

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION**

**CHARLIE HOLDER and
SHARE HOLDERS, LLC, d/b/a ADVANTAGE TESTING**

PLAINTIFFS

vs.

CAUSE NO: 6:20-CV-00875-MJJ-CBW

**THOMAS GRUENBECK, INDIVIDUALLY;
GRUENBECK AND VOGELER; KING CONSULTING
GROUP, LLC; BURT KING, INDIVIDUALLY;
ASA JOHNSON, INDIVIDUALLY;
BAFF CONSULTANTS, INC.; WORLDWIDE CAPITAL
MANAGEMENT; FARHAN A. MIRZA, INDIVIDUALLY;
SALMAN VAKIL, INDIVIDUALLY;
ABC CORPORATIONS 1-5; and DOES 1-5.**

DEFENDANTS

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS [Doc. 39]**

Plaintiffs, Charlie Holder, and Share Holders, LLC d/b/a Advantage Testing file their Memorandum in Opposition to BAFF Consultants, Inc. and Farhan Mirza's ("BAFF," "Mirza," or collectively, "Defendants") Motion to Dismiss [Doc. 39], and request the Court deny their Motion due to waiver of personal jurisdiction and other reasons as argued below.

I. Introduction

This Court should deny Defendants' Motion to Dismiss for two reasons: (1) Defendants waived any objection to personal jurisdiction of this Court by voluntarily appearing at the hearing held on August 6, 2020 and (2) even if Defendants did not waive their jurisdiction objection, this Court should exercise personal jurisdiction over the Defendants because

II. Procedural History

Plaintiffs filed their Complaint on July 13, 2020. Defendant was duly and properly served with a true and correct copy of the Summons and Complaint via Certified Mail on February 28, 2019 [Doc. 5, Summons Returned Executed]. Mirza, failed to appear, answer, or otherwise plead or defend as required and provided by the Federal Rules of Civil Procedure and other applicable statutes and laws. On September 16, 2020, Plaintiff filed their Application for Clerk's Entry of Default [Doc. 35], attaching the required documentation pursuant to Rule 55(a) of the Federal Rules of Civil Procedure. On September 17, 2020, the Clerk for the United States District Court Clerk properly entered its Notice of Entry of Default [Doc. 38]. Then, on September 17, 2019, Defendants filed their instant Motion to Dismiss [Doc. 39].

III. Legal Standard

A. Burden of proof

In resolving a dispute over personal jurisdiction, the Court may consider “the pleadings, affidavits, interrogatories, depositions, oral testimony, exhibits, any part of the record, and any combination thereof.” *Command-Aire Corp. v. Ontario Mech. Sales & Serv., Inc.*, 963 F.2d 90, 95 (5th Cir. 1992). In the absence of an evidentiary hearing on a motion to dismiss for lack of personal jurisdiction, the plaintiff need make “only a *prima facie* showing of the facts on which jurisdiction is predicated.” *Freudensprung v. Offshore Tech. Srvs., Inc.*, 379 F.3d 327, 342-43 (5th Cir. 2004); *Felch v. Transportes Lar-Mex S.A. de C.V.*, 92 F.3d 320, 326 (5th Cir. 1996). In determining whether a *prima facie* case exists, the Court must accept as true the plaintiff's uncontroverted allegations and resolve in the plaintiff's favor all conflicts between the

jurisdictional facts contained in the parties' affidavits and other documentation. *Id.* Proof by a preponderance of the evidence is not required. *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989).

B. Personal jurisdiction

A federal court obtains personal jurisdiction over a defendant if it is able to serve process on him. *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 538 (9th Cir. 1986). In order for a court to validly exercise personal jurisdiction over a nonresident defendant, a statute must authorize service of process on the nonresident defendant, and the service of process must comport with due process. *In re Celotex Corp.*, 124 F.3d 619, 627 (4th Cir. 1997).

Alternatively, a federal court sitting in diversity may exercise personal jurisdiction over a nonresident defendant if: (1) the long-arm statute of the forum state confers jurisdiction; and (2) exercise of such jurisdiction by the forum state is consistent with due process under the United States Constitution. *Mink v. AAAA Development LLC*, 190 F.3d 333, 335 (5th Cir. 1999). Because Louisiana's long-arm statute has been interpreted to extend to the limits of due process, the Court needs only to determine whether subjecting Defendants to suit in Louisiana would be consistent with the Due Process Clause of the Fourteenth Amendment.

(1) Minimum contacts

The constitutional due process test has two parts: (1) whether the non-resident defendant has purposely availed itself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state; and (2) if so, whether the exercise of jurisdiction over that defendant does not offend "traditional notions of fair play and substantial justice." *Revell v. Lidov*, 317 F.3d 467, 470 (5th Cir. 2002). Although not determinative, foreseeability is an

important consideration in deciding whether the nonresident has purposefully established “minimum contacts” with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). In other words, a non-resident defendant’s conduct and connection with the forum state must be such that it should reasonably anticipate being compelled to defend a suit there. *Id.*

The minimum contacts analysis is divided into general and specific jurisdiction. Specific jurisdiction exists when the defendant’s contacts with the forum state arise from, or are directly related to, the cause of action. *Mink*, 190 F.3d at 336. General jurisdiction, on the other hand, is present when the defendant’s contacts are unrelated to the cause of action but are “continuous and systematic.” *Id.*

(2) Fair play and substantial justice

After a determination that a non-resident defendant has purposely established minimum contacts with the forum state, the Court must determine whether the assertion of personal jurisdiction comports with “fair play and substantial justice” by evaluating the contacts in light of other factors. *Burger King*, 417 U.S. at 476. These factors include: (1) the burden on the Defendant; (2) the interest of the forum state in adjudicating the dispute; (3) the plaintiff’s interest in obtaining convenient and effective relief; (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Id.* at 477.

IV. Law & Argument

A. BAFF and Mirza voluntarily consented to personal jurisdiction of this Court when BAFF’s President, Farhan Mirza, voluntarily appeared at the Court’s status conference on August 6, 2020.

Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived. In *McDonald v. Mabee, supra*, the Court indicated that regardless of the power of the State to serve process, an individual may submit to the jurisdiction of the court by appearance. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–05, 102 S. Ct. 2099, 2104–05, 72 L. Ed. 2d 492 (1982). [T]he requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. *Id.* A party can waive an objection to jurisdiction by an appearance of record, such as filing a pleading, appearing at a hearing, or formally enrolling as counsel of record. *Diamond v. Progressive Sec. Ins. Co.*, 2005-0820 (La. App. 1 Cir. 3/24/06), 934 So. 2d 739, 744–45.

In *Buckley v. S. Abraham Co.* the Court found a personal appearance by the Defendant subjected the Defendant to the jurisdiction from the Court. There the Court stated:

Defendant voluntarily appeared and excepted on December 10, 1927. By so doing defendant merely made citation unnecessary. Its voluntary appearance was not retroactive or curative in effect, but was the exact equivalent of citation, only as of the day when appearance was made. 4 C. J. par. 41, p. 1352, verbo ‘Appearances.’ By personally appearing, a defendant subjects himself to the jurisdiction of the court only from the date of such appearance and for future proceedings.

Buckley v. S. Abraham Co., 172 La. 845, 849, 135 So. 606, 608 (1931).

Indeed, “[t]he well settled rule in our jurisprudence is that the exception of want of jurisdiction *ratione personae* to be valid must be presented in limine and alone and an appearance to the suit, except for the purpose of objecting to the jurisdiction or to the process of citation,

subjects defendant to the jurisdiction of the court *Corley v. Rowan*, 146 So. 2d 271, 273–74 (La. Ct. App. 1962). When there is no process of the Court compelling or forcing a party to appear, an appearance is deemed voluntary. See e.g., *Dawson v. Frazar*, 150 La. 203, 210, 90 So. 570, 572 (1921).

Here, BAFF's President and a Defendant personally, Mirza, voluntarily appeared at the Court's status conference on August 6, 2020. Mirza did not make a limited entry of appearance for purposes of contesting this Court's jurisdiction nor did he raise the issue at the conference. The very wording of the Court's minute entry notes there were some, but not all, parties who had yet to make their appearances. BAFF and Mirza were notably on the call and voluntarily made their appearance. Further, BAFF and Mirza were not forced by this Court to appear at the conference.

Farhan Mirza's voluntary appearance at the conference waived BAFF and Mirza's objection to personal jurisdiction in this case. Therefore, this Court should deny their Motion to Dismiss.

B. In the alternative, Plaintiffs are entitled to limited discovery regarding jurisdiction

Here, BAFF was a party to the purchase agreement where 1,250,000 of Plaintiffs money was transferred to another defendant in Louisiana. Plaintiffs seek limited discovery to further flesh out the issues of contacts and what purposeful availment BAFF performed in the state of Louisiana and or/what business it solicited, established or otherwise participated in to further establish that no violation of fair play would exist to continue this matter in Louisiana with

BAFF. Accordingly, Plaintiffs seek limited jurisdictional discovery on these grounds in the alternative.

V. Conclusion

Defendants waived objections based on personal jurisdiction of this Court when Mirza voluntarily appeared in this action on August 6, 2020. The preliminary injunction did not involve the Defendant's property--they were not forced to appear and did so voluntarily. Even if Defendants did not waive jurisdiction, Plaintiffs have met the burden to establish that this Court has jurisdiction over Defendants. Therefore, Plaintiffs request that the Court deny the Motion to Dismiss [Doc. 39]. Alternatively, Plaintiffs respectfully seek limited jurisdictional discovery.

Respectfully submitted this the 29th day of October, 2020.

**CHARLIE HOLDER and SHARE
HOLDERS, LLC d/b/a ADVANTAGE
TESTING, *Plaintiffs***

/s/ Mary Lee Holmes

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Certificate of Service

I hereby certify that I electronically filed the above and foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

This, the 29th day of October, 2020.

/s/ Mary Lee Holmes
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