DOCKET NO.: CV-01-0811205-S	:	SUPERIOR COURT
AMERICAN RECYCLING COMPANY, INC.	:	JUDICIAL DISTRICT OF HARTFORD
V.	:	AT HARTFORD
DIRECT MAILING AND FULFILLMENT SERVICES, INC., d/b/a DIRECT GROUP	:	SEPTEMBER 24, 2001

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

Plaintiff American Recycling Company, Inc. ("American Recycling"), a Connecticut corporation, has sued defendant Direct Mailing and Fulfillment Services, Inc. ("Direct Group"), a New Jersey corporation, for breached of contract. On November 21, 2001, Direct Group filed a motion to dismiss the plaintiff's complaint "on the grounds that this Court lacks personal jurisdiction under Conn. Gen. Stat. § 52-59b." Contrary to Direct Group's argument, American Recycling need not establish that Direct Group "transacted business" in Connecticut within the meaning of C.G.S. § 52-59b because that statute only applies to foreign individuals and partnerships and thus has no application to the present action, which is against a foreign corporation. This court should deny the motion to dismiss because (1) this action arises out a "contract made in this state or to be performed in this state" and involves the defendant's distribution of goods to Connecticut within the meaning of the applicable long-arm statute, C.G.S. § 33-929(f); and (2) Direct Group had minimum contacts with Connecticut such that the maintenance of the suit does not offend constitutional notions of fair play and substantial justice. At most, the question of minimum contacts is a disputed factual issue that should await discovery and a hearing.

FACTUAL BACKGROUND

American Recycling is a Connecticut corporation that is engaged in the business of recycling paper products. Complaint, ¶ 1. Direct Group is a New Jersey corporation that is engaged in the direct mail business. Complaint, ¶ 2. On or about March 7, 2000, representatives of American Recycling and Direct Group met to discuss the potential for American Recycling to collect, process, and sell Direct Group's recyclable waste paper products for recycling. Affidavit of Steven Trouden, ¶ 5, attached hereto as Exhibit A. At the meeting, American Recycling offered to purchase, arrange for the collection, transportation, processing and sale of Direct Group's recyclable waste paper products. Id., ¶ 6. American Recycling agreed to pay Direct Group for its waste paper products based upon the weight and commodities price of the products that American Recycling presented for collection each month. Id., ¶ 7. American Recycling further agreed to guaranty Direct Group a minimum payment of $30,000 for the first three months of the parties' contract. Id.; Complaint, ¶ 5, Exhibit A, thereto, Addendum to Service Agreement, Page Two.

Accordingly, on or about March 7, 2000, the parties entered into a written agreement ("the Agreement") whereby Direct Group hired American Recycling to purchase and arrange for the shipment and sale of all of the recyclable waste paper that Direct Group generated. Complaint, ¶¶ 3-4 and Exhibit A. Thereafter, for three months, American Recycling, from its offices in Connecticut, arranged for the collection of Direct Group's recyclable waste paper. Trouden Affid., ¶ 8. Additionally, American Recycling trucks left from Connecticut to pick-up the waste paper and deliver it to one of two recycling facilities (one in Connecticut and one in Massachusetts) to be sorted, graded, weighed, warehoused, and then shipped for recycling.

Trouden Affid., ¶ 9. Pursuant to the Agreement, American Recycling paid Direct Group $30,000 for the scrap waste paper generated at Direct Group's facilities during the first three months of the Agreement, which Direct Group accepted and cashed. Complaint, ¶ 5. American Recycling mailed the check from Connecticut. Trouden Affid., ¶ 10.

During the course of the first three months of the Agreement, American Recycling mailed letters to Direct Group from Connecticut; Direct Group mailed letters to American Recycling in Connecticut; representatives of Direct Group telephoned American Recycling from Connecticut; and representatives of Direct Group, including Direct Group's General Manager and Plant Managers, made telephone calls to American Recycling in Connecticut. Trouden Affidavit, ¶¶ 11, 12 and Exhibits 1, 2, thereto. Direct Group subsequently terminated the Agreement, and American Recycling filed the above-captioned action. Complaint, ¶ 7.

ARGUMENT

A. STANDARD FOR GRANTING MOTION TO DISMISS

"It is well established that in ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." Lawrence Brunoli, Inc. v. Branford, 247 Conn. 407, 410-11, 722 A.2d 271 (1999). While a court may look to affidavits in support of a motion to dismiss to establish the facts, "[a]ffidavits are insufficient to determine the facts unless, like the summary judgment, they disclose that no genuine issue as to a material fact exists . . . In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses . . . When issues of fact are necessary to the determination

of a court's jurisdiction, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." Standard Tallow Corp. v. Jowdy, 190 Conn. 48, 56, 459 A.2d 503 (1983).

B. THE COURT HAS PERSONAL JURISDICTION OVER DIRECT GROUP

"When a defendant files a motion to dismiss challenging the court's jurisdiction, a two part inquiry is required. The trial court must first decide whether the applicable state long-arm statute authorizes the assertion of jurisdiction over the [defendant]. If the statutory requirements [are] met, its second obligation [is] then to decide whether the exercise of jurisdiction over the [defendant] would violate constitutional principles of due process." Knipple v. Viking Communications, Ltd., 236 Conn.602, 606, 674 A.2d 426 (1996). If the defendant challenges the court's personal jurisdiction, the plaintiff bears the burden of proving the court's jurisdiction." Id., at. at 607.

In this case, the applicable long-arm statute, C.G.S. § 33-929(f)(1), and (3) provides the court with personal jurisdiction. Additionally, the exercise of jurisdiction would not violate the Constitution.

1. The Court Has Jurisdiction Pursuant to C.G.S. § 33-929(f)

Defendant's sole challenge to the court's jurisdiction, that it does not "transact business" in Connecticut within the meaning of C.G.S. § 52-59b, is clearly misplaced. First, that statute, by its terms, is limited to "foreign partnerships", and has no bearing on this action against a foreign corporation. See, Def. Br., p.5, quoting, C.G.S. § 52-59b ("a court may exercise personal jurisdiction over any **foreign partnership** . . ."). Second, the applicable statute, C.G.S. § 33-929 specifically provides for jurisdiction over a foreign corporation "whether or not such foreign

corporation is transacting or has transacted business in this state" and thus "has a much broader scope" than C.G.S. § 52-59b. (emphasis added); Lane v. Hopfeld, 160 Conn. 53, 58, 273 A.2d 721 (1970) (distinguishing between C.G.S. § 52-59a (former C.G.S. § 52-59b) and C.G.S. § 33-411 (former C.G.S. § 33-929)). Consequently, third, the defendant's affidavit, which purports to "show[] that the defendant does not satisfy the requirement of Conn. Gen. Stat. § 52-59b" is irrelevant and does not support dismissal.[1]

The long-arm statute that applies to foreign corporations such as Direct Group provides in relevant part that:

> every **foreign corporation** shall be subject to suit in this state . . . **whether or not such foreign corporation is transacting or has transacted business in this state** and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows: (1) Out of any contract made in this state or to be performed in this state . . . (3) out of the production, manufacture or distribution of goods by such corporation with the reasonable expectation that such goods are to be used or consumed in this state and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed or sold or whether or not through the medium of independent contractors or dealers.

C.G.S. § 33-929(f) (emphasis added).

[1] For these reasons, the decision in Matto v. Dermatopathology Assoc. of New York, 55 Conn.App. 592, 739 A.2d 1284 (1999), upon which defendant relies, has no bearing on this action. That decision was based on the requirements of C.G.S. § 52-59b and their application to a foreign partnership.

The court thus has jurisdiction over Direct Group because this action arises out of a contract to be performed primarily in, and from, Connecticut within the meaning of C.G.S. § 33-929(f)(1). American Recycling, from its Connecticut offices, arranged for Direct Group's waste to be picked up; received Direct Group's waste in Connecticut; processed the waste for recycling in Connecticut; recycled the waste in Connecticut; and mailed payment to Direct Group from Connecticut. Trouden Affid., ¶¶ 8-10. Any **one** of these activities, **alone**, would be sufficient to meet the requirements of C.G.S. § 33-929(f); See e.g. Thornton & Company, Inc. v. Pennsak, Inc., 1998 Conn. Super. LEXIS 3474 at * 8-9 (November 20, 1998) (Robinson, J.) (Contract wherein plaintiff, acting from Connecticut offices, located, purchased and arranged to have various goods shipped from Louisiana to Pennsylvania defendant sufficient performance in Connecticut under C.G.S. § 33-929.) (attached).[2] Thus, the nature and extent of performance in

[2] See also, Senior v. American Institute for Foreign Study, 1996 Conn.Super.LEXIS 343 at *6-7 (February 7, 1996) (Karazin, J.) (Plaintiff who found foreign camp counselor and arranged for their visas from its offices in Connecticut, performed contract within meaning of C.G.S. § 33-411(c)(1) (former C.G.S. § 33-929(f)(1)) (attached); Salisbury Group v. Alban Institute, 1996 Conn. Super. LEXIS 1702 (July 3, 1996) (Pickett, J.) (attached); Advanced Claims Service v. Franco Enterprises, 2000 Conn. Super. LEXIS 269 at * 10-11 (October 13, 2000) (Melville, J.) (foreign defendant's contract which contemplated substantial performance of investigative services by plaintiff in Connecticut sufficiently satisfied long-arm statutory requirements of § 33-929(f)(1)) (attached); Teleco Oilfield Services Inc. v. Skandia Insurance Company, Ltd., 656 F. Supp. 753, 758 (D. Conn. 1987) *(*Plaintiff's payment of premiums from Connecticut to an out-of-state insurer was 'actual and substantial performance of the terms of the contract.')

Connecticut in this case far exceeds that which the courts found to be sufficient in every other case cited herein. For example, in Thornton, supra, the goods at issue never even entered Connecticut whereas in this case, the goods were shipped to Connecticut, where plaintiff processed and recycled them. Thornton, supra, at *8.

Defendant's argument, that because plaintiff picked up the waste paper in New Jersey, "New Jersey is the place where the Agreement was performed," overlooks that (a) the contract required an contemplated that plaintiff, a Connecticut corporation, arrange for the waste paper to be picked up; and (b) picking up the waste paper was only one part of the Agreement; the Agreement contemplated that American Recycling would thereafter arrange for the sale of the waste paper, sell the waste paper, and subsequently pay Direct Group for the waste paper based upon its recycling value, all from Connecticut. Trouden Affid., ¶¶ 6-10. Nevertheless, the Agreement at issue would satisfy the requirements of C.G.S. § 33-929(f)(1) even assuming *arguendo*, as defendant argues, that plaintiff's performance were limited to arranging for the defendant's waste paper to be picked up in New Jersey, to be delivered to some other unknown state. See e.g., Thornton, supra (plaintiff's organization of transportation of goods from one state to another sufficient); Senior, supra, (plaintiff locating counselors in foreign country and arranging for transport to foreign state sufficient).

Moreover, the court also has jurisdiction pursuant to C.G.S. § 33-929(f)(3) because the action arises out of Direct Group's distribution of goods (recyclable waste paper) with the reasonable expectation that they would be used in Connecticut, and those goods were, in fact, used for recycling purposes in Connecticut. See e.g., Phillips Industrial Services Corp. v. Connecticut Light & Power Co., 1999 Conn.Super.LEXIS 105 (January 20, 1999) (Levin, J.) (attached). As Direct Group acknowledges, it agreed to sell its waste paper to American Recycling, a Connecticut corporation. Dolan Affid., ¶ 5. Whether Direct Group or American Recycling arranged for the paper to be shipped to Connecticut is irrelevant because the statute specifically provides for jurisdiction over a foreign corporation that distributes products in

Connecticut "whether or not through the medium of independent contractors or dealers." C.G.S. § 33-929(f)(3).

2. Direct Group Has Minimum Contacts With Connecticut And Could Foresee Being Haled Into Court In Connecticut

Also contrary to defendant's argument, the exercise of jurisdiction in Connecticut meets the constitutional requirements of due process. Where, as here, a foreign corporation enters a contract with Connecticut corporation that anticipates the performance of services by the Connecticut corporation primarily in Connecticut, the courts have uniformly found that the defendant had minimum contacts with this state and could foresee being haled into court in Connecticut. See Thornton, supra, at * 11-14; Salisbury Group, supra, at * __ (Minimum contacts requirements were met when the defendant foreign corporation hired plaintiff to do a nationwide search, which the plaintiff did, primarily, from Connecticut.); Senior, supra, at * 8 (defendant could reasonably expect to be sued in Connecticut when it knowingly contracted with a Connecticut company to perform services in Connecticut)[3]; Advanced Claims Services, supra, at * 12 (same). Additionally, where, as here, a foreign corporation sells products for use in Connecticut, it can foresee being haled into court in Connecticut. See Phillips Industrial Services, supra, at * 4-5 (holding that defendant who sold goods to Connecticut business

[3] In Senior, supra, as in this case, the defendant submitted an affidavit that claimed it was not **aware** that the contract would be performed in Connecticut. Comp., Senior, supra, at * 8 ("at all times herein, up until after the incident in the underlying complaint, [the president of Camp Sunrise] did not know that he was dealing with Camp America's Greenwich office, but did realize that they maintained a Greenwich office.") and Affidavit of Michael Dolan, ¶ 9, attached to Defendant's Motion ("we have no information about where American Recycling took the paper, nor did we arrange for shipping of the paper."). In this case, as in Senior, the parties' agreement prominently displayed plaintiff's Connecticut address, and the defendant made telephone calls and received and sent correspondence to Connecticut. Accordingly, as in Senior, defendant knew it was working with a Connecticut company and could reasonably expect to be haled into court on a cause of action related to the contract. Senior, at * 9.

"purposefully availed itself of the privilege of conducting activities within [Connecticut]"; and its amenability to this court's jurisdiction is both foreseeable and fair.").

Moreover, the "totality" of defendant's contacts with Connecticut are far more pervasive than it would have the court believe. As in Thornton, supra, and Advanced Claims Services, supra, the defendant sent correspondence to Connecticut and made telephone calls to Connecticut in connection with the business transaction Thornton, supra, at * 12; Advanced Claims Services, supra, at * 12-13. As in those cases, and the cases cited therein, these "purposeful contacts" are sufficient to justify the exercise of personal jurisdiction over the defendant. See also, Res. Sys. Group, Inc. v. Internetcash Corp., 2001 Conn.Super.LEXIS 1628 at * 21 (June 12, 2001) (Lewis, J.) (same).

"Once the plaintiff] has established that minimum contacts exist, the burden of proof shifts to the defendant who then must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Thornton, at * 14-15. "Whether it is reasonable to exercise jurisdiction in a particular case depends on (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 plaintiff's interests 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." Id. Defendant's terse assertion that "it would be grossly unfair if personal jurisdiction were exercised over Direct Group" utterly fails to meet this burden. Id., at 15-16 (holding defendant failed to meet its burden where it did not address any of the above listed considerations).

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the court deny the defendant's motion to dismiss.

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By: _____

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