> 43 of 93 DOCUMENTS MEGA TECH INTERNATIONAL CORPORATION, Plaintiff, - against - AL-SAGHYIR ESTABLISHMENT and NATIONAL KITCHENS FACTORY CO. LTD., Defendants. 96 Civ. 8711 (LBS)
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK 1999 U.S. Dist. LEXIS 6381
May 3, 1999, Decided May 3, 1999, Filed DISPOSITION: [*1] Defendants' Motion to Dismiss denied without prejudice to renewal at later date. Plaintiff's leave to file Second Amended Complaint and Amended RICO statement by June 14, 1999 supplementing and correcting any defects in its RICO claim granted. CORE TERMS: tortious, personal jurisdiction, arbitration, assertion of jurisdiction, resident, arbitrate, tortious interference, causes of action, claims asserted, choice of law, bid, breach of fiduciary duty, situs, tip, psychiatric hospital, common law, letterhead, facsimile, briefing, kitchen, laundry, Federal Rule Of Civil Procedure, business relations, motion to dismiss, consortium, asserting, signatory, litigate, renewal, oral argument COUNSEL: For MEGA TECH INTERNATIONAL CORPORATION, plaintiff: Richard B. Cohen, Akabas & Cohen, New York, NY. PAGE 427 1999 U.S. Dist. LEXIS 6381, *1 For AL-SAGHYIR ESTABLISHMENT, NATIONAL KITCHENS FACTORY CO. LTD., defendants: Grant Aram Hanessian, Duane Morris & Heckscher LLP, New York, NY. JUDGES: HON. LEONARD B. SAND, U.S.D.J. OPINIONBY: LEONARD B. SAND OPINION: MEMORANDUM AND ORDER SAND, District Judge. Plaintiff, Mega Tech International Corporation ("Mega Tech"), brings this action against Al-Saghyir Establishment ("ASE") and National Kitchens Factory Co. Ltd ("NKF") (together "Defendants") asserting numerous state law causes of action as well as violations of the Racketeer Influenced and Corrupt Organization Act of 1964, codified at 18 U.S.C. @@ 1961-68. Presently before the Court is the Defendants' Motion to Dismiss pursuant to the following provisions: Federal Rule of Civil Procedure 9(b), 12(b)(2), 12(b)(3), 12(b)(5), 12(b)(6), and the Federal Arbitration Act, codified at 9 U.S.C. [*2] @@ 1-16. For the reasons set forth below, we deny the Motion with respect to both Defendants without prejudice to renewal at a later date. BACKGROUND Except where otherwise indicated, the following facts are taken from Plaintiff's Amended Complaint or documents explicitly referenced therein, see Koppel v. 4987 Corp., 167 F.3d 125, 128 (2d Cir. 1999); Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir. 1991), and are assumed to be true for purposes of considering Defendants' Motion. Mega Tech is a New Jersey Corporation with its principal place of business in Pearl River, New York. Mega Tech is a project management and design company that designs, commissions, and installs kitchen and laundry facilities. Both ASE and NKF are corporations organized under the laws of Saudi Arabia with their principal places of business located within that country. ASE is primarily a trading and contracting company. NKF is primarily a distributor of kitchen cabinets and furnishings. Both companies also serve as local agents for foreign businesses wishing to conduct business in Saudi Arabia. In 1984, the Ministry of Health of the Kingdom of Saudi Arabia retained Hyundai [*3] Engineering and Construction Co. Ltd. ("Hyundai"), which is not a party to the present litigation, to construct the King Fahad Medical City in Ryadh, Saudi Arabia ("Medical City"). The Medical City was to contain two facilities that are relevant to this case: the main hospital and the psychiatric hospital. Hyundai subcontracted out the tasks of designing, commissioning, and installing the kitchen cabinets, counters, appliances, and equipment for both facilities and the laundry equipment for the main hospital. Mega Tech was

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unable to bid directly for any subcontracting work because existing Saudi Arabian law prohibited foreign businesses from conducting PAGE 428 1999 U.S. Dist. LEXIS 6381, *3 business in that country without a domestic agent. On December 15, 1997, Mega Tech sent a telefax addressed to "NATIONAL KITCHEN FACTORY" expressing its interest in bidding on the Medical City projects. (Am. Comp. P 13; see also Lee Aff. Ex. A.) On December 16, 1997, Mega Tech received a response on "AL-SAGHYIR EST." letterhead that indicated it was from the "AL SAGHYIR GROUP OF COMPANIES" and was signed by the "General Manager" of the "Al Saghyir Group of Companies." (Am. Comp. P 14; see also Lee Aff. Ex. A.) This letter stated, [*4] in part: Thank you very much for your telex . . . . We assure you of our interest in joining your companies. Can you give us more information in details about your company? We are Group of Companies dealing with manufacturing kitchen cabinet. Besides that one of our sister company is one of the largest companies handling laundry equipments. (Id.)

On January 30, 1998, Mega Tech and NKF entered into an agreement providing that the two would "join hands" in seeking the psychiatric hospital subcontract. The parties signed this "First Agreement" at Mega Tech's New York offices after initial negotiations via facsimile and subsequent negotiations that took place at the New York offices. The First Agreement states in the second paragraph that Mega Tech's "head office [is] located at 1 Blue Hill Plaza, Pearl River, New York 10965" and the contract itself is on Mega Tech letterhead, which displays the company's New York address. (See Hanessian Decl. Ex. C.) The ninth paragraph of the First Agreement provides as follows: "Once the project is awarded to NKF, then within five (5) working days upon receipt of the transferable L/C [Letter of Credit] from Hyundai, [*5] NKF fully understands and agrees that kitchen & laundry equipment portion of the L/C shall be properly transferred to MTI [Mega Tech.]." (Id.) NKF was to pay any additional amounts owing to Mega Tech within ten days after receiving such proceeds from Hyundai. (See id.) The First Agreement also gave NKF the right of first refusal for any business Mega Tech might conduct in Saudi Arabia and gave Mega Tech the right of first refusal for any business NKF might conduct in the United States or Korea. (See id.) Pursuant to the First Agreement, Mega Tech prepared the bid for the psychiatric hospital on behalf of the two companies and on October 29, 1988, Hyundai accepted this bid for a total contract price approximating $ 4,531,000. Hyundai and NKF entered a twenty-nine page agreement on that date (the "Hyundai Subcontract Agreement"), which detailed the parties' obligations. The Hyundai Subcontract Agreement provided, inter alia, that "any dispute which the two parties are unable to resolve shall be settled under the Arbitration Regulations issued by Royal Decree No. M-46 by three Arbitrators, one to be appointed by each party, and the third Arbitrator to be appointed by [*6] the two chosen Arbitrators." (See Hanessian Decl. Ex. H at @ 22.1.) In late 1988, Hyundai, acting pursuant to the Hyundai Subcontract Agreement, opened a letter of credit in favor of NKF in the sum of approximately $ 3,527,000. NKF failed to transfer any portion of that amount to Mega Tech despite Mega Tech's requests. Hyundai transferred additional amounts to NKF in June 1992, September 1992, October 1994, February 1995, April 1995, April 1996, and May 1996, but NKF again refused to transfer any of the proceeds to Mega PAGE 429 1999 U.S. Dist. LEXIS 6381, *6 Tech. After Hyundai awarded the psychiatric hospital project, ASE and Mega Tech commenced negotiations with respect to the larger of the two Medical City projects: the main hospital. The parties negotiated primarily via telephone and facsimile from their respective offices and entered into a contract on January 19, 1989 (the "Second Agreement"). The Second Agreement is on ASE letterhead and apparently was executed in Saudi Arabia. It obligated ASE and

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Mega Tech to "work together to win the [main hospital] contract" and provided that ASE was to open two letters of credit on behalf of Mega Tech, one "immediately" after Hyundai accepted the contract and the second [*7] eight weeks prior to installation of the equipment. (Hanessian Decl. Ex. D.) Mega Tech also alleges that the Second Agreement required ASE to loan Mega Tech approximately $ 750,000 to cover the cost of submitting the bid. Mega Tech prepared the bid on behalf of itself and ASE and submitted it in March 1989. ASE never loaned Mega Tech any portion of the $ 750,000. Don Lee, president of Mega Tech, traveled to Saudi Arabia to resolve the parties' financial disagreements. Mr. Lee asked Mr. A.S. Al-Saghyir, the president of ASE, whether ASE intended to provide the funds owing to Mega Tech. Mr. Al-Saghyir replied "only if God gives me the chance" and subsequently became both "hostile" and "threatening" toward Mr. Lee. (Am. Comp. at P 39.) Mr. Al-Saghyir then surrounded himself with "several large, intimidating confederates" and thereafter gave Mr. Lee a document entitled "Contract Agreement" and "ordered him to sign it on the spot" without allowing Mr. Lee an opportunity to review it (the "Third Agreement"). (Id. at PP 40-41.) The Third Agreement, entered into by Mega Tech and NKF, provided, inter alia, that Mega Tech "accepts all the terms and conditions imposed on NKF by the subcontract [*8] agreement identified between Hyundai Engineering and Construction Co. Ltd. and NKF dated 29 October 1988 [the Hyundai Subcontract Agreement], without any exception (s) of any kind (s)." (Hanessian Decl. Ex. E.) Mega Tech continued to work with NKF and ASE on both of the Medical City projects because it had already expended "huge amounts of time and money" and because Saudi Arabian law did not allow Mega Tech to work without a local agent. (Am. Comp. P 43.) Mega Tech soon learned that the Defendants had not forwarded any of the funds they were required to transfer, had never intended to pay Mega Tech amounts agreed to in the parties' agreements, and in fact retained all sums received from Hyundai for their own accounts. The Defendants excluded Mega Tech from work on the Medical City projects in violation of the First and Second Agreements, informed other companies that Mega Tech was not involved in the Medical City projects, and ultimately caused Mega Tech significant financial losses. Plaintiff commenced the present suit on November 20, 1996, and filed an Amended Complaint on October 3, 1997. Plaintiff asserts that the Court has subject matter jurisdiction pursuant to 28 U.S.C. [*9] @ 1332, in that there is diversity of citizenship and the amount in controversy exceeds $ 75,000, pursuant to 28 U.S.C. @ 1331 for violation of federal anti-racketeering law, and pursuant to 28 U.S.C. @ 1367, the statute governing supplemental jurisdiction. The Amended Complaint seeks an accounting and asserts claims for breach of contract, breach of fiduciary duty, n1 breach of partnership/joint venture, conversion, constructive trust, fraud, conspiracy to commit fraud, n2 violations of RICO, tortious interference with a contract, and tortious interference with business relations. PAGE 430

1999 U.S. Dist. LEXIS 6381, *9 - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - n1 The Amended Complaint designates Plaintiff's third cause of action as "Breach of Agency" but both parties treat the claim as one for breach of fiduciary duty. (See Def's Mem. at 26; Pl's Mem. at 26-27.) n2 Plaintiff has since withdrawn its claims for fraud and conspiracy to commit fraud. (See Pl's Mem. at 29.) - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - Defendants filed the instant Motion on January 30, 1998. By Order dated April 27, 1998, the Court stayed [*10] the action in all respects until Plaintiff could establish authority to do business in the State of New York, see N.Y. Business Corporation Law @ 1312(a) (McKinney's Supp. 1999), such authority having lapsed. On February 4, 1999, after Mega Tech reestablished its authority to conduct business in New York, the Court held oral argument on the Motion and

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reserved decision. LEGAL STANDARDS On a motion to dismiss for lack of personal jurisdiction, see Fed. R. Civ. P. 12(b)(2), "the plaintiff bears the burden of showing that the court has jurisdiction over the defendant. Prior to discovery, a plaintiff may defeat a motion to dismiss based on legally sufficient allegations of jurisdiction." Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 566 (2d Cir. 1996) (citation omitted). "Eventually personal jurisdiction must be established by a preponderance of the evidence, either at an evidentiary hearing or at trial. But where the issue is addressed on affidavits, all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor . . . ." A.I. Trade Fin., Inc. v. Petra Bank, 989 F.2d 76, 79-80 (2d Cir. [*11] 1993). On a motion to dismiss for failure to state a claim upon which relief may be granted, see Fed. R. Civ. P. 12(b)(6), we must "construe in plaintiff['s] favor factual allegations in the complaint. . . . Dismissal of the complaint is proper only where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 67 (2d Cir. 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957) (footnote omitted)) (citation omitted). If a federal court has reason to doubt its jurisdiction, it must always conduct a jurisdictional inquiry in the first instance even if the suit appears dismissible on substantive grounds. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-101, 118 S. Ct. 1003, 1012-16, 140 L. Ed. 2d 210 (1998). DISCUSSION I. PERSONAL JURISDICTION We conduct a two-part inquiry to evaluate Mega Tech's claim that the Court has personal jurisdiction over each of the defendants. First, we "must determine whether the plaintiff has shown that the defendant is amenable [*12] to service PAGE 431 1999 U.S. Dist. LEXIS 6381, *12 of process under the forum state's laws." Metropolitan Life, 84 F.3d at 567. Second, we "must assess whether the court's assertion of jurisdiction under these laws comports with the requirements of due process." Id. See generally Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57-62 (2d Cir. 1985). The Defendants assert that the Court lacks personal jurisdiction both as a matter of statutory interpretation under New York law and also as a matter of federal due process. n3 We evaluate the jurisdictional question as to NKF and ASE independently. - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - - n3 The Defendants also claim that the Plaintiff failed to follow Saudi Arabian law in effecting service of the Summons and Complaint in this action as required by Federal Rule of Civil Procedure 4(f). Although we do not now decide that service was properly completed, Plaintiff has alleged facts sufficient to withstand a Motion to Dismiss on this basis. - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - a. NKF (1) New York State Jurisdictional Law Under @ 301 of the New York Civil [*13] Practice Law and Rules, a New York court has jurisdiction over any claim asserted against a corporate defendant who is doing business within New York sufficient to support a finding of corporate presence. See N.Y. C.P.L.R. @ 301 (McKinney's 1990). Under @ 302, even when a corporate defendant is not "present" within the State, a New York court may assert jurisdiction over claims asserted against that defendant if those claims arise out of certain enumerated conduct. See id. at @ 302. Plaintiff does not claim that NKF is "present" in New York within the meaning of @ 301 but instead asserts that it is subject to jurisdiction under @ 302's provisions. The relevant subsections provide as follows:
(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
1. transacts any business within the state or contracts anywhere to supply goods or

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services in the state; or 2. commits a tortious act within the state . . .; or 3. commits a tortious act without [*14] the state causing injury to person or property within the state . . ., if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or reasonably should expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . . Id. Mega Tech asserts that NKF is subject to jurisdiction under each of the three above-quoted provisions. PAGE 432 1999 U.S. Dist. LEXIS 6381, *14 The propriety of NKF's presence in this action presents a relatively straight-forward question under @ 302's "transacting business" provision. Plaintiff has alleged that NKF officials made numerous telephone calls and sent numerous facsimiles into New York both before and after signing the First Agreement, and, more importantly, traveled to New York to negotiate and sign the First Agreement at Mega Tech's New York offices. There is a significant body of authority from within this Circuit indicating that the presence of a corporate officer within New York for purposes of negotiating and signing a contract is sufficient to create [*15] jurisdiction under CPLR @ 302(a)(1) when the causes of action asserted relate to breach of that agreement. See Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951, 954-56 (2d Cir. 1967); First Wall Street Capital Corp. v. International Property Corp., Ltd., 1998 U.S. Dist. LEXIS 9260, 97 Civ. 0702 (JGK), 1998 WL 338105, at *4 (S.D.N.Y. June 24, 1998); Levisohn, Lerner, Berger & Langsam v. Medical Taping Sys., Inc., 10 F. Supp. 2d 334, 339-40 (S.D.N.Y. 1998); Pointer (U.S.A.), Inc. v. H & D Foods Corp., 1998 U.S. Dist. LEXIS 8794, 97 Civ. 5333 (TPG), 1998 WL 315464, at *2 (S.D.N.Y. June 16, 1998); Triboro Entertainment Group, Inc. v. Filmcat Inc., 1996 U.S. Dist. LEXIS 9754, 93 Civ. 6798 (JFK), 1996 WL 391859, at *2 (S.D.N.Y. July 12, 1996); Gilbert v. Wilson, 821 F. Supp. 857, 859-60 (N.D.N.Y. 1993); Goldreyer, Ltd. v. Van de Wetering, 217 A.D.2d 434, 630 N.Y.S.2d 18, 25 (1st Dep't 1995); see also Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 60 (2d Cir. 1985); McShan v. Omega Louis Brandt et Frere, 536 F.2d 516, 518 (2d Cir. 1976); Philips Electronics North America Corp. v. Maeser, 1997 U.S. Dist. LEXIS 8972, 97 Civ. 1672 (JSR), 1997 WL 362176, at *2 (S.D.N.Y. June 26, 1997); Pfaff v. Denver Art Museum, 1995 U.S. Dist. LEXIS 8573, 94 Civ. 9271 (JSM), 1995 [*16] WL 373489, at *2 (S.D.N.Y. June 22, 1995). We are mindful of the Second Circuit's instruction that determining whether a defendant falls within @ 302(a)(1) requires evaluation of several factors, none of which is dispositive. See Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp., 98 F.3d 25, 29 (2d Cir. 1996). Viewing the totality of the circumstances, we conclude that jurisdiction is appropriate under @ 302(a)(1) in light of the presence of NKF officials in New York to negotiate and execute the First Agreement, their presence on numerous occasions after signing that contract, (see Lee Aff. P 8), and the numerous telephone calls that these officials made and facsimiles that they sent to Mega Tech in New York both before and after executing the First Agreement. Even considering that Mega Tech may have initiated the parties' relationship by sending the first telex into Saudi Arabia, NKF's activities constitute purposeful availment of the laws of New York sufficient to satisfy the New York long-arm statute. (2) Federal Due Process Protection

There remains the question whether assertion of jurisdiction in these circumstances would offend the concepts of "fair play [*17] and substantial justice" that form the cornerstones of federal due process guarantees. International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339 (1940)). We must look to five factors in determining whether assertion of jurisdiction is "reasonable" for constitutional

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purposes: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the PAGE 433 1999 U.S. Dist. LEXIS 6381, *17 plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996) (citing Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987)). Where, as here, a defendant "who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the [*18] presence of some other considerations would render jurisdiction unreasonable." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). The first factor, the burden on NKF, tips strongly against allowing jurisdiction. NKF is a corporation organized under the laws of Saudi Arabia and it would be both costly and cumbersome to force NKF to litigate this action in New York. See Asahi, 480 U.S. at 114. Although "the conveniences of modern communication and transportation ease what would have been a [more] serious burden only a few decades ago," Metropolitan Life, 84 F.3d at 574 (discussing forcing a Delaware corporation to defend a suit in Vermont), the "unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." Asahi, 480 U.S. at 114 (discussing forcing a Japanese corporation to defend a suit in California). The second factor, New York's interest in adjudicating the case, tips moderately in favor of allowing jurisdiction. New York has a legitimate interest in insuring that [*19] corporations with substantial business operations in the state are given legal protection and in remedying tortious activities that occur within the state. Compare Burger King, 471 U.S. at 478-83 (rejecting, in context of case involving a Florida plaintiff, the argument that Florida had no legitimate interest in the litigation), with Asahi, 480 U.S. at 114 ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished), and Metropolitan Life, 84 F.3d at 574. The third factor, Plaintiff's interest in obtaining convenient and effective relief, tips strongly in favor of asserting jurisdiction. Mega Tech is incorporated in New Jersey with its principal place of business in New York. Much as it would be difficult for NKF to litigate in New York, it would be onerous to require Mega Tech to litigate in Saudi Arabia. Plaintiff has also alleged that Mr. Lee was threatened by certain officials affiliated with ASE and NKF while in Saudi Arabia, officials who Mr. Lee claims have close ties to the Saudi Arabian government. When taken as true at this stage of the litigation, Mr. Lee's allegations present an additional [*20] reason to believe that Plaintiff would be substantially inconvenienced by resolving its claims in Saudi Arabia. The fourth factor, regarding the efficient administration of justice, does not tip strongly in favor of either party. For purpose of this analysis, courts generally evaluate "where witnesses and evidence are likely to be located." Metropolitan Life, 84 F.3d at 574. In this case, witnesses will most likely come from Plaintiff's offices, in New Jersey and New York, and from NKF's, in Saudi Arabia. We see no reason to believe that the location of the Medical City project itself bears significantly on this question as the bulk of the evidence PAGE 434 1999 U.S. Dist. LEXIS 6381, *20 is likely to be documentary. See, e.g., Hatzlachh Supply Inc. v. Savannah Bank, 649 F. Supp. 688, 691 (S.D.N.Y. 1986) ("The probable emphasis on documentary proof in this action makes it highly unlikely that defendant will need to transport many witnesses.") Given that the parties negotiated and signed the agreement

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in New York and Mega Tech completed a significant portion of its project planning in New York, we do not think that significantly more evidence would be available if the dispute were to be resolved in Saudi Arabia. [*21] Fifth and finally, we see no strong policy arguments relating to substantive social policies that alter the above analysis.

Review of these five factors supports a finding of jurisdiction. The first and third factors cancel each other out and the fourth and fifth do not favor a particular result. The second factor, which focuses on New York's interest in resolving claims asserted by one of its residents, militates moderately in favor of asserting jurisdiction. The five factors therefore support a decision subjecting NKF to suit in New York and NKF has not made a "compelling" case sufficient to prevent assertion of jurisdiction. We therefore conclude that we have personal jurisdiction over NKF. n4 - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - - n4 Under CPLR @ 302, a statute that creates specific rather than general jurisdiction, the Court may assume jurisdiction only over claims that arise from a defendant's contacts with the forum -- in this case, NKF's contacts with New York surrounding execution of the First Agreement. The Second Circuit has stated that a court with specific personal jurisdiction over a defendant as to one claim has personal jurisdiction as to all other claims in the action that arise from the same nucleus of operative facts. See Hargrave v. Oki Nursery, Inc., 646 F.2d 716, 719-21 (2d Cir. 1980). The only causes of action Plaintiff asserts that arguably fail to satisfy this test are those for tortious interference with a contract and tortious interference with business relations. Because proof of these claims is inextricably intertwined with proof of the other counts alleged in the Amended Complaint, however, (see Am. Comp. PP 46-54), assertion of jurisdiction over all of Mega Tech's claims against NKF is appropriate. - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [*22] b. ASE (1) New York State Jurisdictional Law Jurisdiction over ASE presents a different set of circumstances. The First Agreement, which provides the basis for our jurisdiction over NKF, makes no mention of ASE. Plaintiff has not alleged that the Second Agreement, to which ASE was a party, was either negotiated or executed in New York. Nor does Plaintiff dispute ASE's contention that it was never licensed to do business in New York, never had an office, warehouse, plant, employee, sales agent, or bank account in New York, and never advertised or sold goods to customers in New York. (See Al-Goblan Decl. at P 4.) Plaintiff instead argues in its brief that NKF and ASE are alter egos and that the Court should assume jurisdiction over the claims asserted against ASE PAGE 435 1999 U.S. Dist. LEXIS 6381, *22 under C.P.L.R. @ 302(a)(1) due to NKF's contacts with New York. (See Pl's Mem. at 4-8.) It is settled that the propriety of piercing the corporate veil in such situations must be assessed pursuant to the law of the place where the defendant is incorporated. See Fletcher v. Atex, Inc., 68 F.3d 1451, 1456 (2d Cir. 1995); Kalb, Voorhis & Co. v. American Fin. Corp., 8 F.3d 130, 132 (2d Cir. 1993). [*23] In this case, we evaluate Plaintiff's argument under Saudi Arabian, rather than New York, law. Plaintiff has not refuted the Defendants' claims that Saudi Arabian law does not recognize the concept of veil-piercing in these circumstances and that under Saudi Arabian law, the two Defendants are legally discrete entities. (See Def's Reply Mem. at 2-3 & Ex. A at PP 2-4.) Even assuming that New York law did govern, which it does not, Plaintiff's failure to plead any facts from which we might be able to infer domination or disregard of the corporate form is fatal to its claim. The Amended Complaint is devoid of allegations indicating an alter ego relationship and at oral argument, Mega Tech was unable to offer any additional evidence that would cure the Amended Complaint's defects in this regard. (See Tr. Oral Arg. at 12-14.) The only allegation contained in the Amended Complaint that in any way supports Plaintiff's

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contention is the fact that NKF and ASE apparently used the same letterhead on certain occasions. This is plainly insufficient to create the type of domination needed to prove an alter ego relationship and is more than adequately explained by the un-refuted [*24] evidence regarding ASE's status as an "umbrella" organization for all of the Al-Saghyir group of companies, of which NKF is one. Accordingly, C.P.L.R. @ 302(a)(1) provides no statutory basis for assertion of personal jurisdiction over ASE. Section 302(a)(2), the provision governing assertion of jurisdiction over a defendant for tortious acts committed within New York, is also inapposite. To be amenable to jurisdiction under that provision, a defendant must commit a tort while physically present within the State. See Bensusan Restaurant Corp. v. King , 126 F.3d 25, 28-29 (2d Cir. 1997). Because ASE's was not present in New York by virtue of NKF's actions, and because the Amended Complaint contains no other allegations regarding tortious activities conducted by ASE officials while in New York, @ 302(a)(2) does not apply. Mega Tech argues in the alternative that jurisdiction is appropriate under @ 302(a)(3), which governs tortious acts performed outside of New York causing injury within New York that should have been foreseeable to the defendant. ASE concedes that the Amended Complaint contains allegations that it engaged in tortious activities in Saudi Arabia and that Mega Tech [*25] suffered financial loss as a result. (See Def's Mem. at 8.) ASE argues, however, that Mega Tech has failed to allege injury in New York with the meaning of existing case law.

ASE relies primarily on Mareno v. Rowe, 910 F.2d 1043 (2d Cir. 1990), a case involving a New York plaintiff who sued his former employer, a Maryland corporation with a single facility in New Jersey, regarding his termination from the New Jersey site. Mareno, the plaintiff, alleged that the court had jurisdiction over the company via @ 302(a)(3) because its tortious activities conducted outside New York had caused him injury within New York, his state of residence. The Second Circuit stated: An injury, however, does not occur within the state simply because the plaintiff is a resident. The situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff. Thus, despite the fact that Mareno may PAGE 436 1999 U.S. Dist. LEXIS 6381, *25 suffer the economic consequences of his firing in New York, the location of the original event which caused the injury is New Jersey. Undoubtedly, the exercise of personal jurisdiction must be based on a [*26] more direct injury within the state and a closer expectation of consequences within the state than the type of indirect financial loss alleged by Mareno.

Id. at 1046 (citations, internal quotation marks, and other punctuation omitted).

This case is distinguishable from Mareno, ASE's expansive reading of which would all but eliminate the utility of @ 302(a)(3). In Mareno, the employer had little reason to know that any tortious activities could cause it to be haled into a New York court. If the Second Circuit had accepted Mareno's argument that the location of injury is automatically assumed to be where the plaintiff lives, the employer's amenability to suit would be entirely divorced from the location of the tortious activity and the employer would be subject to suit in every jurisdiction in which an employee resided. Regardless of where the defendant acted, suit in New York would be no less reasonable than suit in Hawaii so long as the injured party happened to live in the state from which he filed his action. A defendant would have no way to predict where it might be subject to litigation and could limit this exposure only by hiring residents of a particular [*27] state or by utilizing choice of forum clauses in its employment contracts. In the present case, there is no similar argument that calling ASE to answer for its tortious behavior in New York would have been unforeseeable. ASE allegedly engaged in a pattern of tortious behavior designed to harm a business that it knew was located in New York. That Mega

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Tech might suffer harm in New York was not merely possible, it should have been expected. Moreover, the allegations concerning ASE's interference with Mega Tech's business opportunities directly link ASE to harm that Mega Tech would have suffered in its state of corporate residence. In short, ASE's alleged actions committed outside New York with immediately foreseeable adverse business consequences to Mega Tech inside New York are precisely within the class of harms covered by @ 302(a)(3). This result squares with the Second Circuit's recent decision in Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 1999 U.S. App. LEXIS 5318, 1999 WL 166451 (2d Cir. 1999). That case involved an action filed by a Belgian banking corporation's New York affiliate, which was one member of a consortium of banks that lent [*28] money under a revolving credit agreement to two oil companies, against the Puerto Rican law firm that had structured the transaction. Nearly two years after the consortium provided $ 245,000,000 to complete the deal, the oil companies defaulted. The plaintiff sought recovery against the law firm for fraud, breach of fiduciary duty, and breach of the contract for legal services. Although the law firm's alleged omissions occurred in Puerto Rico, the court concluded that the situs of the injury was New York for purposes of @ 302(a)(3). See id. at *13. The Second Circuit offered a detailed discussion of the role of @ 302(a)(3) in commercial disputes and stated, "in the case of fraud or breach of fiduciary duty committed in another state, the critical question is thus where the first effect of the tort was located that ultimately produced the final economic injury." Id. at 13. The court concluded that the first effect of the firm's tortious behavior was located in New York because the "'original event' that

 caused the economic harm" was the bank's disbursement of funds in that state. Id. The first effect of ASE's conduct was also located in New York because Mega Tech had [*29] invested large sums of money in the State to plan the main hospital project and because Mega Tech lost prospective business opportunities in New York. The "original event," just as in Bank Brussels, was a New York corporation's contribution of money to a project that ultimately caused the corporation to sustain significant financial losses due to tortious conduct that occurred outside the forum. n5 - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - n5 For the allegations of tortious interference with a contract and tortious interference with business relations, the initial and subsequent effects appear to be one and the same: the third-parties' failure to hire Mega Tech due to representations made by ASE. These effects are based in New York, where Mega Tech lost the potential business. - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - Bank Brussels and Mareno together indicate the central position of foreseeability in determining the situs of tort under @ 302(a)(3). The rejection of jurisdiction in Mareno, where the defendant had no reason to foresee New York litigation as a result of firing an [*30] employee in New Jersey, contrasts with the assertion of jurisdiction in Bank Brussels, where any financial harm the law firms' omissions were likely to cause would occur in New York, the location of the consortium's banks. Given that ASE allegedly engaged in tortious commercial conduct in Saudi Arabia that it should have expected to cause harm to a New York resident and that in fact caused such harm in the State, New York is the situs of the tort under @ 302(a)(3). As to the second component of the statutory analysis, evaluating pursuant to @ 302(a)(3)(ii) whether ASE derives substantial revenue from interstate or international commerce, we take as true the allegations contained in Mr. Lee's affidavit on this point. (See Lee Aff. at P 10.) (2) Federal Due Process Protection

Section 302(a)(3) "was not designed to go to the full limits of permissible jurisdiction"

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and the New York Court of Appeals has stated that the provision serves to create "a limitation more stringent than any constitutional requirement." Ingraham v. Carroll, 90 N.Y.2d 592, 597, 665 N.Y.S.2d 10, 687 N.E.2d 1293 (1997). We nevertheless review the assertion of jurisdiction to insure that it is [*31] consistent with federal due process. See, e.g., Bank Brussels, 1999 WL 166451, at *15 (remanding for determination whether @ 302(a)(3) had been satisfied and, in the event that it had been, for evaluation of due process inquiry). The five-part due process inquiry conducted previously with respect to NKF applies with equal force to ASE. See supra 11-13; Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996). (1) ASE has a strong interest in not being haled into this Court. (2) New York has a moderate interest in remedying tortious conduct that occurs outside the State that aims to harm its residents. (3) Mega Tech has a strong interest in not being forced PAGE 438 1999 U.S. Dist. LEXIS 6381, *31 to seek redress in Saudi Arabia. (4) Our desire to promote the efficient administration of justice does not counsel in favor of either result. (5) The Court is aware of no strong policy arguments favoring assertion or rejection of jurisdiction. A balancing of these five factors shows that it is consistent with federal due process standards to assert jurisdiction under C.P.L.R. @ 302(a)(3)(ii). Accordingly, we conclude that we have personal jurisdiction over the claims asserted against ASE. [*32]

II. ARBITRATION NKF and ASE argue that all of the claims Mega Tech asserts must be dismissed in favor of arbitration in Saudi Arabia. According to the Defendants, the compulsory arbitration provision of the Hyundai Subcontract Agreement, which was executed by Hyundai and NKF and required arbitration as to all disputes between Hyundai and NKF, was incorporated by reference into the Third Agreement, which was executed by NKF and Mega Tech. The Defendants point to the Third Agreement's statement that Mega Tech "accepts all the terms and conditions imposed on NKF by the" Hyundai Subcontract Agreement, "without any exception (s) of any kind (s)." The Defendants maintain that this provision operates to require Mega Tech to arbitrate all of its disputes with them. Section 206 of Title 9 of the United States Code provides, in pertinent part, that "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." Section 206 is one provision of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), [*33] to which both the United States and Saudi Arabia are signatories. See 9 U.S.C.A. @ 201 (West 1999). Section 203 of Title 9 provides jurisdiction for actions or proceedings "falling under the Convention," which @ 202 defines to include "arbitration agreement[s] or arbitral award[s] arising out of a legal relationship, whether contractual or not, which is considered as commercial . . . ." Id. at @ 202. Courts from within this District and elsewhere have applied a four-part analysis to determine whether the Convention applies to a particular case: (1) Is there any agreement in writing to arbitrate the subject of the dispute? (2) Does the agreement provide for arbitration in the territory of a signatory of the Convention? (3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial? (4) Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation to one or more foreign states? Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., 1997 U.S. Dist. LEXIS 11916, 95 Civ. 10506 (DLC), 1997 WL 458785, at *4 (S.D.N.Y. Aug. 11, 1997) (citing cases). As in Lark, the final three [*34] questions are not seriously in dispute, see id.: Saudi Arabia is a signatory to the Convention; the agreement arises from a commercial relationship; and neither NKF nor ASE is an American citizen. The sole question is whether there has been an agreement to arbitrate

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the subject of the present dispute. NKF was plainly obligated under the Hyundai Subcontract Agreement to PAGE 439 1999 U.S. Dist. LEXIS 6381, *34 arbitrate any dispute it had with Hyundai in Saudi Arabia. It therefore follows that the Third Agreement, which incorporated by reference the terms of the Hyundai Subcontract Agreement and subjected Mega Tech to the same burdens that the Hyundai Subcontract Agreement placed on NKF, would have required Mega Tech to arbitrate any disputes it had with Hyundai in Saudi Arabia. It does not follow, however, that the Third Agreement compels arbitration in a dispute between only Mega Tech and NKF, let alone between Mega Tech and ASE. To the extent that the Third Agreement placed Mega Tech in another party's shoes, they are NKF's. As such, Mega Tech's obligation to arbitrate, like NKF's, would be limited to disputes involving Hyundai. There is simply no reason to believe that the Third Agreement – which by its terms [*35] applied NKF's obligations vis-a-vis Hyundai to Mega Tech – altered Mega Tech's and NKF's obligations with respect to dispute resolution between each other. Nor is there any reason whatsoever to think that the Third Agreement requires arbitration of disputes between Mega Tech and ASE. We do not believe that a different result is commanded by the numerous federal cases, several of which Defendants cite, detailing the strong presumption in favor of reading arbitration clauses broadly. These cases require courts, when faced with a valid arbitration agreement, to read that agreement expansively in determining what type of disputes are covered. See, e.g., EEOC v. Kidder, Peabody & Co., Inc., 156 F.3d 298, 302 (2d Cir. 1998) (discussing the federal policy of construing arbitration agreements broadly where the individual "has freely agreed to arbitrate"); Worldcrisa Corp. v. Armstrong, 129 F.3d 71, 74 (2d Cir. 1997) (stating that "the existence of a broad agreement to arbitrate creates a presumption of arbitrability"). These cases, however, are premised a fortiori on the parties' execution of a valid agreement to arbitrate. See Volt Info. Sciences, Inc. v. Board of Trustees, [*36] 489 U.S. 468, 476, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989) ("The federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."). Where parties have not reached any agreement, a court should not compel arbitration. See id. at 478. n6 - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - - n6 Our analysis is not effected by any claim that the Third Agreement fails to create an obligation to arbitrate because Mr. Lee was forced to sign the agreement under duress. Plaintiff hinted at this line of argument in its submissions, but apparently recognized its futility at oral argument. (See Tr. Oral Arg. at 16.) See generally Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967); Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655, 667 (2d Cir. 1997) ("There must be some substantial relationship between the fraud or misrepresentation and the arbitration clause in particular in order to protect the obvious distinction drawn in Prima Paint between the arbitrability of fraud relating to a contract generally and fraud in the inducement of the arbitration clause in particular."). - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - [*37] III. COMMON LAW CAUSES OF ACTION The Defendants argue with some force that each of the common law claims asserted in the Amended Complaint must be dismissed for failure to comply with PAGE 440 1999 U.S. Dist. LEXIS 6381, *37 applicable New York statutes of limitations. The Defendants also argue that certain of the common law claims must be dismissed for failure to state a claim on which relief may be granted under existing New York case law. It is only after completing these arguments, in a section addressing the doctrine of forum non conveniens, that Defendants first argue that this dispute should be resolved under Saudi Arabian law. For obvious reasons, choice of law should be resolved at the outset of an action, rather than near its terminus.

Plaintiff, similarly concerned with the jurisdiction and arbitration issues, addresses the choice of law question at the conclusion of its brief and again only briefly. Plaintiff correctly points out that the Defendants have failed to offer sufficient information from which we could conclude that the laws of Saudi Arabia and New York are in conflict, but assumes the existence of such a conflict arguendo in order to perform what amount to abbreviated analyses for both [*38] the contract and tort claims. Plaintiff concludes that New York law must govern both sets. In light of the parties' sparse briefing addressing the substance of Saudi Arabian law, the possibility that such law might govern either or both of the contract and the tort claims in this action, and the possibility, raised only in an affidavit, that Saudi Arabia does not recognize the majority of causes of action asserted by the Amended Complaint, (see Def's Reply Mem. at Ex. A), we deny the Defendants' Motion without prejudice to renewal at any time upon a more full briefing of the choice of law issue. It is impracticable for us to evaluate the claims' sufficiency under Saudi Arabian law at this time and we think it is unwise to undertake a lengthy survey of New York law when the parties' briefing raises serious questions about its applicability. This decision should not be read as expressing any opinion on the merits of the choice of law question or as to the validity of any of the common law claims under either legal regime. VI. RICO CAUSE OF ACTION The Defendants argue that Plaintiff's RICO claim is substantively deficient and fails to comply with Federal Rule of Civil Procedure [*39] 9(b) in that it neglects to plead the circumstances of the alleged conspiracy with sufficient particularity. Many of Defendants' arguments address perceived pleading deficiencies with Plaintiff's submissions. In light of our decision to retain jurisdiction over the case until we receive further briefing addressing choice of law, we think it is prudent to allow Plaintiff an opportunity to file a Second Amended Complaint and Amended RICO statement by June 14, 1999, curing any defects it believes may exist with respect to pleading of the RICO claim. Granting Plaintiff leave to amend is consistent with the liberal pleading regime established by the Federal Rules, see Fed. R. Civ. P. 15(a); see also, e.g., Devaney v. Chester, 813 F.2d 566, 569 (2d Cir. 1987), and will provide Plaintiff with a final opportunity to supplement its papers with relevant information so that technical defects will not cloud the issue of the RICO claim's substantive sufficiency. As with the common law causes of action, we leave to a later date the ultimate question of the RICO claim's viability and express no opinion on the subject at this time. CONCLUSION PAGE 441

1999 U.S. Dist. LEXIS 6381, *39 For the foregoing reasons, we deny Defendants' [*40] Motion to Dismiss without prejudice to renewal at a later date. The Court hereby grants Plaintiff leave to file a Second Amended Complaint and an Amended RICO statement by June 14, 1999, supplementing and correcting any defects in its RICO claim. The Clerk of the Court is instructed that the case remains open. SO ORDERED. Dated: New York, New York May 3, 1999 Leonard B. Sand U.S.D.J.

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