

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV11-01242-AHM (DTBx) Date January 16, 2013
 Title ESTATE OF DAVID R. FOSTER v. AEHUI GOMER, et al.

Present: The Honorable	A. Howard Matz		
	Stephen Montes	N/A	
	Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:		
	No Appearance	No Appearance	
Proceedings:	IN CHAMBERS (No Proceedings Held)		

For the second time, Defendant Donna White moves this Court to dismiss her from this case for lack of personal jurisdiction. The Court previously found that it lacked specific personal jurisdiction over White because the allegations in the original complaint were insufficient to show that White’s conduct was “expressly aimed” at California. (Dkt. 44 at 5-8.) The Court declined to address, however, whether personal jurisdiction over White could be proper under the RICO statute’s limited provisions for nationwide service of process pursuant to 18 U.S.C. § 1965(b). * * * *

Plaintiff has since filed a First Amended Complaint (“FAC”), and White has filed a renewed motion to dismiss. In the instant motion, White again argues that the Court lacks personal jurisdiction, this time under the RICO statute.

The Court finds that personal jurisdiction over White is proper but does so without addressing the issue of RICO jurisdiction. On August 8, 2012, after the briefs on this motion were filed, the Ninth Circuit issued an amended decision that clarified the “express aiming” prong of the Ninth Circuit’s specific personal jurisdiction test. *Fiore v. Walden*, 688 F.3d 558 (9th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3334 (U.S. Nov. 6, 2012) (No. 12-574) (denying rehearing *en banc* of *Fiore v. Walden*, 657 F.3d 838 (9th Cir. 2011), and issuing an amended, superceding opinion). As such, the parties did not have an opportunity to address the new law on personal jurisdiction. Having reviewed *Fiore*, the Court reconsiders its previous finding and concludes that specific

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personal jurisdiction over White in California is proper and within the limits of due process.¹ The Court therefore DENIES White's motion to dismiss.²

I. BACKGROUND

* * * *

David R. Foster ("Foster"), formerly the CEO of Colgate-Palmolive, died on June 4, 2010, leaving behind an estate worth as much as \$20 million. (FAC ¶ 1.) Plaintiff is the Estate of Foster, appearing through its executor Sarah Foster, who is Foster's daughter from his second marriage. (FAC ¶ 3.) The gist of Plaintiff's allegations is that during Foster's life, Foster's now deceased third wife Alexandra Chang ("Chang"), Chang's siblings, and Defendant White conspired to defraud Foster of his money and property while his health and mental faculties were deteriorating, to the detriment of the Plaintiff Estate. The Estate alleges claims for violation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, conspiracy to commit a RICO violation, fraud, and other common law tort theories. (FAC ¶¶ 187-242.)

During his life, Foster owned property in various states, including California and Massachusetts. (FAC ¶ 15.) Throughout their marriage, Foster and Chang spent their summers in Massachusetts and their winters in California. (FAC ¶ 40.) Foster's mental faculty began to suffer in 2003, when he underwent surgery at the age of 82 to have a non-cancerous tumor removed from the lining of his brain. (FAC ¶ 43.) Although Foster ultimately died in Massachusetts, his Estate is being probated in California. (FAC ¶¶ 1, 160.)

White is an attorney who resides in Boston, Massachusetts. (FAC ¶ 6.) In January of 2005, Chang, who was in California at that time, retained White for estate planning advice. (FAC ¶¶ 6, 50.) White developed an attorney-client relationship with not only Chang but also Foster, who paid all of her fees. (FAC ¶ 50.) Plaintiff generally alleges that despite White's duties to Foster as his attorney, she knowingly gave him legal advice and rendered services that benefitted only Chang (and later Chang's siblings) in

¹ *Fiore* triggered a blistering dissent from the order denying rehearing en banc. This court would not be surprised if the Supreme Court grants review, but in any event *Fiore* remains binding precedent.

² Dkt. 57.

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furtherance of the Defendants' conspiracy to defraud Foster out of money and property. In 2005, for example, White advised Foster to revoke his premarital agreement with Chang and name Chang as the successor trustee over certain trusts, despite White's knowledge that Foster was too mentally incapacitated at the time to make such decisions. (FAC ¶ 50-53.) White drafted the legal documents that accomplished these actions, giving Chang control over a substantial portion of Foster's assets. (FAC ¶¶ 51-54.) Later, in 2006, White helped Chang prepare her own will and revocable trust. (FAC ¶ 57.) White planned Chang's trust under the assumption that Foster would die before Chang and that Chang would inherit much of his estate. (FAC ¶ 57.) As such, Chang's trust distributed several of Foster's properties to Chang's siblings upon her death. (FAC ¶ 57.) White referred to herself as "your sister" in a letter she addressed to Chang pertaining to the trust documents. (FAC ¶ 57.) Chang's trust was later amended to include a gift of \$100,000 to each of White's daughters. (FAC ¶ 57.)

Ultimately, Chang died before Foster, on January 31, 2008. (FAC ¶ 63.) Chang's estate was probated in California, and White was the estate's initial counsel. (FAC ¶ 27.) Thereafter, Chang's sister, Defendant Aehui Gomer, took over as Foster's caretaker, against the wishes of Foster's daughters. (FAC ¶¶ 74-76.) Gomer continued Chang's collaboration with White to divert money from Foster's estate and sought counsel from White regarding Foster's legal affairs. (FAC ¶ 84.) White, by drafting the relevant documents, helped Gomer become Foster's power of attorney in March 17, 2008, without first consulting Foster outside of the presence of Gomer. (FAC ¶¶ 80-84.) Gomer sought counsel from White about altering some of Foster's trusts that were designed to leave some of his assets to his daughters and about the legal ramifications of marrying Foster. (FAC ¶¶ 95, 99, 103.) White later advised Gomer to fraudulently induce Foster to agree to sell shares of his Colgate-Palmolive stock to pay Chang's estate taxes. (FAC ¶ 108.) White also helped Gomer become trustee of the Foster Family Trust. (FAC ¶ 110.)

In May of 2008, Gomer moved Foster to his home in Nantucket, Massachusetts. (FAC ¶ 89.) A few months later, in August of 2008, the Elder Services of Cape Cod ("ESCC") began an investigation into Foster's care after receiving a call from his visiting nurse. (FAC ¶ 111.) Rather than looking out for the best interests of Foster, White instead tried to assist Gomer with her legal rights regarding the ESCC investigation. (FAC ¶ 115.) On February 20, 2009, the ESCC recommended that Gomer be relieved of her duties related to Foster's care and management of his finances as soon as possible.

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(FAC ¶ 155.) Soon after, the Nantucket Probate Court struck certain provisions of Foster’s will and trusts pertaining to Gomer. (FAC ¶ 157.) Foster’s court-appointed guardian *ad litem* reported to the probate court that White had renounced Chang’s \$200,000 bequest to her daughters. (FAC ¶ 158.)

While the above events were happening, White allegedly was aware that Foster lived in California for at least part of the time. Indeed, she told Foster’s guardian *ad litem* in 2009 that “it was expected that Mr. Foster would be considered a California domiciliary when he died.” (FAC ¶ 28.) In addition, many of the legal documents she drafted for Foster were governed by California law. (FAC ¶ 18.) Plaintiff does not allege, however, that White ever traveled to California in furtherance of the alleged conspiracy.

II. LEGAL STANDARD

A party may move to dismiss an action for lack of personal jurisdiction. *See* Fed. R. Civ. P. 12(b)(2). Once a defendant has challenged personal jurisdiction, the plaintiff bears the burden of making a prima facie showing that jurisdiction is proper. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (citing *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990)). In determining whether the plaintiff has made that showing, the Court must accept as true all uncontroverted allegations in the complaint and must resolve in the plaintiff’s favor any conflicts in the parties’ affidavits. *See AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996). The Court must “draw reasonable inferences from the complaint in favor of the plaintiff where personal jurisdiction is at stake, and will assume credibility.” *Fiore*, 688 F.3d at 575. Mere “bare bones” assertions of minimum contacts with the forum state or legal conclusions unsupported by specific factual allegations will not satisfy the plaintiff’s burden. *Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007). Where, as in this case, there is no applicable federal statute authorizing personal jurisdiction over a non-resident defendant, the court must apply the long-arm statute of the state in which it is located and also ensure that exercising jurisdiction does not violate the defendant’s rights under the Due Process Clause. *See* Fed. R. Civ. P. 4(k)(1)(A). *See also Panavision Int’l, L.P. v. Toepfen*, 141 F.3d 1316, 1320 (9th Cir. 1998). California’s long-arm statute permits courts to exercise personal jurisdiction “on any basis not inconsistent with the Constitution of this state or of the United States.” *See Cal. Code. Civ. Proc.* § 410.10. Because the Due Process Clause of the California Constitution is

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coextensive with that of the federal Constitution, courts must assess only whether exercising personal jurisdiction over a non-resident defendant comports with the requirements of the federal Due Process Clause. *See Roche v. Canadian Auto. Sport Club*, 660 F.2d 395, 398 (9th Cir. 1981).

Due process requires that a non-resident defendant have “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). A non-resident defendant has sufficient contacts with the forum state if: (1) he engages in substantial, continuous and systematic activities within the state, or (2) he purposefully directs his activities at the forum state or purposefully avails himself of the privileges of the forum state, and the claim arises out of his forum-related activities. *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd*, 328 F.3d 1122, 1129 (9th Cir. 2003).

A district court “may exercise either general or specific jurisdiction over nonresident defendants.” *Fed. Deposit Ins. Corp. v. British-Am. Ins. Co.*, 828 F.2d 1439, 1442 (9th Cir. 1987). In this case, Plaintiff has never asserted that the Court has general jurisdiction over White. Thus, the only issue is whether White is subject to specific jurisdiction in California.

The Ninth Circuit’s decision in *Fiore v. Walden*, 688 F.3d at 573-74, sets forth the appropriate test to determine whether the Court may exercise specific personal jurisdiction. The test has three prongs:

- (1) The non-resident defendant must *purposefully direct his activities* or consummate some transaction *with the forum or resident thereof*; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant's *forum-related activities*; and
- (3) the *exercise of jurisdiction* must comport with fair play and substantial justice, i.e. it *must be reasonable*.

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Fiore, 688 F.3d at 573-74 (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)) (emphasis in original).

As the Ninth Circuit noted in *Schwarzenegger*:

The plaintiff bears the burden of satisfying the first two prongs of the test. If the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the forum state. If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to “present a compelling case” that the exercise of jurisdiction would not be reasonable.

Schwarzenegger, 374 F.3d at 802 (internal citations omitted) (emphasis added).

III. DISCUSSION

A. Purposeful Direction: The *Calder* Effects Test

While the first prong of the specific jurisdiction test refers to both “purposeful availment” and “purposeful direction,” the two are treated as two distinct concepts in the Ninth Circuit. *Id.* A “purposeful availment” analysis typically focuses on whether a defendant’s actions within the forum state invoked the “benefits and protections” of that state. *Id.* A “purposeful direction” analysis focuses on a defendant’s actions outside of the forum that are directed at the forum state. *Id.* Where, as here, the action sounds in tort, courts generally apply a purposeful direction analysis. *Fiore*, 688 F.3d at 576.

In addressing the first prong of the *Schwarzenegger* test, courts apply the “effects test” set forth in *Calder v. Jones*, 465 U.S. 783 (1984). *Id.* That is, courts have personal jurisdiction over a non-resident defendant where that defendant (1) committed an intentional act, (2) expressly aimed at the forum state, and (3) which caused harm that the defendant knows is likely to be suffered in the forum state. *Id.* (quoting *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010)). Thus, the first prong of the *Schwarzenegger* three-part test for specific personal jurisdiction itself has three subparts.

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1. Express Aiming

As the Court noted in its February 15, 2012, Order denying White’s first motion to dismiss, the parties do not dispute that White’s intentional act was her legal advice and estate planning advice for the Fosters. What is in dispute is whether her actions were “expressly aimed” at California.

“This Court has emphasized that “‘something more’ than mere foreseeability [is required] in order to justify the assertion of personal jurisdiction,” and that “something more” means conduct expressly aimed at the forum.” *Brayton Purcell*, 606 F.3d at 1129 (internal quotation marks and citations omitted). In general, however, “where there [is] ‘individual targeting’ of forum residents--actions taken outside the forum state for the purpose of affecting a particular forum resident or a person with strong forum connections--[the Ninth Circuit has] held the express aiming requirement satisfied.” *Fiore*, 688 F.3d at 577. In *Fiore*, the Ninth Circuit explained, “[T]he difference between those cases in which harm is merely foreseeable in the forum and those in which conduct is ‘expressly aimed’ at the forum is often the difference between an intended impact that is either local or undifferentiated, and an intended impact that is targeted at a known individual who has a substantial, ongoing connection to the forum.” *Id.* at 578. In *Schwarzenegger*, for example, the court held that an Ohio car dealership’s unauthorized use of Arnold Schwarzenegger’s image in local advertisements was not expressly aimed at California because the “express aim was local”--*i.e.*, targeted towards Ohio. *Schwarzenegger*, 374 F.3d at 807.

This Court based its prior decision regarding personal jurisdiction over White in part on the fact that “White has never personally advertised or solicited business in California. White Decl. ¶ 15. She never met the Fosters in California. *Id.* at ¶ 16. Moreover, the Fosters were her only clients with any property in or connection to California and, unlike in *Sher [v. Johnson]*, neither Foster nor Chang executed a deed of trust in favor of White that included an encumbrance on their California home. *Id.* at ¶ 17.” (Dkt. 44 at 7.) In *Fiore*, however, the Court stated, “it is not relevant who *initiated* the contacts with [the forum state.] Instead, the critical factor is whether [the defendant], knowing of [the plaintiffs’] significant connections to [the forum state], should be taken to have intended that the consequences of his actions would be felt by them in that state.” 688 F.3d at 580. Moreover, the court stated:

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As to that issue, our precedents regarding personal jurisdiction in cases concerning fraud or similar causes of action are informative. That case law firmly establishes that if a defendant is alleged to have defrauded or similarly schemed against someone with substantial ties to a forum, the “expressly aimed” factor is met, even if all the defrauding activities occur outside the forum.

Id.

In this case, Plaintiff has alleged that White schemed to defraud Foster, whom she knew had substantial ties in California. Indeed, drawing all reasonable inferences in Plaintiff’s favor, White drafted legal documents pertaining to Foster’s estate with the knowledge that his estate would likely be probated in California. (FAC ¶ 28.) Although Foster died in Massachusetts, White drafted documents for him that were governed by California law and communicated with Chang, who was in California, regarding Foster’s legal matters. *Fiore* makes clear that under these facts, White “expressly aimed” her actions towards California and knew that the consequences of her actions would be felt in this state. The fact that Chang “initiated” the relationship with White is not relevant. Thus, the Court reconsiders its previous decision and finds that the allegations against White satisfy the “express aiming” requirement.

2. Foreseeable Harm

“The final prong of the Calder-effects test is the requirement that the conduct at issue caused foreseeable harm in the forum.” *Id.* at 581. The Ninth Circuit does “not require that the ‘brunt’ of the harm be suffered in the forum.” Instead, the foreseeable-harm element “is satisfied when defendant’s intentional act has ‘foreseeable effects’ in the forum.” *Id.* (citations omitted). “If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state.” *Id.* (quoting *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1208 (9th Cir. 2006)).

This factor is readily satisfied here. White stated that she expected Foster to be “considered a California domiciliary when he died.” (FAC ¶ 28.) Throughout the course of her dealings with Foster, Chang, and Gomer, it is plausible that she knew that the Foster estate included property in California and that his estate would ultimately be probated there. Indeed, Plaintiff alleges that White helped Chang and Gomer make numerous amendments to Foster’s will and his trusts, the terms of which likely made

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clear that Foster lived in California. As such, White's alleged attempts to defraud Foster and his estate of money and property clearly had "foreseeable effects" in California.

B. Forum Related Conduct

To satisfy the second factor of the Ninth Circuit's three-factor *Schwarzenegger* test, Plaintiff's claims must "arise[] out of or relate[] to the defendant's forum-related activities." See *Brayton Purcell*, 1123 F.3d at 1128 (emphasis in original). The Ninth Circuit "follows the 'but for' test to determine forum-related conduct." *Fiore*, 688 F.3d at 582 (citations and quotations omitted). Plaintiff must show that it would not have suffered the alleged injuries in California "but for" White's estate and legal planning advice for Foster. See *id.* As in *Fiore*, the standard is "easily met" here. *Id.* But for White's legal services, neither Chang nor Gomer would have been able to gain control of Foster's estate. Thus, this factor is satisfied.

C. Reasonableness

The final *Schwarzenegger* factor is that of "reasonableness." Due Process also requires that the exercise of personal jurisdiction over a non-resident defendant be fair and reasonable under the circumstances. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985). In determining reasonableness, courts consider seven factors: (1) the extent of the defendant's purposeful interjection in the forum state; (2) the burden on the defendant of defending the lawsuit in the forum state; (3) the extent of any conflict with the sovereignty of the defendant's home state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1114 (9th Cir. 2002).

On balance, these factors favor the exercise of personal jurisdiction over White. Although it was Chang who initiated contact with White, White continued to serve as the attorney for Foster and Chang for years, starting in 2005. Even after Chang passed away, White stayed on as the initial counsel for Chang's estate, which was probated in California. Moreover, White continued to help Gomer until Foster was taken out of Gomer's care. The duration and extent of White's involvement in the alleged conspiracy, all undertaken with the knowledge that Foster was a resident of California, are sufficient

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to show that White “purposefully interjected” herself in California. In addition, California has a strong interest in adjudicating the dispute because Foster’s estate is probated here and many of the documents White drafted invoke California laws.

Because this case involves a conspiracy allegation against all Defendants, exercising jurisdiction over White would result in the most efficient judicial resolution-- otherwise, the allegations against one co-conspirator would be adjudicated elsewhere while the claims against three of her alleged co-conspirators would be pursued here. Finally, it is unclear if there exists an alternative forum in which all Defendants could be tried. Although White argued in the instant motion that a district court in Massachusetts could exercise jurisdiction over all Defendants, she offered no evidence to contradict Plaintiff’s allegations that two Defendants, Yong Sam Chang and Sung Hui Kim, have no contacts with Massachusetts.

Given that White is a partner at a law firm and has previously served as counsel for Chang’s estate, which is located in California, it is unlikely that the burden on White to defend herself in California would outweigh the above factors. Nor would the Court’s jurisdiction over White result in any conflicts with the sovereignty of White’s home state of Massachusetts. Thus, the Court finds the exercise of personal jurisdiction over White in California is reasonable.

IV. CONCLUSION

For the above reasons, the Court DENIES White’s motion to dismiss for lack of personal jurisdiction.

Initials of Preparer	: _____
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