Taboola, Inc. v FSM Fashion Style Mag, Inc.
2016 NY Slip Op 30428(U)
March 14, 2016
Supreme Court, New York County
Docket Number: 653403/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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TABOOLA, INC.

Index No.: 653403/2014

Plaintiff,

DECISION & ORDER

-against-

FSM FASHION STYLE MAG, INC., d/b/a, FASHION STYLE MAGAZINE, a/k/a, FASHIONSTYLEMAG and RAAJ KAPUR BRAR, a/k/a, RAAJ SINGH BRAR, a/k/a, RAJINDER BRAR,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Raaj Kapur Bra, a/k/a, Raaj Singh Brar, a/k/a, Rajinder Brar (Brar) moves to dismiss the complaint pursuant to CPLR 3211(a)(7) and (8), for failure to state a claim and lack of personal jurisdiction (Motion Seq. 001). Plaintiff Taboola, Inc. (Taboola) opposes. For the reasons that follow, the motion is granted in part and denied in part.

I. Background

As this decision involves a motion to dismiss, the facts recited are taken from the complaint and the documentary evidence submitted by the parties.

Taboola is a Delaware corporation with its principal place of business in midtown Manhattan. Compl. ¶ 2. Defendant FSM Fashion Style Mag Inc., d/b/a, Fashion Style Magazine, a/k/a, FashionStyleMag (FSM) is a Canadian corporation headquartered in Ontario, Canada. ¶ 3. Brar is FSM's CEO and principal shareholder and resides and works in Canada. ¶¶ 4-5.

Taboola provides online advertising services to corporate clients by using the Taboola "widget" to generate targeted advertisements on third-party websites. ¶ 11. Once installed on a website, the Taboola widget attempts to determine which of a client's advertisements will

interest individual visitors to the site. *Id.* The widget then displays advertisements tailored to particular site visitors. *Id.* When a site visitor clicks on a Taboola-generated advertisement, a hyperlink embedded in the advertisement directs the visitor to the advertiser's webpage. *Id.* This increases traffic to the advertiser's webpage and, presumably, increases the advertiser's revenue. *Id.* Taboola charges its clients according to the number of clicks a Taboola-generated advertisement receives. ¶ 12. The advertiser then pays Taboola an agreed upon cost-per-click rate, up to a specific daily cap. *Id.* In this lawsuit, Taboola seeks to recover $561,896.26 for advertising services that it rendered to FSM pursuant to a February 21, 2014 digital advertising agreement between Taboola and FSM (the Agreement). ¶ 24; *see* Dkt. 15.[1]

A. The Agreement

The Agreement is entitled "Digital Advertising Insertion Order" and dated February 21, 2014. Dkt. 15. It names as the "Advertiser" "FashionSyleMag [sic]"; as billing contact Raaj Brar; as billing city Toronto; and as main contact Raaj Kapur, CEO. *Id.* It is signed by "Raaj Kapur" [Brar], CEO. *Id.* Brar claims to have signed electronically, in Canada. Dkt. 8 (January 16, 2015 Affidavit of Raaj Brar) ¶ 5.

The Agreement states the cost per click as $.14, the "Daily Caps" as "675", the start date as February 2, 2014, the end date as March 4, 2014, and the "Flighting" as renewing monthly. Dkt. 15. The effective date for commencing the Agreement is listed as February 21, 2014, the date the Agreement was signed. *Id.* The Agreement incorporates Taboola's Digital Insertion Order Terms and Conditions (Terms and Conditions) by reference and are annexed to the Agreement. *Id.*

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

The Terms and Conditions govern the rights and obligations of the parties. *Id.* The first two pages of the Terms and Conditions describe the advertising services that Taboola agreed to provide to FSM and specifies that Taboola will pay per click. *Id.* Page one of the Terms and Conditions grants Taboola the right to include FSM's advertising material in the content that Taboola "recommends" to visitors to third-party websites. *Id.* In Paragraph 1, FSM grants Taboola a limited license to use FSM's name, logo, and trademarks in connection with FSM's advertising campaign. *Id.* Taboola further agrees to discontinue its services when FSM reaches its agreed-upon advertising budget. *Id.*

As set forth in Paragraph 2 of the Agreement, FSM limited its initial advertising campaign period to one week, with a budget of $5,000. *Id.* Paragraph 2 limits the geographical region for the initial campaign to the United States. *Id.* At the bottom of the Agreement, Taboola provides a New York address for receiving notices under the Agreement:

44 West 18th Street, Suite 702
New York, New York 10011

Id.

Paragraph 12 of the Terms and Conditions contains a New York choice of law and forum selection clause. *Id.* It states, in relevant part:

> 12. **Choice of Law:** This Agreement will be governed by and construed in accordance with the laws of the State of New York excluding its conflicts of law principles. Any legal action or proceeding arising under this Agreement will be brought exclusively in the federal or state courts located in the County of New York, New York and the parties hereby irrevocably consent to personal jurisdiction and venue therein.

Id.

Paragraph 3 of the Terms and Conditions, entitled Target Spend, gives FSM the option to extend its campaign period beyond the first week, and to change its advertising budget:

> 3. **Target Spend**: [FSM] may change the Target Spend set forth in Section 2 of the [Agreement], for a particular month, a portion of a month or on a going-forward basis, at any time on no less than 1 business day's notice by either (1) sending [FSM]'s designated Taboola Campaign Manager an email indicating the amount of the revised Target Spend and the period during which it shall be in effect or (2) using the Campaign Management dashboard in Taboola Backstage.

Id.

Terms and Conditions Paragraph 4 requires Taboola to invoice FSM within 14 days of the end of each billing period. *Id.* FSM must then pay Taboola within 30 days of receiving the invoices. *Id.*

Terms and Conditions Paragraph 16 provides:

> 16. **Miscellaneous:** The failure of either party to enforce strict performance by the other party of any provision of this Agreement or to exercise any right under this Agreement shall not be construed as a waiver of that party's right. Any waiver, modification or amendment of any provision of this Agreement will be effective only if in writing and signed by a duly authorized representative of each party.

Id.

B. Alleged Breach of the Agreement

Shortly after the parties entered into the Agreement on February 21, 2014, Taboola began generating ads for FSM on various third-party websites. Dkt. 13 (Mar. 5, 2015 Affidavit of Michael Gifis), Ex. 2 (Emails). On March 5, 2014, after the week-long initial campaign period ended, Brar authorized Meghan Miehe, FSM's campaign manager at Taboola,[2] to expand FSM's advertisements to the United Kingdom and Canada. Compl. ¶ 20. Later that month, Brar authorized Michael Gifis, Taboola's sales manager in New York City, to increase FSM's monthly advertising budget to $500,000 across all campaigns. *Id.*; Gifis Aff. ¶ 7. Gifis states in

[2] A search of Miehe's public LinkedIn profile indicates that Miehe works out of Taboola's New York office. *See* https://www.linkedin.com/in/meghanmiehe.

his affidavit that he and Brar negotiated the terms of the expanded campaign over the phone, and that Brar acted as FSM's sole decision-maker during the negotiations. Gifis Aff. ¶¶ 5-9. On April 29, 2014, Brar again contacted Gifis to add two more locations to FSM's advertising campaign. Compl. ¶ 21; Gifis Aff. ¶ 8. The parties do not dispute that they properly amended the Agreement to reflect FSM's increased budget and expansion into new geographical territories. Compl. ¶ 22.

From February to May of 2014, Taboola sent FSM monthly invoices specifying the number of clicks that Taboola-generated advertisements for FSM received during the previous billing period, and the total amount due. Compl. ¶ 24; Gifis Aff., Ex. 8 (Invoices). Taboola verified the total number of clicks during each billing period by tracking and conducting a forensic analysis of all clicks. Compl. ¶¶ 31-32; Gifis Aff., Ex. 8, p. 6-7. By the end of May 2014, FSM had accrued an outstanding balance of $561,896.26. Compl. ¶¶ 25 & 33.

From May to September 2014, Taboola alleges that it demanded payment from FSM orally and in writing on at least six occasions. Compl. ¶¶ 27-28; Gifis Aff., Ex. 9 (Emails). In a June 26, 2014 email to Gifis, Brar acknowledged that Taboola owed a balance of $517,935.00. Gifis Aff., Ex. 9 (Emails), p. 2. Ultimately, however, FSM made no payments to Taboola. Compl. ¶ 26.

In June 2014, Brar emailed Gifis stating that FSM was having financial difficulties, and requested a payment schedule for the Taboola invoices. Compl. ¶ 34. Brar and Gifis held a telephone conference on June 5, 2014, during which Brar allegedly offered to satisfy Taboola's invoices by transferring stock shares that Brar owned in another company, Fetopolis, Inc. (Fetopolis), to Taboola. Gifis Aff. ¶ 13. Plaintiff further contends that Brar also offered to apply

funds that Taboola owed Fetopolis in connection with a separate transaction to offset the amount that FSM owed Taboola.[3] *Id.*

C. Brar's New York Contacts

Brar's primary contacts with New York arise from his role in negotiating and executing the Agreement with Taboola's New York representatives. In February 2014, Brar negotiated the terms of the Agreement with Gifis and Taboola's business development manager, Andrew Naoum. Gifis Aff. ¶¶ 5-9. Both Gifis and Naoum were working out of Taboola's Manhattan office. *Id.* Gifis asserts that he advised Brar on multiple occasions that he was working out of New York. Gifis Aff. ¶ 14. The signature line at the bottom of Gifis's emails to Brar reads, "Taboola NYC". Gifis Aff., Ex. 2 (Emails), p. 1. Similarly, Naoum's emails to Brar contain a New York address in the signature line: "Taboola Inc. | 44 W. 18th Street | New York, New York 10011". Gifis Aff., Ex. 2 (Emails), p. 4.

Brar communicated with Taboola by telephone and email. Dkt. 35 (March 31, 2015 Affidavit of Raaj Brar) ¶ 6. Brar estimates that he sent about one email per week to Taboola representatives over the course of six months. January 16, 2015 Brar Aff. ¶ 4. Some of these emails contained documents and information to Taboola's New York-based representatives to assist Taboola with sustaining FSM's advertising campaign. Gifis Aff. ¶¶ 9-10, Ex. 6 & 7 (Emails). Additionally, Brar held at least six telephone conferences with Gifis, who was based in New York. *Id.*

[3] Brar admits that he negotiated a similar advertising agreement with Taboola on behalf of Fetopolis. Dkt. 8 (January 16, 2015 Affidavit of Raaj Kapur Brar) ¶¶ 4 & 6-7. This occurred at around the same time as the FSM deal. *Id.*

Brar asserts that he does not have an office in New York, does not regularly conduct business in New York, and has visited New York just twice for a few days during the twelve years leading up to this lawsuit. January 16, 2015 Brar Aff. ¶ 10.

D. Piercing the Corporate Veil

Taboola alleges that Brar exercised complete domination and control of FSM, and that FSM was a shell entity with little or no capital or assets. Compl. ¶ 43. Taboola points out that Brar is the only director listed on FSM's Canadian Federal Corporations information page [Dkt. 14 (March 6, 2015 Affidavit of Jared E. Paioff) ¶ 5, Ex. 10 (Canadian Federal Corporations Search Results)], and that FSM's only active mailing address is Brar's home address. *Id.* ¶ 6, Ex. 12 (Process Server Affidavit). FSM's only other registered office address is a discontinued UPS store post office box. Paioff Aff. ¶ 5.

In addition, Taboola alleges that Brar used FSM to further his personal interests, and co-mingled FSM's assets with the assets of other companies that Brar owns. Compl. ¶ 24. Taboola contends that Brar disregarded any corporate formalities in operating FSM, by not holding regular meetings or elections, or maintaining corporate records or minutes. ¶ 45. Taboola argues that as a result of Brar undercapitalizing FSM and disregarding corporate formalities, FSM was unable to compensate Taboola for Taboola's services. ¶ 46.

Taboola also argues that, at some point between September 2014 and November 2014, Brar transferred FSM's assets to a Delaware company that Brar owned to avoid paying FSM's debt to Taboola. Paioff Aff. ¶¶ 10-11. Counsel for Taboola submits documentary evidence that in September 2014, Brar incorporated a Delaware company called "Fashion Style Mag, Inc.," [Paioff Aff. ¶¶ 8-9, Ex. 14 (Delaware Division of Corporations "Entity Details" for Fashion Style Mag., Inc.)], in which Brar owns a 100% interest. *Id.* Ex. 16 (Nov. 21, 2014 Amended and

Restated Option Agreement), p. 1. Two months later (the same month that Taboola filed this lawsuit), Fashion Style Mag, Inc.'s assets including domain names that once belonged to FSM, e.g., http://www.fashionstylemag.com/ and http://www.thewomanlife.com were transferred. Paioff Aff. ¶10, Ex. 16, p. 7. Taboola points out that FSM had previously provided these same domain names to Taboola in connection with FSM's advertising campaign. Paioff Aff. ¶ 10, Ex. 2 & 5 (emails).

Counsel states in his affidavit that in October 2014 – a month after Brar incorporated Fashion Style Mag, Inc. – counsel ran a Canadian Federal Corporations search that indicated that FSM was solvent. Paioff Aff. ¶ 4. Five months later, in March 2015, FSM was insolvent and in dissolution. *Id.*, Ex. 10 (Mar. 4, 2015 Canadian Federal Corporations Search). Taboola maintains that these facts constitute circumstantial evidence of Brar's fraudulent conveyance of FSM's assets into Fashion Style Mag, Inc. Paioff Aff. ¶ 11. Brar denies these allegations, claiming that any corporate restructuring that he engaged in was unrelated to this case.

Finally, in November 2014, Fashion Style Mag, Inc. entered into an option agreement with a company called Indigo-Energy, Inc. [Paioff Aff., Ex. 16, p. 1], which later changed its name to HDIMAX Media, Inc. (HDIMAX Media). Paioff Aff., Ex. 13 (SEC Registration Statement), pp. 10. According to HDIMax Media's SEC form S-1 registration statement, Brar owns a 93.94% share in the company. *Id.* at 77. He also is the CEO of the company's wholly-owned subsidiary, through which the company conducts most of its business. *Id.* at 10-11. The option agreement grants Indigo-Energy, Inc. (later HDIMax Media) an irrevocable option to purchase 100% of Fashion Style Mag, Inc.'s shares. Paioff Aff., Ex. 16, p. 1.[4]

[4]Brar purportedly visited New York in November 2014, around the time that the option agreement and SEC filings went into effect. Paioff Aff. ¶ 13, Ex. 17 (Twitter Screenshots). Brar did not disclose this November 2014 trip to New York in his affidavit.

E. Causes of Action

On the basis of the foregoing allegations, Taboola asserts the following causes of action against FSM and Brar, individually, numbered here as in the complaint: (1) breach of contract; (2) account stated; and (3) unjust enrichment.

II. Discussion

The threshold question underlying Brar's motion to dismiss is whether Taboola can sue Brar, a Canadian resident, in New York. If the court determines that it has jurisdiction over Brar, the court must then decide whether Taboola has stated a claim against Brar individually.

A. Motion to Dismiss for Lack of Personal Jurisdiction – CPLR 3211(a)(8)

To determine whether a non-resident is subject to personal jurisdiction in New York, the court first must decide whether New York's long-arm statute is satisfied, and then whether exercising jurisdiction would comport with due process. *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 (2000). On a motion to dismiss pursuant to CPLR 3211(a)(8), the plaintiff bears the burden of proving that the court has jurisdiction over the moving defendant. *Copp v Ramirez*, 62 AD3d 23, 28 (1st Dept 2009). Such a showing "entails making legally sufficient allegations … including an averment of facts that, if credited, would suffice" to establish that jurisdiction exists. *Penguin Grp. (USA) Inc. v Am. Buddha*, 609 F3d 30, 35 (2d Cir 2010). If the plaintiff shows that facts justifying the exercise of jurisdiction may exist but are not presently in its possession, then the court may direct that discovery take place to explore the issue. CPLR 3211(d); *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 466–67 (1974) (evidence that defendant had acquired permits to store and sell goods in New York tended to support jurisdiction).

1. Long-Arm Jurisdiction Over Brar Under CPLR 302(a)(1)

Under CPLR 302(a)(1), long-arm jurisdiction over a non-resident exists where a defendant transacted business within the state and the cause of action arose from that transaction. CPLR 302(a)(1) ("[A] court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent ... transacts any business within the state or contracts anywhere to supply goods or services in the state."). New York courts treat CPLR 302(a)(1) as a "single act" statute. *Wilson v Dantas*, 128 AD3d 176, 181 (1st Dept 2015). Consequently, proof of one transaction in New York suffices to invoke jurisdiction, so long as the defendant's activities in New York were purposeful and there is a substantial relationship between the transaction and the claims asserted. *Id.*

In construing CPLR 302(a)(1), courts look at the totality of the defendant's activities to determine if he was engaged in purposeful activity in New York in connection with the matter in dispute. *Longines-Wittnauer Watch Co. v Barnes & Reinecke, Inc.*, 15 NY2d 443, 457 n.5 (1965). Purposeful activities are those with which a defendant avails itself of the privilege of conducting activities within the state, invoking the benefits and protections of its laws. *Fischbarg v Doucet*, 9 NY2d 375, 380 (2007) (citations omitted). "[T]he statutory test may be satisfied by a showing of [] purposeful acts performed by [defendants] in this State in relation to the contract, albeit preliminary or subsequent to its execution." *Wilson*, 128 AD3d at 183, quoting *Longines-Wittnauer*, 15 NY2d at 457. However, "jurisdiction is not justified where the relationship between the claim and the transaction is too attenuated" or "merely coincidental." *Johnson v Ward*, 4 NY3d 516, 520 (2005).

In this matter, Brar argues the court should not consider any contacts that he had with New York while acting in his corporate capacity as FSM's CEO. Br. at 4. The court disagrees.

New York has expressly rejected the fiduciary shield doctrine, which insulates corporate officers from long-arm jurisdiction based on acts they perform while acting on behalf of their companies. *See Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 470 (1988). Accordingly, the court may take all of Brar's jurisdictionally relevant contacts with New York into account, whether or not they occurred while Brar was acting on behalf of FSM. While Brar correctly points out that he did not consent to jurisdiction in New York by signing the Agreement for FSM [*see L-3 Commc'ns Corp. v Channel Techs., Inc.*, 291 AD2d 276 (1st Dept 2002)], the Agreement is not the only basis for asserting personal jurisdiction over Brar. As the *Kreutter* court noted, the question of a corporate official's substantive *liability* under a contract is not relevant to the threshold issue of whether the court has personal jurisdiction over him. *Id.* at 470.

Taboola has alleged sufficient facts to justify asserting jurisdiction over Brar in New York. The Court of Appeals has long recognized CPLR 302(a)(1) long-arm jurisdiction over commercial actors who use electronic and telephonic means to project themselves into New York to conduct business transactions. *See Deutsche Bank Secs., Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71 (2006) (exercising personal jurisdiction over Montana bond trader who negotiated bond sales with New York broker over phone during 13-month period), citing Siegel, N.Y. Prac. § 86, at 152 (5th ed) (where defendant "deals directly with the broker's New York office by phone or mail [or e-mail] in a number of transactions instead of dealing with the broker at the broker's local office outside New York, long-arm jurisdiction may be upheld."); *see also Fischbarg v Doucet*, 38 AD3d 270, 275 (1st Dept 2007) (California defendants projected themselves into New York by calling lawyer, consulting him, emailing and faxing him voluminous documents, and retaining him), *aff'd* 9 NY3d 375 (2007); *Ehrlich-Bober & Co. v*

Univ. of Houston, 49 NY2d 574, 581 (1980) (sustaining personal jurisdiction over Texas defendant who initiated series of commercial transactions with New York company over phone).

As the Appellate Division observed in *Fischbarg*, "[w]ith the evolution of technology, it is clear that physical presence alone should not determine whether one has purposely availed itself of a state's rights and benefits for jurisdictional purposes ... lawyers and other professionals today transact business with their pens, their fax machines and their conference calls—not with their feet." *Fischbarg*, 38 AD3d at 274. Likewise, in *Ehrlich-Bober*, the Court of Appeals announced that New York has an interest in assuring ready access to a forum for redress of injuries arising out of commercial transactions spawned in New York. *Id.* at 581.

Here, plaintiff alleges that over a six-month period, Brar knowingly engaged in numerous conference calls, negotiations, and emails with representatives in Taboola's New York office. *See* Gifis Aff. ¶¶ 5-14; *id.* Ex. 1-9. It is undisputed that Brar signed the Agreement on FSM's behalf, and was FSM's sole decision maker throughout its dealings with Taboola. Gifis Aff. ¶¶ 5-9. As such, Brar was aware that the Agreement contained a New York forum selection clause and that Taboola maintained a New York mailing address. Thereafter, Brar sent Taboola's New York City executives documents containing URLs and advertising material for Taboola to include in FSM's ad campaign, which Brar knew Taboola was coordinating from New York. *Id.* ¶¶ 9-10.

It is true that the Agreement's general Terms and Conditions appear to be boilerplate provisions and not the product of an arm's length negotiation. Still, according to plaintiff, Brar negotiated the terms of FSM's expanded advertising campaigns and payment schedule with Gifis, who was based in New York. *Id.* ¶¶ 6-7. In his affidavit, Brar denies that he knew where the Taboola representatives with whom he dealt were located, claiming that he believed Gifis

was located in Canada. His sole basis for this belief was that Gifis told Brar that Gifis handled all of Taboola's Canadian clients. Brar's position, however, contradicts the factual allegations in Taboola's complaint and affidavits. In particular, Gifis avers that he advised Brar on numerous occasions that he was working out of Taboola's New York office. Gifis Aff. ¶ 14. The signature line in Gifis's emails to Brar reads "Taboola NYC", which supports this allegation. *Id.*, Ex. 2 (Emails), p.1. Taboola's business development manager, Naoum, also includes a New York address in the footer of his emails to Brar. *Id.*, p. 4. Likewise, the Agreement itself contains numerous references to New York and designates Taboola's Manhattan office as its mailing address. Dkt. 15 ¶ 12. Brar's affidavit testimony is insufficient to overcome the well-pled allegations in Taboola's complaint, affidavits and supporting documentation.

In light of the foregoing allegations, the court finds that Taboola has pled and presented sufficient facts to show that Brar engaged in a purposeful business transaction in New York and that Taboola's claims against Brar arose from that transaction. *See* CPLR 302(a)(1); *see also Moyal v Theemasystems, Ltd*, 2012 WL 11818698, at *3 (Sup Ct, NY County 2012) (asserting CPLR 302(a)(1) jurisdiction over corporate representative who negotiated advertising deal over the phone and acted as company chief negotiator); *Terwin Advisors Group, LLC v Cameron Financial Group Inc.*, 2008 WL 7563025 (Sup Ct, NY County 2008) (50% shareholder of closely-held corporation who negotiated mortgage-sale contract with New York company via conference calls and document exchange, and who exercised "dominant control" over corporation was subject to CPLR 302(a)(1) jurisdiction in New York.) The court has jurisdiction over Brar.

Alternatively, Brar may be subject to New York long-arm jurisdiction under CPLR 302(a)(1) on an agency theory. In particular, New York may assert long-arm jurisdiction over

non-New York residents who purposefully transact business in this state "by having representatives perform business activities here on their behalf." *Paramount Adjustment Co. v Home Ins. Co.*, 267 AD2d 151 (1st Dept 1999). This is true as long as these business activities were substantially related to the "subject matter of the third party action." *Id.*

Here, Taboola alleges that FSM acted on behalf of Brar, which "owned, dominated, controlled" FSM. Compl. ¶ 5. Taboola also asserts specific facts that, if true, substantiate these allegations. Namely, Taboola claims that Brar, through FSM, transferred FSM's assets to another company to avoid paying its debt to Taboola. This transfer of assets forms the basis of Taboola's veil-piercing allegations, discussed below. These allegations may subject Brar to New York long-arm jurisdiction on the grounds that FSM projected itself into New York on Brar's behalf.[5]

2. Due Process

Finally, the court finds that asserting personal jurisdiction over Brar would not offend due process. Both the "minimum contacts" test and the "reasonableness" analysis are satisfied. *See Bank Brussels Lambert v Fiddler Gonzalez & Rodriguez*, 305 F3d 120, 127 (2d Cir 2002). As noted above, Brar purposely availed himself of doing business in New York and, as a result of his actions, could have foreseen being brought into a New York tribunal. *See Zelouf Int'l Corp. v Na El, Inc.*, 2014 WL 1318372, at *4 (SDNY 2014) ("minimum contacts" test asks whether defendant "purposefully availed" himself of the privilege of doing business in forum and can foresee being "haled into court" there), citing *Burger King Corp. v Rudzewicz,* 471 US 462, 475 (1985) (court examines "quality and nature" of defendant's contacts with forum using totality of

[5] Curiously, Taboola did not argue that Brar is subject to jurisdiction under the closely related doctrine. *See Tate & Lyle Ingredients Americas, Inc. v Whitefox Techs. USA, Inc.*, 98 AD3d 401, 402 (1st Dept 2012).

the circumstances test; physical presence in forum not prerequisite to jurisdiction); *Keeton v Hustler Magazine, Inc.*, 465 US 770, 775 (1984) ("The inquiry [with respect to specific personal jurisdiction] ... focuses on the relationship [between] the defendant, the forum, and the litigation.").

Taboola alleges that Brar knowingly projected himself into New York by reaching out to Taboola's New York executives to negotiate and execute the Agreement, which specifically contemplated performance in New York. Over the next six months, Brar's role in extending the Agreement and negotiating payment gave rise to further contacts in New York. These contacts form the basis of Taboola's lawsuit against Brar. The court finds that Brar's contacts with New York are not so "random, fortuitous, or attenuated" as to defeat jurisdiction as a matter of law.

Moreover, it comports with traditional notions of fair play and substantial justice to find jurisdiction on the facts asserted here. *See Bank Brussels Lambert v Fiddler Gonzalez & Rodriguez,* 305 F3d 120, 129 (2d Cir 2002). To evaluate reasonableness, courts consider:

> "(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiffs interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies."

Metro. Life Ins. Co. v Robertson-Ceco Corp., 84 F3d 560, 568 (2d Cir 1996)

Asserting long-arm jurisdiction over Brar is reasonable under the circumstances here. To begin, although traveling to New York to defend himself would burden Brar, Brar is the principal, if not the only member, of FSM, and his testimony in New York would be essential. Second, New York has a "manifest interest in providing effective means of redress for its residents." *Burger King,* 471 US at 483. Indeed, Taboola New York is located in New York, where most of the proof and witnesses reside. Similarly, it promotes judicial economy and cost-

effectiveness to litigate Taboola's claims against Brar in the same forum as Taboola's claims against FSM. In sum, the court finds that asserting long-arm jurisdiction over Brar would not offend "traditional notions of fair play and substantial justice."

B. Motion to Dismiss for Failure to State a Claim – CPLR 3211(a)(7)

When assessing the adequacy of a complaint under CPLR 3211(a)(7), the court will "liberally construe the pleading, accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83 (1994). Moreover, familiar principles of New York law generally insulate a corporate officer from personal liability for his company's debts or contracts, "unless the corporate veil is pierced[,] or there is clear evidence that he intended to be personally bound." *Kreutter*, 71 NY2d at 469-70; *Goldman v Chapman*, 44 AD3d 938, 939 (2d Dept 2007) ("A primary and completely legitimate purposes of incorporating is to limit or eliminate the personal liability of corporate principals"), citing *Bartle v Home Owners Co-op.*, 309 NY 103, 106 (1955).

To state a claim for piercing the corporate veil, a plaintiff must allege (1) that an owner or officer exercised complete domination or control over his corporation "as to the transaction attacked," and (2) that the officer used that domination to commit a fraud or wrong against the plaintiff. *TNS Holdings Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 (1998). A mere claim of "domination, standing alone, is not enough; some showing of a wrongful or unjust act toward the plaintiff is required." *Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142 (1993). Likewise, mere conclusory assertions that the corporation acted as their "alter ego," without more, will not suffice to support the equitable relief of piercing the corporate veil. *Id.* at 141-142. Nevertheless, a plaintiff opposing a motion to dismiss need only show that facts

unavailable to the plaintiff *may* exist which will justify denial of the motion, and need not demonstrate the actual existence of such facts. *Cerchia v V.A. Mesa, Inc.*, 191 AD2d 377, 378 (1st Dept 1993). Thus, a court should permit discovery on piercing the corporate veil if a plaintiff alleges specific facts that, if true, show a defendant may have "exercised complete dominion and control over the corporation and ... fraudulently conveyed corporate assets to avoid the corporation's obligations." *9 E. 38th St. Assocs. L.P. v. George Feher Assocs.*, 226 AD2d 167, 168 (1st Dept 1996).

Other factors that courts may consider in determining whether to pierce the corporate veil include:

- the absence of corporate formalities;
- inadequate capitalization;
- whether funds are put in and taken out for personal rather than corporate purposes;
- overlap in ownership, officers, directors, and personnel;
- common office space, address and telephone numbers;
- the amount of business discretion displayed by allegedly dominated corporation;
- whether related corporations dealt with dominated corporation at arms-length;
- whether corporations are treated as independent profit centers;
- payment or guarantee of debts of dominated corporation by other corporations;
- and whether corporation had property used by other corporations as its own).

Wm. Passalacqua Builders v Resnick Developers S., 933 F2d 131, 139 (2d Cir 1991).

Here, the complaint alleges that Brar owned and dominated FSM and used FSM to further his own interests. Compl. ¶¶ 43-44. It further alleges that Brar co-mingled FSM's assets with the assets of Fetopolis, which Brar also owned and controlled. ¶ 44. The remainder of the complaint contains more general veil-piercing allegations, including that FSM was "undercapitalized" and failed to observe certain corporate formalities. *See* Compl. ¶¶ 5, 42-46. Taboola supplemental affidavits and evidence that Brar was FSM's sole director [Paioff Aff. ¶¶ 5-6, Ex. 10 (Mar. 4, 2015 Canadian Federal Corporations Search)] and operated FSM out of his apartment [*Id.* ¶ 6, Ex. 12 (Process Server Affidavit)], thereby maintaining complete control over

FSM. Taboola further presents proof that Brar may have transferred FSM's assets to a successor entity with a nearly identical name, Fashion Style Magazine, Inc. Paioff Aff. ¶ 11. This allegation is based on undisputed SEC filings that show that Fashion Style Magazine, Inc. owns domain names that formerly belonged to FSM. Paioff Aff. ¶ 10, Ex. 16 (Option Agreement), p. 7.

Additionally, the timing and circumstances of FSM's dissolution are suspicious. Brar, who owns a 100% interest in Fashion Style Magazine, Inc., incorporated Fashion Style Magazine, Inc. in September 2014, shortly before FSM went into dissolution and Taboola filed this lawsuit. Paioff Aff. ¶ 4, Ex. 14 (Delaware Division of Corporations Entity Details for Fashion Style Magazine, Inc.). Two months later, Brar executed an option agreement with Indigo-Energy, Inc. (later called HDIMAX Media), a company in which Brar owns a 94% interest, which enabled the company to purchase all of Fashion Style Magazine, Inc.'s outstanding shares. Paioff Aff. ¶ 10, Ex. 16.

These allegations, taken together, at least raise the possibility that additional evidence "may exist" to justify piercing the corporate veiling and holding Brar personally liable for FSM's debts. "Almost by definition, [the veil-piercing factors] are fact-laden and often do not lend themselves to resolution by means of a prediscovery motion to dismiss." *E. Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 131 (2d Dept 2009), *aff'd* 16 NY3d 775 (2011); *Kralic v Helmsley*, 294 AD2d 234, 236 (1st Dept 2002). Thus, veil piercing allegations need only be "plead in a non-conclusory manner", not with the sort of particularity required by CPLR 3016(b). *See 2406-12 Amsterdam Assocs. LLC v Alianza LLC*, 25 NYS3d 167 (1st Dept Feb. 16, 2016). The facts pleaded in the complaint suffice to allege that Brar abused the corporate form to defraud Taboola by rendering FSM incapable of paying Taboola

the amounts allegedly owed under the Agreement. *See id.* ("The complaint, together with plaintiff's affidavits in opposition to defendants' motion, sufficiently alleges that [defendant] transferred all of its assets to a newly formed entity ... which was 90% owned by [defendant] and had no employees and no function but to hold those assets away from creditors and, in particular, plaintiff."). Brar's motion to dismiss Taboola's breach of contract and account stated claims under CPLR 3211(a)(7), therefore, is denied.

However, FSM's motion dismiss the third cause of action alleging unjust enrichment, is granted. "It is impermissible...to seek damages in an action sounding in quasi contract where the suing party has... performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." *Navillus Tile, Inc. v George A. Fuller Co.*, 83 AD3d 919, 919-20 (2d Dept 2011), quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987). Accordingly, it is

ORDERED that defendant Raaj Kapur Brar's motion to dismiss the complaint for lack of personal jurisdiction is denied; and it is further

ORDERED that Brar's motion to dismiss the complaint for failure to state a cause of action is granted only to the extent of dismissing the third cause of action alleging unjust enrichment and otherwise denied; and it is further

ORDERED that within 5 days of the entry of this order on the NYSCEF system, plaintiff shall serve a copy of this order along with notice of entry upon defendants by overnight mail, and Brar shall file an answer to the complaint by April 7, 2016; and it is further

ORDERED that defendants are reminded that, pursuant to the court's March 3, 2016 order, defendants must appear in this court (60 Centre Street, Room 228) for a status conference on April 14, 2016, at 10:00 a.m., or defendants will be considered in default.

Dated: March 14, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C