Docket: **CIVIL ACTION NO. 2014-01853**
Date: **May 6, 2015**
Parties: **OPENRISK, LLC vs. MICROSTRATEGY SERVICES CORPORATION & others[1]**
Judge: **/s/Mitchell H. Kaplan**

MEMORANDUM OF DECISION AND ORDER ON MOTION BY DEFENDANTS MARC ROSTON, SPECTANT GROUP, LLC, MNR CAPITAL, LLC, AND ARCVANDAM CORP. TO DISMISS FOR LACK OF PERSONAL JURISDICTION

In this action, OpenRisk, LLC (OpenRisk) asserted claims against: (i) Marc Roston and three entities he is alleged to control, Spectant Group, LLC (Spectant), MNR Capital, LLC (MNR), and Arcvandam Corp., (Arcvandam) (collectively, Moving Defendants); and (ii) two other corporations with whom OpenRisk had contracts, Microstrategy Services Corporation (MicroStrategy) and Adeptia, Inc. (Adeptia).[2] As to the Moving Defendants, OpenRisk alleges that they misappropriated OpenRisk's intellectual property and interfered with its vendor contracts with the assistance of former OpenRisk employees and consultants.[3] The matter is now before the court on the Moving Defendants' motion to dismiss for lack of personal jurisdiction pursuant to Mass. R. Civ. P. 12(b)(2). For the reasons that follow, the motion is ALLOWED.

BACKGROUND

The following facts are taken from OpenRisk's second verified complaint, the affidavit filed in opposition to the Moving Defendants' motion,[4] and the affidavits submitted by the Moving Defendants to the extent they are not disputed by OpenRisk or contradict the complaint.

OpenRisk was organized under the laws of Delaware in January 2011. It identifies its principal place of business as 65 Clark Street in Belmont, Massachusetts, which is also the home address of James Aylward, OpenRisk's CEO and a major equity holder in the company. OpenRisk's business plan was to develop a software platform to host insurance catastrophe risk models on an internet-based private cloud (the Platform). The Platform was conceived to permit insurance, reinsurance, and brokerage companies to run such models without the need to maintain their own hardware, high-end modeling specialists, and IT support.

The company was initially funded with investments aggregating approximately $800,000 from seven investors. Two of those investors, Scott Waxler and James Aylward, together beneficially owned a majority interest in the Company and lived in Massachusetts. Waxler, Aylward and Craig Ott, a New Jersey resident, constituted OpenRisk's Board of Directors.

OpenRisk originally had four employees: Aylward was CEO; Ott was President; Shajy Mathai, a New Jersey resident, served as Chief Technical Officer; and Richard Murnane, who resided in Maryland, was Chief Scientist. Even though OpenRisk was nominally based in Belmont, Massachusett in Aylward's home, Ott, Mathai, and Murnane (collectively, the Former Employees) apparently performed their work in the states where they resided. The Former Employees were parties to Service Agreements with OpenRisk and OpenRisk's Operating Agreement, both of which included covenants not to disclose or use OpenRisk's confidential information for their own benefit. The Former Employees had previously worked together in a start-up venture.

In addition to these four employees, OpenRisk retained two India-based software engineering consultants, Nitish Mathew and Dileep Shivagangoppa ("Shiva"), who were pre-existing contacts of Mathai. OpenRisk hired them to manage the work being performed by CIGNEX Technologies Inc. (CIGNEX) and Adeptia, two software engineering firms, neither of which is based in Massachusetts, that OpenRisk retained to develop software for the Platform. Mathai oversaw Mathew and Shiva's work. There are no allegations that any of

the software development work undertaken by the Former Employees or these consultants occurred in Massachusetts.

Some time prior to August 2011, an investment banker at Guy Carpenter & Company, LLC (Guy Carpenter), contacted Marc Roston, then a New Jersey resident,[5] to suggest that he consider investing in OpenRisk. Matthai had previously worked for Guy Carpenter where he developed the "conceptual foundation" for the Platform. There is no allegation that Roston's meetings with Guy Carpenter had any nexus with Massachusetts. Roston, who had experience with the risk management processes of large reinsurance companies, initially contemplated becoming a passive investor. However, after some investigation (presumably discussions with the Former Employees), he decided that he preferred to acquire a controlling interest in OpenRisk. His plan was to move certain pieces of OpenRisk into a company that he controlled. By no later than early August, without the knowledge of Aylward or Waxler, Roston was having conversations with Ott concerning his plans.

Although not alleged in the complaint, Roston executed a non-disclosure agreement (NDA) as principal of MNR, a limited liability company that he controlled, with OpenRisk, as of September 14, 2011. Ott signed the NDA on behalf of OpenRisk, presumably in New Jersey. The agreement contains a New Jersey choice of law provision but no forum selection clause. It provides that "[t]his Agreement shall not constitute, create, give effect or otherwise recognize a business relationship . . . of any kind." NDA at § 8(c).

On September 22, 2011, Roston transmitted a formal offer to invest $200,000, based on a $400,000 valuation of Openrisk, in exchange for a controlling interest in the company along with full legal releases for Roston and the Former Employees. OpenRisk, however, did not accept the offer. Aylward and Waxler felt that Roston's valuation of the company was far too low. At or about that time, Roston told Ott that he would not participate in the company as long as Aylward and Waxler were involved in managing its operations. On October 6, 2011, Roston submitted another offer, expiring on October 11, 2011. The offer altered some terms of the September 22nd offer, but was essentially the same as the one previously rejected.

At some time prior to Roston's first offer, Roston allegedly told the Former Employees that if he acquired control of OpenRisk, he would offer them equity and benefits beyond what they were presently receiving. It was for this reason that they were willing to share confidential information with Roston and collude with him.

On October 11, 2011, the same day Roston's second offer expired, the Former Employees resigned en masse without prior notice to OpenRisk. Through counsel, the Former Employees sent OpenRisk a letter declaring their respective Service Agreements "null and void, effective immediately" due to the nonpayment of salary.[6] In response to the resignations, OpenRisk sent written demands to the Former Employees for the return of OpenRisk's property in their possession and control but the employees did not comply. Instead, the Former Employees continued porting over items into the Platformcloud space, which was provided by MicroStrategy under a contract with OpenRisk,as if they remained employees of OpenRisk.

At some point, Mathew and Shiva also stopped working for OpenRisk. On October 26, 2011, Aylward emailed them requesting that they return any of OpenRisk's intellectual property. Mathew and Shiva informed Mathai of the request and did not respond to Aylward.

OpenRisk's contract with MicroStrategy required it to pay an initial $15,000 set-up fee by October 31, 2011. On October 31, 2011, Mathai, without Aylward's knowledge,[7] made the $15,000 payment to MicroStrategy and was immediately reimbursed by Roston. On November 1, 2011, an account executive from MicroStrategy, who had been told not to reveal that Mathai had already made the payment, explained to Aylward that Mathai had been able to extend the payment deadline by one day. Roston and the Former Employees desired to conceal the payment to maintain further leverage on OpenRisk to accept Roston's offer for a controlling stake in the company and to keep secret

their continued development of the Platform. Aylward and Waxler, however, did not accept Roston's terms and negotiations ended.

Ten days after negotiations terminated, Roston formed Spectant, a New Jersey-based company. The Former Employees, Matthew, and Shiva joined the company as consultants. Around this time, Roston also formed Arcvandam, another New Jersey-based company, allegedly to provide capital to Spectant.

Thereafter, Roston and the Former Employees continued to develop the Platform, with the assistance of the same companies that had supported OpenRisk, including Adeptia, and MicroStrategy.[8] As a result, Spectant obtained access to OpenRisk's proprietary work product located in the MicroStrategy cloud and the source code developed by Adeptia. Because of Spectant's relationship with the Former Employees and OpenRisk's vendors, Spectant was able to obtain OpenRisk's trade secrets, i.e., its software architecture and source code as well as its business strategies and information about its vendor contracts and prospective customers, and to target OpenRisk's business opportunities.

In November 2011, Waxler, Aylward and other OpenRisk investors filed their lawsuit against the Former Employees that is described above. In June 2014, OpenRisk brought the present lawsuit against the Moving Defendants, MicroStrategy, and Adeptia. OpenRisk asserts that the Moving Defendants tortiously interfered with the contractual relationships OpenRisk maintained with its vendors (Count II); misappropriated OpenRisk trade secrets in violation of the common law and G. L. c. 93, § 42 (Counts III and IV); engaged in a conspiracy with the Former Employees, Mathew, Shiva, MicroStrategy, and Adeptia to misappropriate and use OpenRisk's trade secrets (Count V); and violated G. L. c. 93A through these actions (Count VII). OpenRisk also brings a separate claim against Roston for aiding and abetting the Former Employees' breach of fiduciary duties (Count I) and seeks an accounting (Count VIII).

DISCUSSION

A motion to dismiss for lack of personal jurisdiction may either be resolved by use of the affidavit-based prima facie standard or through an evidentiary hearing. Cepeda v. Kass, 62 Mass. App. Ct. 732, 737-739 (2004). The prima facie method, which is being utilized here, is the typical method of resolving the motion. Id. at 737. Under this approach, the court relies solely on affidavits and other written evidence to determine "whether the plaintiff has proffered evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction." Id. (internal quotes omitted). In evaluating a prima facie showing, the court "take[s] specific facts affirmatively alleged by the plaintiff as true (whether or not disputed) and construe[s] them in the light most congenial to the plaintiff's jurisdictional claim." Id. at 738 (internal quotes omitted). The plaintiff has a burden of production, rather than persuasion. Id. If the court denies the motion using the prima facie method, the plaintiff must, "eventually establish jurisdiction by a preponderance of the evidence at an evidentiary hearing or at trial." Id.

In assessing whether personal jurisdiction exists over a nonresident defendant, the court typically engages in a two step inquiry asking first, whether the jurisdiction is authorized by the Massachusetts long-arm statute and second, whether the exercise of jurisdiction under state law is consistent with basic due process. See Good Hope Indus., Inc. v. Ryder Scott Co., 378 Mass. 1, 5-6 (1979).[9] However, the Supreme Judicial Court has long interpreted the long-arm statute as asserting "jurisdiction over the person to the limits allowed by the Constitution of the United States." Automatic Sprinkler Corp. of America v. Seneca Foods Corp., 361 Mass. 441, 443 (1972). In this case, it seems far more expeditious to follow the lead of the First Circuit Court of Appeals and "sidestep the statutory inquiry and proceed directly to the constitutional analysis." Evans Cabinet Corp. v. Kitchen Int'l, Inc., 593 F.3d 135, 146 (1st Cir. 2010) (internal quotes omitted).[10]

The exercise of jurisdiction does not violate the basic requirements of due process if the defendant had certain minimum contacts with the Commonwealth. Tatro v. Manor Care, Inc., 416 Mass. 763, 772 (1994). To establish that the defendant had sufficient contacts, a plaintiff must demonstrate that: (1) its claim arises from, or relates to, the defendant's activities within Massachusetts; (2) the defendant, through its in-state contacts, purposely availed itself of the privilege of conducting activities in the state; and (3) jurisdiction over the defendant does not offend traditional notions of fair play and substantial justice (i.e., the Gestalt Factors). Id. at 772-773; see also Sawtelle v. Farrell, 70 F.3d 1381, 1389 (1st Cir. 1995). In the present case, OpenRisk cannot satisfy either the relatedness component of the due process analysis with respect to the Moving Defendants nor the purposely availing itself of the privilege of conducting activities in Massachusetts test and therefore has failed to demonstrate that the exercise of jurisdiction would not violate their due process rights.[11]

To meet the relatedness requirement a plaintiff must do more than show that its claims "arose out of the general relationship between the parties." Fern v. Immergut, 55 Mass. App. Ct. 577, 584 (2002), quoting Sawtelle, 70 F.3d at 1389. Rather, "the action must directly arise out of the specific contacts between the defendants and the forum state." Id., quoting Sawtelle, 70 F.3d at 1389 (emphasis in original). MNR, Spectant, and Arcvandam are alleged to be entities wholly owned and controlled by Roston. The relevant question is whether Roston's minimal contacts with Massachusetts is the conduct out of which OpenRisk's claims against him or his entities arose.[12]

Roston's contacts with Massachusetts consist of email communications and telephone calls with Aylward and Waxler, concerning his offer to acquire an interest in OpenRisk.[13] In these communications, Roston received certain unspecified financial information, apparently including information concerning the terms underwhich other investors had made investments in OpenRisk. These contacts, however, have little connection with the wrongs allegedly perpetrated by Roston. The gravamen of OpenRisk's complaint is that Roston misappropriated OpenRisk's intellectual property with the help of the Former Employees, Mathew, Shiva, MicroStrategy, and Adeptia, and used it to tortiously interfere with OpenRisk's contracts with its vendors and customers. OpenRisk also asserts that Roston aided and abetted the Former Employees' breaches of fiduciary duty by encouraging them to provide him with confidential information and trade secrets concerning OpenRisk. None of these actions involve any contact with Massachusetts: the engineers and scientists and vendors involved in the work of OpenRisk neither lived nor worked in Massachusetts. Aylward's home in Belmont, Massachusetts was identified in corporate filings as OpenRisk's principal place of business, but there is nothing in the complaint or any other material submitted by OpenRisk that suggests that any of the work on the Platform or other engineering efforts happened in Massachusetts.

To the contrary, all of the engineers and scientists working on the development of the Platform lived and worked in New Jersey (Ott and Mathai) or Maryland (Murnane);[14] or were located in India (Mathew and Shiva). The conduct which forms the basis for all of OpenRisk's claims, Roston's alleged theft of OpenRisk's intellectual property and enticement of the Former Employees, happened outside of Massachusetts. Roston's communications with Aylward and Waxler went only to his unsuccessful offer to purchase an interest in OpenRisk.[15] He neither learned of the opportunity to invest in OpenRisk, discovered the value of its trade secrets, nor wrongfully encouraged the Former Employees to breach agreements with or fiduciary duties to OpenRisk in Massachusetts. The complaint identifies no specific contacts with OpenRisk's putative customers in Massachusetts, and neither Adeptia nor MicroStrategy are located in Massachusetts. Indeed, although they were sued in this action, the claims against them have been dismissed, and, if they are still being pursued at all, those cases are now filed in

Illinois and Virginia. See Fern, 55 Mass. App. Ct. at 584 (relatedness component of due process analysis not satisfied where defendant law firm's "sending of a draft letter and forms to Massachusetts could not conceivably have caused the alleged negligent representation").

OpenRisk places special emphasis on the fact that Roston signed a NDA with it and apparently suggests that its current claims arise from Roston's alleged breach of the NDA. This argument has no merit. As an initial matter, the NDA was signed in New Jersey by Roston and Ott and recites that it is governed by New Jersey law. But of greater significance to this motion is the fact that OpenRisk is not bringing a breach of contract claim based on the NDA. Indeed, the NDA is not even mentioned in the complaint. Both the complaint as well as emails that OpenRisk included in the record make clear that Roston acquired OpenRisk's intellectual property, to the extent it had any, in the course of his secret communications with the Former Employees and through OpenRisk's vendors. The complaint does not allege, nor could it, that it was through the NDA that Roston was exposed to any relevant confidential information or trade secrets. The NDA is a red herring. This case is not about information Roston gained as a result of the execution of an NDA; rather, it is principally about Roston's alleged secret arrangements with the Former Employees and his access to information in the possession of Microstrategy and Adeptia. Compare Wolverine Proctor & Schwartz, Inc. v. Aeroglide Corp., 394 F.Supp.2d 299, 308-309 (D. Mass. 2005) (conversations over the course of a decade between the parties about possibility of merger and visit by defendant to Massachusetts instrumental in formation of confidentiality agreement the breach of which was at the core of plaintiff's claims).

Nor can it reasonably be asserted that Roston purposely availed himself of the privilege of doing business in Massachusetts by emailing an offer to purchase an interest in OpenRisk to Aylward and Waxler that was summarily rejected. See Sawtelle v. Farrell, 70 F.3d 1381, 1391-1394 (describing factors indicating purposeful availment).

Fundamentally, OpenRisk's claims arise out of Roston's allegedly nefarious conspiracy with the Former Employees. They were the creators of and understood the technology. They had the relationships with Microstrategy, Adeptia, and the India-based consultants. The Former Employees were certainly subject to the jurisdiction of the Massachusetts courts, as Waxler and Aylward financed, at least for a time, their development activities, and they became members of a business which listed its principal place of business as Massachusetts, even though they continued to work in other states. See note 14, supra. The substantive and controlling question presented by this case is: Whether a Massachusetts court may assert personal jurisdiction over a non-resident, all of whose material, allegedly tortious, acts occurred outside the state, because those acts were taken in concert with individuals who were clearly subject to personal jurisdiction in Massachusetts? Stated somewhat differently, under such circumstances can the personal jurisdiction of the co-conspirators be imputed to the out-of-state defendant?

While the Massachusetts appellate courts have yet to address this question of jurisdiction by association or imputation, decisions from other courts caution against attributing the contacts of alleged co-conspirators to a defendant. See, e.g., In re New Motor Vehicles Canadian Export, 307 F.Supp.2d 145, 157-158 (D. Me. 2004) (explaining why the First Circuit would not likely recognize a conspiracy theory of personal jurisdiction and collecting case law and legal commentary discussing the subject). Some courts have, however, been more receptive to this argument. See, e.g., Chenault v. Walker, 36 S.W.3d 45 (Tenn. 2001); Gibbs v. Primelending, 381 S.W.3d 829 (Ark. 2011). Although, the weight of authority seems to favor the rejection of this theory of personal jurisdiction. In this case, the court might engage in a more strenuous intellectual struggle over this issue if the Former Employees were co-defendants with Roston and his entities. However, Aylward and Waxler (and nominally other OpenRisk investors) sued

the Former Employees some three years before this action was filed and that case is over. This is not a situation in which a plaintiff would have to choose between having to litigate two suits in different states or filing one law suit in a foreign jurisdiction. Moreover, while the case is before the court on a personal jurisdiction motion filed by Roston and entities he controls, not a forum non conveniens motion, the court notes that the most important non-party witnesses in this case will be Ott and Mathai, who live in New Jersey and cannot be compelled to testify in Massachusetts. They will have to testify concerning whose technology is at issue, theirs or OpenRisk's; its value, if any; what efforts were made to profit from it; and their communications and relationship with Roston. Under these circumstances this court declines to adopt a conspiracy theory of personal jurisdiction.

ORDER

For the foregoing reasons, the motion to dismiss brought by Marc Roston, Spectant Group, LLC, MNR Capital, LLC, and Arcvandam Corp. is ALLOWED. As the other defendants were previously dismissed, Microstrategy by a prior order of the court and Adeptia by voluntary dismissal, Final Judgment shall enter.

/s/Mitchell H. Kaplan
Justice of the Superior Court

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[1] Marc Roston, Spectant Group, LLC, MNR Capital, LLC, Arcvandam Corp., and Adeptia, Inc.

[2] On November 24, 2014, this court (Billings, J) issued an order dismissing Microstrategy as a defendant based on a forum selection clause in its contract with OpenRisk requiring all disputes arising out of the contract to be brought in Virginia, where Microstrategy had already commenced a collection case against OpenRisk. Adeptia filed a similar motion based upon a contractual forum selection clause requiring claims against it to be brought in Illinois. OpenRisk dismissed its claims against Adeptia before that motion was heard. As a result, the Moving Defendants are the only remaining defendants in this case.

[3] Investors in OpenRisk (represented by the same counsel that represents OpenRisk in this case) brought suit against these employees, and OpenRisk as a nominal defendant, in a separate action. Nekroski, et al. v. Mathai, et al., Suffolk Sup. Ct. CA No. 11-4315. The factual allegations and claims in that case were very much the same as those asserted in this case. That matter was reported settled and dismissed.

[4] The affidavit submitted by OpenRisk to support its showing of personal jurisdiction, signed by its counsel, makes no averments of jurisdictional fact but instead refers to documents attached to the affidavit, including a number of emails between the parties and OpenRisk's former employees.

[5] Roston apparently now lives in Montana.

[6] During this time period, OpenRisk had no revenue and had apparently burned through all of its capital. It owed the Former Employees several months of back pay.

[7] The complaint alleges that Aylward did not learn of the payment until late November 2011. It may be noted, however, that the record contains an email from Aylward to Roston dated October 30, 2011, demanding that either Roston or the Former Employees pay "the

Microstrategy $15K invoice by wire before noon tomorrow (instructions attached).”

[8] MicroStrategy initially made little distinction between OpenRisk and Spectant when conducting its work. It operated as if Spectant was OpenRisk, accepting payments from Roston under its contract with OpenRisk. MicroStrategy, however, eventually signed a separate agreement with Spectant.

[9] In Paragraph 9 of its complaint, OpenRisk alleges that the court has “both general and specific personal jurisdiction over the defendants.” In its opposition, OpenRisk makes only a claim for specific jurisdiction and there appears to be nothing in the record that suggests that general jurisdiction exists.

[10] Here, proceeding directly to the due process analysis is particularly appropriate. The applicability of the long-arm statute is an exceedingly close question, specifically in connection with a fair application of G. L. c. 233A, § 3(a).

[11] Having reached this conclusion, the court does not address the Gestalt factors.

[12] In its surreply, OpenRisk argues that Roston traveled to Boston in January 2012 with Mathai on behalf of Spectant to meet with a risk catastrophe modeling company. There is no suggestion that anything came of this meeting. OpenRisk fails to explain how this single visit gives rise to any of the claims before the court.

[13] Roston also sent a few emails to OpenRisk shareholder Richard McDonald, a Massachusetts resident, during the course of the negotiations.

[14] In the action that Aylward and Waxler filed against the Former Employees, the Former Employees counterclaimed for their unpaid wages under the Massachusetts Wage Act, G. L. c. 149, § 148 et seq. Aylward and Waxler moved to dismiss on the grounds that those claims had to be pursued administratively in New Jersey and Maryland because the Former Employees did not work in Massachusetts and had no rights under the Massachusetts Wage Act. Their motion was allowed.

[15] OpenRisk tries to overcome this problem by pointing to allegations in its complaint that part of the intellectual property taken included source code developed in a collaboration between OpenRisk and the Netezza Corporation, a company located in Massachusetts. However, it fails to point to any contact between either Roston or MNR and this company. Indeed, OpenRisk has failed to specify any relevant contacts Roston and MNR had in Massachusetts with its vendors.