At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of June, 2012.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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D.N.I. USA, INC.

Index No. 9352/2011

Plaintiff,

- against -

DR. NONA CANADA INC., BENNY PRESMAN, AND ERNEST YAVNIK A/K/A ERIC YAVNIK A/K/A ERIK YAVNIK

Defendants.

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The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers defendants, in lieu of answering, seek dismissal of the complaint against Dr. Nona Canada Inc. and Erik Yavnik based upon a lack of personal jurisdiction (CPLR 3211[8]) and dismissal as to defendant Benny Presman based upon plaintiff's failure to timely serve (CPLR 306-b).

The Parties

Plaintiff D.N.I. USA, Inc. a/k/a Dr. Nona USA (DNI USA) is a New York company, with an office in Brooklyn, in the business of selling various health care products carrying the Dr. Nona brand name. David Kohina is the president of DNI USA.

Defendant, Dr. Nona Canada Inc. (DRNC) is a Canadian corporation with its sole office in Toronto, Ontario, Canada. Prior to its dissolution on February 22, 2011, DRNC sold health care products, vitamins and other products including Dr. Nona brand name products. DRNC transacted business via a website and its retail store located in Toronto. Benny Presman was the director and Ernest Yavnik the president of DRNC.

Dr. Nona International, Ltd. (DRN LTD), not named in this action, is an Israeli corporation which supplies Dr. Nona branded products directly from Israel to both DRNC and DNI USA. Moshe Shneerson is the president of DRN LTD. There is no corporate affiliation among DRN LTD, DNI USA and DRNC. DNI USA has the exclusive license to import and distribute Dr. Nona products in the United States and may use Dr. Nona trademarks and copyrights in connection with such distribution. During the relevant time period DRN LTD shipped Dr. Nona products from Israel to DRNC in Canada and to DNI USA in New York. Shipping costs from Israel to DNI USA was less expensive, than to DRNC directly, due to the larger volume of products ordered by DNI USA and the ability to ship in bulk to the United States. DRNC could lower its costs and expedite delivery by obtaining products from DNI USA's inventory in New York.

Parties' Contentions

It is alleged that between 2008 and 2010 plaintiff DNI USA sold "Dr. Nona" branded goods to defendant Dr. Nona-Canada, Inc. (DRNC), that DRNC has only paid $2,128.02 for such goods and that there exists an outstanding balance due to DNI USA of approximately $25,268.38. Plaintiff commenced this action on April 25, 2011 to recover the outstanding balance, plus interest, costs and disbursements.

Yavnik, DRNC's president, argues that DRNC has never been licensed to do business in New York, does not conduct business in New York and, therefore, does not maintain sufficient contacts with the State of New York to permit this court to exercise personal jurisdiction over DRNC or Yavnik. DRNC alleges that all contacts with plaintiff were via telephone or electronic mail (email) and that it conducted business with DRN LTD, not with DNI USA directly. In this regard DRNC avers that DNI USA was utilized by DRN LTD as a "shipment center" for orders received from Defendant "for the sole convenience of DRNLTD" and that any invoices or transactions between DRNC and DNI USA were at DRN LTD's direction. Yavnik admits that in 2006 he traveled to New York to meet with DNI USA, however he avers that such visit was prior to the formation of DRNC and was in his individual capacity seeking possible employment with DRN LTD. DRNC supplies copies of invoices for goods ordered by DRNC from DRN LTD and shipped from Israel to Canada.

David Kohina, president of DNI USA, argues in opposition that Yavnik communicated directly with plaintiff via thousands of emails to order products directly from plaintiff in New

York. Copies of over 80 separate invoices from DNI USA, Inc, Kings Highway, Brooklyn to Dr. Nona-Canada Inc, 440 Dufferin Street, Toronto, Canada are annexed to plaintiff's opposition papers. In addition, plaintiff supplies copies of hundreds of email exchanges between Erik Yavnik, on behalf of Dr. Nona Canada, Inc. (erik_yavnik81@mail.ru), and David Kohina (david@drnona.us) and Arthur Berman (arthur@drnona.us) on behalf of DNI USA. Kohina avers that via these emails Yavnik "ordered products directly from [DNI USA] and [DNI USA] shipped them, from New York, directly to [Yavnik] in Canada." Attached are invoices from DNI USA to DRNC for goods and shipping charges to Canada. In addition, Kohina contends that several of the products purchased by DRNC were manufactured exclusively by Dr. Nona USA and could only have been ordered and shipped from New York. By affidavit sworn to on February 12, 2012, Moshe Shneerson, president of DRN LTD, avers that defendant DRNC was obligated to pay plaintiff for all products shipped from plaintiff to defendant and that plaintiff was obligated to pay for all products received from DRN LTD without regard to whether their final destination was Canada or New York.

In reply, defendants argues that there was an agreement between DRNC and DRN LTD that some products would be shipped directly from Israel and some from DNI USA's stock in New York. No document in support of this alleged agreement is supplied. Defendants argue that DRN LTD was acting as an "international franchiser" who directed its local affiliates methods of supply, shipment and distribution of products. It is contended that defendants' acts, which are limited to emails and phone calls between the parties relating to

shipment of products, do not create a meaningful and purposeful relationship with plaintiff, precluding a basis for personal jurisdiction over this controversy. Defendants aver that the affidavit of Moshe Shneerson, sworn to in Israel, should not be considered as it lacks a certificate of conformity pursuant to CPLR 2309(c). Finally, defendants note that plaintiff has failed to demonstrate timely service on Benny Presman.

Discussion

New York's long-arm statute provides that despite the lack of a defendant's physical presence in the state, "courts may exercise personal jurisdiction over a defendant who 'transacts any business within the state or contracts anywhere to supply goods or services in the state' (CPLR 302 [a] [1]) . . . 'so long as the defendant's activities . . . were purposeful and there is a substantial relationship between the transaction and the claim asserted'" (*Kaprall v WE: Women's Entertainment, LLC*, 74 AD3d 1151, 1153 [2010] [citations omitted]). A non-domiciliary transacts business in New York when it purposefully avails itself of the privilege of conducting activities within the state, thus invoking the benefits and protections of its laws (*Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 243 [2005]).

In discussing personal jurisdiction under the CPLR 302 courts recognize that "the growth of national markets for commercial trade, as well as technological advances in communication, enable a party to transact enormous volumes of business within a state without physically entering it" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006]; *Grimaldi v Guinn*, 72 AD3d 37, 44 [2010]). However, telephone calls and written

communications may only serve as a sufficient basis for personal jurisdiction if it is shown to have been "used by the defendant to actively participate in business transactions in New York" (*Liberatore v Calvino*, 293 AD2d 217, 220 [2002]).

In addition to minimum contacts with the forum state, due process requires that the prospect of defending a suit in the State comport with traditional notions of "fair play and substantial justice" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 217-218 [2000], *citing Burger King Corp. v Rudzewicz*, 471 US 462, 476 [1985], *quoting International Shoe Co. v Washington*, 326 US 310, 320 [1945]; *Liberatore v Calvino*, 293 AD2d 217, 220 [2002]). That is to say, a defendant's conduct and connection with the forum State are such that it should reasonably anticipate being haled into court there (*LaMarca*, 95 NY2d at 216; *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 295, 297 [1980]).

The non-domiciliary's contact with New York must be "purposeful and the totality of the circumstances [should] indicate that the exercise of jurisdiction would be proper" (*Liberatore v Calvino*, 293 AD2d 217, 220 [2002]; *Grimaldi v Guinn*, 72 AD3d 37, 51 [2010]). In this regard, whether the defendant engaged in activities in the jurisdiction in furtherance of creating an on-going course of dealing or contractual relationship between the parties, out of which the cause of action arose, is an important consideration (*Reiner & Co. Schwartz*, 41 NY2d 648, 653 [1977]; *Fischbarg v Doucet*, 9 NY3d 375, 380 [2007] [quality of defendant's New York contact is the primary consideration]).

Plaintiff has sustained its burden by making a prima facie showing that personal jurisdiction exists over DRNC (*Cornely v Dynamic HVAC Supply, LLC*, 44 AD3d 986 [2007]; *Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 243 [2005]). Contact between DRNC and DNI USA began in 2006, prior to the formation of DRNC, when Yavnik traveled to New York, met with DNI USA, was trained on their "business model and products" and discussed employment with DRN LTD. He returned to Canada, formed DRNC in 2008 and thereafter communicated with DNI USA via telephone and fax to obtain Dr. Nona brand products for resale to its Canadian customers. While Yavnik's 2006 visit to New York is not, in and of itself, sufficient for a finding of jurisdiction, it demonstrates an existing and on-going business relationship for over two years and that DRNC's contact with DNI USA was more than incidental or happenstance. DRNC, through its agent Yavnik, was associated with DNI USA since 2006, was aware that DNI USA was a distinct New York company unaffiliated with DRN LTD and authorized to distribute Dr. Nona products. The nature and volume of the communications, initiated by DRNC over the two year period, by phone and email, created a substantial on-going business relationship directly with DNI USA and such contacts are adequate to justify the exercise of jurisdiction (*Fischbarg v Doucet*, 9 NY3d 375, 381 [2007]; *Grimaldi v Guinn*, 72 AD3d 37, 51 [2010] [the purposeful creation of a continuing relationship is a contributing factor in demonstrating sufficient contacts]). DRNC's contacts here are greater than a mere telephoning of a single order to New York requesting a shipment of goods to another state, in which case jurisdiction pursuant to CPLR 302 would not be

supported (*see M. Katz & Son Billiard Products, Inc. v G. Correale & Sons, Inc.*, 20 NY2d 903 [1967];*see Parke-Bernet Galleries v Franklyn*, 26 NY2d 13, 17 [1970]). Significantly, DRNC's communications with DNI USA by telephone and email, were used to actively participate in the business transactions in New York (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], *Parke-Bernet Galleries, Inc. v Franklyn*, 26 NY2d 13, 17 [1970]; *Liberatore v Calvino*, 293 AD2d 217, 220 [2002]). It appears that based upon orders received from DRNC, DNI USA would place a separate order with DRN LTD for those products, create separate invoices for products destined for Dr. Nona-Canada Inc. and arrange for shipment to Canada F.O.B. DRNC's office.

Moreover, it is reasonable for DRNC to anticipate that it would have to answer a claim in New York for its failure to allegedly remit over $20,000 in payment for goods directly and repeatedly order from a vendor located in New York (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000]; *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 295, 297 [1980]). Where, such as here, a defendant "has created 'continuing obligations' between himself and residents of the forum . . . he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well" (*Burger King Corp. v Rudzewicz*, 471 US 462, 475-476 [1985] [citation omitted]).

Finally, there is a substantial relationship between the purposeful activities and the transaction out of which the cause of actions arise (*SPCA of Upstate N.Y., Inc. v American Working Collie Assn.*, 18 NY3d 400, 404 [2012]; *Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 246 [2005]; *McGowan v Smith*, 52 NY2d 268, 272 [1981][articulable nexus required between transaction and cause of action]).

With respect to jurisdiction over Erik Yavnik individually, the fiduciary shield rule is not available to defeat jurisdiction under the New York long-arm statute (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 472 [1988]).

With respect to defendants' motion to dismiss the complaint as against Benny Presman, there is no showing of timely service of the summons and complaint upon such defendant, therefore the complaint against Presman is dismissed without prejudice pursuant to CPLR 306-b. Accordingly, it is

ORDERED, that the motion is granted to the extent that the complaint against Benny Presman is dismissed and he is severed from the action; and it is further

ORDERED, that the caption is amended to read as follows:

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D.N.I. USA, Inc.

Plaintiff,

- against -

Dr. Nona Canada Inc. and Ernest Yavnik

a/k/a Eric Yavnik a/k/a Erik Yavnik

Defendants.

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ORDERED, that defendants' time to serve and file a verified answer to the complaint is extended to 30 days from service of a copy of this order with Notice of Entry; and it is further

ORDERED, that the August 9, 2012 appearance in Intake is rescheduled to September 10, 2010.

ENTER:

J. S. C.

Hon. Gloria M. Dabiri