IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

REPUBLIC CREDIT CORPORATION I,	*	
	*	4-04-cv-90246
Plaintiff,	*	
	*	
v.	*	
	*	
FERNANDO FICACHI,	*	MEMORANDUM OPINION
	*	AND ORDER
Defendant.	*	
	*	

Before the Court is Defendant Fernando Ficachi's ("Ficachi") Special Appearance and Motion to Dismiss on Grounds of Lack of Minimum Contacts, Invalid Forum Selection Clause and Lack of Jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(2). Clerk's No. 12. Plaintiff Republic Credit Corporation ("Republic") brought this action in diversity against Ficachi for payment on a promissory note on May 3, 2004.[1] Ficachi filed the present motion on November 1, 2004. Republic resisted the motion on November 10, 2004. Ficachi did not reply and the matter is fully submitted.

I. BACKGROUND

The present action arises out of the failure of the Hartford-Carlisle Savings Bank ("HCSB"). Prior to HCSB's failure, on or about February 18, 1999, Ficachi executed and delivered to HCSB a promissory note (the "Note") for the principal sum of $500,000.00, plus interest. *See* Complaint Exh. A. The Note was comprised of a one page document including the following language under a heading

[1] The present motion makes clear that Ficachi was served with process in this matter, presumably at his home in Cancun, Mexico. The time period for Republic to file proof of service of process, however, has been extended to March 24, 2005, due to time delays inherent in receiving return of service from Mexican authorities.

entitled "Lender's Rights:"

> This note has been delivered to Lender and accepted by Lender in State of Iowa. If there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of Warren County, the State of Iowa. This note shall be governed by and construed in accordance with the laws of the State of Iowa.

Upon the failure of HCSB, the Federal Deposit Insurance Corporation, acting as receiver, assigned the Note to Republic. Republic alleges in its Complaint that Ficachi has failed to make payments when due and is, therefore, in default pursuant to the terms of the Note. Republic claims it is entitled to a principal sum of $499,900.00, plus interest, and attorney's fees. Ficachi, however, claims that the present suit cannot be maintained in this Court because he lacks sufficient "minimum contacts" with the State of Iowa to sustain jurisdiction.

II. LAW AND ANALYSIS

"While it is true that the plaintiff bears the ultimate burden of proof on [the issue of personal jurisdiction], jurisdiction need not be proved by a preponderance of the evidence until trial or until the court holds an evidentiary hearing." *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1387 (8th Cir. 1991) (citing *Cutco Ind. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986)). Thus, to survive a motion to dismiss for lack of personal jurisdiction, Republic need only make a prima facie showing of personal jurisdiction over Ficachi. *See e.g.*, *Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1387 (8th Cir. 1995); *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 818 (8th Cir.1994); *Watlow Elec. Mfg. Co. v. Patch Rubber Co.*, 838 F.2d 999, 1000 (8th Cir. 1988). In evaluating whether Republic has made such a showing, the Court must view the evidence in the light most favorable to Republic and resolve all factual

conflicts in Republic's favor. *See Dakota Indus., Inc.*, 946 F.2d at 1387 ("If the district court does not hold a hearing and instead relies on pleadings and affidavits, as it did here, the court must look at the facts in the light most favorable to the nonmoving party.").

To determine whether it has personal jurisdiction over a non-resident defendant, this Court is guided by two primary rules. First, the facts presented must satisfy the requirements of the state's long-arm statute. *See Austad Co. v. Pennie & Edmonds*, 823 F.2d 223, 225 (8th Cir. 1987). If the activities of the non-resident defendant pass the first level of analysis, the Court must then consider whether the exercise of personal jurisdiction complies with the requirements of constitutional due process. *See Northrup King*, 51 F.3d at 1387; *Dakota Indus., Inc.*, 946 F.2d at 1388. "Because personal jurisdiction in Iowa reaches to the fullest extent permitted by the Constitution," however, this Court "need only examine whether minimum contacts sufficient to satisfy the Fourteenth Amendment exist." *Hicklin Eng., Inc. v. Aidco, Inc.*, 959 F.2d 738, 739 (8th Cir. 1992) (per curiam) (citing *Newton Mfg. Co. v. Biogenetics, Ltd.*, 461 N.W.2d 472, 474 (Iowa 1990)); *see also Republic Credit Corp. I v. Rance*, 172 F. Supp. 2d 1178 (S.D. Iowa 2001) ("[B]ecause personal jurisdiction in Iowa is coterminous with the constitutional reach of due process, the two level inquiry collapses into one.").

Due process mandates that personal jurisdiction exists only if a defendant has sufficient "minimum contacts" with the forum state, such that summoning the defendant to the forum state would not offend "'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). To maintain personal jurisdiction, a defendant's contacts with the forum state must be more than "random," "fortuitous," or

"attenuated." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Rather, sufficient contacts exist when "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). In evaluating a defendant's reasonable anticipation, there must be "'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Burger King*, 471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Jurisdiction is proper, therefore, where the contacts proximately result from actions by the defendant that create a "substantial connection" with the forum state. *Id.*; *World-Wide Volkswagen* 444 U.S. at 297.

In addition to the basic principles of due process, the Court evaluates five factors in analyzing the constitutional requirements needed to sustain personal jurisdiction: (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum; (3) the relation of the cause of action to these contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties. *See Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc.*, 65 F.3d 1427, 1432 (8th Cir. 1995); *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977). The first three factors are considered to be primary, with the third factor distinguishing whether jurisdiction is specific or general.[2] *See Wessels*, 65 F.3d at 1432 n.4. The latter

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[2] "It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984) (citation omitted). "When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." *Id*. at n.9 (citations omitted).

two factors are considered "secondary factors." *Minnesota Mining and Mfg. Co. v. Nippon Carbide Indus. Co.*, 63 F.3d 694, 697 (8th Cir. 1995); *Northrup King*, 51 F.3d at 1388.

On the record now before the Court, the following facts about Ficachi are ascertainable: 1) Ficachi is a citizen of the Republic of Mexico; 2) he lived for approximately 19 years in California, attending high school and three years of college there; 3) his only personal visit to Iowa was to attend a two-day seminar in 1997 sponsored by Murdock Communications Corporation ("MCC"), a company based in Iowa that is also the parent company of Ficachi's employer at the time, Incomex, Inc.;[3] 4) since moving to Mexico in 1993, Ficachi has occasionally visited the United States, but never Iowa; 5) in 1998, Ficachi received, via overnight mail, the promissory note in question, signed the note, and sent it back to HCSB via overnight mail;[4] and 6) at the time of signing the note, Ficachi owned 80,000 shares of MCC stock.

Of great importance in this case is the fact that Ficachi signed a promissory note containing choice-of-law and jurisdictional consent clauses pointing to the State of Iowa. "While a choice of law provision in itself is insufficient to create personal jurisdiction, it remains a relevant consideration in determining whether a defendant has purposefully availed itself in the forum state." *Northwest Airlines, Inc. v. Astraea Aviation Serv., Inc.*, 111 F.3d 1386, 1390 (8th Cir. 1997) (citing *Wessels,* 65 F.3d at 1434). As was the case in *Republic Credit Corp. I v. Rance*, however, a case stemming

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[3] Ficachi claims that MCC officers perpetrated a fraud upon him, in conjunction with HCSB, fundamentally making him a "straw man" borrower for MCC.

[4] Ficachi claims that he only signed the note because he was led to believe that he was merely the "guarantor," and that MCC would make all payments on the loan. Ficachi states in his affidavit that he never intended to make any payments on the loan, never noticed the forum selection clause, and understood the note to be non-negotiable.

from the same contractual language as the present case, Ficachi's signature on the note indicated, at best, his consent to the jurisdiction of the courts of Warren County, Iowa, not any other courts in Iowa, including this one. *See Rance*, 172 F. Supp. 2d at 1183. Nonetheless, the specific assertion of an Iowa forum in the contract makes it reasonable that personal jurisdiction is asserted in this Court.

Like Rance, Ficachi claims that the forum selection and choice-of-law provisions should not bind him because they are boilerplate language that were "intentionally hidden from Ficachi and he never noticed it." Clerk's No. 13 at 4. Thus, Ficachi claims, his "alleged agreement to the forum selection clause was . . . procured by fraud" and is, therefore, void. *Id*. at 5. "Courts have certainly endeavored to protect poorly educated or illiterate parties from certain boilerplate language on the grounds that it is 'not of a type that would reasonably appear to the recipient to contain the terms of a proposed contract.'" *Rance*, 172 F. Supp. 2d at 1183 (quoting E. Allan Farnsworth, Contracts, § 4.26, at 314 (2d ed. 1990)). "Courts have also disregarded such language where it is included in the writing in such a way that an uninitiated reader would not reasonably understand it to be part of the offer." *Id*. (citing Farnsworth at 315).

Based on the record now before it, the Court finds Ficachi's claim that the clauses were "hidden" untenable at best. The promissory note in question was only one page long. Even though written in a small font, the Note is easily readable. The choice-of-law and forum selection clauses, in particular, are printed in bold typeface, in the same size font as the rest of the contract, under a heading entitled "LENDER'S RIGHTS." Unlike Rance, Ficachi is not a lawyer. It is, however, clear that Ficachi is an educated and literate person and that the contract was neither undecipherable nor filled with legalese. Indeed, Ficachi attended college in the United States for at least three years, held

approximately 80,000 shares of MCC stock, and reasonably could have been expected to understand the nature of the agreement and its terms. It is not unreasonable to expect any person to read a one-page contract that governs a loan of half a million dollars. Moreover, there is no indication that Ficachi was denied the opportunity to read and review the contract before signing it and returning it to Iowa.

As to Ficachi's argument that the entire agreement was obtained through fraud, the Supreme Court has rejected the notion that "any time a dispute arising out of a transaction is based upon an allegation of fraud . . . the [forum-selection] clause is unenforceable." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974). Rather, "an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion." *Id.* As this Court noted in *Rance*:

> It is this Court's view that deviation from the rule enunciated in *Scherk* is a mistake. In *Terra International, Inc. v. Mississippi Chemical Corp.*, 922 F. Supp. 1334, 1380 (N.D. Iowa 1996), the Court argued that "courts will not tolerate 'artful pleading' of non-contract claims to avoid a forum selection clause." *Id.* While that case did not address a fraud in inducement[5] defense, the principle is still applicable. Courts should not allow a defendant, or for that matter a plaintiff, to plead their way out of a forum-selection clause to which they agreed by merely asserting, without offering any evidence, fraud in inducement. Otherwise, any party could vitiate a forum-selection clause by simply pleading fraud in inducement, forcing the other party to litigate in another forum contrary to the agreement, and never offering further evidence of the alleged fraud.

Rance, 172 F. Supp. 2d at 1183. In this case, only Ficachi's own affidavit supports his assertion that he was fraudulently induced to sign the Note. Moreover, there is nothing in the record to support a conclusion that the forum selection and choice-of-law provisions were fraudulently included in the Note

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[5] Ficachi actually claims fraud in factum, as opposed to fraud in inducement. For purposes of analysis, there is little if any difference, however, as neither theory is supported by evidence.

or otherwise "hidden." Ficachi's own negligence in failing to "notice" the provisions in the contract is legally insufficient to defeat personal jurisdiction over this cause of action.

Ficachi next argues that the forum selection clause is unenforceable because "the contract sued upon is clearly one of adhesion and the parties had unequal bargaining power of a corrupt bank versus an unsophisticated Mexican national with no borrowing experience; a very poor credit rating and no assets." Clerk's No. 12 at 5. "Due process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause." *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 726 (8th Cir. 2001) (citing Burger King, 471 U.S. at 472 n.14; *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, (1972)). An adhesion contract is generally defined as one that is "drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms.'" *Pennsylvania Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 813 (Iowa 2002) (quoting Restatement (Second) of Conflict of Laws § 187 cmt. b, at 135 (Rev. 1988)); *see also Schlobohn v. Spa Petite, Inc.*, 326 N.W.2d 920, 924 (Minn. 1982) (an adhesion contract is one that is "drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere."); *Estrin Constr. Co. v. Aetna Cas. and Sur. Co.*, 612 S.W.2d 413, 418 n.3 (Mo. App. 1981) ("A contract of adhesion is a form contract submitted by one party and accepted by the other on the basis of *this or nothing*. It is an instrument devised by skilled legal talent for mass and standard-industry wide use which does not allow for idiosyncracy. It is a transaction not negotiated but one which literally adheres for want of choice.") (emphasis in original). Once a contract is determined to be one of adhesion, courts must scrutinize the terms carefully:

> Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all of the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-450 (D.C. Cir. 1965) (footnotes omitted).

The mere fact that the present contract *may*[6] fall under the rubric of the adhesion doctrine, however, does not make it unenforceable. The term sought to be invalidated must also be unconscionable. *See e.g.*, *Webb v. R. Rowland & Co.*, 800 F.2d 803, 807 (8th Cir. 1986) ("The use of a standard form contract between two parties of admittedly unequal bargaining power does not invalidate an otherwise valid contractual provision. To be invalid, the provision at issue must be unconscionable."); *Surman v. Merrill, Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 61 n.2 (8th Cir. 1984) (noting that standardized contracts of adhesion are not per se unenforceable, but courts must determine whether a particular clause is unconscionable) (citing 6A A. Corbin, Contracts § 1376, at 20-22 (1962)); *Hofmeyer v. Iowa Dist. Court for Fayette County*, 640 N.W.2d 225, 230 (Iowa 2001) ("The determination of whether a contract is a contract of adhesion involves the issue of unconscionability."); *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 180 (Iowa 1975) ("Standardized contracts . . . drafted by powerful commercial units and put before individuals on

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[6] The "bare assertion" that the contract was offered on a "take it or leave it" basis is not sufficient as a matter of law to establish adhesion. *Dominium Austin Partners,* 248 F.3d at 726.

the 'accept this or get nothing' basis, are carefully scrutinized by the courts for the purpose of avoiding enforcement of 'unconscionable' clauses.") (quoting 6A A. Corbin, Contracts § 1376, at 21 (1963)). Ficachi has offered absolutely no evidence that enforcement of the forum selection clause would be unconscionable. Though Ficachi claims that he cannot afford to retain an attorney to represent him through trial of this case, nor can he afford to travel to the forum state, he also states that "[h]e can afford counsel in his home state." Clerk's No. 12 at 7. While clearly there would be additional expense and inconvenience should Ficachi be required to travel to Iowa, it is unclear why Ficachi could afford to hire an attorney in one jurisdiction, but not another.

After carefully reviewing the record, the Court finds that Ficachi has sufficient minimum contacts with Iowa such that it does not offend due process for this Court to exercise personal jurisdiction. Specifically, the Court finds that Ficachi executed and delivered to HCSB, an Iowa citizen, a promissory note identifying himself as borrower and HCSB as lender. Prior to signing the note, Ficachi was not bound by the agreement. The terms of the agreement, including the forum selection clause and choice-of-law provisions, were before Ficachi and he chose not only to sign the agreement, but to mail it to Iowa. Moreover, the promissory note signed by Ficachi specifically states: "This note has been delivered to Lender and accepted by Lender in the State of Iowa." As noted in *Rance*, "this serves as an admission that the main event giving rise in this lawsuit took place in Iowa." *Rance*, 172 F. Supp. 2d at 1183. The Note has a readily visible and plainly worded forum selection clause and Ficachi has offered no evidence that enforcement of the clause would be unconscionable or even unreasonable. While Ficachi's contacts with Iowa are not overtly systematic, they are sufficient to support a conclusion that he purposely availed himself of the laws of Iowa by contracting to borrow money from

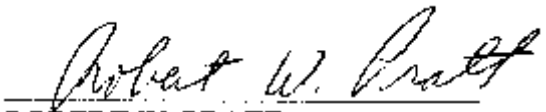
HCSB.

III. CONCLUSION

For the reasons stated herein, Defendant Ficachi's Motion to Dismiss on Grounds of Lack of Minimum Contacts, Invalid Forum Selection Clause and Lack of Jurisdiction (Clerk's No. 12) is DENIED.

IT IS SO ORDERED

Dated this ___2nd___ day of December, 2004.



ROBERT W. PRATT
U.S. DISTRICT JUDGE