IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SCHILLER-PFEIFFER, INC. and JEP MANAGEMENT, INC.	:	
	:	CIVIL ACTION
v.	:	
	:	No. 04-CV-1444
COUNTRY HOME PRODUCTS, INC., JOSEPH M. PERROTTO, RICHARD P. ALTHER, and WILLIAM M. LOCKWOOD, JR.	:	

SURRICK, J. **DECEMBER 1, 2004**

MEMORANDUM & ORDER

Presently before the Court is Defendants' Motion to Dismiss and/or Transfer the Above Captioned Matter to the United States District Court of Vermont filed on May 17, 2004 (Doc. No. 4). Defendants seek dismissal under Fed. R. Civ. P. 12 (b)(12) and/or transfer pursuant to 28 U.S.C. §1404(a).[1] For the following reasons, Defendants' Motion will be granted in part and denied in part.

I. INTRODUCTION

A. Factual Background

This action involves a dispute between Plaintiffs Schiller-Pfeiffer, Inc. ("Schiller-Pfeiffer") and JEP Management, Inc. ("JEP"), and Defendants Country Home Products, Inc. ("CHP"), Joseph Perrotto ("Perrotto"), Richard P. Alther ("Alther"), and William M. Lockwood, Jr. ("Lockwood"), regarding Defendants' conduct during Schiller-Pfeiffer's failed attempt to acquire CHP's business operations. In 2003, Schiller-Pfeiffer, a Pennsylvania corporation that

[1] Also pending is Defendants' Motion To Dismiss under Fed.R.Civ.P 12(b)(6), filed on July 20, 2004 (Doc. No. 10).

manufactures and distributes lawn and garden equipment, entered into negotiations with CHP, a Vermont corporation involved in the same line of business, for acquisition of CHP's operational assets.[2] (Compl. ¶¶ 1, 3, 17.) Representatives of the two parties, including Perrotto—CHP's President, Chief Executive Officer, and a member of the board of directors—conducted detailed negotiations through written correspondence, email, and telephone conversations. (Waitsman Aff. ¶ 12.) During this time, Perrotto also traveled to Schiller-Pfeiffer's offices in Pennsylvania to meet with Plaintiffs' managers, officers, and lawyers. (Waitsman Aff. ¶ 10; Amend. Compl. ¶ 8, *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt. filed May 11, 2004).) These discussions culminated in the execution of a detailed Letter of Intent ("LOI") between Schiller-Pfeiffer and CHP on December 30, 2003. (Compl. ¶ 19, Ex. A.)

The LOI "set forth the general terms and conditions by which Schiller-Pfeiffer . . . would be willing to acquire certain assets and assume certain liabilities" of CHP. It also established a framework for conducting final negotiations between the parties. (*Id.*) The LOI was not binding on Schiller-Pfeiffer and CHP, except for certain specified paragraphs regarding the parties' obligations during final negotiations. (*Id.* Ex. A ¶¶ 6-10.) Specifically, the LOI provided for an exclusive "no shop" period from December 30, 2003, through March 31, 2004 (the "Exclusive Period"), during which CHP and its agents, advisors, and representatives would not enter into or continue any discussions, or review or consider any proposals, for the ownership of CHP and/or the acquisition of its assets by anyone other than Schiller-Pfeiffer. (*Id.* ¶ 26, Ex. A ¶ 6.) The LOI also required CHP to (1) not disclose any non-public information regarding its assets or finances to anyone other than Schiller-Pfeiffer during the Exclusive Period, (2) promptly notify

[2] JEP, a Pennsylvania corporation that provides financial, accounting, and legal services for Schiller-Pfeiffer, also participated in these negotiations. (Compl. ¶¶ 2, 12-13, 17.)

Schiller-Pfeiffer and JEP of any acquisition inquiries or proposals that it received, and (3) negotiate in good faith to reach a final agreement with Schiller-Pfeiffer.[3] (*Id.* ¶¶ 6, 10.) Either party could terminate the LOI by giving notice in writing, and the LOI would automatically expire on March 31, 2004, if a final agreement had not been reached by that date. (*Id.* ¶ 12.) In addition, the LOI provided that, in the event of a legal dispute arising out of the LOI, Pennsylvania law would govern.[4] (*Id.* ¶ 9.) All of these provisions were contractually binding on the parties. (*Id.* Ex. A ¶ 6.) Defendants Perrotto, Alther, and Lockwood signed the LOI on behalf of CHP. (*Id.* Ex. A.) Alther and Lockwood are directors and shareholders of CHP. Alther is also the corporation's Secretary. (*Id.* ¶¶ 5-6.). Plaintiffs allege that Alther and Lockwood are the controlling shareholders of CHP. (*Id.* ¶ 7-8.)

During the Exclusive Period, representatives of Schiller-Pfeiffer, JEP, and CHP had

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[3] Paragraph 6 of the LOI states:

> 6. **No Shop.** In consideration of [Schiller-Pfeiffer]'s agreement to commence due diligence and draft the definitive documentation, CHP agrees that, during the Exclusive Period, it will not, and will cause its agents, advisors and representatives not to, directly or indirectly, (i) enter into or continue any discussions, or review any proposal or offer, with respect to the acquisition by any person (other than [Schiller-Pfeiffer]) of any capital stock or other significant ownership interest in CHP or any significant portion of the assets and properties of CHP; or (ii) furnish or cause to be furnished any non-public information concerning CHP or the assets and properties of CHP to any person (other than [Schiller-Pfeiffer] and its representatives), other than in the ordinary course of business or as required by applicable laws and regulations. CHP will promptly notify [Schiller-Pfeiffer] of any inquiry or proposal received by CHP with respect to the acquisition by any other person of any capital stock or significant ownership interest in CHP or any significant portion of the assets and properties of CHP.

(Compl. Ex. A ¶ 6.)

[4] The LOI did not include a forum selection clause.

numerous meetings and communications regarding the final terms of the proposed acquisition. (Compl. ¶ 35.) Both parties also undertook due diligence concerning various aspects of the proposed acquisition and exchanged draft versions of a final agreement. (*Id.* ¶¶ 38-41; Waitsman Aff. ¶¶ 8, 13; Letter from Paul H. Ode, Jr., Esq., Counsel for CHP, to Mitchell L. Bach, Esq., Counsel for Schiller-Pfeiffer, at 5 (March 23, 2004), *attached to* Doc. No. 9, Ode Aff. Ex. A ("Ode Letter").) Concern about the lack of progress in the negotiations resulted in representatives of CHP and Schiller-Pfeiffer meeting on March 4 and 5, 2004 in Philadelphia to discuss various unresolved issues regarding the final agreement. (Ode Letter at 3-4.) This meeting apparently did not resolve most of the outstanding issues. (*Id.*)

On March 15, 2004, CHP sent a letter to Schiller-Pfeiffer, informing them that CHP was exercising its right to terminate the LOI. (Ode Aff. ¶ 6.) On March 16, 2004, Paul H. Ode, Jr., Counsel for CHP, called Vicki J. Waitsman, Counsel for Schiller-Pfeiffer and JEP, concerning CHP's termination of the LOI. (*Id.* ¶ 7; Waitsman Aff. ¶ 16.) Waitsman asserts that Ode stated that CHP had elected to terminate the LOI in favor of a management buyout, and that Plaintiffs knew that they had been competing with a management buyout concept during the final negotiations. (Waitsman Aff. ¶ 16.) Ode denies making such a statement. (Ode Aff. ¶ 9.)

Plaintiffs were aware of the fact that Defendants had previously discussed the possibility of a management buyout of CHP. (*Id.* ¶ 29.) According to Plaintiffs, Defendants advised Schiller-Pfeiffer and JEP during pre-LOI negotiations that all management buyout discussions had ceased and that there were no further plans to pursue such a buyout. (*Id.* ¶ 30.)

II. PROCEDURAL HISTORY

A. Pennsylvania Action

On March 17, 2004, Plaintiffs filed a praecipe for a writ of summons in the Court of Common Pleas of Philadelphia County, Pennsylvania.[5] (Doc. No. 4 at 2.) Defendants removed the action to this Court on April 2, 2004. (Doc. No. 1.) On May 11, 2004, prior to Plaintiffs' filing of a Complaint, Defendants Perrotto, Alther, and Lockwood moved to dismiss the claims against them under Federal Rule of Civil Procedure 12(b)(2), asserting that they lacked sufficient minimum contacts with Pennsylvania to satisfy the requirements for personal jurisdiction. (Doc. No. 4.) In the same Motion, all Defendants request that this Court transfer the action to the United States District Court for the District of Vermont pursuant to 28 U.S.C. § 1404(a). (*Id.*)

On June 30, 2004, Plaintiffs filed a Complaint, asserting various contract and tort claims against Defendants. Specifically, Plaintiffs allege that: (1) Defendant CHP breached the LOI during the Exclusive Period by negotiating with and furnishing non-public information to the management buyout group, failing to promptly notify Plaintiffs about management's buyout proposal, and failing to negotiate in good faith for a final agreement (Compl. ¶¶ 54-57); (2) all Defendants fraudulently and deliberately misrepresented to Plaintiffs that discussions of a management buyout had ceased prior to and during the Exclusive Period (*id.* ¶¶ 58-70); (3) Defendants Perrotto, Alther, and Lockwood committed fraud by assisting, inducing, encouraging, or condoning CHP's senior managers to prepare and propose a management buyout offer during the Exclusive Period (*id.* ¶¶ 71-81); (4) all Defendants are liable for the above-mentioned conduct pursuant to the doctrines of equitable and/or promissory estoppel (*id.* ¶¶ 82-

[5] In Pennsylvania courts, a party may commence an action by filing a praecipe for writ of summons instead of a complaint. Pa. R. Civ. P. 1007.

83); and (5) Defendants Perrotto, Alther, and Lockwood tortiously interfered with Plaintiffs' business relationship with CHP by assisting, inducing, encouraging, or condoning a senior management buyout during the Exclusive Period (*id.* ¶¶ 84-87.) Plaintiffs seek to recover compensatory damages, attorney's fees, and costs. (*Id.*)

B. Vermont Action

On May 11, 2004, CHP filed a Complaint against Schiller-Pfeiffer and JEP in the United States District Court for the District of Vermont, seeking declaratory judgment that CHP had not violated either the LOI or the corresponding Confidentiality Agreement, a separate document which governed the parties' exchange of information during final negotiations. (Compl., *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt. filed May 11, 2004).) CHP also alleged that Schiller-Pfeiffer and JEP had failed to return or destroy confidential information under the terms of the Confidentiality Agreement, and requested that the District Court order compliance. (*Id.* ¶¶ 18, 20.)

On July 29, 2004, prior to the filing of an answer or motion to dismiss, CHP filed an Amended Complaint under Federal Rule of Civil Procedure 15(a). In the Amended Complaint, CHP withdrew its previous request that the District Court order Schiller-Pfeiffer and JEP to comply with the Confidentiality Agreement, but retained the declaratory judgment claim. (Am. Compl., *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt. filed May 11, 2004)). CHP also added Stuart M. Bryan, President of Schiller-Pfeiffer, and Jeffrey E. Perelman, Chief Executive Officer of Schiller-Pfeiffer and President of JEP, as defendants, and alleged that they committed the torts of fraudulent misrepresentation and fraudulent concealment during final negotiations in the Exclusive Period. (*Id.* ¶¶ 22-30, 45-48.) Defendants in the

Vermont action (Schiller-Pfeiffer, JEP, and its officers) then filed a motion to dismiss for lack of personal jurisdiction and/or transfer the case to the Eastern District of Pennsylvania. (Doc. No. 13, *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt. filed May 11, 2004).) After briefing and oral argument, the United States District Court for the District of Vermont denied the motion to dismiss or transfer on November 19, 2004. *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt. Nov. 19, 2004) (order denying motion to dismiss or transfer).

III. PERSONAL JURISDICTION

A. Standard

A district court has personal jurisdiction over a nonresident defendant to the extent allowed by the law of the state where the court sits, subject to the constitutional limitations of due process. Fed. R. Civ. P. 4(e); *see also Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir. 2001). Under Pennsylvania's long-arm statute, Pennsylvania courts may exercise jurisdiction "the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 Pa. Cons. Stat. Ann. § 5322(b) (West 2002). The reach of Pennsylvania's long-arm statute is therefore coextensive with the Due Process Clause of the Fourteenth Amendment. *North Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 690 (3d Cir. 1990); *Taylor v. Fedra Int'l, Ltd.*, 828 A.2d 378, 381 n.1 (Pa. Super. Ct. 2003).

A court may exercise personal jurisdiction based on the defendant's general or specific contacts with the forum state. *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 150 (3d Cir. 2001). Specific jurisdiction may exist when the cause of action arises from the defendant's forum-related activities. *North Penn Gas Co.*, 897 F.2d at 690. We apply a two-part test to determine

whether specific jurisdiction exists. *IMO Indus. v. Keikert AG*, 155 F.3d 254, 259 (3d Cir. 1998); *Creative Waste Mgmt., Inc. v. Capitol Envtl. Servs.*, No. 04-1060, 2004 U.S. Dist. LEXIS 21497, at *8 (E.D. Pa. Oct. 22, 2004). First, the plaintiff must show that the defendant has "minimum contacts with the forum" such that the defendant could "'reasonably anticipate being haled into court there.'" *Pennzoil Prods. Co. v. Colelli & Assocs.*, 149 F.3d 197, 201 (3d Cir. 1998) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). The required "minimum contacts must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987) (O'Connor, J., plurality opinion) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). Second, we inquire whether "the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King Corp.*, 471 U.S. at 476 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)). Although this second prong "need only be applied at a court's discretion," the Third Circuit has "generally chosen to engage in this second [part] of analysis in determining questions of personal jurisdiction." *Pennzoil Prods. Co.*, 149 F.3d at 201. Among the factors that a court may consider in this determination are "'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' [and] 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies.'" *Burger King Corp.*, 471 U.S. at 477 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292)).

Once a defendant has raised a jurisdictional defense, "'plaintiff bears the burden of demonstrating contacts with the forum state sufficient to give the court in personam

jurisdiction.'" *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 63 (3d Cir. 1984) (quoting *Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A.*, 723 F.2d 357, 362 (3d Cir. 1983)). While a court must "accept the plaintiff's allegations as true and construe disputed facts in [his] favor," *Toys "R" Us, Inc. v. Step Two, S.A*, 318 F.3d 446, 457 (3d Cir. 2003), a plaintiff may not rest solely on the pleadings to satisfy its burden of proof. *Carteret Sav. Bank v. Shushan*, 954 F.2d 141, 146 (3d Cir. 1992). Rather, the plaintiff must present sworn affidavits or other evidence that demonstrates a *prima facie* case for the exercise of personal jurisdiction. *Mellon Bank v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992); *Carteret Sav. Bank*, 954 F.2d at 146. Because a Rule 12(b)(2) motion "requires resolution of factual issues outside the pleadings," *Time Share Vacation Club*, 735 F.2d at 67 n.9, we may consider all undisputed evidence submitted by the parties.

B. Minimum Contacts

Defendants Perrotto, Alther, and Lockwood (collectively, the "individual Defendants") assert that all of their contacts with Pennsylvania occurred in their capacities as corporate officers and/or directors of CHP. (Perrotto Aff. ¶¶ 3-5; Alther Aff. ¶¶ 2-4; Lockwood Aff. ¶¶ 2-4.) They argue that we cannot exercise personal jurisdiction over them individually:

> The mere fact that Defendants Perrotto, Alther, and Lockwood are officers or shareholders of CHP is irrelevant to the issue of minimum contact. "[A] defendant is not individually subject to personal jurisdiction merely based on his actions in a corporate capacity." [*TJS Brokerage & Co. v.*] *Mahoney*, 940 F. Supp. [784,] 789 [(E.D. Pa. 1996)]. Moreover, "[i]t is well settled that, absent allegations that the corporate shield is a sham, jurisdiction over the corporation does not subject officers, directors and shareholders of the corporation to personal jurisdiction." *PSC Prof. Servs. Group, Inc. v. Am. Digital Sys., Inc.* 555 F. Supp. 788, 791 n.5 (E.D. Pa. 1983); *see also Hugo v. Galant*, 1987 U.S. Dist LEXIS 3562, *3-4 (E.D. Pa. Apr. 27, 1987).

(Doc. No. 4 at 4-5.)

"Generally, a court can not assert jurisdiction over a non-resident defendant whose only contacts with the forum state are based on the defendant's role as a corporate officer." *Direct Response Media v. Fall Line Entm't, Inc.*, No. 99-2645, 1999 WL 962542, at *4 (E.D. Pa. Oct. 20, 1999); *see also Nat'l Precast Crypt Co. v. Dy-Core of Pa., Inc.*, 785 F. Supp. 1186, 1191 (W.D. Pa. 1992) ("'[I]ndividuals performing acts in a state in their corporate capacity are not subject to the personal jurisdiction of the courts of that state for those acts.'" (quoting *Bowers v. NETI Techs., Inc.*, 690 F. Supp. 349, 357 (E.D. Pa. 1988))). However, the protections of this rule, which is commonly called the corporate or fiduciary shield doctrine, are not absolute. *Directory Dividends, Inc. v. SBC Comms., Inc.*, No. 01-1974, 2003 U.S. Dist. LEXIS 19560, at *7 (E.D. Pa. Oct. 23, 2003). An individual's status as an officer or employee of a corporation "does not provide an automatic shield for their activities." 16 James Wm. Moore, Moore's Federal Practice § 108.42[3][b][iii] (3d ed. 2000).

One commonly recognized exception to the corporate shield doctrine exists when the corporate officer or director was personally involved in tortious conduct. *See, e.g.*, *Worldcom Techs., Inc. v. Intelnet Int'l, Inc.*, No. 00-2284, 2002 U.S. Dist. LEXIS 15892, at *11 (E.D. Pa. Aug. 22, 2002) ("[T]his district has recognized an exception to th[e] general rule so that personal liability may attach for torts that are committed in the corporate capacity."); *see also DaimlerChrysler Corp. v. Askinazi*, No. 99-5581, 2000 WL 822449, at *4 (E.D. Pa. June 26, 2000); *Elbeco Inc. v. Estrella de Plato, Corp.*, 989 F. Supp. 669, 676 (E.D. Pa. 1997). Corporate officers may be individually liable for tortious conduct "if they personally took part in the commission of the tort, or if they specifically directed other officers, agents or employees of the corporation to commit the act." *Donner v. Tams-Witmark Music Library, Inc.*, 480 F. Supp.

1229, 1233 (E.D. Pa. 1979) (citing *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978); *Zubik v. Zubik*, 384 F.2d 267, 275 (3d Cir. 1967)). Courts in this District have applied a three-prong test to determine if an officer's corporate contacts should be considered for personal jurisdiction over the officer: (1) the officer's role in the corporate structure; (2) the quality of the officer's contacts; and (3) the nature and extent of the officer's role in the alleged tortious conduct. *See, e.g., Streamlight, Inc. v. ADT Tools, Inc.*, No. 03-1481, 2003 U.S. Dist. LEXIS 19843, at *11 (E.D. Pa. Oct. 9, 2003); *Worldcom Techs. Inc.*, 2002 U.S. Dist. LEXIS 15892, at *4; *D & S Screen Fund II v. Ferrari*, 174 F. Supp. 2d 343, 347 (E.D. Pa. 2001).

1. The Role of the Individual Defendants in the Corporate Structure

The first factor requires an examination of the individual Defendants' roles in CHP's corporate structure. Here, it is undisputed that all individual Defendants play major roles in CHP. Perrotto is CHP's President, Chief Executive Officer, and one of the corporation's three directors. (Compl. ¶¶ 4, 7; Doc. No. 15 Ex. A ¶ 8.) Alther and Lockwood are the other two members of the board of directors. Alther also serves as CHP's corporate Secretary. (Waitsman Aff. ¶ 7.) Together, Defendants Alther and Lockwood are the controlling stockholders of CHP. (*Id*.) Consequently, we conclude that Plaintiffs have satisfied this factor for all three individual Defendants. *See Lautman v. Loewen Group, Inc.*, No. 99-55, 2000 U.S. Dist. LEXIS 8241, at *20 (E.D. Pa. June 15, 2000) (concluding that the first prong was satisfied because "the individual defendants were high-ranking corporate officials with a significant level of authority in the corporation"); *TJS Brokerage & Co. v. Mahoney*, 940 F. Supp. 784, 789 (E.D. Pa. 1996) (finding that president and controlling shareholder played a "significant role" in the corporation's structure).

2. The Quality of the Contacts of the Individual Defendants With Pennsylvania

The second relevant factor is the nature of the individual Defendants' contacts with Pennsylvania. One important element in this determination is the scope of a corporate officer's communications with parties located in the forum state. As the Supreme Court held in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985), substantial telephone and electronic communications with parties located in the forum state can qualify as sufficient minimum contacts for the exercise of personal jurisdiction. Here, Defendant Perrotto engaged in substantial telephone and email communications with Plaintiffs, who are located in Pennsylvania, during the period leading up to the LOI and continuing until its termination on March 15, 2004. (Waitsman Aff. ¶ 12; Doc. No. 15 Ex. A ¶ 24.) A corporate officer's actual presence during precontractual negotiations is also relevant evidence of minimum contacts. *Gen. Elec. Co.*, 270 F.3d at 150. As both parties acknowledge, Perrotto personally visited the offices of Schiller-Pfeiffer in Pennsylvania at least once during the acquisition negotiations. (Waitsman Aff. ¶ 10; Doc. No. 15 Ex. A ¶ 8.) This situation is similar to *Banyan Healthcare Servs., Inc. v. Laing*, No. 98-2004, 1998 U.S. Dist. LEXIS 13222 (E.D. Pa. Aug. 19, 1998), in which the Court found that personal jurisdiction existed over a corporation's CEO because he played a major role in the corporation, had numerous phone calls and electronic communications with plaintiffs during contract negotiations, and personally visited Pennsylvania to meet with plaintiff's representatives. *Id.* at *10-11. Plaintiffs have satisfied the second factor as to Perrotto.

We reach a different conclusion, however, with respect to the other two individual Defendants. Alther and Lockwood assert that they have not engaged in any business

communications with Plaintiffs, nor have they personally traveled to Pennsylvania to conduct corporate business.[6] (Alther Aff. ¶ 3; Lockwood Aff. ¶ 3.) Their only direct contact with the forum state appears to be their signatures approving the LOI, a copy of which was transmitted via facsimile to Schiller-Pfeiffer's office in Pennsylvania. (Doc. No. 4 Ex. A.) Although in some situations "[a] single contact that creates a substantial connection with the forum can be sufficient to support the exercise of personal jurisdiction," *Miller Yacht Sales v. Smith*, 384 F.3d 93, 96 (3d Cir. 2004), Alther and Lockwood's signatures on the LOI alone is insufficient to confer personal jurisdiction. *See Vetrotex Certainteed Corp. v. Consol. Fiber Glass Prods. Co.*, 75 F.3d 147, 151 (3d Cir. 1995) (holding that an individual defendant's breach of a single contract was insufficient grounds to exercise personal jurisdiction); *Grand Entm't Group v. Star Media Sales*, 988 F.2d 476, 482 (3d Cir. 1993) ("[A] contract alone does not 'automatically establish sufficient minimum contacts in the other party's home forum.'" (quoting *Burger King Corp.*, 471 U.S. at 478)); *Royal Gist-Brocades N.V. v. Sierra Prods., Ltd.*, No. 97-1147, 1999 U.S. Dist. LEXIS 12414, at *22 (E.D. Pa. Aug. 11, 1999) (holding that a corporate officer's signature of a distribution agreement did not confer personal jurisdiction, even though breach of that agreement was the basis for several of plaintiffs' claims). We note that Plaintiffs have not presented any evidence that CHP's corporate form is an alter ego for the activities of Alther and Lockwood, who are its controlling shareholders. *See* 4A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1069.4 (3d ed. 2002) ("[I]f the corporation is not a

[6] Lockwood acknowledged in a subsequent affidavit that he had engaged in business communications with Schiller-Pfeiffer and traveled to its corporate offices in 1998 or 1999 as part of the initial stages of negotiations regarding cooperation over a particular product line. (Lockwood Supp. Aff. ¶¶ 5, 7.) Because these discussions occurred four or five years before the transactions at issue in this litigation and did not result in any agreement with Schiller-Pfeiffer (*id.*), we do not consider them relevant for purposes of personal jurisdiction.

viable one and the individuals are in fact conducting personal activities and using the corporate form as a shield, a federal court may pierce the corporate veil and permit the assertion of personal jurisdiction over the individuals.") Thus, we are compelled to conclude that Plaintiffs have not carried their burden on this factor with respect to Defendants Alther and Lockwood.

3. The Role of the Individual Defendants in the Alleged Tortious Conduct

The third and final factor to consider is the individual Defendants' role in the alleged tortious conduct. Here, Plaintiffs allege that the individual Defendants committed the intentional torts of (1) fraudulent misrepresentation regarding the termination of the proposed management buyout plan of CHP (Compl. ¶¶ 58-81) and (2) tortious interference with business relations between Schiller-Pfeiffer, JEP, and CHP (*id.* ¶¶ 84-87).

As previously discussed, Perrotto made numerous communications to Plaintiffs prior to the LOI's execution and continuing through the March 15, 2004 termination letter. (Compl. ¶¶ 29-30, 35-37, 40-41; Waitsman Aff. ¶¶ 9-12.) Plaintiffs allege that representatives of CHP, including Perrotto, intentionally misrepresented during these communications that CHP was no longer considering a management buyout when the parties signed the LOI. (Compl. ¶¶ 31-34, 38-39, 60-64, 68-69, 81.) Plaintiffs relied on these representations in conducting due diligence on CHP and engaging in final status negotiations, ultimately incurring expenses in excess of $300,000 for these activities. (Compl. ¶¶ 31-34, 38-39, 64, 70, 78-79; Waitsman Aff. ¶¶ 13-14.) If true, these allegations would establish a prima facie case of the tort of intentional misrepresentation.[7] Obviously, any representations made by Perrotto, the President and CEO of

[7] Under Pennsylvania law, the elements of the tort of intentional misrepresentation are (1) a representation, (2) material to the transaction at hand, (3) made falsely, with knowledge or recklessness of its falsity, (4) with the intent of misleading another into relying on it, (5) justifiable reliance on the misrepresentation, and (6) the resulting injury was proximately caused the reliance. *Bortz v. Noon*, 729 A.2d 555, 560 (Pa. 1999).

CHP, regarding the termination of a proposed management buyout would be critical to Plaintiffs' decision to agree to the LOI. Thus, we conclude that Plaintiffs have satisfied the third factor for Perrotto.

In contrast, Plaintiffs have not adduced any evidence that Defendants Alther and Lockwood participated in any of the allegedly tortious conduct. Plaintiffs vaguely assert that Alther and Lockwood "either directly, or through Perrotto . . . had numerous communications with Plaintiffs located in Pennsylvania," but cannot point to a single statement or representation that Alther or Lockwood made to them which could be considered fraudulent. (Doc. No. 8 at 12.) These bare allegations are insufficient for us to conclude that Plaintiffs have satisfied their burden on the third factor for Alther and Lockwood. "Once the defense [of personal jurisdiction] has been raised, then the plaintiff must sustain its burden of proof in establishing jurisdictional facts through sworn affidavits or other competent evidence. . . . [A]t no point may a plaintiff rely on the bare pleadings alone in order to withstand a defendant's Rule 12(b)(2) motion." *Time Share Vacation Club*, 735 F.2d at 66 n.9.

Likewise, Plaintiffs present little evidence to support their claim of tortious interference with business relations by Alther and Lockwood to justify our exercise of personal jurisdiction over them. Plaintiffs point to a single statement allegedly made by Paul H. Ode, Jr., Counsel for CHP, to Vicki Waitsman, Counsel for Schiller-Pfeiffer and JEP, on the day after the LOI was terminated, asserting that Perrotto had engaged in management buyout discussion during the Exclusive Period with CHP and/or Alther and Lockwood. (Waitsman Aff. ¶ 16.) Ode, however, categorically denies ever making such a statement to Waitsman (Ode Aff. ¶ 9), and Plaintiffs do not point to any other evidence that Alther and Lockwood personally participated in any alleged management buyout discussions.

We are satisfied that at this juncture the exercise of personal jurisdiction over Alther and Lockwood would be problematic at best. Plaintiffs appear unable to satisfy their burden of establishing personal jurisdiction as to Alther and Lockwood with respect to two of the three prongs discussed above.[8] In any event, our decision to transfer this case to the United States District Court for the District of Vermont, discussed in Part IV, *infra*, obviates the necessity to resolve this issue.

IV. TRANSFER

Defendants also request that we transfer this case to the United States District Court for the District of Vermont pursuant to 28 U.S.C. § 1404(a). Requests for transfer under § 1404(a) may be granted when venue is proper in both the original and the requested venue.[9] *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 878 (3d Cir. 1995). Under § 1404(a), district courts have wide discretion "to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)); *see also Jumara*, 55 F.3d at 883 ("[S]ection § 1404(a) was intended to vest district courts with broad discretion to determine

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[8] As discussed above, once a court has determined that minimum contacts exist, it must then examine whether jurisdiction over a defendant would comport with the idea of "fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. A heavy burden rests with Defendants to show that the exercise of jurisdiction would be unreasonable. *Grand Entm't Group*, 988 F.2d at 483; *see also Carteret Savings Bank*, 954 F.2d at 150 (holding that once plaintiff has made out a prima facie case of minimum contacts, "defendant 'must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable'" (quoting *Burger King Corp.*, 471 U.S. at 477)). Here, the individual Defendants limited their argument to whether they had sufficient contacts with Pennsylvania, and did not discuss whether specific jurisdiction over the individual Defendants would be unreasonable despite the presence of minimum contacts.

[9] Because all Defendants are residents of the State of Vermont (Compl. ¶¶ 3-6), this action could have been brought in the District of Vermont. 28 U.S.C. § 1391(a)(1) (2000).

. . . whether convenience and fairness considerations weigh in favor of transfer."). In determining whether a transfer is appropriate under § 1404(a), courts in the Third Circuit have considered a wide range of public and private interests.[10] *See, e.g., Precimed S.A. v. Orthogenesis, Inc.*, No. 04-1842, 2004 WL 263059, at *4 (E.D. Pa. Nov. 17, 2004).

After consideration of the relevant factors, we will exercise our discretion and transfer this case to the United States District Court for the District of Vermont. Specifically, we find compelling the interest in consolidating this action with the related litigation currently pending in the District of Vermont. It is well-settled that the presence of a related case in the proposed transferee forum is a strong reason to grant a motion for a change of venue. *See Southampton Sports Zone, Inc. v. ProBatter Sports, LLC*, No. 03-3185, 2003 WL 22358439, at *5 (E.D. Pa. Sept. 10, 2003) ("The presence of . . . related cases in the transferee forum is a substantial reason to grant a change of venue. The interests of justice and the convenience of the parties and witnesses are ill-served when federal cases arising out of the same circumstances and dealing with the same issues are allowed to proceed separately." (quoting *Prudential Ins. Co. of Am. v. Rodano*, 493 F. Supp. 954, 955 (E.D. Pa. 1980)); *see also Weber v. Basic Comfort, Inc.*, 155 F. Supp. 2d. 283, 286 (E.D. Pa. 2001); *Jontri Trans. Co. v. N. Bank Dev. Co.*, No. 90-2372 , 1990

[10] The private interests that may be considered include: (1) the plaintiff's forum preference as manifested in the original choice, (2) the defendant's preference of forum, (3) whether the claim arose elsewhere, (4) the convenience of the parties as indicated by their relative physical and financial condition, (5) the convenience of the witnesses, to the extent that the witnesses may actually be unavailable for trial in one of the fora, and (6) the location of books and records, similarly limited to the extent that the files could not be produced in the alternative forum. *Jumara*, 55 F.3d at 879 (internal citations omitted). The public interests include: (1) the enforceability of the judgment, (2) practical considerations that could make the trial easy, expeditious, or inexpensive, (3) the relative administrative difficulty in the two fora resulting from court congestion, (4) the local interest in deciding local controversies at home, (5) the public policies of the fora, and (6) the familiarity of the trial judge with the applicable state law in diversity cases. *Id.* at 879-80 (internal citations omitted).

WL 121511, at *2 (E.D. Pa. Aug. 15, 1990). In fact, courts in this District have concluded that this factor alone is sufficient to warrant a transfer. *See, e.g., Southampton Sports Zone, Inc.* 2003 WL 22358493, at *5 (discussing *Blanning v. Tisch*, 378 F. Supp. 1058, 1061 (E.D. Pa. 1974)).

We are satisfied that a transfer to the District of Vermont would simultaneously promote judicial economy and the interests of justice. As the Supreme Court has noted, "[t]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Cont'l Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 26 (1960). Even though the claims of the two cases here are not exactly the same,[11] they arise from the same set of facts and occurrences. If these actions were filed in the same district, consolidation would certainly be appropriate. *See* Fed. R. Civ. P. 42(a) ("When actions involving a common question of law or fact are pending before the court, . . . it may order all the actions consolidated."). Both cases also involve the common legal issue of whether Defendant CHP breached the LOI. (Compl. ¶¶ 54-57; Am. Compl. ¶¶ 41-44, *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt.).) Moreover, transferring this action will benefit all parties because

> the two actions could be consolidated before one judge thereby promoting judicial efficiency, pretrial discovery could be conducted in a more orderly manner, witnesses could be saved the time and expense of appearing at trial in more than one court, duplicative litigation involving the filing of records in both courts could be avoided eliminating unnecessary expense[,] and the possibility of

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[11] In this case, Schiller-Pfeiffer and CHP claim breach of contract, promissory estoppel, fraud, and tortious interference with business relations against CHP and/or its corporate officers. (Doc. No. 7 ¶¶ 57-87.) In the Vermont action, CHP alleges fraudulent misrepresentation and fraudulent concealment against Schiller-Pfeiffer and/or its corporate officer, and also seek declaratory judgment that CHP did not breach the LOI. (Am. Compl. ¶¶ 41-48, *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt. filed May 11, 2004).).

inconsistent results could be avoided.

Pall Corp. v. Bentley Lab, Inc., 523 F. Supp. 450, 453 (D. Del. 1981). Obviously, these factors weigh heavily in favor of transfer.[12]

Plaintiffs assert that transfer of this case to the District of Vermont would violate the "first-filed" rule. (Doc. No. 17 at 3-5.) We disagree. The "first-filed" rule stands for the general proposition that "in all cases of federal concurrent jurisdiction, the court which first has possession of the subject [of the litigation] must decide it." *Am. Soc'y for Testing & Mat'ls v. Corrpro Cos.*, 254 F. Supp. 2d 578, 580 (E.D. Pa. 2003) (citing *IMS Health, Inc. v. Vitality Tech, Inc.*, 59 F. Supp. 454, 463 (E.D. Pa. 1999)). It is designed to "encourage[] sound judicial administration and promote[] comity among federal courts of equal rank" by granting district courts "'the power' to enjoin the subsequent prosecution of proceedings involving the same parties and the same issues already before another district court." *EEOC v. Univ. of Pa.*, 850 F.2d 969, 971 (3d Cir. 1988), *aff'd*, 493 U.S. 182 (1990). The "first-filed" rule, however, "is not a rigid or inflexible rule to be mechanically applied" in all circumstances. *Am. Soc'y for Testing & Mat'ls*, 254 F. Supp. 2d at 580. As the Third Circuit has noted, "[d]istrict courts have always had discretion to retain jurisdiction given appropriate circumstances justifying departure from the first-filed rule." *Univ. of Pa.*, 850 F.2d at 972; *see also Kellen Co. v. Calphalon Corp.*, 54 F. Supp. 2d 218, 221 (S.D.N.Y. 1999) ("The first-filed rule is not to be applied mechanically, but is intended to aid in judicial administration.").

[12] Court congestion may also favor transfer to the District of Vermont. In its opinion denying Schiller-Pfeiffer's motion to transfer, the Vermont District Court noted that "[d]ue to the modest caseload, this Court can address the case expeditiously." *Country Home Prods. v. Schiller-Pfeiffer, Inc.* at 17, No. 04-CV-111 (D. Vt. Nov. 19, 2004) (memorandum and order denying defendants' motion to dismiss and transfer). Although this factor is generally not worthy of great weight, *see, e.g.*, *Penda Corp. v. STK, LLC*, No. 03-6240, 2004 WL 2004439, at *3 (E.D. Pa. Sept. 7, 2004), the District Court in Vermont considered it significant.

There are several reasons why we should decline to exercise our discretion under the "first-filed" rule. Initially, the action in the District of Vermont has already progressed farther than the current case. The further progression of a case in a court of coordinate jurisdiction is one circumstance where courts in this District have declined to enforce the "first-filed" rule. *See, e.g., Dudwick Shindler Verdini, Inc. v. Crowley Bros., Inc.*, No. 99-1942, 1999 WL 374174, at *1 (E.D. Pa. July 9, 1999). Since the filing of CHP's Amended Complaint in July, 2004, the Vermont District Court has ruled on Schiller-Pfeiffer's initial Rule 12 motion and established that it has personal jurisdiction over all parties in that action. *Country Home Prods. v. Schiller-Pfeiffer, Inc.* No. 04-CV-111 (D. Vt. Nov. 19, 2004) (memorandum and order denying defendants' motion to dismiss or transfer). The Vermont Court has also denied defendants' motion to transfer the Vermont action to this District. *Id.* Next, the District of Vermont will be able to exercise personal jurisdiction over all Defendants in this action. If the case remains in this Court, we would be compelled to either (1) permit Plaintiffs to pursue jurisdictional discovery regarding Defendants Alther and Lockwood, potentially further delaying the progress of this case, or (2) outright dismiss all of Plaintiffs' claims against Alther and Lockwood, foreclosing any possibility of recovery against them. Transferring this case to the District of Vermont obviates this problem. *See Kahhan v. City of Fort Lauderdale*, 566 F. Supp. 736, 740 (E.D. Pa. 1983) ("A transfer, obviating a jurisdictional difficulty, has been found to serve the interests of justice."). Finally, transfer may be more convenient for the parties in conducting discovery and, ultimately, proceeding to trial. The Vermont District Court has noted that many of the documents and witnesses relating to this case are located in Vermont, and that much of the negotiation for the LOI also occurred in Vermont. *Id.* at 17-18.

The somewhat unusual procedural history and timing of these two actions is an additional reason for us to decline exercise the "first-filed" rule. Although Plaintiffs technically filed the first lawsuit by issuing a praecipe for writ of summons in the Court of Common Pleas, Philadelphia County, on March 17, 2004, Plaintiffs did not file a Complaint until June 30, 2004, after the case had been removed to this Court. (Doc. No. 7.) As Defendants noted in their motion to dismiss, the praecipe only identified the case as an action arising in contract, with no specific allegations regarding the exact grounds for the dispute. (Doc. No. 4 at 2.) In the meantime, Defendants filed their action in the District of Vermont on May 11, 2004. This does not appear to be a situation where Defendants acted in bad faith or engaged in forum shopping by rushing filing suit in the District of Vermont. Under the circumstances, we decline to invoke the "first-filed" rule.

Because we find that a transfer would be in the interests of justice, we will grant Defendants' Motion to transfer this action to the United States District Court for the District of Vermont.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SCHILLER-PFEIFFER, INC. and JEP MANAGEMENT, INC.	:	
	:	CIVIL ACTION
v.	:	
	:	No. 04-CV-1444
COUNTRY HOME PRODUCTS, INC., JOSEPH M. PERROTTO, RICHARD P. ALTHER, and WILLIAM M. LOCKWOOD, JR.	:	

ORDER

AND NOW, this 1st day of December, 2004, upon consideration of Defendants' Motion to Dismiss and/or Transfer the Above Captioned Matter to the United States District Court of Vermont (Doc. No. 4, No. 04-CV-1444), it is ORDERED that:

1. Defendant Joseph M. Perrotto's motion to dismiss for lack of personal jurisdiction is DENIED; and
2. Defendants' motion to transfer is GRANTED; and
3. Defendants Richard P. Alther and William P. Lockwood, Jr.'s motions to dismiss for lack of personal jurisdiction are DENIED as MOOT; and
4. The Clerk of Court is directed to TRANSFER this action to the United States District Court for the District of Vermont.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge