

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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CLEARWATER REI, LLC, an Idaho
limited liability company,

Plaintiff,

v.

FOCUS CONSULTING ADVISORS,
LLC, an Arizona limited
liability company,

Defendant.

NO. CIV. 1:10-448 WBS

MEMORANDUM AND ORDER RE:
MOTIONS FOR SUMMARY JUDGMENT

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Plaintiff Clearwater REI, LLC, brought this action
against defendant Focus Consulting Advisors, LLC, seeking
declaratory judgment regarding the amount of payment due under a
contract between the parties. Defendant now moves for summary
judgment, arguing that the court lacks personal jurisdiction and
that the action is barred by the Statute of Frauds. Plaintiff
also moves for summary judgment on its claim.

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1 I. Standard

2 Summary judgment is proper "if the movant shows that
3 there is no genuine dispute as to any material fact and the
4 movant is entitled to judgment as a matter of law." Fed. R. Civ.
5 P. 56(a). A material fact is one that could affect the outcome
6 of the suit, and a genuine issue is one that could permit a
7 reasonable jury to enter a verdict in the non-moving party's
8 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
9 (1986). The party moving for summary judgment bears the initial
10 burden of establishing the absence of a genuine issue of material
11 fact and can satisfy this burden by presenting evidence that
12 negates an essential element of the non-moving party's case.
13 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

14 Alternatively, the moving party can demonstrate that the
15 non-moving party cannot produce evidence to support an essential
16 element upon which it will bear the burden of proof at trial.

17 Id.

18 Once the moving party meets its initial burden, the
19 burden shifts to the non-moving party to "designate 'specific
20 facts showing that there is a genuine issue for trial.'" Id. at
21 324 (quoting then-Fed. R. Civ. P. 56(e)). To carry this burden,
22 the non-moving party must "do more than simply show that there is
23 some metaphysical doubt as to the material facts." Matsushita
24 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).
25 "The mere existence of a scintilla of evidence . . . will be
26 insufficient; there must be evidence on which the jury could
27 reasonably find for the [non-moving party]." Anderson, 477 U.S.
28 at 252.

1 In deciding a summary judgment motion, the court must
2 view the evidence in the light most favorable to the non-moving
3 party and draw all justifiable inferences in its favor. Id. at
4 255. "Credibility determinations, the weighing of the evidence,
5 and the drawing of legitimate inferences from the facts are jury
6 functions, not those of a judge . . . ruling on a motion for
7 summary judgment" Id.

8 II. Relevant Facts

9 Daniel Welker, then an employee of plaintiff, first
10 became acquainted with Matthew Lyons in 2008. (Welker Aff. in
11 Resp. to Def.'s Mot. for Summ. J. ("Welker Aff. II") ¶ 2 (Docket
12 No. 20-1).) Welker indicated to Lyons that plaintiff was
13 interested in purchasing distressed notes. (Id. ¶ 3.) Lyons
14 responded that he was "putting together a group" that could help
15 with such purchases. (Id. ¶ 4.) Lyons then created that group,
16 defendant in this suit, consisting of himself and two other
17 members: Thomas Driessen and Joseph Driessen. (Id. ¶ 5; Thomas
18 Driessen Decl. in Supp. of Def.'s Resp. to Pl.'s Mot. for Summ.
19 J. ¶ 2 (Docket No. 21-1).) Lyons asked Welker whether plaintiff
20 would be interested in using defendant's services to review and
21 potentially acquire certain distressed notes in a portfolio
22 offered by defendant. (Welker Aff. II ¶ 5.) The parties then
23 negotiated, via e-mail and phone, and executed a Consulting
24 Agreement. (Id. ¶ 6; see Def.'s Separate Statement of Facts in
25 Supp. of its Mot. for Summ. J. Ex. A ("Consulting Agreement")
26 (Docket No. 16-2).)

27 The Consulting Agreement was executed on May 15, 2009,
28 between plaintiff ("Client"), defendant ("Consultant"), and

1 Mobey, LLC ("Mobey").¹ (Consulting Agreement at 1.) The
 2 Consulting Agreement provides that:

3 Client hereby engages Consultant to provide advisory
 4 services to Client in connection with Client's possible
 5 purchase of one or more Loans described in the Portfolio
 6 Notice, including introductions to the Lender and/or the
 7 lender's representative, notifying Client of
 8 opportunities to purchase Loans, assistance with due
 9 diligence and related advisory services. Client hereby
 10 engages Mobey as Client's sole and exclusive agent for
 11 the purchase of Properties described in the Portfolio
 12 Notice.

13 (Id.)

14 The Consulting Agreement sets a term of engagement of
 15 four months, with non-circumvention obligations continuing for
 16 another six months. (Id. at 1, 4.) Compensation to defendant
 17 and Mobey is set by a fee schedule based on the purchase price of
 18 the loan or property purchased, due at the closing of the
 19 purchase. (Id. at 2.) Untimely payments are set to accrue
 20 interest at the rate of eight percent annually. (Id.)

21 The Consulting Agreement also includes a choice of law
 22 provision and forum selection clause:

23 This Agreement will be interpreted and construed
 24 exclusively in accordance with the laws of the State of
 25 Arizona without regard to its choice of law principles.
 26 The parties further agree that proper and exclusive venue
 27 for any dispute arising in connection with this Agreement
 28 will be the federal or state courts located in Maricopa
 County, Arizona.²

29 ¹ Mobey is not a party to this suit. It is unclear
 30 whether Mobey acted as an agent or played any role in the events
 31 at issue.

32 ² The parties agree that the forum selection clause is
 33 not enforceable under Idaho law but that the choice of law
 34 provision applies. See Cerami-Kote, Inc. v. Energywave Corp.,
 35 116 Idaho 56, 58-59 (1989); (see Def.'s Mem. in Supp. of Mot. for
 36 Summ. J. at 2:14-15, 5:11-13 (Docket No. 16).)

1 (Id. at 4-5.)

2 In June of 2009, plaintiff began bidding to purchase a
3 note secured by real property known as the "Trail Walk
4 Condominiums" in Kenmore, Washington. (Welker Aff. in Supp. of
5 Mot. for Summ. J. ("Welker Aff. I") ¶ 2 (Docket No. 17-2); Lyons
6 Decl. in Supp. of Def.'s Resp. to Pl.'s Mot. for Summ. J. ¶ 4
7 (Docket No. 21-1).) During the bidding process, the price on the
8 note became too competitive, and Welker requested that defendant
9 take a reduced commission in order to help plaintiff purchase the
10 note. (Welker Aff. I ¶ 2.) The parties dispute whether they
11 ever agreed to a reduced commission; plaintiff represents that
12 Lyons agreed to a reduced fee of \$10,000.00. (Id. ¶ 4.)
13 Plaintiff then placed a final bid and successfully purchased the
14 Trail Walk note on June 29, 2009. (Id. ¶ 6; Lyons Decl. ¶ 12.)

15 On September 4, 2009, Lyons sent plaintiff a letter
16 offering to accept \$10,000.00 in full satisfaction of plaintiff's
17 obligations relating to the Trail Walk note if payment was
18 received by September 25, 2009. (Def.'s Separate Statement of
19 Facts in Supp. of its Mot. for Summ. J. Ex. C.) Based on the fee
20 schedule in the Consulting Agreement, the fee for the Trail Walk
21 note would otherwise have been \$171,240.00. (Id. Ex. B.)
22 Plaintiff did not make a payment by September 25. (Lyons Decl. ¶
23 17.) On October 12, 2009, Lyons sent Welker an e-mail informing
24 him that the deadline to pay had expired. (Id. ¶ 18.)

25 Plaintiff then filed suit in Ada County Court on July
26 21, 2010, which was removed to this court on September 2, 2010.
27 Plaintiff seeks declaratory judgment that it owes only \$10,000.00
28 to defendant.

1 After plaintiff filed this action, defendant filed an
2 action against plaintiff in the District of Arizona, which was
3 dismissed in deference to the instant action based solely on the
4 first-to-file rule. (Def.'s Separate Statement of Facts in Supp.
5 of Mot. for Summ. J. ¶ 6 (Docket No. 16-2).)

6 III. Discussion

7 A plaintiff has the burden of establishing that the
8 court has personal jurisdiction over a defendant. Doe v. Unocal
9 Corp., 248 F.3d 915, 922 (9th Cir. 2001) (citing Cabbage v.
10 Merchant, 744 F.2d 665, 667 (9th Cir. 1984)).

11 "Personal jurisdiction over a nonresident defendant is
12 tested by a two-part analysis. First, the exercise of
13 jurisdiction must satisfy the requirements of the applicable
14 state long-arm statute. Second, the exercise of jurisdiction
15 must comport with federal due process." Dow Chem. Co. v.
16 Calderon, 422 F.3d 827, 830 (9th Cir. 2005) (quoting Chan v.
17 Soc'y Expeditions, Inc., 39 F.3d 1398, 1404-05 (9th Cir. 1994)).
18 Idaho's long-arm statute is "intended to exercise all the
19 jurisdiction available to the State of Idaho under the due
20 process clause of the United States Constitution." Doggett v.
21 Elecs. Corp. of Am., Combustion Control Div., 93 Idaho 26, 30
22 (1969). Therefore, the remaining issue is whether the court's
23 exercise of personal jurisdiction over defendant comports with
24 federal due process. See Calderon, 422 F.3d at 831.

25 For a court to exercise personal jurisdiction over a
26 nonresident defendant, due process requires that the defendant
27 have "at least 'minimum contacts' with the relevant forum such
28 that the exercise of jurisdiction 'does not offend traditional

1 notions of fair play and substantial justice.'" Schwarzenegger
2 v. Fred Martin Motor Co., 374 F.3d 797, 801 (9th Cir. 2004)
3 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

4 A district court may exercise either general or specific
5 jurisdiction over a non-resident defendant. Id. at 801-02.
6 Plaintiff does not contend that the court has general
7 jurisdiction; only specific jurisdiction is at issue.

8 The Ninth Circuit applies a three-part test to
9 determine whether the exercise of specific personal jurisdiction
10 is proper:

11 (1) The non-resident defendant must purposefully direct
12 his activities or consummate some transaction with the
13 forum or resident thereof; or perform some act by which
14 he purposefully avails himself of the privilege of
conducting activities in the forum, thereby invoking the
benefits and protections of its laws;

15 (2) the claim must be one which arises out of or relates
to the defendant's forum-related activities; and

16 (3) the exercise of jurisdiction must comport with fair
play and substantial justice, i.e., it must be
reasonable.

17 Id. at 802 (internal quotation marks omitted) (quoting Lake v.
18 Lake, 817 F.2d 1416, 1421 (9th Cir. 1987)). "The plaintiff bears
19 the burden of satisfying the first two prongs of the test. If
20 the plaintiff fails to satisfy either of these prongs, personal
21 jurisdiction is not established in the forum state." Id.
22 (citation omitted). "On the other hand, if the plaintiff
23 succeeds in satisfying both of the first two prongs, 'the burden
24 then shifts to the defendant to present a compelling case that
25 the exercise of jurisdiction would not be reasonable.'" Menken
26 v. Emm, 503 F.3d 1050, 1057 (9th Cir. 2007) (quoting
27 Schwarzenegger, 374 F.3d at 802).

28 Either purposeful availment of the forum or the

1 purposeful direction of activities towards the forum can satisfy
2 the first prong. "A purposeful availment analysis is most often
3 used in suits sounding in contract. A purposeful direction
4 analysis, on the other hand, is most often used in suits sounding
5 in tort." Schwarzenegger, 374 F.3d at 802 (citation omitted).
6 Here, the action sounds in contract. Furthermore, plaintiff does
7 not argue that defendant directed any of its activities toward,
8 or consummated any transactions in, Idaho. Accordingly, the
9 court will apply the purposeful availment analysis.

10 At its base, the purposeful availment requirement seeks
11 to ensure that a defendant is not haled into court for contacts
12 that are random, fortuitous, or attenuated. Burger King Corp. v.
13 Rudzewicz, 471 U.S. 462, 475 (1985). It focuses on a defendant's
14 own actions that create a connection with the forum. Id. To
15 have purposefully availed itself of the privilege of doing
16 business in the forum, a defendant must have "performed some type
17 of affirmative conduct which allows or promotes the transaction
18 of business within the forum state." Sher v. Johnson, 911 F.2d
19 1357, 1362 (9th Cir. 1990) (quoting Sinatra v. Nat'l Enquirer,
20 Inc., 854 F.2d 1191, 1195 (9th Cir. 1988)). In this way, a
21 defendant "purposely avails itself of the privilege of conducting
22 activities within the forum State, thus invoking the benefits and
23 protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253
24 (1958). In exchange for the forum state's benefits and
25 protections, the defendant must submit to the burden of
26 litigation in the forum state. Burger King, 471 U.S. at 476.

27 "A showing that a defendant purposefully availed
28 himself of the privilege of doing business in a forum state

1 typically consists of evidence of the defendant's actions in the
2 forum, such as executing or performing a contract there."
3 Schwarzenegger, 374 F.3d at 802. However, "[c]onsistent with the
4 Supreme Court's holding in Burger King, merely contracting with a
5 resident of the forum state is insufficient to confer specific
6 jurisdiction over a nonresident." Ziegler v. Indian River Cnty.,
7 64 F.3d 470, 473 (9th Cir. 1995). Whether a contract signifies
8 purposeful availment depends upon a number of additional factors,
9 which include "prior negotiations and contemplated future
10 consequences, along with the terms of the contract and the
11 parties' actual course of dealing." Burger King, 471 U.S. at
12 479.

13 Here, the only potential basis for jurisdiction over
14 defendant is the Consulting Agreement between the parties. The
15 Supreme Court has emphasized that "parties who 'reach out beyond
16 one state and create continuing relationships and obligations
17 with citizens of another state' are subject to regulation and
18 sanctions in the other State for the consequences of their
19 activities." Burger King, 471 U.S. at 473 (quoting Travelers
20 Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950)). "Thus, if
21 the defendant directly solicits business in the forum state, the
22 resulting transactions will probably constitute the deliberate
23 transaction of business invoking the benefits of the forum
24 state's laws." Decker Coal Co. v. Commonwealth Edison Co., 805
25 F.2d 834, 840 (9th Cir. 1986). "Similarly, conducting contract
26 negotiations in the forum state will probably qualify as an
27 invocation of the forum law's benefits and protections." Id.

28 However, when a plaintiff solicits a defendant to enter

1 into a contract, the defendant is not normally considered to have
2 availed itself of the laws of the plaintiff's state. See,
3 e.g., Sher, 911 F.2d at 1363 ("Out-of-state legal representation
4 does not establish purposeful availment of the privilege of
5 conducting activities in the forum state, where the law firm is
6 solicited in its home state and takes no affirmative action to
7 promote business within the forum state."); Advance Fin. Res.,
8 Inc. v. Cottage Health Sys., Inc., No. CV 08-1084, 2009 WL
9 1080547, at *4, 6 (D. Or. Apr. 21, 2009) (finding no personal
10 jurisdiction over defendant after considering, inter alia, that
11 plaintiff initiated contract discussions and defendant did not
12 benefit from the fact that plaintiff happened to reside in
13 Oregon).

14 Even taking the facts in the light most favorable to
15 plaintiff, defendant cannot be said to have initiated the
16 parties' contract discussions. It was an employee of plaintiff
17 who first informed Lyons, one of the members of defendant, that
18 plaintiff was looking for a consultant; in response, defendant
19 then offered its services to plaintiff. Plaintiff attempts to
20 characterize the transaction as part of a larger, ongoing
21 relationship between the parties. However, plaintiff still fails
22 to show that defendant reached out first. At best, the
23 interaction could be described as mutual solicitation. Even if
24 Lyons reached out to plaintiff by explaining that he had formed a
25 company that could serve plaintiff's previously-expressed needs,
26 such behavior falls short of the sort of solicitation that would
27 serve as a basis for finding that a defendant purposefully
28 availed itself of the forum state's laws.

1 Plaintiff has presented no other facts that could
2 support a finding of purposeful availment. There is no evidence
3 that any representative of defendant ever traveled to Idaho. The
4 parties only communicated via telephone and e-mail, which is
5 insufficient to establish purposeful availment. See Peterson v.
6 Kennedy, 771 F.2d 1244, 1262 (9th Cir. 1985) ("[O]rdinarily 'use
7 of the mails, telephone, or other international communications
8 simply do not qualify as purposeful activity invoking the
9 benefits and protection of the [forum] state.'" (quoting Thos P.
10 Gonzales Corp. v. Consejo Nacional de Produccion de Costa Rica,
11 614 F.2d 1247, 1254 (9th Cir. 1980)) (second alteration in
12 original).

13 Furthermore, the Consulting Agreement required
14 defendant to perform services in Arizona, not Idaho. Plaintiff
15 has not presented any evidence that defendant could benefit from
16 the fact that plaintiff resides in Idaho. In a number of cases
17 with facts similar to these, courts have declined to find
18 purposeful availment. See Sher, 911 F.2d at 1360, 1366 (where
19 plaintiff in California solicited Florida attorneys to represent
20 him in Florida and one attorney traveled to California on three
21 occasions to prepare the case, the individual attorneys had not
22 purposefully availed themselves of California law); Carreras v.
23 PMG Collins, LLC, 741 F. Supp. 2d 375, 382-83, 385-86 (D.P.R.
24 2010) (where defendants in Florida contacted plaintiffs in Puerto
25 Rico regarding property, plaintiffs signed purchase agreements to
26 buy property in Florida from defendants, and Florida law governed
27 the agreements, defendants could not have reasonably anticipated
28 being subject to suit in Puerto Rico); Advance Fin. Res., Inc.,

1 2009 WL 1080547, at *4-6 (where plaintiff in Oregon initiated
2 contact with defendant in California, the parties contacted each
3 other via telephone, e-mail, and facsimile, no representatives of
4 defendant traveled to Oregon, plaintiff carried out its
5 obligations in Oregon and defendant carried out its obligations
6 in California, and California law governed the contract, no
7 purposeful availment found); Inamar Inv., Inc. v. Lodge Props.,
8 Inc., 737 F. Supp. 12, 12-14 (D.P.R. 1990) (where defendant, a
9 condominium manager in Colorado, mailed rental agreement to
10 plaintiff, a corporate citizen of Puerto Rico that owned an
11 interest in the condominium, plaintiff signed agreement, the
12 parties corresponded via letters, material performance of the
13 contract occurred in Colorado, and Colorado law governed the
14 contract, defendant never purposefully availed itself of the
15 benefits and protections of Puerto Rico law).

16 Additionally, the fact that the parties expressly
17 agreed that Arizona law governed the Consulting Agreement is an
18 important factor in determining whether defendant purposefully
19 availed itself of the benefits and protections of Idaho law.
20 Advance Fin. Res., Inc., 2009 WL 1080547, at *4; see Jones v.
21 Petty-Ray Geophysical Geosource, Inc., 954 F.2d 1061, 1069 (5th
22 Cir. 1992) (noting that choice of law provision designating non-
23 forum state's laws "indicate[d] rather forcefully" that the
24 defendant "did not purposely direct its activities toward" the
25 forum); Nanoexa Corp. v. Univ. of Chicago, No. 10-CV-2631, 2010
26 WL 4236855, at *5 (N.D. Cal. Oct. 21, 2010) ("[Defendant]
27 received no benefit, privilege, or protection from California, as
28 the parties agreed to an Illinois choice of law provision in the

1 License Agreement."). If defendant intended to avail itself of
2 the protections of Idaho law, it presumably would not have
3 negotiated to include the Arizona choice-of-law provision and
4 forum selection clause in the Consulting Agreement. That
5 defendant specifically sought the application of Arizona law
6 strongly indicates that it did not purposefully avail itself of
7 Idaho law. Accordingly, plaintiff has not demonstrated that
8 defendant purposefully availed itself of the privilege of
9 conducting activities in Idaho, thereby invoking the benefits and
10 protections of its laws.³

11 Given that plaintiff cannot establish the first prong
12 of the test for specific personal jurisdiction, the court need
13 not proceed to the remaining inquiries under the Ninth Circuit's
14 test. See Boschetto v. Hansing, 539 F.3d 1011, 1016 (9th Cir.
15 2008) ("[I]f the plaintiff fails at the first step, the
16 jurisdictional inquiry ends and the case must be dismissed.").
17 Plaintiff has thus failed to demonstrate that the court has
18 specific personal jurisdiction over defendant.

19 Pursuant to 28 U.S.C. § 1631, if a court "finds that
20 there is a want of jurisdiction, the court shall, if it is in the
21 interest of justice, transfer such action . . . to any other such
22 court in which the action . . . could have been brought at the
23 time it was filed or noticed" 28 U.S.C. § 1631;
24 see Miller v. Hambrick, 905 F.2d 259, 262 (9th Cir. 1990). The
25

26 ³ Defendant has requested an evidentiary hearing in the
27 event that the court should find that there are questions of
28 fact; plaintiff has not made such a request. An evidentiary
hearing is not necessary given that, even taking the facts in the
light most favorable to plaintiff, plaintiff has not demonstrated
an issue of fact as to defendant's purposeful availment.

1 court can find no reason that this action could not have been
2 brought in the District of Arizona.

3 Dismissing this action and requiring the parties to
4 file a new action in Arizona would waste both the parties' and
5 the court's resources. "Normally transfer will be in the interest
6 of justice because normally dismissal of an action that could be
7 brought elsewhere is 'time-consuming and justice-defeating.'" Miller, 905 F.2d at 262 (quoting Goldlawr, Inc. v. Heiman, 369
8 U.S. 463, 467 (1962)). Defendant previously filed an action
9 against plaintiff in the District of Arizona, which was dismissed
10 in deference to the instant action solely on the ground that this
11 action was first-filed. (Def.'s Separate Statement of Facts in
12 Supp. of Mot. for Summ. J. ¶ 6.) Accordingly, the court finds
13 that transfer to the District of Arizona would be in the interest
14 of justice.
15

16 IT IS THEREFORE ORDERED that:

17 (1) Defendant's motion for summary judgment be, and the same
18 hereby is, GRANTED on the ground that this court lacks personal
19 jurisdiction over defendant and DENIED as moot in all other
20 respects;

21 (2) Plaintiff's motion for summary judgment be, and the same
22 hereby is, DENIED as moot; and

23 (3) This action is hereby ordered TRANSFERRED to the United
24 States District Court for the District of Arizona.

25 DATED: July 22, 2011

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27 

28 WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE