

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

AMERICAN BUSINESS FINANCIAL SERVICES, INC.,	:	JANUARY TERM, 2001
	:	
Plaintiff	:	No. 4955
	:	
v.	:	COMMERCE PROGRAM
	:	
FIRST UNION NATIONAL BANK, FIRST UNION CAPITAL MARKETS, CORP., FIRST UNION SECURITIES, INC., ALAN DAVID BOYER and SAMUEL R. SHIREY,	:	
	:	
Defendants	:	Control No. 061021

OPINION

Presently before this court are the Preliminary Objections of defendants, Alan David Boyer (“Boyer”) and Samuel R. Shirey (“Shirey”), to the Amended Complaint of plaintiff, American Business Financial Services, Inc. (“ABFI”), moving to dismiss for lack of personal jurisdiction.

For the reasons set forth, the Preliminary Objections are sustained, as to defendant Shirey, and overruled, as to defendant Boyer.

BACKGROUND

The pertinent facts, as pled in the Amended Complaint, are as follows.¹ This action arises from an alleged breach of a confidential relationship with and/or fiduciary duty owed to ABFI and the alleged misuse of non-public information in violation of confidentiality agreements between the parties. Am.Compl.,

¶ 1.

¹Certain facts provided in this section derive from deposition testimony taken in response to this court’s Order, dated September 20, 2001, to resolve the issue of personal jurisdiction.

ABFI is a publicly-held, diversified financial services company which sells and services loans to businesses secured by real estate and other business assets, as well as first and second home mortgages to consumers. Id. at ¶¶ 1-2. Defendant, First Union National Bank (“Bank”), with its principal place of business in North Carolina, is a national banking association which provides commercial and retail banking and trust services to various locations, including Pennsylvania. Id. at ¶ 3. Defendant, First Union Capital Markets Corp. (“Capital Markets”), a Virginia corporation with its principal place of business in North Carolina, provides a full range of investment banking products and services to a variety of locations. Id. at ¶ 4. Defendant, First Union Securities, Inc. (“Securities”), a Delaware corporation with its principal place of business in Virginia, is a registered broker/dealer and member of the NYSE and provides investment banking, financial advisory and brokerage services throughout the United States. Id. at ¶ 5. Bank, Capital Markets and Securities are sometimes collectively referred to as “First Union”.²

Defendant Boyer is an employee of Capital Markets and resides in North Carolina. Id. at ¶ 6. See also, Boyer Dep. at 18-20.³ Boyer does not have family in Pennsylvania and has never been to Pennsylvania. Boyer Dep. at 21. Defendant Shirey is also an employee of Capital Markets and resides in North Carolina. Am.Compl., ¶ 7. See also, Shirey Dep. at 36, 235-36.⁴ Shirey, who was born in

²First Union did not join in the present motion but filed an Answer to the Complaint.

³Portions of Boyer’s deposition transcript is attached at Exhibit A to Boyer’s Supplemental Memorandum of Law in Support of the Preliminary Objections. Further, Boyer’s full deposition transcript is attached at Exhibit E to Plaintiff’s Supplemental Memorandum of Law in Opposition to the Preliminary Objections.

⁴Portions of Shirey’s deposition is attached at Exhibit A to Shirey’s Supplemental Memorandum of Law in Support of the Preliminary Objections. Further, Shirey’s full deposition transcript is attached at Exhibit D to Plaintiff’s Supplemental Memorandum of Law in Opposition to the Preliminary Objections.

Pennsylvania and lived in the Commonwealth until 1986, makes semi-annual visits to his parents who still reside in Pennsylvania and occasionally telephones or e-mails them. Shirey Dep. at 35-37, 42-45, 50-51, 54-56. Shirey also has an investment account with Vanguard Discount Brokerage (“Vanguard”), which is headquartered in Pennsylvania. Id. at 8. Shirey’s transactions with Vanguard have been effected from Charlotte, North Carolina via telephone calls using an 800 number or on-line, using First Union bank accounts in Charlotte and in Delaware. Id. at 8, 32, 207. Through his Vanguard account, Shirey executes security transaction including selling of ABFI stock. Id. at 7, 207, 233.

In 1997 through 2000, First Union (or its predecessor) participated in a \$150 million (increased later to \$200 million) warehouse line of credit facility to ABFI, pursuant to which, First Union received substantial non-public information about ABFI.. Am.Compl., at ¶ 9. Prior to the execution of any loan documents, First Union agreed that the information and data from ABFI would be kept confidential. Id., see also Am.Compl., Exhibit A. On October 1, 1998, First Union agreed to the terms of the line of credit transaction with ABFI whereby it agreed that no disclosure of non-public information about ABFI would be made to any third party without prior written consent from ABFI. Id. at ¶ 10, see also Am.Compl., Exhibit B. Additionally, First Union provided direct credit to ABFI in the form of a \$100 million Receivables Purchase Facility. Id. at ¶ 11. In connection with this transaction, First Union agreed to keep information confidential. Id., see also Am.Compl., Exhibit C.

Defendants Boyer and Shirey allegedly received substantial non-public information concerning ABFI, and are bound, as employees of First Union, by the confidentiality agreements between ABFI and First Union. Id. at ¶¶ 14-15. As alleged, defendants Boyer and Shirey each engaged in purchases and

sales of ABFI securities, including short sales.⁵ *Id.* at ¶ 17. Through July and August, 2000, Boyer allegedly commenced a scheme to defame and disparage ABFI and otherwise manipulate the stock price of ABFI for personal gain through various e-mails to ABFI's independent public auditors and others, who are located in Pennsylvania. *Id.* at ¶¶ 18-21. Specifically, on August 1, 2000, Boyer sent an e-mail to ABFI's independent public auditors, BDO Seidman ("BDO"), accusing ABFI of "fraudulent accounting policies" and engaging in "borderline criminal" conduct in order to injure its business reputation, cause it to lose good will with its business relations and to interfere with ABFI's contractual relationship with its auditors. *Id.* at ¶ 19. See also, Pl. Supplemental Mem. of Law, Exhibit A. Boyer acknowledges sending this e-mail message from his office in Charlotte, North Carolina and that he understood that the independent auditors were situated in Pennsylvania, but he specifically denies sending any other e-mails to BDO. Boyer Dep. at 7-8, 12, 54, 90, 110, 130-32. The other e-mails sent to BDO do not contain an address from whom they were sent. Pl. Supplemental Mem. of Law, Exhibit A. Boyer also posted messages on the internet's Yahoo Message Board, which included negative statements about ABFI and/or its management. Pl. Supplemental Mem. of Law, Exhibit B. See also, Boyer Dep. at 85, 95, 100, 102. Shirey, in turn, allegedly joined Boyer in using the internet to spread false and negative information about ABFI with the intent to injure its business reputation and cause others to lose confidence in ABFI and/or to depress the market value of ABFI's stock. Am.Compl., ¶ 21. Shirey also sent approximately fifty to sixty messages on the Yahoo Message Board, referring to ABFI and its management in a negative manner.

⁵"Short-selling' takes place when a speculator sells stock he does not own, in anticipation of a fall in the price prior to his covering purchase of those shares." Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 1997 WL 299430, at *1 n. 1 (S.D.N.Y. June 4, 1997).

Shirey Dep. at 139-140, 193. In addition, Shirey participated in an investor conference call involving ABFI through a 1-800 number. *Id.* at 174-75. However, there is no testimonial or documentary evidence that Shirey sent e-mails to ABFI's independent auditors or others in Pennsylvania

With this background, ABFI filed its amended complaint, asserting counts for breach of fiduciary duty, breach of confidentiality agreements, breach of confidential relationship, interference with contractual relationship, and negligent supervision on the part of First Union.⁶ First Union filed an Answer with New Matter. Defendants, Boyer and Shirey, filed Preliminary Objections, in the nature of a motion to dismiss for lack of personal jurisdiction. This court ordered the parties to conduct discovery and submit supplemental memoranda on the issue of personal jurisdiction.

This court must now resolve the issue of whether it has personal jurisdiction over Defendants Boyer and Shirey.

DISCUSSION

Rule 1028(a)(1) of the Pennsylvania Rules of Civil Procedure ["Pa.R.C.P."] allows for preliminary objections raising lack of jurisdiction over the person. "[W]hen preliminary objections, if sustained, would result in the dismissal of an action, such objections should be sustained only in the clearest of cases." Grimes v. Wetzler, 749 A.2d 535, 538 (Pa.Super.Ct. 2000)(citing King v. Detroit Tool Co., 452 Pa.Super. 334, 337, 682 A.2d 313, 314 (1996). Initially, the objecting party bears the burden of proof and the court must consider the evidence in the light most favorable to the non-moving party. Barr v. Barr,

⁶The Amended Complaint does not contain a count for defamation or commercial disparagement, nor any alleged violation of securities laws, and this court cannot now infer that plaintiffs so intended to assert these claims.

749 A.2d 992, 996 (Pa.Super.Ct. 2000); Grimes, 749 A.2d at 538; King, 452 Pa.Super. at 337, 682 A.2d at 314. However, “[o]nce the moving party supports its objections to personal jurisdiction, the burden of proving personal jurisdiction is upon the party asserting it.” Barr, 749 A.2d at 994. See also, Grimes, 749 A.2d at 538 (“[o]nce the movant has supported its jurisdictional objection, . . . the burden shifts to the party asserting jurisdiction to prove that there is statutory and constitutional support for the court’s exercise of *in personam* jurisdiction.”).

Pursuant to the Judiciary Act, 42 Pa.C.S.A. §§ 5301-5329, Pennsylvania courts may exercise two types of *in personam* jurisdiction over a non-resident defendant. One type of personal jurisdiction is general jurisdiction, which is based upon a defendant’s general activities within the forum as evidenced by continuous and systematic contacts with the state. Fidelity Leasing, Inc. v. Limestone County Bd. of Educ., 758 A.2d 1207, 1210 (Pa.Super.Ct. 2000)(citing GMAC v. Keller, 737 A.2d 279, 281 (Pa.Super.Ct. 1999)). “General jurisdiction . . . exists regardless of whether the cause of action is related to the defendant’s activities in Pennsylvania, as long as the [corporate] defendant’s activities in the Commonwealth are ‘continuous and substantial’.” Garzone v. Kelly, 406 Pa.Super. 176, 183, 593 A.2d 1292, 1296 (1991)(holding that the grounds for general jurisdiction under § 5301, applying to individuals as opposed to corporate defendants, had not been met). The other type is specific jurisdiction, which has a more narrow scope and is focused upon the particular acts of the defendant that gave rise to the underlying cause of action. Fidelity Leasing, at 1210.

Irrespective of whether general or specific *in personam* jurisdiction is asserted, the propriety of such an exercise must be tested against Pennsylvania’s Long-Arm Statute, 42 Pa.C.S.A. § 5322, and constitutional standards of due process. Id. See also, Kubik v. Letteri, 532 Pa. 10, 14, 614 A.2d 1110,

1112 (1992)(citations omitted). The Long-Arm Statute’s reach is co-extensive with that permitted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Maleski by Taylor v. DP Realty Trust, 653 A.2d 54, 62 (Pa.Comm. Ct. 1994). Therefore, any discussion of personal jurisdiction must focus on constitutional due process constraints. Temtex Products, Inc. v. Kramer, 330 Pa. Super. 183, 194, 479 A.2d 500, 505-06 (1984).

Section 5301 of the Judiciary Act provides the rubric for exercising general *in personam* jurisdiction over both individuals and corporations. 42 Pa.C.S.A. § 5301. As to individuals, this section provides that a court can exercise general jurisdiction over non-resident individual defendants only if: (1) the individual is present in the Commonwealth at the time when process is served; (2) the defendant is domiciled in the Commonwealth at the time when process is served; or (3) the defendant consents. 42 Pa.C.S.A. § 5301(a)(1)(i)-(iii). On the other hand, general jurisdiction over corporations may be exercised if (1) the corporation is incorporated or qualifies as a foreign corporation under the laws of this Commonwealth; (2) the corporation consents; or (3) the corporation carries on a “continuous and systematic” part of its business in this Commonwealth. Id. at § 5301(a)(2)(i)-(iii).

Here, it is undisputed that Defendants Boyer and Shirey are domiciled in North Carolina. Am. Compl, ¶¶ 6-7. It cannot be asserted that either defendant consented to this court’s exercise of jurisdiction over them because they filed Preliminary Objections on that issue. Moreover, the docket explicitly indicates that Shirey was served by certified mail and was not present in the Commonwealth when served. Boyer testified that he had never been in Pennsylvania. Boyer Dep. at 21. The totality of these circumstances clearly demonstrate that the grounds for general jurisdiction under 42 Pa.C.S.A. § 5301 over these two individuals have not been met.

This court must now determine whether it can exercise specific *in personam* jurisdiction over either Boyer or Shirey. Specific jurisdiction is governed by the provisions set forth in 42 Pa.C.S.A. § 5322(a).

This section states, in pertinent part, that:

A tribunal of this Commonwealth may exercise personal jurisdiction over a person . . . who acts directly or by an agent, as to cause of action or other matter arising from such person: . . .

(3) Causing harm or tortious injury by an act or omission in this Commonwealth.

(4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth

42 Pa.C.S.A. § 5322(a). In addition, Section 5322(b) directs that jurisdiction over non-residents, who do not fall within the scope of Section 5301, is extended “to 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.C.S.A. § 5322(b).

For a court to exercise specific jurisdiction, “(1) the non-resident defendant must have sufficient minimum contacts with the forum state and (2) the assertion of in personam jurisdiction must comport with fair play and substantial justice.” Kubik, 532 Pa. at 17, 614 A.2d at 1114 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485-86 (1985)) (emphasis added). Determining “whether this standard has been met is not susceptible of any talismanic jurisdictional formula; [rather] the facts of each case must always be weighed in determining whether jurisdiction is proper.” Id. at 17, 614 A.2d at 1114.

Finding whether sufficient minimum contacts exist is based on a determination that the “defendant’s conduct and [his] connection with the forum state are such that he should reasonably anticipate being haled into court there.” Id. The minimum contacts requirement is not satisfied by contacts “that are ‘random’,

‘fortuitous’ or ‘attenuated’” or by “unilateral activity in the forum by others who claim some relationship with the defendant.” Id. at 18, 614 A.2d at 1114 (citing Burger King, 471 U.S. at 475). Rather, the court must determine that “the defendant purposefully directed [its] activities at residents of the forum and purposefully availed [itself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.” Id. Additionally, “the cause of action must arise from the defendant’s activities within the forum state.” Id. at 19, 614 A.2d at 1115 (citation omitted).

A court’s exercise of specific jurisdiction must also conform to notions of fair play and substantial justice. In determining whether this requirement has been met, a court should consider the following:

(1) the burden on the defendant, (2) the forum state’s interest 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 several states in furthering fundamental substantive social policies.

Id. at 18, 614 A.2d at 1114.

Here, this court must determine whether the activities of Defendants Boyer and Shirey are sufficient for this court to exercise specific jurisdiction under the principles outlined above. The discovery taken on this issue indicates that these activities are primarily internet activities, which is a relatively new issue for determining personal jurisdiction. The only Pennsylvania case which this court found on the subject is Kubik v. Route 252, Inc., 762 A.2d 1119 (Pa.Super.Ct. 2000), which addressed internet activity and postings on a website to determine whether venue was appropriate. While Kubik did not address a challenge to personal jurisdiction, it did cite to the test announced in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa. 1997) and reaffirmed in Blackburn v. Walker Oriental Rug Galleries, Inc., 999 F.Supp. 636 (E.D.Pa. 1998), which set forth a sliding scale to determine whether internet

contacts were sufficient to have personal jurisdiction. 762 A.2d at 1124. This court does find that Zippo, Blackburn and other federal cases are helpful in determining whether the defendants' activities over the internet meet the minimum contacts requirement.

In Zippo, the court concluded that “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the [i]nternet.” 952 F.Supp. at 1124. The court ascertained three distinct types of internet contacts. Id. The first type of contact is where the defendant “clearly does business over the [i]nternet,” which allows for personal jurisdiction over the defendant. Id. The second type involves interactive websites and occurs “where a user can exchange information with the host computer.” Id. “In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and [the] commercial nature of the exchange of information that occurs.” Id. The third type “involves the posting of information or advertisements on an internet web site which is accessible to users in foreign jurisdictions.” Id. This “passive website” does not provide grounds for the exercise of personal jurisdiction. Id. See also, Blackburn, 999 F.Supp. at 638-39.

The majority of courts have found that personal jurisdiction clearly exists when the internet activity involves business over the internet, including on-line contracts with residents of a foreign jurisdiction or site. See, e.g., Zippo, 925 F.Supp. at 1125-26 (jurisdiction may be exercised because defendant contracted with approximately 3,000 individuals and seven internet access providers in Pennsylvania); Maritz, Inc. v. Cybergold, Inc., 947 F.Supp. 1328, 1333 (E.D.Mo.1996)(creating an online commercial mailing list by signing people up at their website for commercial purposes was purposeful availment); Gary Scott Int'l, Inc. v. Baroudi, 981 F.Supp. 714, 716-17 (D.Mass.1997)(personal jurisdiction could be exercised because

defendant solicited and sold his product via his website to Massachusetts residents and had a major deal with a Massachusetts business); Superguide Corp. v. Kegan, 987 F.Supp. 481, 486-87 (W.D.N.C.1997)(personal jurisdiction may be exercised under the assumption that citizens of the forum state via the internet have utilized the commercial services and acquired products from the defendant); Thompson v. Handa-Lopez, Inc., 998 F.Supp. 738, 743-44 (W.D.Tex.1998)(personal jurisdiction could be exercised when defendant entered into on-line contracts for commercial purposes with residents of the forum state).

Beyond these type of cases, courts have differed in their determination of the level of interactivity and commercial nature of the information that occurs on the website required to trigger personal jurisdiction. Barrett v. Catacombs Press, 44 F.Supp.2d 717, 725 (E.D. Pa. 1999). The majority of courts have declined to exercise jurisdiction where the only contacts was through a passive website or mere advertisements were made through the website. See, e.g., Barrett, 44 F.Supp.2d at 728 (determining that the posting of messages on listservs and USENET discussion groups on a passive website is insufficient for jurisdictional purposes); Kane v. Coffman, 2001 WL 914016, *5 (Del.Super.Ct. Aug. 10, 2001)(determining that the posting of an electronic message on an internet bulletin board is insufficient to confer personal jurisdiction, as is an internet posting made from outside the state and received by a party inside the state); Revell v. Lidov, 2001 WL 285253, *8 (N.D.Tex. Mar. 20, 2001)(holding that posting of messages to internet bulletin board on college website is insufficient to establish personal jurisdiction or show purposeful availment); Bailey v. Turbine Design, Inc., 86 F.Supp.2d 790, 795 (W.D.Tenn. 2000)(holding that the posting of allegedly defamatory statements on a website, without more, was insufficient to confer jurisdiction); McDonough v. Fallon McElligot, Inc., 1996 WL 753991, *3 (S.D.Cal.

Aug. 5, 1996)(“[b]ecause the Web enables easy world-wide access, allowing computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists.”).

The last category of internet contacts usually involves both internet contacts and non-internet contacts and courts have found that the exercise of personal jurisdiction is proper in certain circumstances. See, e.g., Blumenthal v. Drudge, 992 F.Supp. 44, 54-56 (D.D.C. 1998)(holding that the exercise of personal jurisdiction was proper because of defendant’s interactive website, travel to the District of Columbia to promote the website, and defendant’s contacts and solicitations of forum residents via e-mail, telephone and regular mail); Cody v. Ward, 954 F.Supp. 43, 46-47 (D.Conn. 1997)(finding sufficient minimum contacts where defendant made fraudulent misrepresentations about a stock purchase through a series of e-mails and telephone calls); Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F.Supp. 456, 462 (D.Mass. 1997)(minimum contacts test satisfied because of a contract agreement to apply Massachusetts law, solicitation of Massachusetts business, and sales to some Massachusetts residents).

Here, Defendant Shirey’s semi-annual visits to his parents are unrelated to this action and are of no moment for satisfying the minimum contacts requirement or exercising specific personal jurisdiction. See id. at 35-37, 42-45, 50-51, 54-56. Further, Shirey’s participation in one investor conference call via a 1-800 number is also insufficient to demonstrate purposeful availment. See id. at 174-75. Moreover, the fact that Shirey has an account with Vanguard, which is headquartered in Pennsylvania, and from which he executes trades of stock including ABFI stock does not mean that he purposefully directed his conduct toward Pennsylvania since he executed these trades from North Carolina and from accounts in North

Carolina and/or Delaware.⁷ See id. at 8, 32, 207, 233. Rather, the only contacts of Defendant Shirey that are related to the causes of action lodged against him are his internet postings on the Yahoo bulletin board, which included negative information regarding ABFI. See Shirey Dep. at 139-140, 193. Under the internet cases cited above, such contacts on a passive website are insufficient to exercise specific personal jurisdiction over Shirey.

Boyer also posted internet messages on the Yahoo bulletin board, which included negative information regarding ABFI. See, Boyer Dep. at 85, 95, 100, 102. Unlike Shirey, however, Boyer also sent an e-mail to ABFI's independent auditors, accusing ABFI of "fraudulent accounting practices" and "borderline criminal conduct". Pl. Supplemental Mem. of Law, Exhibit A. Boyer, admittedly, sent this e-mail with the understanding that the independent auditors were situated in Pennsylvania. Boyer Dep. at 7-8, 12, 54, 90, 110, 130-32. Though he denies sending other e-mails, this single e-mail, together with the Yahoo postings, may come under the "effects test" of Calder v. Jones, 465 U.S. 783 (1984), which is relied on by Plaintiff.

In Calder, entertainer Shirley Jones brought a libel action in California against the National Enquirer which had published an article alleging that Jones had an alcohol problem which prevented her from fulfilling her professional duties. 465 U.S. at 785. The Enquirer, a Florida corporation with its principal place of

⁷Plaintiff had served notices of subpoenas *duces tecum* upon Vanguard and America Online, Inc. ("AOL"), seeking information regarding the securities trading, financial and internet activities of Defendants Shirey and Boyer. See Pl. Supplemental Mem. of Law, at 7. Defendants Shirey and Boyer moved to quash these subpoenas as being unrelated to the personal jurisdiction issues. Id. Plaintiff maintains that this additional discovery is necessary to bolster that Shirey and Boyer are subject to personal jurisdiction in Pennsylvania, as well as showing other short-selling schemes in other companies, proving defendants' intent and *modus operandi*. Id. at 8 n.5. It now appears that such discovery is beyond the scope of that needed to establish personal jurisdiction.

business in Florida, is distributed nationally, but it had its largest circulation in Florida. Id. Defendant South, the reporter, did most of his research in Florida and relied on telephone calls to California for information. Id. at 785-86. Defendant Calder, the president and editor of the Enquirer, had no such contacts with California. Id. at 786. Both defendants, residents of Florida, moved to dismiss the suit for lack of personal jurisdiction. Id. The United States Supreme Court found that the exercise of personal jurisdiction was proper. Id. at 789. It stated:

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California.

Id. This language gave rise to what the courts have deemed the Calder "effects test".

The Court of Appeals for the Third Circuit determined that the Calder "effects test" required the plaintiff to show the following to allow for specific jurisdiction over a non-resident defendant:

- (1) the defendant committed an intentional tort;
- (2) the forum was the focal point of the harm suffered by the plaintiff as a result of the tort;
- (3) the forum was the focal point of the tortious activity in the sense that the tort was "expressly aimed" at the forum.

IMO Industries, Inc. v. Kiekert, 155 F.3d 254, 261 (3d Cir. 1998). As a corollary, the defendant(s) know that the "brunt" of the injury caused by their tortious acts would be felt by the plaintiff in the forum. Id. at 261. In IMO Industries, the court held that New Jersey did not have jurisdiction over a German corporation for tortiously interfering with the plaintiff's attempt to sell its Italian subsidiary to a French

corporation because New Jersey was not the focus of the dispute. Id. at 267-68. While the defendant's knowledge that the plaintiff is located in the forum is essential under Calder, such knowledge alone is insufficient to show that the defendant specifically targeted its conduct toward the forum. Id. at 267. The letters in that case were not sent to New Jersey, even though defendant knew they would ultimately be sent to New Jersey. Id. at 260. Further, the meetings occurred outside of the United States and the bid solicitation was done in New York. Id. at 268. But see, Remick v. Manfredy, 238 F.3d 248, 260 (3d Cir. 2001)(holding that Pennsylvania could exercise specific jurisdiction over defendants for a tortious interference claim where the majority of the negotiation, consultations and advice took place in Philadelphia and the allegedly tortious conduct was expressly aimed at injuring plaintiff in Pennsylvania where he lives and works). Here, it appears that the Calder "effects test" is applicable. Plaintiff's claim against Defendant Boyer is for tortious interference with contract, which is an intentional tort.⁸ Boyer sent the e-mail to BDO, making negative accusations of ABFI, with knowledge that ABFI's auditors were located in Pennsylvania and possibly to damage ABFI's relationship with BDO. If damage to ABFI's reputation and/or relationship did in fact result from this e-mail, then the focal point of the harm would be in Pennsylvania. Moreover, this e-mail falls under the parameter of 42 Pa.C.S.A. § 5322(a)(4), allowing for specific jurisdiction where an act or omission outside the Commonwealth causes harm or tortious injury inside the Commonwealth. Naturally, plaintiff will ultimately have to prove that its business relationships in Pennsylvania have in fact been harmed by Defendant Boyer's conduct, but this determination is not

⁸A claim for tortious interference with contract requires the plaintiff to plead (1) the existence of a contractual relationship, (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship, (3) the absence of a privilege or justification for such interference, and (4) damages resulting from the defendant's conduct. Hennesy v. Santiago, 708 A.2d 1269, 1278 (1998)(citations omitted)

presently before this court.

Moreover, this court finds that its exercise of jurisdiction over Defendant Boyer would not necessarily violate traditional notions of fair play and substantial justice. It is true that as a non-resident individual, Boyer will be burdened in being forced to defend himself in Pennsylvania. However, his conduct appears to be directed towards Pennsylvania where Plaintiff is located and where Plaintiff's auditors are located. Plaintiff's interest in adjudicating its dispute and vindicating its reputation in Pennsylvania appears to be self-evident. Further, Defendant First Union filed an Answer to the Complaint and allowing the action to proceed in Pennsylvania would be more efficient than dismissing Defendant Boyer, who seems integral to the action. While it is problematic that this court cannot exercise jurisdiction over Defendant Shirey which may result in duplicative actions in two jurisdictions, this factor is outweighed by Plaintiff's interest in protecting its reputation. In addition, it does seem reasonable and fair to require Boyer to conduct his defense in Pennsylvania since that is where he sent the negative e-mail.

CONCLUSION

For the reasons set forth above, Defendant Shirey's Preliminary Objections, asserting lack of personal jurisdiction, are sustained. However, Defendant Boyer's Preliminary Objections are overruled. The court will enter a contemporaneous Order in accordance with this Opinion.

BY THE COURT:

JOHN W. HERRON, J.

Dated: March 5, 2002

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

AMERICAN BUSINESS FINANCIAL SERVICES, INC.,	:	JANUARY TERM, 2001
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	:	No. 4955
Plaintiff	:	
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v.	:	COMMERCE PROGRAM
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FIRST UNION NATIONAL BANK, FIRST UNION CAPITAL MARKETS, CORP., FIRST UNION SECURITIES, INC., ALAN DAVID BOYER and SAMUEL R. SHIREY,	:	
	:	
Defendants	:	Control No. 061021

ORDER

AND NOW, this 5th day of March, 2002, upon consideration of the Preliminary Objections of Defendants Alan David Boyer (“Boyer”) and Samuel R. Shirey (“Shirey”), in the nature of a motion to dismiss for lack of personal jurisdiction, Plaintiff’s response thereto, the respective memoranda, all other matters of record and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that Boyer’s Preliminary Objections are **Overruled**, but Shirey’s Preliminary Objections are **Sustained** and the complaint against Shirey is **Dismissed**.

BY THE COURT:

JOHN W. HERRON, J.