

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

COMPLEX BUSINESS LITIGATION DIVISION

NICHOLE WERTHEIM, Derivatively,
on behalf of the Dr. Herbert and Nicole,
Wertheim Family Foundation, Inc.
And BROOKHILL CONSULTANTS LTD.,
a foreign corporation,

CASE NO.: 24-012813-CA

Plaintiffs,

v.

DR. HERBERT WERTHEIM, Individually
and in his capacity as a Member, Trustee, Officer and/or
Director of the Dr. Herbert and Nicole Wertheim Family Foundation, Inc.
and RAY WERTHEIM, an individual,

Defendants.

and

DR. HERBERT AND NICOLE WERTHEIM
FAMILY FOUNDATION, INC., a Florida
not for profit corporation, et. al.

NOTICE OF APPEAL OF A NONFINAL ORDER

NOTICE IS GIVEN that NETJETS AVIATION, INC. ("NetJets Aviation"),
NETJETS CARD PARTNERS, INC. a/k/a MARQUIS JET PARTNERS, INC. ("NetJets
Card"), and NETJETS SERVICES, INC. ("NetJets Services") (collectively "NetJets")
hereby appeal to the Third District Court of Appeal, the Order of this Court titled "Order
Denying Nominal Defendants NetJets Aviation, Inc., NetJets Card Partners, Inc., and
NetJets Services, Inc.'s Motion to Dismiss Amended Verified Complaint," rendered on
December 3, 2024 (a conformed copy of the Order is attached hereto as Exhibit A in

accordance with Fla. App. R. 9.130(c) and 9.160(c)). The nature of the Order being appealed is a non-final order on a motion to dismiss for improper venue.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished this 16th day of December, 2024, via the Florida courts E-Filing Portal in accordance with Rule 2.516, Florida Rules of Judicial Administration to all registered participants; by electronic mail to all other counsel; and by First-Class US Mail to all *pro se* parties, as follows:

Bruce A. Weil, Esq.
Tyler E. Ulrich, Esq.
Robert G. Keefe, Esq.
BOIES SCHILLER FLEXNER LLP
100 S.E. 2nd Street, Suite 2800
Miami, Florida 33131
bweil@bsflp.com
tulrich@bsflp.com
rkeefe@bsflp.com
Counsel for Plaintiffs

Dennis Richard, Esq.
Melissa Mackiewicz, Esq.
Kevin Shohat, Esq.
RICHARD AND RICHARD, P.A. 825
Brickell Bay Drive Tower III, Suite 1748
Miami, FL 33131
dennis@richardandrichard.com
melissa@richardandrichard.com
kevin@richardandrichard.com
Counsel for Defendants, Dr. Herbert Wertheim and Ray Wertheim

Daniel R. Lazaro, Esq.
Hala Sandridge, Esq.
Buchanan Ingersoll & Rooney PC
401 East Jackson Street, Suite 2400
Tampa, Florida 33602
Dan.lazaro@bipc.com
Hala.sandridge@bipc.com
Counsel for Nominal Defendant, the University of Florida Foundation, Inc.

Andrew S. Berman, Esq.
Young, Berman, Karpf & Karpf, P.a.
825 Brickell Bay Dr, Tower III, Ste. 1748
Miami, FL 33131
aberman@ybkklaw.com
eservice2ybkklaw.com
Co-Counsel for Defendant, Dr. Herbert Wertheim

PORTER, WRIGHT, MORRIS & ARTHUR, LLP

STATE OF FLORIDA, COUNTY OF MIAMI-DADE

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE

JUAN FERNANDEZ-BARQUIN, Clerk of the Court and Comptroller, Miami-Dade County

Deputy Clerk



/s/ Javier A. Pacheco
JAVIER A. PACHECO, ESQ.
Florida Bar # 51368
SARA K. WHITE, ESQ.
Florida Bar # 0086014

9132 Strada Place, Third Floor
Naples, Florida 34108
Tel 239.593.2964
Fax 239.593.2922
jpacheco@porterwright.com
swhite@porterwright.com
kmead@porterwright.com

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CASE NO: 2024-012813-CA-01

SECTION: CA43

JUDGE: Thomas J. Rebull

NICOLE WERTHEIM

Plaintiff(s)

vs.

DR. HERBERT WERTHEIM et al

Defendant(s)

**ORDER DENYING NOMINAL DEFENDANTS NETJETS AVIATION, INC., NETJETS
CARD PARTNERS, INC., AND NETJETS SERVICES, INC.'S MOTION TO DISMISS
AMENDED VERIFIED COMPLAINT**

This action came before the Court on November 22, 2024, for hearing on Nominal Defendants NetJets Aviation, Inc., NetJets Card Partners, Inc., and NetJets Services, Inc.'s (collectively, "NetJets") Motion to Dismiss Amended Verified Complaint (the "Motion"). The Court has reviewed the Motion, Plaintiffs' response in opposition to the Motion, NetJets' reply in support of the Motion, and Plaintiffs' November 20, 2024 letter enclosing supplemental authority, has considered counsels' arguments, rules as follows:

LEGAL STANDARD

1. In ruling on the Motion, this Court "treat[s] as true all well pled allegations in the complaint, including its incorporated attachments, and 'look[s] no further than the complaint and its attachments.'" *Chakra 5, Inc. v. City of Miami Beach*, 254 So. 3d 1056, 1061 (Fla. 3d DCA 2018); see *Intego Software, LLC v. Concept Dev.*, 198 So. 3d 887, 889, 892 (Fla. 1st DCA 2016).

ANALYSIS

2. NetJets moves to dismiss the Amended Verified Complaint on three grounds. First, NetJets argues that Miami-Dade County is the improper venue based on a contractual choice of venue provision. Second, NetJets argues that Plaintiffs have failed to state a cause of action against NetJets. Third, NetJets argues that Plaintiffs have failed to allege that personal jurisdiction exists over NetJets. For the following reasons, the Court finds that venue is proper in Miami-Dade County, that Plaintiffs have sufficiently alleged that NetJets is an “affected person” under Section 617.0304(3) of the Florida Statutes and is therefore properly a party to this lawsuit, and that Plaintiffs have alleged sufficient jurisdictional facts to establish personal jurisdiction over NetJets.

Venue Is Proper

3. NetJets argues that venue is improper in Miami-Dade County based on the following choice-of-venue provision in the relevant contract:

Governing Law and Court Jurisdiction. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Ohio, without regard to that state’s or any other state’s choice of law provisions. *The state and federal courts located in Franklin County, Ohio shall have exclusive jurisdiction over any action or other legal proceeding of any kind, legal or equitable, based upon or in any way related to the subject matter of this Agreement, including the sale, operation, maintenance, management, inspection, servicing, or occupancy of the Aircraft. Any such proceeding shall be brought exclusively in an appropriate court of competent jurisdiction located in Franklin County, Ohio. . . .*” (second emphasis added).

(the “Venue Provision”).

4. The Court concludes that venue is proper in Miami-Dade County because Plaintiffs’ claims do not fall within the Venue Provision’s scope because Plaintiffs’ claims are not “based upon or in any way related to the subject matter” of the NetJets contract.

5. The Supreme Court of Florida has explained that “the mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one ‘arising out of or relating to’ the agreement.” *Siefert v. U.S. Home Corp.*, 750 So. 2d 633, 638 (Fla. 1999). Rather, the claim must have a “significant relationship” to the contract. *Id.* at 640. A “significant relationship” exists “if there is a ‘contractual nexus’ between the claim and the contract,” meaning that “the claim presents circumstances in which the resolution of the disputed issue requires either reference to, or construction of, a portion of the contract.” *Baker v. Econ. Research Servs., Inc.*, 242 So. 3d 450, 455 (Fla. 1st DCA 2018) (quoting *Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013)).
6. The Eleventh Circuit has adopted a similar approach in determining a forum-selection clause’s scope. In *Bailey v. ERG Enterprises, LP*, 705 F.3d 1311 (11th Cir. 2013), the Eleventh Circuit evaluated the scope of a contractual forum-selection clause that encompassed “any dispute, proceeding, suit or legal action concerning the interpretation, construction, validity, enforcement, performance of, or related in any way to, [the contract].” 705 F.3d at 1317. The court held that the plaintiffs’ fraud claims did not “relate[s] in any way” to the contract because the fraud claims did not have “a direct relationship to” the contract. *Id.* at 1317–18. The court reasoned:

A claim ‘relates to’ a contract when ‘the dispute occurs as a fairly direct result of the performance of contractual duties. Moreover, the fact that a dispute could not have arisen but for an agreement does not mean that the dispute necessarily ‘relates to’ that agreement. The phrase ‘related to’ marks a boundary indicating some direct relationship. Requiring a direct relationship between the claim and the contract is necessary because, if ‘relate to’ were taken to extend to the furthest stretch of its indeterminacy, it would have no limiting purpose because really, universally, relations stop nowhere.

Id. (citations and quotation marks omitted and alterations adopted). Thus, the court explained, “The

claims must result from the performance of duties under the” contract. *Id.* The court concluded that because the plaintiffs “would still be able to bring their . . . fraud claims even if” all obligations under the contract had been performed, the fraud claims did not fall within the scope of the forum-selection clause. *Id.* at 1318–19.

7. Based on the Florida Supreme Court’s decision in *Siefert* and the Eleventh Circuit’s persuasive reasoning in *Bailey*, this Court determines that Plaintiffs’ claims do not fall within the Venue Provision’s scope. Plaintiffs allege that Defendant Dr. Herbert Wertheim misappropriated Nominal Defendant Dr. Herbert and Nicole Wertheim Family Foundation, Inc.’s (the “Foundation”) NetJets account, and Plaintiff Nicole Wertheim, derivatively on behalf of the Foundation, requests that this Court “Order NetJets . . . to return the Foundation’s account to the Foundation and request that Nicole Wertheim be granted full access to the account.” Am. Compl. at 14. Plaintiffs neither seek adverse relief against NetJets nor allege that NetJets breached any provision of the contract. Thus, because Plaintiffs’ claims are not “a fairly direct result of the performance of contractual duties,” *see Bailey*, 705 F.3d at 1317, and Plaintiffs’ claims do not “require[] either reference to, or construction of, a portion of the contract,” *see Baker*, 242 So. 3d at 455, Plaintiffs’ claims are not “based upon or in any way related to the subject matter of” the NeJets contract. Accordingly, the Venue Provision does not apply to Plaintiffs’ claims, and venue is proper in Miami-Dade County.

Plaintiffs Properly Named NetJets A Nominal Defendant

8. NetJets argues that it should be dismissed because Plaintiffs do not bring claims against NetJets and because NetJets is not an “affected person” under Section 617.0304(3) of the Florida Statutes.

9. The Court concludes that Plaintiffs have properly named NetJets as a Nominal Defendant

because NetJets is an “affected person” under Section 617.0304(3). Section 617.0304(3) provides, in relevant part,

In a member’s proceeding under paragraph (2)(a) to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, *if equitable and if all affected persons are parties to the proceeding*

§ 617.0304(3), Fla. Stat.

10. In the Amended Verified Complaint, Plaintiff Nicole Wertheim brings a claim for injunctive relief under Section 617.0304, including that the Court “Order NetJets . . . to return the Foundation’s account to the Foundation and request that Nicole Wertheim be granted full access to the account.” Am. Compl. at 14. If Plaintiff Nicole Wertheim prevails on her claim under Section 617.0304, then the Court may order NetJets to transfer ownership and control of the NetJets account from Dr. Wertheim back to the Foundation. Accordingly, NetJets is an “affected person” that is required to be made a party to this proceeding.

Plaintiffs Have Sufficiently Alleged Personal Jurisdiction Over NetJets

11. NetJets argues that Plaintiffs have failed to sufficiently allege facts supporting personal jurisdiction.

12. The Court finds that, considering Plaintiffs’ allegations and the exhibits attached to the Amended Verified Complaint, Plaintiffs have sufficiently alleged personal jurisdiction over NetJets. Plaintiffs allege that NetJets “conduct[s] business in Miami-Dade County” and that NetJets contracted with the Foundation, which is a Florida not-for-profit corporation, to provide services. Am. Compl. ¶¶ 15, 48. And Exhibit F to the Amended Verified Complaint includes an email from NetJets’ Senior Vice President of Sales indicating that he conducts business at NetJets’ office in West Palm Beach, Florida, and that he contacted Dr. Wertheim by phone and email regarding the transfer of a NetJets’ account. Am. Compl. at Ex. F.

13. Taken together, Plaintiffs’ allegations and Exhibit F to the Amended Verified Complaint establish both specific and general personal jurisdiction over NetJets in Florida. *See Intego Software, LLC*, 198 So. 3d at 892–93 (holding plaintiffs had sufficiently alleged personal jurisdiction over the defendant where the plaintiffs’ allegations and exhibit attached to complaint “demonstrated that Defendant pursued business in Florida through numerous communications in writing, electronically, and by phone; and Defendant’s representatives traveled to Florida to procure business” and that the defendant “provided deliverables to Plaintiff”); *Int’l Univ. of Health Sciences Ltd., Inc. v. Abeles*, 299 So. 3d 405, 408–09 (Fla. 4th DCA 2020) (affirming denial of motion to dismiss for lack of personal jurisdiction because the defendant’s “substantial business operations conducted within the state”—entering contracts in Florida, including the contract at issue in the lawsuit, having Florida as the place of payment for services, and having a dedicated Florida telephone line to conduct business-related calls—“established both specific and general jurisdiction in this state”); *see also Barriere v. Juluca*, 2014 WL 652831, at *5–8 (S.D. Fla. Feb. 19, 2014) (concluding exercise of general jurisdiction over foreign corporation was proper based on un rebutted allegations that the corporation maintained a sales office in Florida and provided services in Florida).

CONCLUSION

14. For the foregoing reasons and the reasons stated on the record during the November 22, 2024 hearing, it is:

ORDERED^[1] AND ADJUDGED:

1. NetJets’ Motion to Dismiss Amended Verified Complaint is DENIED.
2. The stay of discovery directed to NetJets is hereby LIFTED.

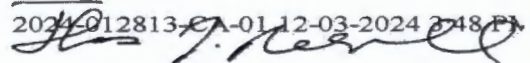
3. NetJets shall file a response to the Amended Verified Complaint within 20 days of the date of this Order.

4. NetJets shall serve written responses to and produce responsive documents not objected to Plaintiffs' September 4, 2024 Request to Produce (D.E. 81) within 20 days of the date of this Order, and the deposition of NetJets shall take place via Zoom or other remote means within 45 days of the date of this Order at a mutually convenient time and date.

5. Nothing in this Order shall be deemed to preclude NetJets from objecting to any pending discovery requests from Plaintiff on grounds of relevance, scope, undue burden, privilege, confidentiality or any other applicable grounds.

[1] The Court reviewed NetJets' and Plaintiffs' competing proposed orders. This order represents the Court's independent ruling.

DONE and ORDERED in Chambers at Miami-Dade County, Florida on this 3rd day of December, 2024.

2024-012813-CA-01 12-03-2024 3:48 PM


2024-012813-CA-01 12-03-2024 3:48 PM
Hon. Thomas J. Rebull

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

Electronically Served:

Andrew Scott Berman, aberman@ybkkllaw.com

Andrew Scott Berman, eservice@ybkkllaw.com

Bruce Alan Weil, bweil@bsflp.com
Bruce Alan Weil, mperez@bsflp.com
Bruce Alan Weil, bruce-weil-2673@ecf.pacerpro.com
Daniel R. Lazaro, dan.lazaro@bipc.com
Daniel R. Lazaro, patricia.delgado@bipc.com
Daniel R. Lazaro, eservice@bipc.com
Dennis Richard, dennis@richardandrichard.com
Dennis Richard, valerie@richardandrichard.com
Dennis Richard, denise@richardandrichard.com
Hala Sandridge, hala.sandridge@bipc.com
Hala Sandridge, eileen.murphy@bipc.com
Hala Sandridge, eservice@bipc.com
Javier A. Pacheco, jpacheco@porterwright.com
Javier A. Pacheco, kmead@porterwright.com
Kevin Shohat, kevin@richardandrichard.com
Leonel Peraza, Jr., lperaza@bressler.com
Leonel Peraza, Jr., mgomez@bressler.com
Mark J Heise, mheise@hsmpa.com
Mark J Heise, csegui@hsmpa.com
Mark J Heise, filings@hsmpa.com
Melissa Mackiewicz, melissa@richardandrichard.com
Richard Sarafan, rjsarafan@venable.com
Richard Sarafan, darudasill@venable.com
Robert G. Keefe, rkeefe@bsflp.com
Sara K. White, Esq., swhite@porterwright.com
Sara Kannensohn White, swhite@porterwright.com
Sara Kannensohn White, kmead@porterwright.com
Sara Soto, ssoto@bressler.com
Sara Soto, ktoulon@bressler.com
Shayne A. Thomas, sthomas777@ufl.edu
Shayne A. Thomas, klogiurato@ufl.edu
Tyler E. Ulrich, tulrich@bsflp.com
Tyler E. Ulrich, vbrikey@bsflp.com

Physically Served: