COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT
C.A. No. 04-2736-H

GURU DEVI M. KHALSA,

Plaintiff,

vs.

JOHN HANCOCK FINANCIAL SERVICES, INC., WILLIAM KELLY and DAVID L. CRANE

Defendants

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OF WILLIAM KELLY

Defendant William Kelly ("Mr. Kelly") respectfully submits this memorandum in support of his motion to dismiss this action as against him for lack of long-arm jurisdiction under Rule 12(b)(2) of the Massachusetts Rules of Civil Procedure, Section 3 of Chapter 223A of the General Laws of the Commonwealth and the Constitution of the United States, or, in the alternative, under the doctrine of forum non convieniens as codified in G.L. c. 223, §5. There is no doubt that this action is based upon events in the State of Georgia in 2000, and would not have been brought in Massachusetts had the plaintiff not fortuitously moved from the Atlanta area to the Commonwealth and the corporate defendant (identified as "John Hancock Financial Services, Inc." in the Complaint) ("John Hancock") did not maintain a principal office in Boston. Mr. Kelly's

participation in the sale of the investment products in issue herein in Georgia to a then-Georgia resident cannot be construed as "doing business" in Massachusetts in a manner in which either the Federal Constitution or Massachusetts law permits to create a basis for personal jurisdiction. Even if personal jurisdiction were to exists, the doctrine of forum non convieniens permits the dismissal of a case such as this where both individual defendants and most of the underlying documents may be found only in Georgia. Under either rationale, this Court must dismiss this action so that it may be brought—if at all—in a venue where Mr. Kelly has real contacts and the bulk of the evidence is likely located.

THE FACTS REGARDING PERSONAL JURISDICTION

The facts relevant to the plaintiff's claim that it can compel Mr. Kelly to appear before this Court are set forth in the allegations of the Complaint (which must be regarded as true for purposes of this motion, see, e.g., Kleinerman v. Morse, 26 Mass.App.Ct. 819, 821 n.4 , 533 N.E.2d 221, 223 n.4 (1989), as supplemented by the facts set forth in Mr. Kelly's affidavit being submitted herewith (the "Kelly Aff't").

The dispute underlying this action, as alleged in the Complaint, arises out of the creation of a charitable remainder trust by the plaintiff, Guru Devi K. Khalsa ("Ms. Khalsa") in 2000, when Ms. Khalsa concedes she was a resident of Georgia.

(Complaint ¶6). The individual defendants, Mr. Kelly and David Crane ("Mr. Crane") were associated with a firm then known as Atlanta Glass General Agency, which was a general agent of the John Hancock companies with the authority to issue insurance policies on behalf of John Hancock (See Complaint ¶¶5,7, Kelly Aff't ¶3. The Complaint alleges that Messrs. Kelly and Crane assisted in the creation of a charitable remainder trust with a fixed return of 7% per year, to which Ms. Khalsa contributed approximately $500,000 of Coca-Cola stock. (See Complaint ¶¶8, 11, 13). The Coca-Cola stock was then liquidated and the proceeds invested in a variable annuity contract funded by a portfolio of stock mutual funds (alleged to have been chosen by Messrs. Kelly and Crane), which would be the source of the distributions to be made to Ms. Khalsa for the remainder of her life. (See Complaint ¶¶12-13).

As of mid-2004, Ms. Khalsa alleges that the value of the assets remaining in the trust (apparently net of distributions) was $270,000 and the creation of the trust and purchase of a life insurance policy in connection thereto deprived her of income and assets necessary for her support. (See Complaint ¶¶15-17). Now a resident of Massachusetts, she commenced this action in June, 2004, alleging that Messrs. Kelly and Crane recommended the purchase of unsuitable investment vehicles (including the trust, the annuity and mutual funds used to

purchase the trust, and the life insurance policy). (See Complaint ¶¶14-16).[1] The Complaint alleges in conclusory fashion that Mr. Kelly may be held liable to Ms. Khalso on the basis of these allegations for negligence, negligent or fraudulent misrepresentation, unjust enrichment and breaches of contract fiduciary duty. (Complaint ¶¶18-22).

The Complaint makes no reference to the place where the alleged misconduct took place other than a brief reference to Ms. Khalsa's 2000 status as a Georgia resident and the identification of the Atlanta Glass agency (which has not been named a defendant) as Messrs. Kelly and Crane's employer. (See Complaint ¶¶5-7). By doing so—as Mr. Kelly's affidavit makes clear—she obscures the fact that essentially every act forming a base for Ms. Khalsa's claims took place in Georgia. All communications with respect to the creation and funding of the Trust took place in person or by telephone in Georgia. (Kelly Aff't ¶¶4-5). Mr. Kelly and Mr. Crane had no formal affiliation

[1] The Complaint neglects to acknowledge that the investment program Ms. Khalsa now alleges was unsuitable conferred substantial benefits upon her, including an immediate income tax deduction by reason of the gift of the $500,000 in Coca-Cola stock to a charitable trust, the ability to convert her position in Coca-Cola to a diversified portfolio through the charitable trust without incurring capital gains taxes, and sufficient anticipated income to fund a life insurance policy which would provide a legacy to her children in an amount commensurate with her former holdings in Coca-Cola and the purchase of health insurance. See Kelly Aff't ¶4.

with John Hancock other than as employees of Atlanta Glass, a John Hancock general agent (although their compensation included commissions payable on the sale of John Hancock products). (Kelly Aff't ¶¶2, 5)[2] While Mr. Kelly is and has been properly licensed to engage in the sale of life and disability insurance, annuity contracts, and investment securities in the state of Georgia, where Ms. Khalsa then resided, he has never been licensed to do so in Massachusetts. (Kelly Aff't ¶2). He has worked exclusively in Georgia in the insurance industry since completing his studies at the University of Georgia in 1996. (Id.) Any records pertaining to the Khalsa transactions other than those in the possession of Mr. Kelly and Mr. Crane are likely in the custody of the Atlanta Glass agency in Georgia. Kelly Aff't ¶6). Indeed, notwithstanding Mr. Kelly's employment by agencies acting on behalf of John Hancock, he has never been present in Massachusetts except for short periods as a tourist. (Kelly Aff't ¶2). In fact, Mr. Kelly would have had no connection with this dispute to Massachusetts had Ms. Khalso not

[2]Because the sale of variable life insurance and annuity contracts encompasses the sale of securities (typically mutual funds), insurance advisors assisting in the sale of such products must be registered with the National Association of Securities Dealers, Inc., associated with a NASD member broker-dealer, and licensed by the states in which they do business. While an employee of Atlanta Glass, Mr. Kelly was also deemed to be a registered representative associated with Signator Financial Services, Inc., a John Hancock affiliate. Kelly Aff't ¶¶2-3.

chosen to move to the Commonwealth after the purchase of the investments in issue in this case.

ARGUMENT

MASSACHUSETTS IS NEITHER A PROPER NOR A CONVENIENT FORUM FOR THE ADJUDICATION OF ANY CLAIMS AGAINST MR. KELLY

All events material to Ms. Khalsa's claims against Mr. Kelly (and Mr. Crane, the other individual defendant herein) took place in Georgia. Only Ms. Khalsa's recently acquired status as a Massachusetts resident creates any connection between Massachusetts and claims which will have to be decided under Georgia law. Even taking into consideration the fact that John Hancock was the issuer or sponsor of many of the products Ms. Khalso acquired, the sale of insurance by Georgia-based individuals to a then-resident of Georgia cannot confer jurisdiction on Massachusetts courts on any basis cognizable under G.L. C. 233A or the Constitution. Even if jurisdiction over Mr. Kelly exists, this Court should exercise its discretion under G.L. c. 233A, §5 to dismiss a case governed by Georgia law in which almost all witnesses and original documents are located in Georgia and permit it to be refilled in a more convenient judicial (or arbitral) forum in Georgia.

I. THIS COURT CANNOT ASSERT PERSONAL JURISDICTION OVER MR. KELLY

The Complaint does not allege any specific basis for its claim that Massachusetts courts have jurisdiction over Mr. Kelly

other than to state that he and Mr. Crane "frequently" transacted business in Massachusetts as "agents for John Hancock". This claim conveniently ignores the fact that, at most, Mr. Kelly was an employee of a John Hancock agent, and was never licensed to transact any business in Massachusetts. If jurisdiction exists at all over Mr. Kelly for his conduct in Georgia, it must rest on G.L. c. 223A §3(a)("transacting any business in this Commonwealth") or §3(d)("causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from . . . services rendered, in this commonwealth"). It is well settled, however, that agents of Massachusetts corporations with only sporadic contact with home offices cannot be deemed to do business in the Commonwealth in a manner permitting the exercise of personal jurisdiction under c. 223A, §3 or the Constitution. Plaintiff's claims against Mr. Kelly must be dismissed for lack of such jurisdiction based on his conduct relating to a single client present in another jurisdiction.

The Appeals Court's decision in Roy v. Roy, 47 Mass.App.Ct 921, 715 N.E.2d 70 (1999) (rescript) demonstrates that Massachusetts courts are without power to compel Mr. Kelly to appear in this case. In Roy, one purported defendant (Mueller)

was an officer of a defendant Massachusetts corporation being sued, inter alia, for breach of contract. The Court held there were insufficient contacts between Mueller and Massachusetts to permit the exercise of long-arm jurisdiction over Mueller as an individual with "contacts of a continuous and systematic nature" so as to permit the exercise of "general" jurisdiction" under the Massachusetts long-arm statute or the Constitution when

> the aggregate of Mueller's contacts with Massachusetts [were] being officer and director of a Massachusetts corporation, writing two checks to the plaintiff drawn on the Massachusetts account, and sending copies of correspondence to the plaintiff's Massachusetts attorney

47 Mass.App.Ct. at 921, 715 N.E.2d at 71-72, citing Heins v. Wilhelm Loh Wetzlar Optical Mach. GmbH & Co. KG., 26 Mass.App.Ct. 14, 22n. 6, 522 N.E.2d 989 (1988);, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 & n. 11(1984);International Shoe Co. v. Washington, 326 U.S. 310, 318(1945).

A similar result was reached in Kleinerman, supra, where the Appeals Court held as a matter of both state and Constitutional law that Massachusetts courts could not exercise long-arm jurisdiction over two directors of a Massachusetts corporation defendant in a wrongful termination case who had done nothing other than attend one and two directors' meetings in Massachusetts, holding it was "plausible" to find that "they

had not availed themselves purposefully of the privilege of conducting business in Massachusetts". 26 Mass.App.Ct. at 225, 533 N.E.2d at 825, citing Hanson v. Denckla, 357 U.S. 235, 253, (1958).

In this case, while Mr. Kelly may have been acting on behalf of a Massachusetts insurer, he did so for the benefit of a Georgia client (the plaintiff) within the borders of the State of Georgia; the Complaint does not suggest there was any wrongdoing within Massachusetts' borders at the time of the events in issue. Plaintiff's contention that Mr. Kelly did enough "business" in Massachusetts to support jurisdiction, if adopted by this Court, would subject any employee of a Massachusetts business to the jurisdiction of Massachusetts courts for any conduct anywhere in the world which might have benefited his employer. Such a test, looking to the place of an employer's headquarters rather than the place of the employee or agent's conduct, falls far below the "minimum contacts" required under the Constitution as set forth in International Shoe, supra, and stretches the "doing business" rule set forth in G.L. c. 223A, §3 beyond all recognition. To the extent all of Mr. Kelly's alleged misdeeds took place in Georgia in transactions with a then-Georgia resident, the happenstances that the plaintiff now resides in Massachusetts and the acts in question may have benefited a Massachusetts insurer are insufficient to

prevent the dismissal of this action against Mr. Kelly for lack of personal jurisdiction.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION UNDER G.L. c. 223A, §5 TO DISMISS THIS ACTION SO THAT IT MAY BE BROUGHT IN A MORE CONVENIENT FORUM

Even if this Court concludes it has personal jurisdiction over Mr. Kelly, and thus the power to compel Mr. Kelly to defend himself against Ms. Khalsa's claims in Massachusetts, the fact remains that all the claims in question arose out of events in Georgia, are likely to be resolved under Georgia law, and require the use of witnesses and docuents located primarily in Georgia. There can be little doubt that, notwithstanding the plaintiff's residence in Georgia, this case can be more efficiently administered in Georgia than Massachusetts; accordingly, this Court should exercise its discretion under the doctrine of forum non convieniens (as codified by G.L. c. 233A, §5) and dismiss this action to permit it to be heard in a more suitable forum in Georgia.

G.L. c. 223A, §5 provides:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.

All the conduct underlying this case took place in Georgia; all the witnesses other Ms. Khalsa and members of her family

reside in Georgia; much of the documentary evidence is located in Georgia; it is likely that Georgia law will be applied to all claims herein. Massachusetts courts—even though reluctant to interfere with a Massachusetts resident's choice of forum—have long recognized that under such circumstances, a case must be tried in the jurisdiction where actual wrongdoing took place. Thus, the Appeals Court recently upheld dismissal of claims in the nature of medical malpractice against a Dominican Republic hotel and the physicians to which it referred a diabetic patient in Gianocostas v. Riu Hotels, S.A., 59 Mass.App.Ct. 753, 797 N.E.2d 937 (2003)(applying common law doctrine), even as it required further inquiry on the adequacy of a foreign remedy on claims against the Massachusetts-based tour operator who allegedly negligently chose the hotel and misrepresented its ability to assist a patient in diabetic crisis. 59 Mass.App.Ct. at 760-61, 797 N.E.2d at 942-43. Indeed where the evidence and compulsory process is available in the proposed alternative forum, this Court may properly consider "cost-effectiveness" in exercising its discretion. See Green v. Manhattanville College, 40 Mass.App.Ct. 76, 80, 661 N.E.2d 123, 126 (1996).

Plaintiff has not and cannot complain that Georgia common law or securities law is any less protective of her interest as a consumer/investor than that of Massachusetts. Where compulsory process is more available as to third party witnesses

in Georgia than Massachusetts—and, indeed, the individual defendants, to the extent that they do not regularly visit Massachusetts, may be able to obtain protective orders compelling their depositions taker place in Georgia., see Mass.R.Civ.P. 26(c)(2) (permitting entry of protective order setting time or place of discovery to prevent undue burden or expense)-both public and private interests suggest the use of a Georgia forum as opposed to one in Massachusetts is far more appropriate in this case.[3] This Court should, even if personal jurisdiction exists, dismiss this action to permit it to be heard in a more appropriate forum.

CONCLUSION

Notwithstanding plaintiff's desire to see this case decided in her state of new residence, this is a case involving business transactions in which all individuals involved were Georgia residents and the participation of any Massachusetts entity was at best, incidental. Accordingly, defendant William Kelly

[3] Mr. Kelly acknowledges that dismissal under G.L. 233 §5 may be made conditional on the waiver of certain defenses, i.e., the statute of limitations. See Green, supra, 40 Mass.App.Ct. at 81, 661 N.E.2d 127.

To the extent that claims involving the sale of securities (mutual funds) may also be in issue in this case, the plaintiff may have executed a pre-dispute arbitration agreement requiring such claims be submitted to arbitration. Mr. Kelly reserves the right to demand a stay of proceedings to permit such arbitration until such time as the venue in which this action will be heard is decided.

respectfully requests that this Court dismiss this action as against him for lack of personal jurisdiction or, in the alternative, dismiss this case under the doctrine of forum non convieniens and G.L. c. 223A, §5 to permit it to be heard in a more convenient forum.

WILLIAM KELLY
By his attorney,

Edward R. Wiest (BBO 547801)
Edward R. Wiest, P.C.
60 State Street, Suite 700
Boston, MA 02109-1803
(617) 878-2077

Dated: November 19, 2004

CERTIFICATE OF SERVICE

I hereby certify that I served this document by causing a true and genuine copy thereof to be delivered first class mail, postage prepaid, all counsel of record in this action this 19th day of November, 2004. .

EDWARD R. WIEST