



to the Magistrate Judge's application of federal rather than Texas and Mississippi state law, to several of the Magistrate Judge's findings, and to the Magistrate Judge's interpretation and application of the Supreme Court's five factors that determine the "fairness prong" of specific jurisdiction's due-process analysis. *See Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987). After a *de novo* review of the record, and having considered Plaintiff's objections, Defendants' response, Plaintiff's reply, and the applicable law, this Court is of the opinion that the Report and Recommendation is correct and should be approved and accepted by the Court. *See Fed. R. Civ. P. 72(a)*.

EIEIO objects that the Magistrate Judge "does not mention or discuss the application of Texas state law." Further, EIEIO argues that a Mississippi appellate-court decision should inform this Court's consideration of whether it will exercise personal jurisdiction over Waring. As the Magistrate Judge described, this Court needs only address the due process prong of the personal-jurisdiction analysis because the Texas long-arm statute reaches as far as the federal due-process requirement will allow. *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 854 (5th Cir. 2000). Accordingly, the Magistrate Judge correctly narrowed his consideration to whether exercising jurisdiction over Waring will violate the federal due-process clause, which is controlled by federal law. *See Stabler v. New York Times Co.*, 569 F. Supp. 1131 (S.D. Tex. 1983). This Court will therefore overrule EIEIO's objections related to the Magistrate Judge's application of federal law.

EIEIO also objects to specific factual findings of the Magistrate Judge. First, EIEIO contests the finding that "Waring purchased EIEIO's products through an independent broker, Russ Pilcher, who called on its offices in Vicksburg, Mississippi;" rather, EIEIO asserts, Pilcher was a "broker who told Waring about EIEIO . . . and signed [the contract] on EIEIO's behalf." Additionally, EIEIO

objects to the finding that “[t]he negotiations for the contract occurred in Mississippi,” contending that the contract was “signed” in Mississippi but that “[EIEIO’s] side of these negotiations (such as they were) took place in Texas.” Finally, EIEIO objects to the Magistrate Judge’s finding that “[m]ost of the conduct relating to this matter occurred in Mississippi,” arguing that Waring and EIEIO engaged in additional communications in Texas after negotiation of the initial contract.

Because EIEIO’s statement in its Objection that the broker was not independent contradicts Waring’s affidavit, this Court will consider the parties’ evidence and will not take EIEIO’s allegation as true. *See Wyatt v. Kaplan*, 686 F.2d 276, 282-83 n.13 (5th Cir.1982). EIEIO’s affidavit refers to Pilcher as “a broker” without stating whether he was affiliated with either party, while Waring’s affidavit states that Pilcher is independent. This Court will view the evidence in the light most favorable to EIEIO and find that Pilcher was a broker affiliated with EIEIO. This does not change the determination that Waring did not “purposefully avail itself” of the forum, though. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Even assuming that Waring agents met with an EIEIO-affiliated broker in Mississippi to purchase EIEIO’s product, this Court finds that the evidence clearly indicates that the initial contract between the parties was discussed, negotiated, and signed in Mississippi between Pilcher and Waring’s agents. Although EIEIO describes communications between EIEIO and Waring regarding technical support as support for Waring’s minimum contacts with Texas, EIEIO provides no evidence that such communications took place; an affidavit submitted by EIEIO merely states that such a service was available under the contract. Additionally, EIEIO identifies renegotiations of the contract that took place by telephone between Waring’s agent in Mississippi and EIEIO’s president in Texas as additional contacts made by Waring with Texas. Taking the statements of EIEIO as true, this Court finds that telephone contacts

did take place between the parties, and holds that this finding does not contradict the Magistrate Judge's Report and Recommendation. After considering EIEIO's factual challenges, this Court approves and accepts the Magistrate Judge's finding that the conduct under the contract primarily occurred in Mississippi.

In light of these findings, the Magistrate Judge correctly applied the analysis from *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.* 700 F.2d 1026 (5th Cir. 1983). The court of appeals in that case held that the seller's unilateral activity in Texas was not enough to constitute the requisite minimum contacts with Texas. Similarly, in this case, "although [Waring] did agree to purchase goods which it knew were to be manufactured by [EIEIO] in Texas, no performance by [Waring] was to take place in Texas, other than perhaps the payment of goods." *Id.* at 1029. This was true in *Hydrokinetics* despite "the exchange of communications between Texas and Alaska," and this Court finds that Waring's contact with Texas was not sufficient for purposes of personal jurisdiction, despite its telephone communications with EIEIO. 700 F.2d at 1029; *see also Stuart v. Spademan*, 772 F.2d 1185, 1193 (5th Cir. 1985) ("an exchange of communications between a resident and a nonresident in developing a contract is insufficient of itself to be characterized as purposeful activity invoking the benefits and protection of the forum state's laws"). Although EIEIO asks this Court to distinguish *Hydrokinetics* based on the fact that the parties' contract in this case did not have a choice-of-law provision, this Court will not hold that the lack of such a provision is enough to indicate that Waring had the requisite minimum contacts with Texas. *See Electrosources, Inc. v. Horizon Battery Techs., Ltd.*, 176 F.3d 867, 872 (5th Cir. 1999). This is especially true when this Court compares Waring's contact with Texas to the conduct of the defendant in *Hydrokinetics*. 700 F.2d at 1027 (describing that defendant traveled twice to Texas to inspect facilities, "closed the

deal” in Texas, and met in Texas again after delivery of product to discuss concerns over performance). The court of appeals has “repeatedly held that the combination of mailing payments to the forum state, engaging in communications related to the execution and performance of the contract, and the existence of a contract between the nonresident defendant and a resident of the forum are insufficient to establish the minimum contacts” required under the first prong of the specific jurisdiction analysis. *Freudensprung v. Offshore Tech. Servs.*, 379 F.3d 327, 344 (5th Cir. 2004). Accordingly, this Court overrules EIEIO’s objections on these issues and will approve and accept the Magistrate Judge’s findings of fact and conclusions of law related to Waring’s minimum contacts with Texas.

Finally, EIEIO objects to the Magistrate Judge’s analysis of whether exercising jurisdiction over Waring in Texas would offend “traditional notions of fair play and substantial justice.” *Burger King Corp.*, 471 U.S. at 476. Having determined that EIEIO has not met its *prima facie* case that Waring had minimum contacts with Texas, this Court need not reach the “fairness prong” of the analysis. *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir. 1994). In analyzing this issue, however, the Magistrate Judge appropriately considered the following factors: (1) the defendant's burden in having to litigate in the forum state; (2) the forum state's interest in adjudicating the suit; (3) the plaintiff's interest in convenient and effective relief; (4) the judicial system's interest in efficient resolution of controversies; and (5) the forum state's shared interest in furthering fundamental social policies. *Rushton Gas Turbines, Inc. v. Donaldson, Inc.*, 9 F.3d 415, 421 (5th Cir. 1993). Having considered EIEIO’s objections on these factors, this Court concludes that the Magistrate Judge properly determined that exercising jurisdiction over this case would offend “traditional notions of fair play and substantial justice” for the reasons stated in the Magistrate Judge’s Report and Recommendation.


**IT IS THEREFORE ORDERED** that Plaintiff's Objections to Magistrate's Report and Recommendations Under 28 U.S.C. § 636 (Clerk's Document 16) are **OVERRULED**.

**IT IS FURTHER ORDERED** that the United States Magistrate Court's Report and Recommendation (Clerk's Document No. 15) is hereby **APPROVED AND ACCEPTED**.

**IT IS FURTHER ORDERED** that Waring's Motion to Dismiss for Lack of Personal Jurisdiction (Clerk's Document 8) is **GRANTED**.

**IT IS FURTHER ORDERED** that Plaintiff's claims asserted against Waring are **DISMISSED WITHOUT PREJUDICE**.

SIGNED this 14<sup>th</sup> day of December, 2006.

  
\_\_\_\_\_  
LEE YEAKEL  
UNITED STATES DISTRICT JUDGE