approved of MicroPortal’s contract with EnvisioNet for support services to WorldSpy customers.” (*Id.* at ¶ 13.)

The Service Agreement was short-lived. In July 2000, EnvisioNet stopped receiving contacts for support services from Worldspy customers. In the same general timeframe, MicroPortal informed EnvisioNet that WorldSpy had ceased operations. (*Id.* at ¶ 22.) MicroPortal had by that time failed to pay EnvisioNet’s invoices for April and May. (*Id.* at ¶ 23.) In response to EnvisioNet’s demands for payment, Schachar faxed a letter to EnvisioNet on July 21, 2000, stating that MicroPortal lacked the funds to pay EnvisioNet and that its largest asset was an unpaid account receivable from WorldSpy. (*Id.* at ¶ 25.) The letter was written on MicroPortal letterhead and the facsimile indicated that it had originated from a WorldSpy fax machine. (*Id.*) On or about July 21, 2000, EnvisioNet learned that MicroPortal was negotiating a sale of its assets to a third party. (*Id.* at ¶ 25.) MicroPortal allegedly owes EnvisioNet over \$ 1 million for services EnvisioNet provided on behalf of WorldSpy.

#### ***Jurisdictional Evidence in Supplemental Pleadings***

WorldSpy provided free internet service, including electronic mail, online shopping, information services, and customer service, to customers nationwide. (Donnelly Affidavit, Docket No. 4, at ¶ 6; Milos Affidavit, Docket No. 17, at ¶ 3.) WorldSpy’s customers included Maine residents. Several of these Maine customers contacted EnvisioNet for customer service related to WorldSpy’s online product.<sup>4</sup> (Milos Affidavit at ¶ 3.) WorldSpy gave EnvisioNet

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<sup>4</sup> In its memorandum, EnvisioNet describes WorldSpy as an Internet “portal.” This indicates that WorldSpy was structured like Yahoo, *i.e.*, users would visit the WorldSpy site after dialing into or otherwise connecting to the Internet through an “Internet Service Provider,” or ISP, such as AOL. Thus, WorldSpy’s customers did not connect

access to proprietary customer account information, which was placed on EnvisioNet's servers in Maine. (*Id.*)

The moving defendants are separate commercial entities that have different boards of directors, officers, and employees and separate books, records, and bank accounts. (Schachar Affidavit at ¶ 11.) Schachar is the only overlapping operational officer. (*Id.*) He serves as the Executive Vice President of both MicroPortal and WorldSpy, Chief Operating Officer of iCV, and is a general partner in iCO. (*Id.* at ¶ 2.) Although Schachar's affidavit informs us that iCO "has had no financial or corporate relationship with any of the other defendants" (*Id.* at ¶ 9), Schachar does not make a similar representation with respect to the three remaining entities. ICV provided MicroPortal and WorldSpy with their start up capital. (*Id.* at ¶ 5.) ICV and iCO described MicroPortal and WorldSpy as being within their "portfolio" of start up companies. (Complaint, Exhibit B.)

## DISCUSSION

### I. Rule 12(b)(2) Aspects of the Motion

In their memorandum of law accompanying their motion to dismiss, the moving defendants argue that Maine does not have an interest in the outcome of this litigation and that they do not have sufficient minimum contacts with Maine for this Court to constitutionally exercise jurisdiction over them. (Memorandum of Law in Support of Motion to Dismiss, Docket No. 30, at 10.) EnvisioNet counters that the Court has personal jurisdiction over WorldSpy and

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to the Internet through WorldSpy equipment located in Maine or elsewhere. Nor did they license software from WorldSpy. Presumably, they merely "registered" with WorldSpy in order to utilize its services.

that the Court should permit further jurisdictional discovery with respect to iCV and iCO.<sup>5</sup>  
(Opposition Memorandum, Docket No. 39, at 8-13, 13-14, 15-16.)

***1. Specific jurisdiction over WorldSpy.***

In order to exercise personal jurisdiction over a non-resident party to a diversity action, a federal court must be persuaded that the non-resident's contacts with the forum state "satisfy the requirements of both the forum state's long-arm statute and the Fourteenth Amendment." *Ticketmaster-New York v. Alioto*, 26 F.3d 201, 204 (1st Cir. 1994). In Maine, these two requirements are really one, because Maine's long-arm statute is coextensive with the Fourteenth Amendment's due process clause. *Dorf v. Complastik Corp.*, 1999 ME 133, ¶ 9, 735 A.2d 984, 988. To satisfy the strictures of due process, the defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit [will] not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Proof of these "minimum contacts" varies according to whether the basis for jurisdiction is general or specific. General jurisdiction "exists when the litigation is not directly founded on the defendant's forum-based [activity], but the defendant has nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state." *United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1088 (1st Cir. 1992). "Specific jurisdiction exists when there is a demonstrable nexus between a plaintiff's claims and a defendant's forum-based activities . . ." *Mass. Sch. of Law*, 142 F.3d at 34.

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<sup>5</sup> Should the Court find that the jurisdictional record does not support a finding of personal jurisdiction over WorldSpy, EnvisioNet argues that it should be allowed to conduct jurisdictional discovery with respect to WorldSpy as well. (*Id.* at 14-15.)

Because EnvisioNet's unjust enrichment claim arises out of WorldSpy's allegedly forum-based activity, EnvisioNet seeks to meet the specific jurisdiction standard.

To establish minimum contacts on a theory of specific jurisdiction, a plaintiff must first demonstrate that its cause of action "arises out of, or relates to" defendant's contacts with the forum state, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). Then, the plaintiff must demonstrate the deliberateness of the defendant's contacts, or, phrased another way, that the defendant "purposefully availed itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

*Ticketmaster*, 26 F.3d at 206. If the plaintiff succeeds in meeting these burdens, the defendant may yet evade the court's jurisdictional grasp if it can establish that forcing it to defend a suit in the forum state would be counter to "our traditional conception of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 320.

A. *Does EnvisioNet's unjust enrichment claim arise out of or relate to WorldSpy's forum contacts?*

EnvisioNet passes over this question cursorily in its memorandum, which is frustrating because it is the most difficult test for it to satisfy. It simply states, "EnvisioNet's unjust enrichment claim derives from WorldSpy's failure to pay for the customer service EnvisioNet provided in Maine to support WorldSpy's Internet service." (Opposition Memorandum, Docket No. 39, at 10.) WorldSpy argues that EnvisioNet's claim does not arise out of or relate to WorldSpy's contacts with forum-based internet users, but rather arises out of a contract EnvisioNet entered into with MicroPortal. (Reply Memorandum, Docket No. 44, at 4.) WorldSpy contends that the connection between EnvisioNet's claim and WorldSpy's Maine customers who received support from EnvisioNet, is too "ephemeral" to meet the relatedness test. (*Id.* at 3-4.)

"[R]elatedness is the divining rod that separates specific jurisdiction cases from general jurisdiction cases. [I]t ensures that the element of causation remains in the forefront of the due

process investigation.” *Ticketmaster*, 26 F.3d at 206. The relatedness test imposes a “flexible, relaxed standard.” *Pritzker v. Yari*, 42 F.3d 53, 61 (1st Cir. 1994). Relatedness is to be analyzed in a claim-specific manner. *Phillips Exeter Acad. v. Howard Phillips Fund*, 196 F.3d 284, 289 (1st Cir. 1999). Thus, this Court must consider the nexus between WorldSpy’s activities within this jurisdiction and the elements of EnvisioNet’s unjust enrichment claim, *viz.*, (1) EnvisioNet’s conferral of a benefit (2) with WorldSpy’s appreciation or knowledge (3) under circumstances in which WorldSpy’s retention of the benefit without payment of value would be inequitable.<sup>6</sup> *Forrest Assocs. v. Passamaquoddy Tribe*, 2000 ME 195, ¶ 14, 760 A.2d 1041, 1045-46.

I do not agree with EnvisioNet that the presence of WorldSpy customers in Maine and their use of EnvisioNet support services generate a sufficient causal link between EnvisioNet’s cause of action and WorldSpy’s forum activities. Customer support calls and email from third-parties do not constitute in-forum activities by WorldSpy. Nor do I consider EnvisioNet’s in-state conferral of a benefit to amount to in-state activity by WorldSpy. However, I do find in-state conduct by WorldSpy that sufficiently “relates to” elements one and three of the unjust enrichment claim: WorldSpy transferred proprietary customer information to EnvisioNet and stored it on EnvisioNet’s servers in order to facilitate EnvisioNet’s provision of support services to WorldSpy’s customers. Without this data, the provision of customer support would have been hampered, if not entirely forestalled. Furthermore, this act made it reasonably foreseeable that EnvisioNet would confer a benefit on WorldSpy (element one) and that, in the absence of payment, EnvisioNet would suffer a corresponding injury (element three). I acknowledge that

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<sup>6</sup> The standard applicable to the relatedness determination has not been narrowly addressed in this Circuit in the context of an unjust enrichment claim. In a contract case, the boilerplate relatedness test is whether the defendant’s forum-based activities were “instrumental in the formation of the contract.” *Hahn v. Vt. Law Sch.*, 698 F.2d 48, 51 (1st Cir. 1983). In a tort case, the focus is on proximate cause, *i.e.*, whether the defendant’s forum-based activities were the legal, or material, cause of plaintiff’s injury and whether the injury was a reasonably foreseeable consequence of the contacts. *Nowak*, 94 F.3d at 715 (but qualifying this general statement with the observation that “strict adherence to a proximate cause standard in all circumstances is unnecessarily restrictive”).

this relation is slightly attenuated, but this is due, in large measure, to the equitable nature of the unjust enrichment claim and the fact that it is neither a contract claim nor a tort claim.

Nevertheless, I believe that the facts sufficiently meet the relatedness test because the transfer of this proprietary information should have put WorldSpy on notice that EnvisioNet might seek a quasi-contractual remedy in the event of MicroPortal's breach.

B. *Did WorldSpy purposefully avail itself of the privileges of conducting activities in Maine?*

EnvisioNet does not argue this aspect of the personal jurisdiction contest per se. Rather, it generally argues that WorldSpy has "sufficient contacts" to Maine. (Opposition Memorandum, Docket No. 39 at 11-13.) However, the cases cited in this portion of the memorandum are addressed to the more particular issue of purposeful availment. In order to meet its burden of proving purposeful availment, EnvisioNet points to WorldSpy's "operation of a web portal and related Internet services" as WorldSpy's "most significant Maine contact." (*Id.* at 11.) In addition, EnvisioNet points to the fact that WorldSpy knew of and facilitated EnvisioNet's provision of support services to WorldSpy customers, that WorldSpy directed visitors to its site to contact customer support personnel located in Maine, and that WorldSpy placed proprietary data on EnvisioNet's computer system in Maine. (*Id.* 12-13.) WorldSpy counters that there is no evidence that it made the decision to retain EnvisioNet's services. (Reply Memorandum, Docket No. 44, at 6.) According to WorldSpy, "Who MicroPortal contracted with, or where the parties with whom MicroPortal contracted were located, was of no moment to WorldSpy." (*Id.*)

The purposeful availment test requires this Court to consider whether the Movants' contacts with Maine "represent a purposeful availment of the privilege of conducting activities in [Maine], thereby invoking the benefits and protections of [its] laws and making the defendants'

involuntary presence before the state's courts foreseeable.” *163 Pleasant St. Corp.*, 960 F.2d at 1089. The “‘purposeful availment’ requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts or of the ‘unilateral activity of another party or a third person.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). For this analysis, the Court may look beyond the specific conduct that gives rise to the claim and consider the defendant's more general connections with the forum state. *Id.* at 475-76. The extent of contact need not be great. “So long as it creates a ‘substantial connection’ with the forum, even a single act can support jurisdiction.” *Id.* at 475 n.18 (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). Moreover, a physical presence is not required. *Id.* at 476.

Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.

*Id.*

A number of federal courts have addressed the question of when Internet operations may be substantial enough to reflect purposeful availment of the privileges of doing business in a particular state. The rapidly expanding body of caselaw in this area portrays a broad expanse of commercial Internet activity that, at one extreme, is insufficient to support a finding of minimum contacts between a forum state and a nonresident commercial enterprise and, at the other extreme, is clearly sufficient to support a finding of minimum contacts. In the former camp are cases establishing that the mere posting of information or advertisements on a “passive” website will not confer nationwide jurisdiction over the owner of the website. *See, e.g., Remick v. Manfredy*, 2001 WL 62889, at \*8 n.3, 2001 U.S. App. LEXIS 1049, at \*26 n.3 (3rd Cir. January

25, 2001); *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1299 (10th Cir. 1999); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419-20 (9th Cir. 1997); *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 297, 299 (S. D. N.Y. 1996). *But see Inset Systems, Inc. v. Instruction Set*, 937 F. Supp. 161 (D. Conn. 1996). In the latter camp are cases establishing that Internet-based commercial activity involving repeated transmission of computer files or data pursuant to contractual relationships with the residents of a forum state will subject that entity to a forum court's jurisdiction. *See, e.g., Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W. D. Pa. 1997) (finding minimum contacts where non-resident defendant contracted with several thousand individuals and seven Internet access providers in the forum state for the purpose of enabling the individuals to view and download electronic newsgroup files for a fee).

Between these two extremes are a number of cases involving interactive websites through which users exchange information with the website's host computer. *See, e.g., LFG, LLC v. Zapata Corp.*, 78 F. Supp. 2d 731, 736-37 (N. D. Ill. 1999) (concluding minimum contacts existed because Internet "portal" site permitted users to contact host and encouraged them to join host's mailing list in an effort to increase the number of subscribers, which bolstered host's ability to earn revenue from advertisers)<sup>7</sup>; *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1330, 1333 (E. D. Mo. 1996) (finding minimum contacts where non-resident's Internet activity amounted to active solicitation of subscribers to develop an email mailing list of Internet users interested in receiving advertisements keyed to their personal interests in order to lure advertisers and advertising fees). In these cases, courts have generally made personal jurisdiction

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<sup>7</sup> This finding was aided by other, non-electronic commercial correspondence with a resident of the state. *Zapata*, 78 F. Supp. 2d at 737.

determinations based on “the level of interactivity and [the] commercial nature of the exchange of information.” *Zippo*, 952 F. Supp. at 1124.<sup>8</sup>

EnvisioNet likens this case to *Zapata* based on WorldSpy’s operation of an Internet “portal.” The record reflects that a number of Maine residents have joined this service, obtaining free email addresses and exchanging information with WorldSpy, from which WorldSpy derived a proprietary database of customers. As noted by the *Zapata* court, the commercial viability of portal sites depends on their ability to amass a large number of subscribers or repeat visitors in order to attract revenue from advertisers. *Zapata*, 78 F. Supp. 2d at 736. That the commercial success of Internet portals depends on their ability to attract, among others, the citizens of this state, leads one to question whether the cost of this quest should include submission to this Court’s jurisdiction. After all, insofar as WorldSpy actively sought out the citizens of this state to join its site and succeeded to some extent in doing so, its presence in this Court arises from something greater than a merely random, fortuitous, or attenuated contact. However, I do not need to resolve this case solely on that basis. With respect to WorldSpy’s more narrow in-forum connection with EnvisioNet, the inquiry leads, once again, to WorldSpy’s decision to transfer and store proprietary customer information, the very data that they seek to market, in an EnvisioNet computer system located in this state. Certainly together, these facts warrant a finding that WorldSpy has purposefully availed itself of the privileges of conducting activities in Maine. In fact, the latter of these two contacts with Maine would likely support a finding of purposeful availment. Not only does *Zapata* support the former basis for jurisdiction, but at least one case holds that the purposeful routing of files to an in-state server without any attendant contract or other business relationship or commercial motive can itself confer jurisdiction. *See*

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<sup>8</sup> This line of cases refutes WorldSpy’s contention that the absence of a contract between EnvisioNet and WorldSpy prevents a finding of minimum contacts.

*Intercon, Inc. v. Bell Atl. Internet Solutions, Inc.*, 205 F.3d 1244, 1247-48 (10th Cir. 2000)

(holding that minimum contacts were met where non-resident defendant purposefully routed its customers' emails and support calls to plaintiff's server and personnel, handicapping the server and jeopardizing plaintiff's customer relationships). Finally, it bears noting that WorldSpy presumably did not relinquish its property rights in this proprietary information by transferring it to EnvisioNet. Had it become necessary, it is safe to assume that WorldSpy would have sought to protect these rights under Maine law.

*C. Would it be contrary to our traditional conception of fair play and substantial justice to require WorldSpy to defend this suit in Maine?*

Because I consider EnvisioNet to have carried its burden of establishing minimum contacts, it remains for WorldSpy to show that it would be unreasonable or unfair for it to have to litigate this dispute in Maine. *Nowak*, 94 F.3d at 717. This inquiry requires the Court to weigh a number of "Gestalt factors:" (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. *163 Pleasant Street*, 960 F.2d at 1088.

Neither party has adequately addressed any of these considerations other than the second. With respect to that criteria, it appears plain to me that Maine has a strong interest in ensuring that a domestic corporation, not to mention a major employer and one of the state's more significant "new economy" enterprises, is paid for the services it renders. Without belaboring this Recommended Decision with a discussion of the remaining criteria, suffice it to say that WorldSpy has not carried its burden of proof on this issue.

Based on the foregoing discussion, I recommend that the Court DENY WorldSpy's Rule 12(b)(2) motion to dismiss.

**2. Jurisdictional discovery concerning iCV and iCO.**

ICV and iCO also contend that this Court lacks personal jurisdiction over them. (Movants' Memorandum, Docket No. 30, at 12-14.) They argue that there is no legal justification for this Court to exercise jurisdiction over a non-resident based merely on the non-resident's integration with or control over a company to which jurisdiction does attach.<sup>9</sup> (Reply Memorandum, Docket No. 44, at 7-9.) They note that piercing the corporate veil to establish jurisdiction is an extreme measure and is especially disfavored in contract cases where the plaintiff has voluntarily exposed itself to the limited liability associated with the corporate form of the party with whom it contracted. (*Id.* at 9.) EnvisioNet acknowledges that the current record would not support jurisdiction over iCV or iCO, but seeks permission to conduct discovery on the extent of iCV and iCO's control over MicroPortal and WorldSpy. (Opposition Memorandum, Docket No. 39, at 13-14, 15-16.)

The Maine Supreme Judicial Court (Law Court) has not yet been called upon to pierce a corporate veil in order to establish personal jurisdiction.<sup>10</sup> Otherwise, the Law Court holds that "a court may pierce the corporate veil when equity so demands, and may disregard the corporate entity when used to cover fraud or illegality, or to justify a wrong." *Johnson v. Exclusive Props. Unlimited*, 1998 ME 244, ¶ 5, 720 A.2d 568, 571. The prescribed standard requires a plaintiff to establish that "the defendant abused the privilege of a separate corporate identity[] and [that] an unjust or inequitable result would occur if the court recognized the separate corporate

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<sup>9</sup> ICO and iCV do not concede that they control or dominate WorldSpy or MicroPortal.

<sup>10</sup>Maine law governs this question. See *De Castro v. Sanifill, Inc.*, 198 F.3d 282, 283 (1st Cir. 1999); *Snell v. Bob Fisher Enters.*, 106 F. Supp. 2d 87, 90 (D. Me. 2000).

existence.<sup>11</sup> *Id.* at ¶ 7. With respect to the more specific jurisdictional issue, federal common law in this Circuit indicates that a showing of mere corporate ownership or common management will not be sufficient to justify veil piercing. *De Castro v. Sanifill, Inc.*, 198 F.3d 282, 283 (1st Cir. 1999); *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 905 (1st Cir. 1980). Rather, the determinative factor is control.<sup>12</sup> *De Castro*, 198 F.3d at 283; *Escude Cruz*, 619 F.2d at 905. *See also Minn. Mining & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1265 (Fed. Cir. 1985) (“The precedents establish that a court which has jurisdiction over a corporation has jurisdiction over its alter egos.”). This statement of the federal common law is consistent with the first element of the Law Court’s standard. If a corporation having minimum contacts with the state is nothing more than a shell or puppet through which a defendant lacking contacts with the state acts, the exercise of jurisdiction over the latter is proper because the minimum contacts of the former are attributed to the latter.

In any event, EnvisioNet’s argument that it is entitled to jurisdictional discovery on the extent of the iCentennial defendants’ control over MicroPortal and WorldSpy is not particularly persuasive. “[A] diligent plaintiff who sues an out-of-state corporation and who makes out a colorable case for the existence of *in personam* jurisdiction may well be entitled to a modicum of

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<sup>11</sup> With respect to resolving the first part of this test, the Law Court invites consideration of twelve factors enumerated by the United States District Court for the District of Massachusetts:

- (1) common ownership; (2) pervasive control; (3) confused intermingling of business activity, assets, or management; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporate assets by the dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promotion fraud.

*Johnson*, 1998 ME 244, ¶ 7, 720 A.2d at 571 (quoting *The George Hyman Constr. Co. v. Gateman*, 16 F. Supp. 2d 129, 149-50 (D. Mass. 1998)).

<sup>12</sup> In the context of federal question jurisdiction, the First Circuit requires that “litigants who insist that the corporate veil be brushed aside must first prove three things: lack of corporate independence, fraudulent intent, and manifest injustice.” *163 Pleasant St.*, 960 F.2d at 1093. Maine law does not require proof of fraud. *Johnson*, 1998 ME 244, ¶ 5, 720 A.2d at 571.

jurisdictional discovery if the corporation interposes a jurisdictional defense.” *Sunview Condo. Ass’n v. Flexel Int’l, Ltd.*, 116 F.3d 962, 964 (1st Cir. 1997). However, an idle plaintiff will likely squander the entitlement. *Id.* at 964 & n.3.

Although EnvisioNet argues that it “should” be permitted to conduct jurisdictional discovery, it has not previously sought “a prompt hearing with a judicial officer” in order to ensure timely resolution of the underlying discovery dispute. D. Me. Local R. 26(b). According to its brief, EnvisioNet has attempted to depose Henry Schachar, but Schachar has been uncooperative. (Opposition Memorandum, Docket No. 39, at 7.) In a letter dated December 18, 2000, Attorney Haley, EnvisioNet’s counsel, informed counsel for Movants that he felt there was little option left but to seek the Court’s intercession with respect to taking Schachar’s deposition. (Haley Affidavit, Docket No. 40, Exhibit C, p.2.) No intercession was sought. In addition to complaining of Schachar and MicroPortal’s uncooperativeness, Haley also referenced outstanding requests for production of documents and expressed concern that MicroPortal would not respond. (*Id.*) Despite these difficulties, EnvisioNet never contacted this Court to resolve this dispute and ensure that an adequate record existed for purposes of a 12(b)(2) motion. Furthermore, it is troubling that EnvisioNet’s memorandum in opposition does not include a copy of the outstanding requests for production of documents so that this Court could consider whether the requested documents actually bear on the issue of the iCentennial defendants’ control over either MicroPortal or WorldSpy. Without such information, it is impossible for this Court to adequately evaluate just how diligent EnvisioNet’s efforts have been with respect to the narrow issue of this Court’s jurisdiction over the iCentennial defendants. Finally, it would have been of assistance to the Court if EnvisioNet had included draft interrogatories or a draft request for documents that narrowly addressed this issue in order to provide this Court with some

guidance on the precise scope of the discovery sought. In this light, the current “request” for jurisdictional discovery falls short of a diligent effort to gather those facts necessary to meet EnvisioNet’s jurisdictional burden.

As an aside, even if the Court issued an order permitting limited jurisdictional discovery on the issue of corporate control, EnvisioNet would still be required to establish that the interest of justice requires this Court to pierce the corporate veil of either MicroPortal or WorldSpy in order to hale iCV and iCO into this Court. EnvisioNet has not presented any developed argumentation on this point in its current memorandum. In my view, EnvisioNet is a sophisticated commercial enterprise that has only itself to blame for entering into a contract with one party, MicroPortal, to provide services for the benefit of another, WorldSpy, or others, the iCentennial defendants. *Cf. Birbara v. Locke*, 99 F.3d 1233, 1233, 1238 (1st Cir. 1996) (observing that parties seeking to pierce the veil of a corporation that they voluntarily contracted with may have a harder time obtaining this form of equitable relief). Under these specific circumstances, I believe that EnvisioNet is asking too much to have this Court order jurisdictional discovery in order to make a veil-piercing determination with respect to non-resident commercial entities when the alternative, filing suit in New York, is a foreseeable and fair consequence of their willingness to enter into a contract with one corporation to provide services to another.

For the foregoing reasons, I recommend that the Court GRANT the iCentennial defendants’ Rule 12(b)(2) motion.<sup>13</sup>

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<sup>13</sup> Today I received supplemental correspondence submitted by the parties regarding the jurisdictional challenge. (Letter from EnvisioNet’s counsel, Matthew Schaefer, dated February 2, 2001; Letter from Movants’ counsel, Todd Holbrook, dated February 13, 2001.) Attached to Mr. Schaefer’s letter is a copy of an opinion and order issued January 4, 2001, by Judge Haggerty of the United States District Court for the District of Oregon, captioned *900 Support, Inc. v. MicroPortal*, in which Judge Haggerty denied defendants’ motion to dismiss for lack of personal jurisdiction. EnvisioNet contends that Judge Haggerty’s opinion and order addresses “the precise issue now before the Court.” This is not accurate. The facts and claims presented to Judge Haggerty in *900 Support* are wholly

## II. Rule 12(b)(6) Aspects of the Motion

With respect to WorldSpy, Movants argue that the facts alleged do not sufficiently indicate that it would be inequitable for WorldSpy to retain the benefit of the services provided by EnvisioNet. (Movants' Memorandum, Docket No. 30, at 15-16.) With respect to the iCentennial defendants, Movants argue, in a nutshell, that because EnvisioNet entered into a contract with MicroPortal, a distinct corporate entity, and the contract bore no relation to the iCentennial defendants, EnvisioNet cannot state a claim against the iCentennial defendants unless the claim adequately alleges all of the elements required to obtain equitable relief in the nature of piercing MicroPortal's corporate veil. (*Id.* at 17-19.) Finally, with respect to all three defendants, Movants contend that EnvisioNet must adequately allege the absence of an adequate remedy at law. (*Id.* at 17, 19.) In opposition, EnvisioNet argues, "For the defendants to prevail, the Court must find that no set of facts could support EnvisioNet's claims." (Opposition Memorandum at 16.) With respect to WorldSpy, EnvisioNet contends that there is "ample evidence in the record of possible collusion between WorldSpy and MicroPortal." (*Id.* at 17.) With respect to the iCentennial defendants, EnvisioNet argues only that it conferred a benefit on them. It does not address whether retention of any alleged benefit would be unjust. (*Id.* at 17-18.) EnvisioNet also clarifies that its claim against the iCentennial defendants is not premised on piercing MicroPortal's corporate veil, but for their "direct liability . . . for unjust enrichment." (*Id.* at 17.)

### 1. *WorldSpy*

In Maine, the elements of a claim for unjust enrichment are three: (1) conferral of a benefit; (2) appreciation or knowledge of the benefit on the part of the defendant; and (3) the

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different from the facts and claims presented here. I do not consider *900 Support* to be persuasive on the issues presented by the instant motion, either in favor of EnvisioNet or in favor of Movants.

presence of circumstances that make retention of the benefit without payment of value inequitable. *Forrest Assocs.*, 2000 ME 195, ¶ 14, 760 A.2d at 1045-46. When claims of unjust enrichment are leveled against third-party beneficiaries of a contract, the bar is raised for proof of the third element of an unjust enrichment claim. *George C. Hall & Sons, Inc. v. Taylor*, 628 A.2d 1037, 1039 (Me. 1993) (vacating judgment for plaintiff and remanding for entry of judgment for defendant third-party beneficiary where complaint failed to allege fraud or collusion or that contracting defendant was judgment proof).

EnvisioNet's complaint contains sufficient facts to permit an inference that its legal remedies against MicroPortal will be ineffectual. Paragraph 24 of the complaint indicates that Schachar informed EnvisioNet that MicroPortal would be unable to pay EnvisioNet for its services unless and until it received payment from WorldSpy on an account receivable that was MicroPortal's single largest asset. It is not as easy to establish collusion between MicroPortal and WorldSpy. Although the additional facts presented through the parties' affidavits would give rise to a reasonable inference that MicroPortal and WorldSpy are colluding to prevent paying EnvisioNet, the allegations of the complaint do not adequately reveal the extent of Schachar's control over both MicroPortal and WorldSpy. Based merely on the allegations of the complaint, I would be inclined to recommend that the Court grant WorldSpy's motion to dismiss for failure to state a claim.

However, in view of the admonition in Rule 1 that the Rules be construed to ensure the "just determination of every action" and the provision in Rule 12(b) that permits the Court to treat a 12(b)(6) motion as a Rule 56 motion when "matters outside the pleadings are presented to and not excluded by the court," my view is that the Court ought to view the complaint and jurisdictional (veil piercing) evidence in tandem and deny WorldSpy's motion. In my view,

when so conjoined, the record permits the inference that MicroPortal, an affiliate of WorldSpy, is making no effort to obtain payment from WorldSpy due solely to this affiliation, and that WorldSpy, as an affiliate of MicroPortal, is withholding funds where it would otherwise pay an unaffiliated creditor. I think that this fact, inferred from the jurisdictional materials, is sufficient to satisfy the third element of the unjust enrichment claim at this stage of litigation and permit EnvisioNet's claim against WorldSpy to proceed.

## ***2. The iCentennial defendants***

In the event that the Court disagrees with the jurisdictional recommendation regarding the iCentennial defendants, *supra* Section I(2), this section evaluates EnvisioNet's unjust enrichment claim against the iCentennial defendants. I do not believe EnvisioNet's complaint states a claim against these defendants because there is not a legally adequate benefit that has been conferred on them by EnvisioNet. The allegations clearly indicate that WorldSpy was the beneficiary of the services provided by EnvisioNet. Accepting, as I must, that these defendants have a financial stake in WorldSpy and stand to profit from the sale of this corporation or its assets, that fact does not justify disregarding WorldSpy's corporate form to treat the benefit conferred on WorldSpy as a benefit conferred on the iCentennial defendants. In my view, in order to obtain relief from the iCentennial defendants, EnvisioNet would either have to pierce WorldSpy's corporate veil to recover on its unjust enrichment theory or pierce MicroPortal's corporate veil to recover on its contract theory. However, EnvisioNet's brief makes clear that it did not intend to recover from the iCentennial defendants based on the veil-piercing equitable remedy.

## **CONCLUSION**

Based on the foregoing, it is my conclusion that this Court has personal jurisdiction over WorldSpy and that EnvisioNet's unjust enrichment claim against WorldSpy is adequately plead,

when supplemented by the parties' affidavits. Therefore, I recommend that the Court DENY WorldSpy's motion to dismiss on both grounds. With respect to the iCentennial defendants, I conclude not only that EnvisioNet's attendance to the obvious jurisdictional problems was less than adequate and does not justify an order permitting preliminary jurisdictional discovery, but also that EnvisioNet's unjust enrichment claim is insufficiently pled. Therefore, I recommend that the Court GRANT the iCentennial defendants' motion to dismiss on both grounds.

### 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 of 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: February 14, 2001

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Margaret J. Kravchuk  
U.S. Magistrate Judge

U.S. District Court

District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-225

ENVISIONET COMPUTER v. MICROPORTAL.COM INC, et al Filed: 08/03/00

Assigned to: JUDGE D. BROCK HORNBLY Jury demand: Plaintiff

Demand: \$15,000,000 Nature of Suit: 190

Lead Docket: None Jurisdiction: Diversity

Dkt# in other court: None

Cause: 28:1332 Diversity-Contract Dispute

ENVISIONET COMPUTER SERVICES GEORGE S ISAACSON

INC [COR LD NTC]

plaintiff            MATTEW P. SCHAEFER, ESQ.  
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                         BRANN & ISAACSON  
                         184 MAIN STREET  
                         P. O. BOX 3070  
                         LEWISTON, ME 04243-3070  
                         786-3566

v.

MICROPORTAL.COM INC            KENNETH D. PIERCE, ESQ.  
defendant            [COR LD NTC]  
                         MONAGHAN, LEAHY, HOCHADEL &  
                         LIBBY  
                         P. O. BOX 7046 DTS  
                         PORTLAND, ME 04112-7046  
                         774-3906

WORLDSPIY.COM INC            TODD S. HOLBROOK, ESQ.  
defendant            [COR LD NTC]  
                         BERNSTEIN, SHUR, SAWYER, &  
                         NELSON  
                         100 MIDDLE STREET  
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ICENTENNIAL VENTURES LLC            TODD S. HOLBROOK, ESQ.  
defendant            (See above)  
                         [COR LD NTC]

ICENTENNIAL OVATION I LP            TODD S. HOLBROOK, ESQ.  
defendant            (See above)  
                         [COR LD NTC]