UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RAILROAD EARTH, LLC, TIM CARBONE, DAVE VON DOLLEN, TODD SHEAFFER and JOHN SKEHAN, Plaintiffs, - vs. - JOSEPH I. PALESCANDOLO and NOBLE CLARK MACHINERY AND EQUIPMENT, LTD, aka NOBLE CLARK MACHINERY AND EQUIPMENT, Defendants.	DOCKET NUMBER 03-335 (JCL) CIVIL ACTION

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

COLEMAN LAW FIRM
Ronald D. Coleman (RC-3875)
881 Allwood Road
Clifton, New Jersey 07012
(973) 471-4010
Attorneys for Plaintiffs

PRELIMINARY STATEMENT

This is simply a case of a defective product being knowingly sold by a Maryland company to a New Jersey buyer, which suffered substantial damages as a result. Because, as demonstrated below, the facts that prove this are unrebutted and unrebuttable; because defendants have produced numerous documents demonstrating regular and systematic contacts with this State; because defendants have demonstrated a gross propensity for delay tactics; and because their apparent ultimate goal is to evade the protections afforded New Jersey consumers by this State's Consumer Fraud Act, their motion should be dismissed. This case, filed nearly seven months ago, should be put on a fast track for discovery and trial, and in the jurisdiction where defendants knowingly caused the harm.

FACTS

New Jersey Residents

The plaintiffs are a fledgling rock band, Railroad Earth, LLC, that is a New Jersey limited liability corporation in good standing[1]; and the members of the band,

[1] Defendants aver mysteriously that they "have obtained information that calls into question the legal status of Railroad Earth, LLC, and its standing to bring a lawsuit in the State of New Jersey." Plaintiffs' Brief at 8. Of

individuals of whom each and every one is, save for plaintiff John Skehan, a resident of this State (collectively, "Railroad Earth").

The Purchase of the Bus

Railroad Earth spent over $35,000 to buy a specially-outfitted bus from defendants in an adventure that resulted in losses to them of over twice that amount. Though a broker was involved in the transaction, there were from the beginning many direct contacts between the plaintiffs and the various defendants as well as another significant party – Precision Financial Services, a financing company used by defendants and located in Mine Hill, New Jersey ("Precision") – in New Jersey. As the pleadings set out, discussion between plaintiff Andy Goessling and defendant Palescandolo began December, 2001 and, communications, both oral and written, between the two sides continued until May 12, 2002, when Palescandolo transferred title in the bus to Railroad Earth and John Skehan.

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course, not surprisingly, plaintiffs keep this "information" to themselves. We do not expect that they withheld it merely to "sandbag" defendants with it in their reply and avoid rebuttal, but rather suspect that they withheld because it does not exist. In any event, it is a matter of public record that Railroad Earth, LLC is in good standing. See Exhibit A to Coleman Certification.

Defendants had every reason to know that their customer was in New Jersey, as demonstrated by the documents produced by defendants themselves in this action[2]:

- A certified mail letter dated March 1, 2002 from Precision, clearly marked with a return address of Mine Hill, New Jersey, addressed to defendants and enclosing a check for $16,000 (Exhibit B to Coleman Certification)
- A letter dated March 5, 2002 from Precision in Mine Hill, New Jersey to defendants transmitting a check for $6,000 in connection with the purchase (*id.*)
- A receipt for certified mail, dated March 7, 2002, sent to defendants from Mine Hill, New Jersey and bearing Palescandolo's signature (*id.*)

[2] Because the documents on which plaintiffs rely were produced by defendants, albeit ignored by them in their moving papers, plaintiffs submit them as exhibits to a certification of counsel testifying to their provenance; their authenticity is not in question. Indeed when many of them were submitted to defendants in plaintiffs' attempt to avoid this motion, no issue of authenticity was raised (see *infra*). If necessary, however, plaintiffs can supplement this record by submitting an authenticating certification of a plaintiff with first-hand knowledge of the original documents and the attendant facts.

- Another such letter, dated April 19, 2002, also from Mine Hill, New Jersey to defendants, enclosing $5,000 (*id.*)
- Yet another such letter, dated April 23, 2002, also from Mine Hill, New Jersey, also enclosing $5,000 (*id.*)
- A Federal Express airbill dated April 19, 2002 from Brian Ross, clearly marked as sender with an address of Mine Hill, New Jersey, to defendants (Exhibit C to Coleman Certification), by which the April 19th letter was sent
- The signed contract of sale, faxed to defendants from "Ross Entertainment," plaintiffs' representative, bearing a 201 (northern New Jersey) fax banner, dated April 22, 2002 (Exhibit D to Coleman Certification).
- A fax cover sheet, dated March 4, 2002, from defendants to Mr. Babyak in Mine Hill, New Jersey, bearing his 973 area code (Exhibit E to Coleman Certification)

- A second fax cover sheet, dated February 24, 2002, to Brian Ross (of Ross Entertainment) and Mr. Babyak in Mine Hill, New Jersey (*id.*)
- An April 19, 2002 check from Mrs. Lois Skehan to defendant Noble Clark Machinery ("NCM") in the amount of $5,000, bearing the address of 11 Ellam Drive, Randolph, New Jersey (Exhibit F to Coleman Certification)
- An April 23, 2002 check to NCM, also from Mrs. Skehan in the same amount, bearing the same Randolph, New Jersey address (*id.*)
- A third such check with a Randolph, New Jersey address, dated March 5, 2002, for $6,000 (*id.*), written to NCM (*id.*)

Not a single one of these documents is news to defendants. They produced each of them pursuant to Fed. R. Civ. P. 26 in this case and bear defendants' document control numbers on the right-hand corner. Considering these documents, it is a puzzle how defendants can say "the only contacts within the State of New Jersey that Defendants are aware of are that one or more members of Railroad Earth, LLC personally reside [there]," Defendants' Brief at 7; or why they make repeated (pages 6 and 7) references to phone calls while ignoring the substantial

record of correspondence and commerce (i.e., money) between them and New Jersey.

Defendants' Motion

This case was filed by plaintiffs in January of this year. Defendants made the first version of their motion to dismiss on March 12, 2003. The papers were rejected because the defendants neglected to comply with Appendix N. In early April this office approached counsel for defendants and urged them not to renew their motion, based on the extensive paper record set forth above. Because Rule 26 disclosures had not yet been made, on April 10, 2003, counsel for plaintiffs mailed certain documents to defendants to convince them that a motion to dismiss on personal jurisdictional grounds would fail. (Exhibit G to Coleman Certification.) On April 23rd, defense counsel responded that it would "advise you of our intent with respect to going forward with the Motion to dismiss." (Exhibit H to Coleman Certification.) Meanwhile the plaintiffs waited for the Court to order a preliminary conference, which was finally set for the end of June.

At a teleconference on Friday, June 27th with U.S. Magistrate Judge Falk, however, defendants stated that they were going to renew their motion, and the Magistrate Judge declined to set a scheduling order. No request was made for

discovery in connection with this motion. In a caucus following the judge's departure from the call, plaintiffs asked defendants to expedite their service of the motion, considering the considerable lapse of time since the beginning of the case and the fact that the motion was identical to one already filed. Defendants agreed to "try" to serve the motion by the following Wednesday.

In fact, the motion was not served until three weeks later, on July 22, 2003, and only after plaintiffs wrote to the Court and begged for relief on July 9, 2003. The result was more delay and then, finally, a second teleconference on July 21, at which defendants again declined to request discovery. Not surprisingly, the motion of July seemed little different from the one filed last winter and – consistent with defendants' scorched-earth policy of delay – insists that, notwithstanding the extensive evidence of jurisdictional contacts set forth above – not only should the litigation of this case await the resolution of this meritless motion, but that defendants need time for discovery in order properly to respond to the motion (a need they did not bring up with Judge Falk).

FACTS

Under Fed. R. Civ. P. 4(e), a federal court has personal jurisdiction over a non-resident defendant to the extent authorized by the law of the state in which that court sits. *North Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 689 (3d Cir.), cert. denied, 498 U.S. 847 (1990). In turn, New Jersey Court Rule 4:4-4 enables the exercise of personal jurisdiction as far as is constitutionally permissible under the Due Process Clause of the Fourteenth Amendment. *Apollo Technologies Corp. v. Centrosphere Industrial Corp.*, 805 F. Supp. 1157, 1181 (D.N.J. 1992); *Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 N.J. 460, 469 (1986). The constitutional standards serve the dual function of protecting the defendant and ensuring "that the States . . . do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

Due process requires that there exist minimum contacts between the defendant and the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). Thus the courts in this State have held, that personal

jurisdiction may be exercised "wherever possible with a liberal and indulgent view if the facts reasonably support the presence of the flexible concepts of 'fair play and substantial justice.'" *Ketcham v. Charles R. Lister Int'l, Inc.*, 167 N.J. Super. 5, 7 (App. Div. 1979)

As defendants acknowledge, an important threshold issue in this regard is the distinction between general and specific jurisdiction, and the related level of minimum contacts which each standard invokes. *Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 437 (3d Cir. 1987). Given that Railroad Earth's cause of action arises directly out of the defendants' forum contacts, specific jurisdiction may be asserted. This less onerous standard of minimum contacts can be satisfied by sporadic contacts or even an isolated event of forum activity. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984); *De James v. Magnificence Carriers, Inc.*, 654 F.2d 280, 286 (3d Cir.), cert. denied, 454 U.S. 1085 (1981); *Charles Gendler*, 102 N.J. at 471.

In formulating the minimum contacts analysis, the United States Supreme Court posited that a non-resident defendant's enjoyment of the privilege and benefit of conducting business in the forum state entails a concomitant obligation to possibly litigate within that

forum. *International Shoe*, 326 U.S. at 317. The minimum contacts standard was subsequently refined in *Hanson v. Denckla*, where the Court required that "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . . ." 357 U.S. 235, 253 (1958). This requisite of a volitional contact underlies a defendant's reasonable expectation that he may be haled into the forum. *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978); *American Tel. & Tel. Co. v. MCI Communications Corp.*, 736 F. Supp. 1294, 1302-03 (D.N.J. 1990); *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 323 (1989).

In the present case, defendants entered into a contract with New Jersey residents, who prepared the financing and did much of the planning for the outfitting of the customized bus in New Jersey, and proceeded to mail the payment to defendants from New Jersey, utilizing New Jersey accounts drawn on a New Jersey bank. Defendants cannot possibly be believed not to have known of this, considering their repeated receipt of letters, checks, and faxes from New Jersey, their sending of faxes from there, and their cashing of three substantial New Jersey checks as well. As such, there can be no plausible dispute, even in the absence of discovery, that defendants purposefully

availed itself of the privilege of conducting business activity within New Jersey with respect to this transaction. These contacts, over the course of over half a year, made it reasonably foreseeable that the defendants might become subject to a lawsuit in New Jersey for claims arising out of those specific contacts.

Nothing in defendants' papers addresses this analysis. Joseph Palescandolo's certification merely recites irrelevant facts as to his own residence, whether plaintiffs (who are musicians, not mechanics) inspected the defective bus in person, and numerous other distractions. It is strange, admittedly, that Palescandolo admits that the plaintiffs contacted him in December 2001 (¶ 6), and that the "Plaintiffs informed me that they needed the bus… They also told me they intended … [and that he made] many invitations and admonishments to inspect the bus before purchasing it" in ¶ 7 but claims in ¶ 9 never to have talked to the plaintiffs themselves.

Not a single mention is made, either in the certification or the brief, of the extensive and explicit contacts between defendants and plaintiffs' New Jersey financing company; the faxes repeatedly sent by defendants to New Jersey; or the money extracted from New Jersey banking accounts by defendants by way of three separate

checks drawn on New Jersey banks and bearing New Jersey addresses.

Certainly nothing in the cases cited by defendants explains the omissions. The do not explain the applicable rule of law, either. Defendants' suggestion that courts never find that phone calls and mail sent into the subject state a sufficient basis for minimum contacts is not only incorrect, it is disproved by the main case they cite in support of their claim.

Defendants rely on *Pfundstein v. Omnicom Group Inc.*, 285 N.J. Super. 245 (App. Div. 1995). In *Pfundstein*, the Appellate Division denied the exercise of jurisdiction where the tenuous claim to specific jurisdiction, in an action by a former New York employee of a New York company, was the fact that one of three contracts – not including the one being sued on – was delivered to and executed by the plaintiff's home here. The Appellate Division found this too attenuated, and contrasted it with *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317 (1989), a case truly akin to this one and where jurisdiction was found.

In *Lebel*, the Florida defendant had sold a boat to New Jersey defendant. The Florida seller had solicited the New Jersey defendant, which defendants here admittedly did not do. The New Jersey Supreme Court focused, however, not on

a scorecard of the number of calls from Florida to New Jersey or the presence or absence of an intermediary, but on the fact that "the phone calls were relevant because the defendant had tried to 'tap an interstate market.'" *Pfundstein*, 252 N.J. Super. at 252. In *Pfundstein* the contact was merely fortuitous; the entire relationship between the parties had been focuses on New York. Here, however, the defendants admit that they were dealing with a broker in California, from their office in Maryland, apparently titling the vehicle in Pennsylvania, and clearly were communicating from Maryland with both California and New Jersey to make this sale. The appropriate comparison, therefore, is to *Leber*, where purposeful availment was found, not to *Pfundstein*.

Defendants' citation to *Jacobs v. Walt Disney World, Co.*, 309 N.J. Super. 443 (App. Div. 1998) is similarly inapposite. Plaintiffs, New Jersey residents, had gone to Walt Disney World in Orlando, Florida, and claimed damages arising from certain egregious incidents. The purported purposeful availment by defendant Disney World was its heavy advertising in New Jersey, mailings sent to the plaintiffs in New Jersey by related companies, and phone calls placed by one of the plaintiffs to the defendant. The Appellate Division, remanding for discovery,

acknowledged that a phone call – even if placed by the plaintiff – could indeed form the basis of personal jurisdiction if the reason the plaintiff called was because of acts by the defendant that amounted to solicitation of that call. *Id.* at 462. Surely the claim by defendants here that they were mere innocent bystanders to the flurry of financial, contractual and commercial activity centered on New Jersey – the location of their customer, their customer's funds and their customer's financing company – qualifies as purposeful availment under the rule of *Jacobs*.

Finally, defendants cite *Alexander v. CIGNA Corp.*, 991 F. Supp. 427 (D.N.J. 1998), for the proposition that a corporation that mailed promotion tapes and made telephone calls to a New Jersey company did not purposely avail itself of the New Jersey forum. In fact, this Court in *Alexander* entered into only a minimal discussion of the issue of specific jurisdiction, but suffice it to say that in that case the overall nature of the defendants' attenuated dealings with plaintiffs – a number of fraudulent oral statements – bore little resemblance to the facts here demonstrating very purposeful, targeted availment, as set out above.

Ultimately, in *Alexander* this Court relied on the rule of *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105

S.Ct. 2174, 85 L.Ed.2d 528 (1985) that "defendant will not be haled into a jurisdiction solely as a result of random, fictitious, or attenuated contacts, or [based upon] the unilateral activity of another person." There is nothing random, nothing fictitious, nothing attenuated and nothing unilateral about the very straightforward transaction in this case. Plaintiffs, whom the documents demonstrate defendants must have known to be located in New Jersey, relied on defendants' representations about a bus and entered into a contract with defendants to buy the bus. Plaintiffs paid defendants what was, for them, a lot of money. Defendants, as the documents demonstrate, coordinated the purchase through a New Jersey finance company and then opened envelope after envelope from New Jersey, bearing New Jersey checks, and put that New Jersey money in their bank accounts.

This is not fiction; this is not random; this is not attenuated. It certainly is not unilateral. In this case, it is simply "fair play and substantial justice" that defendants be able to seek redress of their rights – finally – in their home State.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court deny the motion of defendants to order dismissal of this case.

Ronald D. Coleman (RC-3875)
COLEMAN LAW FIRM
881 Allwood Road
Clifton, New Jersey 07012
(973) 471-4010
Attorneys for Plaintiffs

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