UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LAW OFFICES
CHARLES A. GRUEN
381 Broadway
Suite 300
Westwood, New Jersey 07675
(201) 342-1212
Attorneys for Defendant

KROPSCHOT FINANCIAL SERVICES, INC.,

Plaintiff,

vs.

BALBOA CAPITAL CORPORATION,

Defendant.

Civil Action
No.: 11 Civ. 8609 (SAS)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULE 12 FOR LACK OF PERSONAL JURISDICTION, FOR FAILURE TO STATE A CLAIM, FOR IMPROPER VENUE, OR, ALTERNATIVELY, TO TRANSFER VENUE

LAW OFFICES OF CHARLES A. GRUEN
Attorneys for Defendant
381 Broadway, Suite 300
Westwood, New Jersey 07675
(201) 342-1212
CG 5456

Charles A. Gruen, Esq.
On The Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

PRELIMINARY STATEMENT

Plaintiff, KROPSCHOT FINANCIAL SERVICES, INC. (hereinafter referred to as "Plaintiff" or "KROPSCHOT"), seeks a commission for a transaction entered into between the Defendant, BALBOA CAPITAL CORPORATION (hereinafter referred to as "Defendant" or "BALBOA") and a third party, Babcock & Brown.

This matter comes before the Court upon the Defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12 (b)(2) for lack of personal jurisdiction, pursuant to Fed. R. Civ. P.12(b)(3) for improper venue and pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. In the alternative, the Defendant seeks an Order pursuant to 28 U.S.C. § 1406(a) transferring venue of this matter to the United States District Court for the Central District of California, Southern Division.

Plaintiff filed the Complaint in this matter on November 28, 2011. Plaintiff filed an Amended Complaint on December 6, 2011. Defendant was served with the Amended Complaint on December 8, 2011. The time for service and filing of a responsive pleading was extended by Stipulation to and including the 28th day of January, 2012. Accordingly, the Defendant's Motion to Dismiss is timely.

Pursuant to the Individual Rules and Procedures of the Honorable Shira A. Scheindlin, U.S.D.J., on January 10, 2011, Defendant's counsel served upon Plaintiff's counsel correspondence which explained the grounds for the within Motion. On January 20, 2011, Plaintiff's counsel responded. It is respectfully submitted that good faith attempts to resolve the issues raised by the within Motion have proven unsuccessful.

STATEMENT OF FACTS

On January 22, 2005, the parties entered into an Agreement whereby KROPSCHOT, in exchange for certain designated commissions in the event a deal was consummated, agreed to assist BALBOA in identifying, obtaining interest from and negotiating with potential investors. A true copy of said Agreement is attached as Exhibit "A" to and made a part of the Affidavit of Patrick E. Byrne, Defendant's Chief Executive Officer (hereinafter referred to as the "Byrne Affidavit"). All prior discussions and negotiations between KROPSCHOT and BALBOA were merged into the Agreement which was executed on January 22, 2005. See paragraphs 2 and 3 of the Byrne Affidavit.

The Agreement was for a six (6) month term, and expired on July 22, 2005. See Exhibit "A" to the Byrne Affidavit, at the top of page 2. In order to be extended, the Agreement requires the consent of both parties, in writing. See Exhibit "A" to the Byrne Affidavit, at second full paragraph on page 4. The Agreement was not extended by BALBOA. See paragraph 9 of the Byrne Affidavit. Although not permitted by the document, the Agreement was not extended orally, either. It is anticipated that Plaintiff will argue that BALBOA implicitly agreed to extend the term by continuing to correspond with Plaintiff after the initial six (6) month term and into the eighteen (18) month tail of the Agreement. However, there was no such implicit extension either, as correspondence between the parties in no way implied an extension of the Agreement. *Id.*, at paragraph 9.

Additionally, pursuant to the terms of the Agreement, KROPSCHOT would be entitled to a commission, to the extent that it procured a transaction between BALBOA and another party, which was identified or pursued by KROPSCHOT, and which was consummated within eighteen (18) months after termination of the Agreement:

> This agreement can be extended beyond the initial six month term upon mutual written agreement of the parties. If a transaction is not consummated before the expiration of the initial or extended term, this agreement (other than the provisions regarding Confidential Information) shall terminate and your only obligation is to pay any reimbursable expenses and fees then due and to pay subsequently the fees due on any transaction that is consummated within 18 months of such termination with a party identified or pursued by KFS prior to such termination, except that fees will be payable to KFS on all applicable transactions consummated with such a party for a period of two additional years after the consummation of the initial transaction.
>
> See Exhibit "A" to the Byrne Affidavit, at page 4.

Based upon the foregoing language, the eighteen (18) month period within which KROPSCHOT could arguably be entitled to a commission expired on January 22, 2007. In its Amended Complaint, Plaintiff seeks a commission for a transaction entered into between BALBOA and a third party, Babcock & Brown, which was consummated in March of 2007. See Plaintiff's Amended Complaint, at First Claim for Relief, paragraph 6, page 2. Under the aforementioned specific terms of the subject Agreement, Kropschot is not entitled to a commission for the transaction between BALBOA and Babcock & Brown, which was not consummated until March of 2007, which is more than eighteen (18) months after the initial termination date of July 22, 2005. See paragraph 8 of the Byrne Affidavit.

BALBOA is a California corporation, with a principal place of business located in Irvine, California. BALBOA is not a New York corporation, does not maintain any offices in the State of New York, nor was it served with the Summons and Amended Complaint in the State of New York. See paragraph 12 of the Byrne Affidavit. Plaintiff, KROPSCHOT, is a Florida corporation, with offices located in Florida. Upon information and belief, KROPSCHOT's principal place of business is in The Villages, Florida. See paragraph 13 of the Byrne Affidavit. The Agreement at issue emanated from Plaintiff's offices in Florida. See Exhibit "A" to the Byrne Affidavit, at page 1 thereof. All contacts relating to the contract which is at issue in this

case, i.e., the contract between KROPSCHOT and BALBOA, occurred either in California or in Florida. See paragraph 15 of the Byrne Affidavit.

KROPSCHOT does not allege, nor can it allege, that any significant events material to its claim occurred in the State of New York. See paragraphs 15 and 16 of the Byrne Affidavit. KROPSCHOT alleges that, because an agreement was reached between Babcock and Brown and BALBOA, venue should be in New York. Babcock and Brown is an Australian company, with an office in New York. KROPSCHOT was not a party to the agreement between Babcock and Brown. Moreover, the agreement between BALBOA and Babcock and Brown was signed more than two years after the Agreement between KROPSCHOT and BALBOA. *Id.*, at paragraph 16.

It is BALBOA's position that the only reason Plaintiff brought suit in New York is to try to take advantage of New York's six (6) year statute of limitations. If suit were brought in the proper venue, California, it would be barred by the applicable four (4) year statute of limitations, since the transaction for which Plaintiff believes it is entitled to a commission occurred in March of 2007, and Plaintiff's lawsuit was not commenced until November 28, 2011. There is simply no basis to bring suit in New York, other than to try to take advantage of a more favorable statute of limitations, where the applicable statute of limitations has expired.

LEGAL ARGUMENT

POINT I

THE COURT LACKS PERSONAL JURISDICTION OVER THE DEFENDANT

A. Plaintiff's factual allegations do not meet its burden of demonstrating the existence of personal jurisdiction in this Court over the Defendant

A Plaintiff bears the burden of demonstrating the existence of jurisdiction over the defendants in a lawsuit. *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir. 1996). Once personal jurisdiction is challenged by a defendant, a plaintiff bears the burden of proving by a preponderance of the evidence the facts necessary to establish jurisdiction over the defendant. *Landoil Res. Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1043 (2d Cir. 1990). A plaintiff must in good faith plead "legally sufficient allegations of jurisdiction" to defeat a motion to dismiss for lack of personal jurisdiction. *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d. Cir. 1990). To make a *prima facie* showing of personal jurisdiction, a plaintiff is required to make specific "averments of fact that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction." *Krepps v. Reiner*, F.Supp.2d 471, 478-9 (S.D.N.Y. 2008).

Before even weighing the facts as alleged against the relevant legal standards for determining jurisdiction, it must be noted that the Plaintiff's Amended Complaint barely attempts to justify the assertion of personal jurisdiction over the Defendant. The Amended Complaint makes no mention at all of facts upon which personal jurisdiction could be premised.

B. The Amended Complaint does not allege sufficient minimum contacts by the Defendant to establish the minimal level of due process required under either New York or federal constitutional standards

Pursuant to New York's long-arm rule, New York courts can exercise personal jurisdiction over a nonresident defendant to the extent consistent with due process of law. *Girl Scouts of the United States v. Steir*, 102 Fed. Appx. 217, 221 (2d Cir. 2004). A state court's assertion of personal jurisdiction violates the Due Process Clause if the defendant does not have certain minimum contacts with it such that the maintenance of the suit offends "traditional notions of fair play and substantial justice." *See Int'l Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154 (1945).

The Supreme Court in *International Shoe* established a two-part test for jurisdiction, which consists of minimum contacts and fundamental fairness. Whether a state may constitutionally exercise personal jurisdiction over a non-resident defendant depends on the "quality and nature" of the forum related activities:

> The [minimum contacts] test is not merely…whether the activity…is a little more or a little less…Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.
>
> *Id.* at 319.

Further, a court must determine whether it is reasonable to require the defendant to defend the particular suit in that forum. A court must make an 'estimate of the inconveniences' resulting to the defendant as a result of a trial away from its home. *Id.* at 317.

The rule of *International Shoe* was clarified in *Hanson v. Denckla*, 337 U.S. 235 (1958). In *Hanson,* the Supreme Court added a critical factor, purposeful availment, to the due process analysis. "It is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefit and

protection of its laws." *Id.* at 253. Critical to the due process analysis is the question of whether the defendant should reasonably anticipate being haled into court in the forum state. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985); *World-Wide Volkswagen v. Woodson,* 444 U.S. 286, 297.

This analysis was further refined in the case of *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984), in which the Supreme Court distinguished between general and specific jurisdiction. General jurisdiction refers to the jurisdiction to adjudicate claims that do not arise from the defendant's contacts with the forum state. General jurisdiction ordinarily exists only when the non-resident defendant's forum connections are continuous, systematic, and substantial. *See Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). Specific jurisdiction is jurisdiction to adjudicate claims arising from the defendant's contacts with the forum state. Thus, if a non-resident defendant is not amenable to general jurisdiction in a state, the state may exercise jurisdiction over the defendant only for claims that arise out of the defendant's forum contacts. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474-476 (1985). The threshold of contacts for satisfying the minimum contacts requirement is higher in general jurisdiction cases than it is in specific jurisdiction cases. *See Helicopteros, supra.*

Even if a non-resident defendant is engaged in continuous and systematic activities within the forum state, due process requires that the exercise of general jurisdiction be reasonable, that is, it must meet the interest-balancing part of the minimum contacts test. It cannot amount to a denial of fair play and substantial justice. *See Amoco Egypt Oil Co. v. Leonis Navigations Co. J.F.*, 1 F.3d 848, 851 n.2 (9th Cir. 1933). Specific jurisdiction exists only when a non-resident defendant has purposefully established significant contact with the forum state and the cause of action arises out of or relates to those contacts. In *Burger King,* the Supreme

Court reaffirmed the general rule that specific jurisdiction requires a showing by the plaintiff that the non-resident defendant has purposefully established significant contact with the forum state. *Burger King,* 471 U.S. at 475. Defendants are protected against being haled into court in a foreign jurisdiction solely on the basis of random, fortuitous, or attenuated contacts, or as a result of the unilateral activity of some other party. *Id.* The inquiry focuses on defendant's purposeful activity directed toward the forum state, not on the unilateral activity of plaintiff or some unrelated third party. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297-98 (1980); *Hanson,* 357 U.S. at 253.

If a court finds that a defendant has purposefully established minimum contacts within the forum state, other factors, such as the State's interests in adjudicating the suit and the plaintiff's interest in obtaining relief, may properly be weighed in determining whether those minimum contacts establish jurisdiction consistent with considerations of fair play and substantial justice. Those considerations may even "serve to establish the reasonableness of jurisdiction upon a lesser showing of jurisdiction than would otherwise be required." *Burger King,* 462 U.S. at 477.

In the instant matter, Plaintiff's suit in New York violates traditional notions of fair play and substantial justice in that BALBOA does not have the requisite minimum contacts with the State of New York. Applying the standards set forth above, it is clear that this Court lacks personal jurisdiction over the Defendant. The Plaintiff cannot establish general nor specific jurisdiction over the Defendant.

Plaintiff cannot meet the rigorous standards for establishing general jurisdiction. The Defendant's contacts with the State of New York are sporadic and limited, not continuous or systematic. No such contacts have been alleged by the Plaintiff, nor do they exist. As set forth

in Mr. Byrne's Affidavit, BALBOA is a California corporation, with a principal place of business located in California. It is not a New York corporation and does not maintain any offices in the State of New York. It was not served with the Summons and Amended Complaint in the State of New York and does not have an agent within the State of New York for service of process. As such, general jurisdiction is unavailable.

Plaintiff is similarly unable to meet its burden of demonstrating specific jurisdiction over the Defendant. BALBOA, a California corporation, with a principal office in California, could not reasonably expect to be haled into court in New York over a contract entered into with Plaintiff, which is a Florida corporation, with offices located in Florida. To begin with, and as discussed in detail in Mr. Byrne's Affidavit, the Agreement between KROPSCHOT and BALBOA was prepared in Plaintiff's offices in Florida. All negotiations between BALBOA and KROPSCHOT took place in either California or Florida. BALBOA executed the subject Agreement in California and, upon information and belief, KROPSCHOT executed the Agreement in Florida. KROPSCHOT does not allege, nor can it allege, that any significant events material to its claim occurred in the State of New York. Furthermore, the Plaintiff does not suggest that New York has any role in this dispute. All contacts relating to the contract which is at issue in this case, i.e., the contract between KROPSCHOT and BALBOA, occurred either in California or Florida. See Byrne Affidavit, at paragraph 15.

It is BALBOA's position that the only reason why Plaintiff brought suit in New York is to try to take advantage of New York's six (6) year statute of limitations. N.Y. C.P.L.R. § 213.[1] If the suit were brought in the proper venue, California, it would be barred by the applicable four

[1] The following actions must be commenced within six years . . . (2) an action upon a contractual obligation or liability, express or implied, except as provided in section two hundred thirteen-a of this article or article 2 of the uniform commercial code or article 36-B of the general business law… N.Y. C.P.L.R. § 213.

(4) year statute of limitations, since the transaction for which Plaintiff believes it is entitled to a commission occurred in March of 2007, and Plaintiff's lawsuit was not commenced until November 28, 2011. Cal.C.C.P. § 337.[2] There is simply no basis to bring suit in New York, other than to try to take advantage of a more favorable statute of limitations, where the applicable statute of limitations has expired.

[2] Within four years. 1. An action upon any contract, obligation or liability founded upon an instrument in writing… Cal.C.C.P. § 337.

POINT II

THE AMENDED COMPLAINT CANNOT WITHSTAND THE STANDARD FOR DISMISSAL FOR FAILURE TO STATE A CLAIM UNDER FED. R. CIV. P. 12 (b)(6)

Under Fed. R. Civ. P. 12(b)(6), a court should dismiss a complaint if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). It is well-settled that when considering a motion to dismiss under 12(b)(6), a court must accept all factual allegations as true and draw all inferences in favor of the nonmoving party. *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir. 1999). However, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss." *Gebhardt v. Allspect, Inc.*, 96 F.Supp.2d 331, 333 (S.D.N.Y.2000) (internal citation and quotation marks omitted).

A court addressing a 12(b)(6) motion is not to determine the weight of the evidence, but only to "assess the legal feasibility of the complaint." *Geisler v. Petrocelli,* 616 F.2d 636, 639 (2d Cir. 1980). "The issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In reaching its determination, a court's review must be limited to the complaint and documents attached or incorporated by reference thereto. *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 772 (2d Cir. 1991). Dismissal pursuant to Fed. R. Civ. Pro. 12(b)(6) is appropriate if Plaintiff can prove no set of facts that would entitle him or her to relief. *See Cooper v. Parsky,* 140 F.3d 433, 440 (2d Cir. 1998). Under this standard, it is clear that Plaintiff's Amended Complaint in this matter should be dismissed.

All negotiations between the parties were necessarily merged into the Agreement dated January 22, 2005. Under New York law, a contract which appears complete on its face is an

integrated agreement as a matter of law and the contract need not contain an integration clause in order be considered integrated. *Morgan Stanley High Yield Securities, Inc. v. Seven Circle Gamin Corp.*, 269 F.Supp.2d 206 (S.D.N.Y. 2003). The Agreement between BALBOA and KROPSCHOT specifically states that the term was for six (6) months and that in order for it to be extended, the consent of both parties, in writing, was required. The Agreement was not extended by BALBOA. As such, the Agreement terminated on July 22, 2005. Since the language of the Agreement is clear and unambiguous in that any extensions had to be agreed upon by both parties, in writing, Plaintiff cannot prove that the Agreement was extended.

As stated above, pursuant to the terms of the Agreement, KROPSCHOT would be entitled to a commission, for certain transactions between BALBOA and a third party, which were consummated within eighteen (18) months after termination of the Agreement. Based upon the aforementioned specific language of the Agreement, the eighteen (18) month period within which KROPSCHOT would arguably be entitled to a commission expired on January 22, 2007.

In its Amended Complaint, Plaintiff seeks a commission for a transaction entered into between BALBOA and a third party, Babcock & Brown, which was consummated in March of 2007. Clearly, KROPSCHOT is not entitled to a commission for the transaction between BALBOA and Babcock & Brown, which was not consummated until March of 2007, more than eighteen (18) months after the initial termination date of July 22, 2005.

Plaintiff's claims are barred by the very language of the applicable Agreement between the parties. Accordingly, Plaintiff's Amended Complaint fails to state a valid cause of action and should be dismissed.

POINT III

VENUE IN THIS COURT IS IMPROPER

Plaintiff's factual allegations do not meet the required burden of showing why venue in this Court is proper. If venue is improper in the district court where the action was filed, as here, the Court may, within its discretion under 28 U.S.C. § 1406(a), dismiss the action or transfer the action to any district in which it can be brought to promote the interest of justice. *Minnette v. Time Warner*, 997 F. 2d 1023 (2d Cir. 1993). The burden is on the Plaintiff to plead venue and, if challenged, to demonstrate that venue is proper. *Jaguar Cars, Ltd. v. Nat'l Football League,* 886 F.Supp. 335, 338 (S.D.N.Y. 1995); *PI, Inc. v. Quality Products, Inc.,* 907 F.Supp. 752, 757 (S.D.N.Y. 1995).

The applicable statute, 28 U.S.C. § 1391(b), provides as follows:

> A civil action may be brought in (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

Paragraph 1 of Plaintiff's Amended Complaint is the sole basis of its allegation of venue and is insufficient as a matter of law. It merely recites what the applicable venue statute is and sets forth a conclusory allegation that the claim arose in this district.

It is undisputed that this is not a District in which "any defendant may be found". The Defendant, BALBOA, is not alleged to be incorporated in New York, to have a principal place of business in New York or to have been served here. *See, e.g., Jackson v. American Brokers Conduit,* 2010 WL 2034508, 2 (S.D.N.Y. 2010). Alternatively, Section 1391(b)(2) permits an action to be brought in a judicial district in which "a substantial part of the events or omissions

giving rise to the claim occurred." Under Section 1391(b), significant events material to plaintiff's claim must have occurred in the district for venue to be proper. As the Second Circuit Court of Appeals explained in *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353 (2d Cir. 2005):

> [W]e caution district courts to take seriously the adjective "substantial." We are required to construe the venue statute strictly. See *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338 (1953). That means for venue to be proper, significant events or omissions material to the plaintiff's claim must have occurred in the district in question, even if other material events occurred elsewhere. It would be error, for instance, to treat the venue statute's "substantial part" test as mirroring the minimum contacts test employed in personal jurisdiction inquiries.

Id. at 357.

As discussed above, all contacts relating to the subject Agreement, between the parties to this case, took place either in California or Florida. The State of New York is no way related to the Agreement between the Plaintiff and the Defendant.

Again, it is strikingly clear that the only reason why Plaintiff brought suit in New York is to try to take advantage of New York's six (6) year statute of limitations for contractual disputes. If the suit were brought in the proper venue, California, it would be barred by the applicable four (4) year statute of limitations, since the transaction for which Plaintiff believes it is entitled to a commission occurred in March of 2007. Plaintiff cannot forum shop so as to resurrect a claim, which is otherwise without merit, just to avoid dismissal in the proper venue on statute of limitations grounds. It is clear that venue is improper in this District pursuant to § 1391(b), and the action should be dismissed.

In the alternative, Defendant respectfully requests that this matter be transferred to the United States District Court for the Central District of California. The Trial Court is authorized by 28 U.S.C. § 1406(a) to transfer a case to any district or division in which it could have been

brought. This case could (in fact, should) have been brought, if at all, in the United States District Court for the Central District of California.

CONCLUSION

In summary, the Defendant does not have the minimum contacts necessary for this Court's exercise of personal jurisdiction over it in this matter. Additionally, the Plaintiff has failed to state a claim upon which relief can be granted. Finally, venue in this District is improper.

Accordingly, for the reasons set forth above, the Defendant respectfully requests that the Court dismiss Plaintiff's Amended Complaint. In the alternative, the Defendant respectfully requests that the case be transferred to the Central District of California

LAW OFFICES OF CHARLES A. GRUEN
Attorneys for Defendant, Balboa Capital Corporation

By: /s/ Charles A. Gruen
Charles A. Gruen (CG5456)
381 Broadway, Suite 300
Westwood, New Jersey 07675
(201) 342-1212

Dated: January 27, 2012