

asking him to become a partner in what were represented as profitable investments. These representations continued for at least five years. None of these projects, it is alleged, ever existed. In all, Plaintiff paid to Defendants \$976,485.91. One of the Defendants, John Brink (“Brink”), has been indicted in Texas for mail fraud. Two other Defendants, Kyle Kirkland (“Kyle”) and Sylvia Kirkland (“Sylvia”), face criminal indictments in the Southern District of Iowa for wire and mail fraud.

Pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, Defendants urge dismissal on grounds the Court lacks personal jurisdiction over them.

II. Legal standard for dismissal on personal jurisdiction grounds

“The federal court in a diversity case must determine whether [the] defendant is subject to the court’s jurisdiction under the state long-arm statute, and if so, whether exercise of that jurisdiction comports with due process.” *Moog World Trade Corp. v. Bancamer, S.A.*, 90 F.3d 1382, 1384 (8th Cir. 1996). Under this two-part analysis, the Court must first ask whether the activity of the Defendant falls within the scope of the state statute. *See Portnoy v. Defiance, Inc.*, 951 F.2d 169, 171 (8th Cir. 1991). Second, the Court must determine whether the assertion of jurisdiction violates federal due process by considering the Defendant’s minimum contacts with the forum. The suit must not “offend traditional notions of fair play and substantial justice.” *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). It is essential in each case that there is 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.” *Id.* Where a litigant invokes the jurisdiction of the court over a non-resident defendant, due process is satisfied if “the defendant has ‘purposely directed’ his activities at residents of the forum . . . and the litigation results from alleged injuries that ‘arise out of or relate to’ those

activities.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citations omitted).

To survive a motion to dismiss for lack of personal jurisdiction, Plaintiff bears the burden of demonstrating that personal jurisdiction exists. *Moog World Trade Corp.*, 90 F.3d at 1384.

A. Iowa’s long arm statute

Iowa’s long arm statute permits personal jurisdiction over “a nonresident person” who “commits a tort in whole or in part in Iowa against a resident of Iowa.” Iowa Code § 617.3. In this case, assuming true the allegations in the Complaint, Defendants committed fraud against Plaintiff by knowingly and intentionally misrepresenting investment projects, inducing reliance, and causing damages. *See, e.g., Beeck v. Kapalis*, 302 N.W.2d 90, 94 (Iowa 1981) (setting forth the elements of fraud). By affidavit, Plaintiff asserts that the Defendants called and wrote him on numerous occasions during the period from 1993-1999 to report on the status of the projects and to request money. Supporting documents filed with Plaintiff’s affidavit include: (1) a letter from Brink to Clauss in Iowa dated July 6, 1993 indicating, among other things, that Clauss’ investment has “netted” him \$10,212.12 or a 31% “return on investment.” Pl.’s Ex. 1; (2) an affidavit from a United States Postal Inspector attesting to “frequent, continuing and substantial amounts of communications between Clauss and the Defendants in Texas.” Pl.’s Ex. 2; (3) a copy of a grand jury indictment from this district charging Kyle and Sylvia with seven counts of mail fraud and 45 counts of wire fraud. The Court concludes that Plaintiff has met his burden in showing that the exercise of jurisdiction over Kyle, Sylvia, and Brink is authorized by Iowa’s long arm statute. *See E & M Mach. Tool Corp. v. Continental Machine Products, Inc.*, 316 N.W.2d 900, 904 (Iowa 1982) (allegations of false advertising in Iowa, misrepresentations in telephone calls to state, and damage in Iowa are sufficient to show alleged tort in Iowa for purposes of long-arm statute).

B. Due process analysis

The Eighth Circuit in *Health Care Equalization Comm. v. Iowa Med. Soc'y*, 851 F.2d

1020 (8th Cir. 1988) summarized the relevant due process analysis.

In determining whether there are sufficient minimum contacts to satisfy due process, we focus on the “relationship among the defendant, the forum, and the litigation.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977)); *Institutional Food Marketing Assocs., Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 448, 455 (8th Cir.1984). This inquiry involves a consideration of five factors: (1) the nature and quality of the defendant’s contacts with the forum state; (2) the quantity of the defendant’s contacts with the forum state; (3) the relation of the cause of action to the defendant’s contacts with the forum state; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties. *Institutional Food Marketing*, 747 F.2d at 455; *Scullin Steel Co. v. National Ry. Utilization Corp.*, 676 F.2d 309, 313 n.4 (8th Cir.1982). The first three factors are of paramount importance. *Id.*; *Aaron Ferer & Sons Co. v. American Compressed Steel Co.*, 564 F.2d 1206, 1210 n.5 (8th Cir.1977).

Id., at 1030.

Having examined the affidavits, supporting documents, and the relevant case law, the Court finds that it cannot, consistent with due process, exercise jurisdiction over the Defendants in this case. The Defendants are alleged to have the following contacts with the State of Iowa:

(1) Kyle Kirkland. From 1993 to 1999, Kyle called Plaintiff in Iowa several times and mailed Plaintiff “numerous documents” in connection with the proposed investment schemes. Kyle never visited Iowa. On at least 45 separate occasions, Plaintiff wired money to Kyle and the other Defendants in Texas.

(2) Sylvia Kirkland. Sylvia’s contacts are substantially the same as Kyle’s. The only difference was that every check or wire sent by Plaintiff was made payable to Sylvia. Sylvia never visited Iowa.

(3) John Brink. In 1993, Plaintiff wired money once and sent checks four times to Brink

in Texas totaling between \$140,000 and \$160,000. Brink sent Plaintiff a letter, dated July 6, 1993, accounting for Plaintiff's investments in the oil and pipeline projects. During 1993, Brink called Plaintiff several times to solicit his money in these investments. Brink never visited Iowa.

Personal jurisdiction over these three Defendants is not authorized because as a general rule, "the use of interstate mail, telephone or banking facilities, standing alone [is] insufficient to satisfy the requirements of due process," *T.J. Raney & Sons, Inc. v. Security Sav. & Loan Ass'n*, 749 F.2d 523, 525 (8th Cir. 1984) (citations omitted). Although use of interstate mail, phone or banking facilities is alone not enough to satisfy due process, "when these contacts are combined with ... other factors, they become wholly relevant and significant." *Wessels, Arnold & Henderson v. National Med. Waste Inc.*, 65 F.3d 1427, 1433-34 (8th Cir. 1995) (in addition to significant mail and phone contacts, 90% of the contract was performed in the forum state; defendants briefly visited forum state on two occasions); *Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1388 (8th Cir. 1995) (in addition to "extensive written communication," officers of defendant corporation held several meetings in forum state).

In this case, the Defendants have no other contact with Iowa beyond their phone, mail, and wire transactions. Those contacts, substantial though they may be, are not enough to satisfy this Court's exercise of personal jurisdiction over the Defendants. The Eighth Circuit consistently has rejected assertions of personal jurisdiction over defendants whose contacts are limited to phone, mail, and/or wire transactions. See *Moulton v. Webb*, 21 F.3d 432, 1994 WL 124228, *1 (Apr. 13, 1994, 8th Cir. 1994) (unpublished opinion) ("exchange of correspondence" or "use of interstate mail" is insufficient to satisfy due process); *T.J. Raney*, 749 F.2d at 525; *Institutional Food Mktg. Associates, Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 448, 456

(8th Cir. 1984) (contacts of out-of-state defendant over a two-year period “limited to phone conversations and written correspondence”; due process not satisfied); *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, (8th Cir. 1982) (in addition to use of phone, mail, and banking facilities, Panamanian defendant caused to be manufactured, packaged, and shipped to Panama from Arkansas over 2,000 tons of animal feed worth over \$750,000: due process not satisfied); *Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co.*, 558 F.2d 450, 454-56 (8th Cir. 1977) (dismissal of four out-of-state defendants affirmed on due process grounds where defendants “had engaged in a continuous course of business” between one and five years involving transactions between \$500,000 and \$700,000: due process not satisfied because contacts limited to telephone calls and mailings).

Although the authorities cited above are contract cases, the Eighth Circuit has not adopted a different analysis for suits based on fraud. *See Portnoy v. Defiance, Inc.*, 951 F.2d 169 (8th Cir. 1991) (fraud and misrepresentation case subject to minimum contacts analysis: due process found where out-of-state defendants conducted significant activities in forum state); *Dudley v. Dittmer*, 795 F.2d 669, 672 (8th Cir. 1986) (fraud and market manipulation claims under the Commodities Exchange Act subject to minimum contacts analysis: due process sufficient where out-of-state defendants had “numerous phone calls” and paid two visits to the forum state).

Although the Defendants had many contacts with the Plaintiff in Iowa, the nature and quality of those contacts are insufficient to satisfy constitutional standards of due process. Granted, there are pending criminal indictments against Kyle and Sylvia in this district based on the same facts which gave rise to this lawsuit. Although that may make Iowa a more logical and convenient forum in which to handle Clauss’ civil claims – which, under *Health Care*

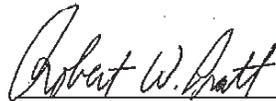
Equalization Comm., 851 F.2d at 1030, are factors to consider – it does nothing to alter the nature and quality of Defendants’ contacts with Iowa. And as noted above, those contacts – which are based *exclusively* on phone, mail, and wire transactions – are insufficient grounds on which to constitutionally base an exercise of this Court’s jurisdiction over the Defendants.

III. Conclusion

For the foregoing reasons, Kyle’s Motion to Dismiss (clerk’s #23) is **GRANTED**; Sylvia’s Motion to Dismiss (clerk’s #13) is **GRANTED**; Brink’s Motion to Dismiss (clerk’s #9) is **GRANTED**. The Clerk is also reminded, *see* footnote 1, that Hayes’ and Brook’s joint Motion to Dismiss (clerk’s #4) is also **GRANTED**. Plaintiff’s Complaint is dismissed without prejudice.

IT IS SO ORDERED.

Dated this 6th day of June, 2000.



ROBERT W. PRATT
U.S. DISTRICT JUDGE