SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 3

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HIGH STREET CAPITAL PARTNERS, LLC,

Plaintiff,

- v -

ICC HOLDINGS, LLC,REVOLUTION CANNABIS - BARRY, LLC,ACE 820 CORP., BARRY 820 CORP., ACREAGE ILLINOIS, LLC

Defendants.

INDEX NO. 652592/2018

MOTION DATE 09/06/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

----------X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 41, 42, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 71, 72, 86, 88, 89, 90
were read on this motion to DISMISS.

Plaintiff High Street Capital Partners, LLC ("High Street") brings this action against Defendants ICC Holdings ("ICC") and related entities (collectively, "Defendants") for allegedly violating an exclusivity provision in a Letter of Intent to which the parties agreed in anticipation of a contemplated business transaction. High Street alleges breach of contract, fraudulent inducement, and unjust enrichment.

Defendants move to dismiss High Street's claims on either of two threshold grounds: lack of personal jurisdiction under CPLR § 3211(a)(8) or, alternatively, the doctrine of forum non conveniens under CPLR § 327.

For the reasons set forth below, the motion is denied.

Factual Background

High Street is a New York-based company operating in the cannabis industry "with a diverse portfolio of cultivation, processing, and dispensing operations." (Complaint ("Compl.") ¶9) (NYSCEF 14). ICC, which operates in the medical marijuana industry, has its principal place of business in Illinois. The other named Defendants are corporate entities—also based in Illinois—that ICC owns or controls. (*Id.* ¶¶10-14).

On March 5, 2018, High Street and ICC entered into a Letter of Intent (the "LOI") as part of ongoing negotiations which contemplated High Street acquiring certain property and assets from Defendants (the "Contemplated Acquisition"). (*Id.* ¶¶25, 28). The LOI contained an "Exclusivity Period," during which Defendants were prohibited from, *inter alia*, engaging in discussions with other companies about the sale of Defendants' business. (*Id.* ¶34). As consideration for this exclusivity provision—and several extensions of the Exclusivity Period in subsequent months—High Street paid Defendants $575,000 in non-refundable deposit payments. (*Id.* ¶¶ 117-18).

According to High Street, Defendants "never intended to abide by the parties' exclusivity period." (*Id.* ¶5). Instead, High Street claims, Defendants actively "solicit[ed] competing offers," (*id.* ¶95), using their negotiations with High Street as a bargaining chip "to generate interest, and a higher offer, on the market." (*Id.* ¶5). Defendants, of course, deny these allegations. On the instant motion, however, the focus is not on the merits of the allegations, but on the threshold issue of whether the allegations state a sufficient connection to the State of New York to justify exercising personal jurisdiction over the Defendants and to warrant maintaining the action in New York.

High Street alleges that Defendants directed their actions to New York in the course of negotiating, drafting, and performing the LOI by, among other things:

- Directing calls to High Street's New York offices to discuss the LOI, including a December 2017 conference call with senior executives from both companies, organized by High Street, which discussed preliminary information about the Contemplated Acquisition. (*See* Affidavit of James Tyson Macdonald ("Macdonald Aff.") ¶¶4-5, 8, 11) (NYSCEF 57)).

- Negotiating the three extensions of the Exclusivity Period through regular communications directed to New York, including 24 separate instances in April 2018 to discuss the LOI as well as the Contemplated Acquisition. (*Id.* ¶¶37, 40).

- Emailing High Street in New York. These emails transmitted key documents, such as draft agreements, redlined agreements, and signed and executed agreements. (*Id.* ¶¶13-22, 36-31; Affidavit of Kevin Murphy ("Murphy Aff.") ¶¶9-11 (NYSCEF 64)). According to Plaintiffs, these emails also contained Defendants' material misrepresentations that form the basis for this action. (*See* Compl. ¶¶30-31, 51, 55, 59, 71-73, 87-88, 140, 142, 149-150).

- Receiving non-refundable deposit payments from High Street, which High Street initiated from New York. (Compl. ¶21; Macdonald Aff. ¶¶23-24).

- Meeting in-person with High Street twice at High Street's New York headquarters. (*See* Macdonald Aff. ¶5). The parties dispute the substance and significance of these face-to-face meetings: Plaintiffs say the meetings were in furtherance of the LOI, while Defendants argue that they were irrelevant because the exclusivity provision was not discussed.

Defendants do not dispute that they engaged in voluminous electronic communications with High Street, but disagree that such communications can support the exercise of personal jurisdiction over them in New York or render New York a convenient forum.

Legal Analysis

A. Personal Jurisdiction

New York's Long-Arm Statute

Under CPLR § 302(a)(1), this Court "may exercise personal jurisdiction over a 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." This so-called "long-arm" jurisdiction requires that: (i) the non-New York defendant transacted some business in New York, and (ii) "some articulable nexus" exists between the business transacted and the cause of action. *McGowan v. Smith*, 52 N.Y.2d 268, 272 (1981). Both conditions are met here.

First, Defendants' actions constituted the transaction of business in New York. Section 302(a)(1) is a "single act statute," which means that "proof of one transaction in New York is sufficient to invoke jurisdiction." *Deutsche Bank Sec., Inc. v. Montana Bd. of Investments*, 7 N.Y.3d 65, 71 (2006). "Although it is impossible to precisely fix those acts that constitute a transaction of business, our precedents establish that it is the quality of the defendants' New York contacts that is the primary consideration." *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007). In that vein, the "purposeful creation of a continuing relationship with a New York corporation" supports the exercise of personal jurisdiction under the statute. *Id.* And critically, this holds true "even though the defendant never enters New York." *Deutsche Bank*, 7 N.Y.3d at 71. Because "technological advances in communication . . . enable a party to transact enormous volumes of business within a state without physically entering it," New York courts have "recognized CPLR 302(a)(1) long-arm jurisdiction over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions." *Id.*

Defendants transacted business in New York by projecting themselves into the state to create an ongoing contractual relationship with High Street, and to perform under that obligation. Defendants did so through repeated, purposeful communication knowingly directed to a New York entity and its largely New York-based representatives. (*See, e.g.*, Macdonald Aff. ¶6 ("Throughout the parties' negotiations regarding the Letter of Intent and the Contemplated Acquisition, Defendants' representatives directed phone calls, contract documents, and emails to High Street's

Headquarters in New York."); Murphy Aff. ¶5 ("[ICC executive Oleg Movchan] alone sent over 90 emails to my High Street account in New York between December 2017 and May 2018 . . . [and] communicated and negotiated with several other High Street representatives in New York[.]"). Defendants' digital dealings fit into a long line of case law which predicates personal jurisdiction on remote—but purposeful—contact. *See Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 17 (1970) (exercising personal jurisdiction under § 302 where customer in Los Angeles called into an auction happening in New York City); *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 577 (1980) (exercising long-arm jurisdiction over Texas defendant where most of the securities transactions at issue "arose out of telephone calls made to the plaintiff's New York office," with only a few occasional in-person visits); *Fischbarg*, 9 N.Y.3d at 380 (finding out-of-state defendants subject to jurisdiction where they made a "purposeful attempt" to establish a relationship with New York-party and "their direct participation in that relationship via calls, faxes, and e-mails that they projected into [New York] over many months"); *C. Mahendra (N.Y.), LLC v. Nat'l Gold & Diamond Center, Inc.*, 125 A.D.3d 454, 456 (1st Dep't 2015) (holding that "parties' telephone dealings over several years and in the two transactions at issue" were sufficient under 302(a)(1)).[1]

[1] Defendants' two in-person meetings with High Street executives in New York are neither necessary nor sufficient to establish personal jurisdiction, so the Court need not wade into the dispute about what transpired at those meetings. However, Defendants' physical presence in New York—albeit fleeting—underscores further that Defendants were purposefully negotiating and transacting with a New York entity. *See Cooper, Robertson & Partners, LLP v. Vail*, 143 F. Supp. 2d 367, 372 (S.D.N.Y. 2001) ("Defendants are correct in noting that a single meeting in New York will rarely provide the basis for jurisdiction pursuant to § 302(a)(1), especially when that meeting does not result in the execution of a contract. Courts, however, have held that a meeting which is significant to the development of the contractual relationship may support a finding of jurisdiction when in combination with other factors.").

Defendants' arguments in opposition are unavailing. For example, Defendants cite *Ingraham v. Carroll*, 90 N.Y.2d 592, 597 (1997), to argue that "[a] 'one-shot' single transaction is legally insufficient to constitute purposeful availment" for purposes of § 302(a)(1). (Defs.' Mem. of Law ¶26) (NYSCEF 32). But *Ingraham* says something close to the opposite, contrasting § 302(a)(1) with the relatively higher hurdle of CPLR § 302(a)(3): "Although [§ 302(a)(3)(i)] does not require the quantity of New York contacts that is necessary to obtain general jurisdiction under the 'doing business' test of CPLR 301, it does require something more than the 'one shot' single business transaction described in CPLR 302(a)(1)." 90 N.Y.2d at 597. And *Zucker v. Waldmann*, 43 Misc. 3d 1233(A) (Sup. Ct. Kings Cty. 2014), can be distinguished on the facts, since that case involved significantly less contact directed at New York.

More broadly, Defendants' insistence that all of their "actions relevant to this case took place entirely in Illinois," (Defs.' Mem. of Law ¶27), ignores the teachings of *Deutsche Bank* and other comparable cases. Defendants may indeed have been physically located in Illinois for every email, phone call, or text that they exchanged with High Street. But the focus must be on the business being transacted, not on Defendants' physical location. *Parke-Bernet Galleries* illustrates this point. There, a defendant living in California sought to participate in a New York City art gallery auction, so "an open telephone line was set up on the evening of the auction between the defendant in Los Angeles and [a gallery agent] in the latter's New York City premises." 26 N.Y.2d at 18. The defendant was then able to make bids and stay abreast of others' bids. *Id.* at 15. The Court of Appeals held that the defendant had, "in a very real sense, projected himself" into the auction room, doing via telephone what once could only have been done in person. *Id.* at 17-18. Similarly, here, Defendants were able to conduct their business with High Street without needing to constantly shuttle papers and people between Illinois and New York. That fact does not nullify

Defendants' connection to New York, however, and Defendants' remote physical location cannot serve as a jurisdictional shield.

Second, Defendants' contacts with High Street clearly related, at least in part, to the LOI. These contacts included the negotiation and execution of the original LOI, as well as the three extensions to the agreement. (*See* Macdonald Aff. ¶¶5-6, 39). Defendants counter that the LOI does not require any performance in New York since "the property subject [to] the LOI was in Illinois, and the ultimate purchase agreement contemplated by the LOI was to be performed in Illinois." (Defs.' Mem. of Law ¶29). But as High Street rightly points out, its claims against Defendants "are based on the *LOI* and its three extensions—*not* the property or business subject to the failed Contemplated Acquisition." (Pl.'s Mem. of Law) (emphasis in original) (NYSCEF 56).

Section 302(a)(1) thus permits this Court to exercise personal jurisdiction over Defendants[2]—but that is not the end of the analysis.

Federal Due Process

"Exercise of personal jurisdiction under the long-arm statute must comport with federal constitutional due process requirements." *Al Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 330 (2016). Because CPLR § 302 is "not coextensive" with constitutional due process, "personal jurisdiction permitted under the long-arm statute may theoretically be prohibited under due process analysis." *Al Rushaid*, 28 N.Y.3d at 331; *D & R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 299 (2017). In practice, however, the Court of Appeals has stated that it "expect[s]

[2] High Street also argues that long-arm jurisdiction may be exercised under other provisions in § 302, but those arguments are mooted.

such cases to be rare." *Id.* (citing *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 170 (2d Cir. 2013) ("It would be unusual, indeed, if a defendant transacted business in New York and the claim asserted arose from that business activity within the meaning of section 302(a)(1), and yet, in connection with the same transaction of business, the defendant cannot be found to have purposefully availed itself of the privilege of doing business in the forum and [to have been able to] foresee being haled into court there.")).

Therefore, although "satisfaction of the [Section] 302(a)(1) criteria will generally meet federal due-process requirements," *Sills v. Ronald Reagan Presidential Found., Inc.*, No. 09 CIV. 1188 (GEL), 2009 WL 1490852, at *10 (S.D.N.Y. May 27, 2009), "[t]hat observation does not . . . spare us from a separate constitutional analysis in each such case." *Licci*, 732 F.3d at 170.

To satisfy due process, the defendant must have "certain minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *accord LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 216 (2000) ("Under the Due Process Clause, the standards of 'minimum contacts' and 'fair play and substantial justice' are implicated in the decisional law governing personal jurisdiction."). This canonical standard, in turn, comprises a two-part test: (1) whether the defendant has "'minimum contacts' with the forum state" and (2) whether "personal jurisdiction is reasonable under the circumstances of the particular case." *D & R Glob.*, 29 N.Y.3d at 300.

First, Defendants had sufficient minimum contacts with New York. They purposefully conducted business with a New York entity, directing phone calls, correspondence, deal documents, and other communications to New York. *See LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 216-19 (2000) (finding non-domiciliary tortfeasor had minimum contacts with New

York because the company "itself forged the ties with New York" through "purposeful action"). As with the long-arm analysis, the fact that these contacts were predominantly electronic does not change the result. The United States Supreme Court recognized in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985), that "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." As a result, *Burger King* held, "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.*; *see Travelers Health Ass'n v. Com. of Va. ex rel. State Corp. Comm'n*, 339 U.S. 643, 647 (1950) (noting that minimum contacts exist "where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state"); *Deutsche Bank*, 7 N.Y.3d at 71 ("[T]he growth of national markets for commercial trade, as well as technological advances in communication, enable a party to transact enormous volumes of business within a state without physically entering it.").

Defendants' arguments, again, equate minimum contacts with minimum physical contacts. (*See* Defs.' Mem. of Law ¶42 (noting "Defendants have created no contacts with New York" because they have "no offices or employees, no property, and no bank accounts or tax payments" here)). But as noted above, that is not the law. And the authorities on which Defendants rely are not on point. Defendants cite to *Williams v. Beemiller*, 159 A.D.3d 148 (4th Dep't 2018), for example, which held that long-arm jurisdiction did not comport with federal due process where the defendant was a gun retailer in Ohio whose business did not advertise, distribute, or directly sell guns in New York. The court held that the retailer's "awareness of the mere possibility that

the guns could be transported to and resold and New York" did not confer specific personal jurisdiction. *Id.* Defendants' connection with New York in this case, by contrast, is much more direct.

Second, the exercise of personal jurisdiction over Defendants in New York is reasonable in these circumstances. As a general matter, "a defendant who purposefully has directed [its] activities at forum residents . . . must present a compelling case that the presence of some other considerations would render jurisdiction *unreasonable*." *LaMarca*, 95 N.Y.2d at 217–18 (emphasis added). Defendants have made no such showing. New York has a strong interest in vindicating the rights of corporations that reside here, and High Street has a strong interest in obtaining convenient and effective relief here. Defendants' burden, meanwhile, is relatively minimal. (Defendants' purported burden in litigating here is further discussed in the context of their forum non conveniens argument in Part B, *infra*.) As the Court of Appeals stated in *LaMarca*, "[c]onsidering that [the non-domiciliary's] long business arm extended to New York, it seems only fair to extend correspondingly the reach of New York's jurisdictional long-arm," and "conclud[ing] that asserting jurisdiction over [the non-domiciliary] in New York would not offend traditional notions of fair play and substantial justice." 95 N.Y.2d at 218–19. In short, it is both fair and reasonable to subject Defendants to the jurisdiction where they purposefully directed their business dealings.

As such, Defendants' motion to dismiss for lack of personal jurisdiction is denied.

B. Forum Non Conveniens

"The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that in the interest of substantial justice the action should be heard in another forum." *Nat'l Bank & Tr. Co. of N. Am. v. Banco De Vizcaya,*

S.A., 72 N.Y.2d 1005, 1007 (1988); CPLR § 327(a) ("When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just."). It is the defendant who bears the "heavy burden of demonstrating that [the] plaintiff's selection of New York was not in the interest of substantial justice." *Wilson v. Dantas*, 128 A.D.3d 176, 177 (1st Dep't 2015).

To decide "whether to retain jurisdiction or not" under the doctrine, New York courts must consider an array of factors, including: the residence of the parties, the situs of the underlying transaction, the existence of an adequate alternative forum, the location of potential witnesses and relevant documents, potential hardship to the defendant, and the burden on New York courts. *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478–79 (1984); *see Bluewaters Communications Holdings, LLC, v Bernard Ecclestone*, No. 653965/2012, 2014 WL 220779, at *12 (Sup. Ct. N.Y. Cty. Jan. 16, 2014). No one factor is controlling, but "the residence of a plaintiff . . . has been held to generally be the most significant factor in the equation." *Thor Gallery at South DeKalb, LLC v. Reliance Mediaworks (USA) Inc.*, 131 A.D.3d 431, 432 (1st Dep't 2015).

Here, Defendants have not met the high burden of displacing a New York plaintiff's choice of a New York forum. High Street resides in New York, engaged in the relevant transactions from New York, and felt the effects of Defendants' alleged breach in New York. Those circumstances weigh heavily in favor of keeping this dispute in New York. *See Bacon v. Nygard*, 160 A.D.3d 565, 566 (1st Dep't 2018) ("Plaintiff is a New York resident. While also not dispositive, this is generally the most significant factor in the equation."); *Georgia-Pac. Corp. v. Multimark's Int'l Ltd.*, 265 A.D.2d 109, 112 (1st Dep't 2000) (rejecting forum non conveniens argument where "significant events took place, or were to take place, in New York").

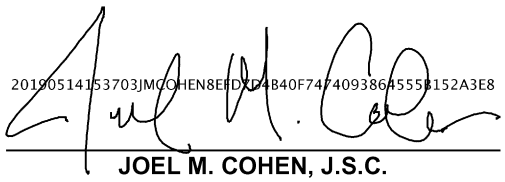
Moreover, litigating this case in New York imposes no undue hardship on Defendants, who chose to direct their business efforts towards this state. *See Pharo v. Piedmont Aviation, Inc.*, 34 A.D.2d 752, 753 (1st Dep't 1971) ("The claim by the defendants that they would be inconvenienced by the suit remaining in our state must be considered in the light of the fact that . . . the defendants transact[ed] business here."). Defendants argue that "[v]irtually all of the potential material witnesses in this case are Defendants' employees." (Defs.' Mem. of Law ¶55). That seems unlikely, since High Street presumably will put forward witnesses to testify about representations made by Defendants with respect to the LOI. At any rate, "New York courts, particularly this division, have procedures in place, which are used every day, to deal with out-of-state non-party witnesses." *JPS Capital Partners, LLC v. Silo Point Holding LLC*, 24 Misc. 3d 1234(A), at *7 (Sup. Ct. N.Y. Cty. 2009). And despite Defendants' concern with "burden[ing] one of the busiest trial courts in the country with this dispute," (Defs.' Mem. of Law ¶53), "[t]here is no undue burden on our courts, which routinely adjudicate commercial disputes of this nature." *Hudson Ins. Co. v. Oppenheim*, 35 A.D.3d 168, 169 (1st Dep't 2006). Similarly, applying the laws of another state (*i.e.*, Illinois) poses no grave concern, since "the courts of New York are frequently called upon to apply the law of foreign jurisdictions and, should the necessity arise, will be fully capable of applying [it]." *Anagnostou v. Stifel*, 204 A.D.2d 61, 62 (1st Dep't 1994).

Therefore, Defendants' motion to dismiss on the ground of forum non conveniens is denied.

Therefore, it is:

ORDERED that Defendants' motion to dismiss for lack of personal jurisdiction or, alternatively, on the basis of forum non conveniens is DENIED.

This constitutes the Decision and Order of the Court.



5/14/2019
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE