

FILED
September 8, 2016
Court of Appeals
Division I
State of Washington

No. 74241-8-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

NAM CHUONG HUYNH and LIN R. BUI, husband and wife, and JO-
HANNA READ, as guardian *ad litem* for H.H.1, H.H.2, and H.H.3,
minors,

Appellants/Cross-Respondents,

v.

AKER BIOMARINE ANTARCTIC AS, a Norwegian corporation, and
AKER BIOMARINE ANTARCTIC II AS, a Norwegian corporation,

Respondents/Cross-Appellants,

and

MAREL SEATTLE, INC., a Washington State corporation,

Defendant.

REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS

Philip A. Talmadge, WSBA # 6973
Talmadge | Fitzpatrick | Tribe
2775 Harbor Avenue SW, Ste. C
3rd Floor
Seattle, Washington 98126
(206) 574-6661
(206) 575-1397 (fax)
phil@tal-fitzlaw.com
Attorney for Petitioners

C. Steven Fury, WSBA # 8896
Scott David Smith, WSBA # 48108
Fury Duarte, PS
710 10th Avenue East
PO Box 20397
Seattle, Washington 98102
(206) 726-6600
(206) 726-0288 (fax)
steve@furyduarte.com
scott@furyduarte.com
Attorneys for Petitioners

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I. INTRODUCTION

Our Supreme Court recently reaffirmed that a nonresident defendant is subject to personal jurisdiction if (1) it purposefully establishes minimum contacts with—*i.e.*, purposefully avails itself of—Washington, (2) the action arises from those contacts, and (3) exercising jurisdiction is reasonable. It is also well-established that a nonresident may establish purposeful availment by reaching out beyond its state and into another by entering a contractual relationship with continuing and wide-reaching contacts in the forum.

Washington resident Nam Huynh suffered a near-fatal electric shock on January 6, 2012 while preparing to install krill-processing equipment onboard the vessel *Antarctic Sea*. His employer, Marel Seattle, Inc. (Marel), a Washington corporation, built the equipment in Seattle and sent it, with Washington installers, to the vessel in Uruguay pursuant to a contract with the vessel's Norwegian owner, Aker BioMarine Antarctic II AS (AKAS II), and its parent, Aker BioMarine Antarctic AS (AKAS). But for that contract, Huynh would not have been working in Uruguay where AKAS' and AKAS II's failures to make the vessel and its equipment safe caused his shock.

After Huynh sued AKAS/AKAS II in King County Superior Court, the trial court held that AKAS II purposefully availed itself of Washington through its *Antarctic Sea* contract contacts; thus, jurisdiction existed over AKAS II (and its successor in a post-injury merger, AKAS, for successor

liability claims). However, it further held that AKAS was not subject to personal jurisdiction for its own direct liability.

Despite AKAS/AKAS II's arguments, the trial court's order was correct in denying AKAS II's motion, and erroneous in dismissing AKAS. Based on well-developed jurisdictional tenets that federal courts and our state courts apply, Washington has jurisdiction over all of Huynh's injury claims against both AKAS and AKAS II, and this Court should so rule.

II. COUNTER-STATEMENT OF THE CASE

A. Unaddressed and/or undisputed facts.

Huynh relies on and incorporates his initial statement of the case. *Brief of App.* at 3-12. In their counter-statement, AKAS and AKAS II do not address most of the facts in that statement. Specifically, but not exclusively, they provide no counter-statement to the following briefly restated facts:

1. AKAS first contacted Marel, physically in Washington, in 2006 for AKAS' first vessel project, *Saga Sea* ("Saga"). CP 947-48, 952.

2. Marel was in extensive contact with *Saga*'s chief engineer, AKAS agent Sindre Skjong, during the project. CP 948. It built equipment in Seattle and sent it, with Washington workers, including Huynh, to Chile; Huynh made many *Saga* trips to South America. CP 948-49; Ex. 85.

3. The *Saga* project was worth over \$1 million, and Marel still conducts ongoing *Saga* work for AKAS. CP 949; Ex. 5 at 6.

4. AKAS's parent, on AKAS' behalf, required Marel to enter a 20-year Secrecy Agreement in 2007, and Marel became a preferred provider. Exs. 1, 49. Webjørn Eikrem—AKAS' executive vice president and head of its vessel operations—negotiated the contracts with Marel on AKAS' behalf. Ex. 1; Ex. 5 at 2; RP 4, 36-37 (06.26.15); CP 947.

5. AKAS again contacted Marel in 2008 for its second vessel project—*Antarctic Navigator* (“*Navigator*”). CP 949-50.

6. Skjong was again extensively involved as AKAS' technical team leader, and Eikrem headed the project for AKAS. *E.g.*, CP 418-19.

7. Marel completed \$7 million of work, including \$4 million of building, in Seattle. CP 949; RP 38, 72 (06.26.15). Because AKAS cancelled the project before install, CP 945, Marel stored much of the equipment in Seattle. CP 948-49; RP 72 (06.26.15); 109-11 (08.17.15).

8. AKAS, through Skjong, again contacted Marel in July 2011, prior to buying *Antarctic Sea*, to request that, upon purchase, Marel perform that ship's factory design, build, and installation. CP 950.

9. AKAS then bought AKAS II to buy and convert the ship. Ex. 5 at 4. AKAS' board members, including Eikrem, also comprised AKAS II's board. CP 945, 947; Ex. 33. AKAS II had no employees. CP 945.

10. AKAS II purchased *Antarctic Sea* in October 2011; AKAS managed the project as AKAS II's agent. CP 945, 950; Ex. 5 at 4-5; RP 126-

27 (08.17.15). Eikrem negotiated the contract with Marel, and Skjong was Marel's project contact. RP 98 (08.17.15); RP 60 (06.26.15); CP 947, 950.

11. Though Eikrem and Skjong represented AKAS on both prior projects, and this project was substantively identical to the prior projects, *e.g.*, RP 146 (08.17.15), neither one told Marel that Eikrem now represented AKAS II, was entering the contract on AKAS II's behalf, or AKAS II even existed. RP 48-50 (06.26.15); RP 103-04 (08.17.15).

12. Eikrem knew Marel would build the equipment in Seattle and ship it, with AKAS' stored *Navigator* equipment—which was to be used to the fullest extent possible—from Washington to the vessel. CP 951.

13. Prior to sending installers to Uruguay, Marel told AKAS that, as with the prior projects, Americans were again coming down, Ex. 81, and that Washington industrial insurance applied. *E.g.*, Exs. 6, 18-24.

14. Marel built about \$3 million of equipment in Seattle, and it installed newly built and AKAS' *Navigator* equipment. CP 951. The project was worth \$5 million, CP 951, and Marel's work is ongoing. CP 952.

16. The quote comprising the *Antarctic Sea* contract contained Washington choice of law and forum selection clauses. CP 953-54.

17. Washington Labor and Industries has paid at least \$256,948 on Huynh's claim, and it has set a reserve at \$1,896,259. CP 123, 952.

18. When AKAS/AKAS II merged, they back dated the effective date to January 1, 2012 for both tax and accounting purposes. Ex. 9 at 7.

B. Post-contract-formation billing emails.

AKAS and AKAS II do, however, discuss in their counter-statement certain emails the parties exchanged well after contract formation occurred in early November 2011. *Brief of Resp./Cross-App.* [*Brief of Resp.*] at 5-7. Those emails do not detract from Huynh’s contention that Washington appropriately exercised jurisdiction over AKAS/AKAS II.

On December 22, 2011, Kenneth Olsen, Marel’s CFO, RP 58 (08.17.15), sent an email to Eikrem attaching a \$97,249 *Antarctic Sea* invoice directed to AKAS. Ex. 4 at 5-6. It stated: “As per [Rasmussen’s] agreement with you, please find [Marel’s] invoice for hours and expenses in connection with the Antarctic Sea Krill project in [South] America.” *Id.* The invoice covered work from October 1 to December 1, 2011. *Id.* Olsen sent Eikrem two more emails on January 2, 2012, one attaching six more *Antarctic Sea* invoices directed to AKAS, and one directing an invoice to AKAS’ parent. *Id.* at 7-13, 14-15; Exs. 101-102. When he sent the invoices directed to AKAS, he believed he sent them to the contracting party. RP 72 (08.17.15).

On January 3, 2012, Eikrem responded with two emails asking that the invoices be changed from AKAS to AKAS II—the vessel’s owner. Ex.

4 at 17-20; Exs. 103-104. He did not state that AKAS was not a party to the contract or that only AKAS II was a party. RP 59-60 (June 26, 2016). Nor was Olsen responsible for negotiating contracts. RP 69-70 (08.17.15).

On January 3, Olsen sent the invoices, with a handwritten change from AKAS to AKAS II, stating that Skjong had told Marel to “invoice the usual way,” which was to bill AKAS, and that they will “invoice separately” for *Saga* and *Antarctic Sea*. Ex. 4 at 21; Ex. 105; RP 60-61 (06.26.15). Olsen then sent another email that same day with an invoice to AKAS II. Ex. 106.

III. SUMMARY OF ARGUMENT RE AKAS II’S APPEAL

The trial court’s October 15, 2015 order properly denied AKAS II’s motion to dismiss. It also properly denied AKAS’ motion for claims based on successor liability. Personal jurisdiction exists in a negligence action if the long-arm statute, RCW 4.28.185, permits jurisdiction and due process is satisfied, *i.e.*, the nonresident entity purposefully avails itself of Washington, the action would not have arisen but for the nonresident entity’s conduct and contacts, and the exercise of jurisdiction is reasonable. Since RCW 4.28.185 extends jurisdiction to the limits of due process, the focus in this appeal is on due process.

AKAS II itself purposefully reached into Washington to solicit Marel and form the *Antarctic Sea* contract. The contract anticipated, and involved, extensive Washington work, Washington workers, covered by Washington

industrial insurance, traveling to Uruguay to complete contract work, and ongoing work after the project completed. This wide-reaching forum contact, as well as AKAS' earlier, significant business activities, establishes purposeful availment. Further, but for these purposeful contacts, Huynh would not have been in Uruguay where AKAS II negligently caused his injury. Exercising jurisdiction is also reasonable and appropriate.

Moreover, the U.S. Supreme Court's recent personal jurisdiction decision, *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014), an intentional tort action, neither changed this well-established analysis nor the result here. Rather, it simply held, relying on long-standing jurisdictional tenets, that under the *Calder v. Jones*¹ effects test, the fact that a plaintiff experiences the effects of intentionally tortious conduct in the forum, standing alone, does not establish jurisdiction. A defendant must purposefully establish contacts with the forum through its own conduct. This is not new. In fact, the Court made clear at the end of its opinion that it created no new principle or test: "Well-established principles of personal jurisdiction are sufficient to decide this case." *Walden*, 134 S. Ct. at 1126.

¹ 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984).

IV. ARGUMENT

A. **Huynh’s response to AKAS II’s cross appeal: The trial court correctly held that AKAS II, and thus its successor, AKAS, are subject to specific personal jurisdiction.**²

Non-residents are subject to jurisdiction if a state’s long-arm statute permits jurisdiction and exercising jurisdiction comports with due process. *FutureSelect Portfolio Mgmt. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 963, 331 P.3d 29 (2014). The long-arm statute, RCW 4.28.185, extends jurisdiction to due process limits; thus, the analysis focuses on due process. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649-50, 336 P.3d 1112 (2014).

Due process permits jurisdiction if a defendant has certain minimum contacts with a state such that maintaining the suit does not offend traditional notions of fair play and substantial justice. *LG Elecs., Inc.*, ___ Wn.2d ___, 375 P.3d 1035, 1040 (2016). Jurisdiction may be specific or general. *State v. LG Elecs., Inc.*, 185 Wn. App. 394, 411, 341 P.3d 346 (2015), *aff’d*, 375 P.3d 1035 (2016).

Specific jurisdiction exists if the suit arises out of or relates to the defendant’s forum contacts. *Id.* The analysis thus focuses on the relationship between a defendant, the forum, and the litigation, *Failla*, 181 Wn.2d at 650, which must arise out of contacts that the defendant itself creates with the forum. *Walden*, 134 S. Ct. at 1122. Jurisdiction lies if a defendant’s conduct

² Huynh agrees the issues AKAS II’s cross-appeal presents are subject to *de novo* review.

and connection with a forum “are such that he should reasonably anticipate being haled into court there.” *LG*, 185 Wn. App. at 412. A three-part test applies to determine if jurisdiction exists:

“(1) The . . . foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities”

Failla, 181 Wn.2d at 650.³ A plaintiff bears the burden of satisfying the first two prongs. *State v. AU Optronics Corp.*, 180 Wn. App. 903, 914-15, 328 P.3d 919 (2014). The defendant must then present “a compelling case” that jurisdiction is unreasonable. *LG*, 375 P.3d at 1044.⁴

³ The jurisdictional test looks largely to the nexus between a defendant’s activities and Washington. Washington has taken a broad view of constitutional nexus requirements. *Brief of App.* at 26 n.18 (discussing Washington B&O cases *Lamtec Corp. v. Dep’t of Rev.*, 170 Wn.2d 838, 246 P.3d 788 (2011), *cert. denied*, 132 S. Ct. 95 (2011), and *Space Age Fuels, Inc. v. State*, 178 Wn. App. 756, 315 P.3d 604 (2013), *review denied*, 180 Wn.2d 1010 (2014). Washington’s B&O cases are instructive as to State policy here because the dormant commerce clause analysis encompasses the minimum contact analysis: “a finding that the imposition of tax does not violate the dormant commerce clause is sufficient to establish that the imposition also does not violate the due process clause” *Flight Options, LLC v. Dep’t of Rev.*, 172 Wn.2d 487, 498-99, 259 P.3d 234 (2011).

⁴ Huynh submits that the facts surrounding AKAS II’s general business relationship with Washington establish general jurisdiction. However, the Court need not address that more complex question because specific personal jurisdiction exists.

1. The trial court correctly held that AKAS II purposefully availed itself of Washington, which AKAS II presents no argument to refute.

A plaintiff may satisfy the test's first prong by showing purposeful availment or purposeful direction, which are distinct concepts. *Learjet, Inc. v. Oneok, Inc.*, 715 F.3d 716, 743 (9th Cir. 2013). The purposeful direction "effect test" applies to intentional torts; the purposeful availment test applies to contract and negligence cases. *Holland Am. Line, Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 460 (9th Cir. 2007). Since this is a negligence case, the purposeful availment analysis applies.⁵

The purposeful availment analysis looks to "whether there was some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities in the forum, thus invoking the benefits and protections of its laws." *Goodyear Tire Dunlop Ops. v. Brown*, 564 U.S. 915, 924, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011). The United States Supreme Court has "emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of

⁵ The purposeful direction test is, in fact, incompatible with negligence claims. The test requires that a defendant (1) commit an intentional act, (2) expressly aimed at the forum state, (3) causing harm, the brunt of which the defendant knew would be suffered in the forum state. *Picot v. Weston*, 780 F.3d 1206, 1213-14 (9th Cir. 2015). In negligence actions, a defendant does not perform intentionally injurious or tortious act; thus, it cannot purposefully direct a negligent act toward a forum to cause harm with the knowledge that harm will be felt in the forum.

their activities.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

[W]here the defendant “deliberately” has engaged in significant activities within a State or 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.

Id. at 475-76 (citations omitted). “[P]rior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing” must be evaluated to determine if the defendant purposefully established minimum contacts. *Freestone Capital Partners, LP v. MKA Real Estate Opp. Fund I, LLC*, 155 Wn. App. 643, 653, 230 P.3d 625 (2010) (quoting *Burger King*, 471 U.S. at 479).

The trial court properly held that AKAS II purposefully availed itself of Washington through its *Antarctic Sea* contract conduct and contacts. CP 1144-45. Outside of a single footnote, *Brief of Resp.* at 19 n.16, AKAS II presents no argument relating to that holding. The order should be affirmed.

a. Walden neither created a new jurisdictional test nor altered the existing test.

Rather than address the trial court’s purposeful availment holding, AKAS II instead relies heavily on its argument that *Walden*, 134 S. Ct. 1115, created a new jurisdictional test or altered the existing one. It did not. It simply applied pre-existing jurisdictional principles and reiterated that a

defendant itself must create contacts with a forum state. As the Court made clear, it relied solely on pre-existing law: “Well-established principles of personal jurisdiction are sufficient to decide this case.” *Id.* at 1126.

In *Walden*—an intentional tort case—a police officer in Atlanta’s airport seized a large sum of cash from two Nevada residents as they flew through Georgia from Puerto Rico to their home in Nevada. The officer later drafted a probable cause affidavit supporting the seizure and forwarded it to the U.S. Attorney in Georgia. The Nevada residents then filed suit against the officer in Nevada claiming that the officer unlawfully seized the funds and that the affidavit was false and misleading. *Id.* at 1119-20.

The Ninth Circuit held jurisdiction existed,⁶ but the U.S. Supreme Court reversed *Id.* at 1121. In so holding, the Court simply reaffirmed two well-established jurisdictional tenets. First, a defendant’s own suit-related conduct must create the forum connections. *Id.* at 1121-22. As it explained, this is because “the relationship [between the defendant and the forum] must arise out of contacts the ‘defendant *himself*’ creates with the forum”, *id.* at 1122—a principle the Court established 30 years prior in *Burger King*, 471 U.S. at 475. Second, a defendant must establish connections with the forum,

⁶ The Ninth Circuit reversed a district court’s personal jurisdiction dismissal. Because the action involved an intentional tort, the Ninth Circuit applied the purposeful direction effects test from *Calder*, 465 U.S. 783, and held that the officer had aimed the affidavit at Nevada because he knew its harm would affect persons with Nevada connections.

not just a plaintiff. *Walden*, 134 S. Ct. at 1122. It then reaffirmed another 30-year-old tenet—a defendant can create that connection by “purposefully ‘reach[ing] out beyond’ [its] State and into another by, for example, entering a contractual relationship that ‘envisioned continuing and wide-reaching contacts’ in the forum State.” *Id.* at 1122-23 (quoting *Burger King*, 471 U.S. at 479-80). It then stated these tenets also apply to intentional torts. *Id.*

The Court ultimately held that, under the *Calder* intentional tort effects test, which requires that a defendant (1) commit an intentional act, (2) expressly aimed at the forum, (3) causing harm that it knew would be suffered in the forum, *Picot v. Weston*, 780 F.3d 1206, 1213-14 (9th Cir. 2015), courts cannot exercise jurisdiction if a defendant’s sole, suit-related connection with the forum is that the plaintiff lives in the forum and feels the effects of the intentionally tortious conduct in the forum. Since the police officer’s sole connection with Nevada was that his actions affected persons who lived in Nevada, jurisdiction did not exist.

Despite the holding’s limited nature, the fact the Supreme Court has never limited review of a defendant’s suit-related actions and contacts to acts that establish a cause of action’s elements, and the Court’s clear statement that it applied only pre-existing law, AKAS II argues the Court in fact, by using the phrase “challenged conduct” near the end of the opinion, made a sweeping change by requiring that courts look only to actions and contacts

that establish a cause of action's elements to exercise jurisdiction. *Walden* does not support this narrow focus.⁷

First, the Court was clear that jurisdiction may have arisen in *Walden* had the officer made other contacts. As it stated, “[the officer] never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada.” *Walden*, 134 S. Ct. at 1124. None of those acts/contacts were needed for the intentional tort, but could have supported jurisdiction. Moreover, in reiterating that California jurisdiction existed in *Calder*, the Court noted it had, beyond tortious acts, “examined *the various contacts* the defendant had created with” the forum, including the fact “[t]he defendants relied on phone calls to ‘California sources’ for the information in their article”. *Id.* at 1123. Again, that action was not needed to establish the tort.

The Court also uses the phrase “challenged conduct” only once, and it is only in that part of the opinion that specifically addresses the intentional tort and application of the effects test. Clearly, looking to tortious conduct when applying the effects test follows from the test itself. Yet, even under

⁷ Though AKAS II cites to *Eclipse Aerospace, Inc. v. Star 7, LLC*, 15 C 1820, 2016 U.S. Dist. LEXIS 27597 (N.D. Ill. Mar. 3, 2016), and *Priority Env'tl. Solutions, Inc. v. Stevens Co.*, No. 15-cv-871, 2015 U.S. Dist. LEXIS 170230 (E.D. Wisc. Dec. 18., 2015), to argue that all courts now apply *Walden* as AKAS II suggests, those cases demonstrate *Walden* created no new law. In stating “a defendant’s contacts with the forum state must directly relate to the challenged conduct or transaction,” neither case cited to *Walden*—they cited to pre-*Walden* cases. See *Eclipse*, 2016 U.S. Dist. LEXIS 27597, at *10 (quoting *N. Grain Mktg., LLC v. Greving*, 743 F.3d 487, 492 (7th Cir. 2014); *Priority*, 2015 U.S. Dist. LEXIS 170230, at *14 (quoting *Tamburo v. Dworkin*, 601 F.3d 693, 701 (7th Cir. 2010)).

that test, as *Walden* notes, the Supreme Court still looked to non-tortious conduct when it decided *Calder*. AKAS II's narrow interpretation fails. *See Havel v. Honda Motor Eur.*, No. 131291, 2014 U.S. Dist. LEXIS 140983, at *26-27 (S.D. Tex. Sept. 30, 2014) (“*Walden* and *Calder* do not limit ‘suit-related conduct’ to the *elements* of a tort.”).

In its most recent specific jurisdiction decision, our Supreme Court reaffirmed that the test requires only that a defendant purposefully establish contacts: “purposeful ‘minimum contacts’ must exist between the defendant and the forum”. *LG*, 375 P.3d at 1040. The relevant, suit-related conduct and purposeful forum contacts here include AKAS II reaching into Washington to establish a large-scale, ongoing contractual connection in Washington that is the sole reason Huynh and other Washington installers, covered by Washington industrial insurance, traveled to Uruguay. *Walden* is distinguishable from this action and requires no different focus.

b. *The trial court properly held that AKAS II purposefully availed itself of Washington based on AKAS II's substantial, purposeful Antarctic Sea connection with Washington.*

Purposeful availment requires that a defendant purposefully create contacts with the forum. *LG*, 375 P.3d at 1040. For at least 30 years, the U.S. Supreme Court has held that a defendant may establish that contact by “purposefully reach[ing] out beyond [its] State and into another by . . . entering a contractual relationship that ‘envision[s] continuing and wide-

reaching contacts’ in the forum State.” *Walden*, 134 S. Ct. at 1122 (quoting *Burger King*, 471 U.S. at 479-80). As the trial court correctly concluded, AKAS II purposefully availed itself of Washington through its *Antarctic Sea* contract actions and contacts. CP 1144-45.⁸

Based on its parent, AKAS’, prior five-year, continuing, two-vessel relationship with Marel in Washington, AKAS II purposefully reached into Washington⁹ to solicit and establish an ongoing *Antarctic Sea* relationship with Marel. In so doing, it knew it had contacted a Washington corporation with operations and employees based in Washington. *E.g.*, CP 948, 951-52. In fact, while the project anticipated Marel would perform work abroad, the parties clearly contemplated Marel engaging in extensive equipment design

⁸ Rather than address that holding, AKAS II argues it cannot be subject to jurisdiction because it did not commit a tort in, or direct tortious conduct to, Washington. *Brief or Resp.* at 16-20. The arguments fail. First, the purposeful availment, not the purposeful direction, test applies. *Holland*, 485 F.3d at 460. AKAS II needed not intend to direct negligence to Washington. Second, AKAS II need not commit a tort in Washington. AKAS II discusses only RCW 4.28.185(1)(b), which allows for jurisdiction when a defendant commits a tort in the state. But RCW 4.28.185(1)(a), which grants jurisdiction over a non-resident that conducts business in Washington, applies here. Huynh alleged that AKAS II conducted business in Washington and that his cause of action arises from the business contacts. Moreover, due process, which subsumes the statutory analysis, *Failla*, 181 Wn.2d at 650, requires only that AKAS II purposefully avail itself of Washington law and that the action arise from its contacts. As the trial court correctly held—and AKAS II does not refute—AKAS II purposefully availed itself of Washington via the *Antarctic Sea* contract.

⁹ While AKAS II states it approached Marel via email, AKAS physically approached Marel in Washington in 2006 to begin the relationship. CP 948, 952. And, “it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, [the Supreme Court has] consistently rejected the notion that an absence of physical contacts can defeat [jurisdiction] there.” *Burger King*, 471 U.S. at 476; *Precision*, 96 Wn. App. 721,728-29 981 P.2d 454 (1999).

and fabrication work in Washington. Eikrem knew that Marel would build equipment in Washington, and Skjong's email communications with Marel made that fact further evident. CP 950-51. Marel in fact built roughly \$3 million of equipment in Seattle for *Antarctic Sea*, and at one point, two-thirds of its shop was working on the project. CP 951; Rasmussen Dep. 86-87 (02.24.14).¹⁰

AKAS II also knew prior to Huynh's injury that Marel was sending Washington personnel, covered by worker's compensation, to Uruguay. CP CP 951, Exs. 6, 18-24, 81. Huynh and other Washington residents had been down to work on the prior *Saga* project in Chile. CP 949. Huynh repeatedly traveled to South America for *Saga* work over the entirety of the business relationship. *Id.* Before sending Huynh and other workers to Uruguay for the *Antarctic Sea* installation, Marel informed AKAS II that Americans were again coming down. Ex. 81. Per AKAS II's request for Marel's employee insurance coverage information, Marel also informed AKAS II that its workers were covered by Washington industrial insurance. Exs. 6, 18-24. That insurance now pays for Huynh's injuries, and without a recovery, Washington will likely pay around \$1.8 million dollars. CP 123.

¹⁰ Huynh submitted at the evidentiary hearing two full depositions from Marel's President, Henrik Rasmussen, dated February 24, 2014 and June 2, 2015. *See* CP 919-20. He also submitted parts of two depositions of Eikrem, dated April 25, 2014 and May 12, 2015. CP 921-22. Citations to these depositions state either "Rasmussen Dep. [Page Number] [Date]" or "Eikrem Dep. [Page Number] [Date]".

The parties also contemplated future consequences in Washington. The project required ongoing orders and payments into Washington until it was completed. Additionally, like *Saga*, AKAS—AKAS II’s successor and *Antarctic Sea*’s current owner—also conducted, and currently conducts, “business with Marel for spare parts, fabrications, installations, service and maintenance” on *Antarctic Sea*. Ex. 95 at 13; CP 952.

The contract terms underscore AKAS II’s purposeful availment and demonstrate AKAS II should have foreseen being hailed into Washington courts. Forum-selection/choice-of-law clauses are relevant in the analysis. *Burger King*, 471 U.S. at 481-82; *see also Kysar v. Lambert*, 76 Wn. App. 470, 487, 490, 887 P.2d 431 (1995). This is true even if the injured plaintiff was not a contract party. *See Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395, 397 (9th Cir. 1983). Marel used quotes that contained Washington forum-selection and arbitration clauses, which were integral parts of its estimates. CP 953. AKAS II knew of and agreed to these provisions. Eikrem Dep. 154-55 (04.25.14). While AKAS had discussed terms on the *Navigator* project, AKAS II, through AKAS’ personnel, did not question them on this project. Rasmussen Dep. 121-22 (02.24.14).

AKAS II’s contract—which led to extensive equipment design and building in Washington and Washington workers covered by Washington industrial insurance traveling abroad, which AKAS II knew would occur—

far exceed the showing necessary to demonstrate purposeful availment. *Peter Pan Seafoods, Inc. v. Mogelberg Foods, Inc.*, 14 Wn. App. 527, 544 P.2d 30 (1975) (New Jersey defendant’s purposefully initiating telephone contact with a Washington seafood seller, sending orders into Washington to buy \$440,000 of seafood over a year period, inspection of the seller’s processing facility, and the delivery of goods “FOB Seattle,”¹¹ established purposeful availment); *Sorb Oil Corp. v. Batalla Corp.*, 32 Wn. App. 296, 647 P.2d 514 (1982) (Texas defendant’s ongoing telephone orders to a Washington plaintiff to buy products over a 20-month period constituted purposeful availment, though it did not initiate contact, no contract required that any orders be made, and the goods were shipped from Indiana); *Crown Controls, Inc. v. Smiley*, 47 Wn. App. 832, 737 P.2d 709 (1987), *remanded on other grounds*, 110 Wn.2d 695 (1988) (Oregon defendant purposefully contacting Washington plaintiff, making phone calls into the State, making equipment purchases, and the fact that an order was sent FOB Bellevue, met purposeful availment); *Kysar*, 76 Wn. App. 470 (Massachusetts defendant that seasonally ordered Christmas trees from a Washington plaintiff over a three-year period purposefully availed itself of Washington, though the

¹¹ Courts look to contractual payment and delivery terms. *Crown Controls v. Smiley*, 47 Wn. App. 832, 836 (1987) (FOB Bellevue); *Peter Pan Seafoods*, 14 Wn. App. at 529 (FOB Seattle). Marel’s quotes state delivery is Free Carrier at its premises, and its invoices provide for payment into a Seattle account. Ex. 3 at 4; Ex. 4 at 6, 8-13.

parties contested who made first contact); *Byron Nelson v. Orchard Corp.*, 95 Wn. App. 462, 975 P.2d 555 (1999) (Virginia defendant's contacting a Washington plaintiff to enter a contract requiring the plaintiff to act as defendant's broker to sell some equipment, which required work in Washington, was purposeful availment).

AKAS II's purposeful actions and intended contacts far surpass those the Court found satisfied the purposeful availment prong in *Peter Pan*, *Sorb Oil*, *Crown Control*, *Kysar*, or *Byron*. And, unlike *Walden*, to which AKAS II attempts to analogize this case, AKAS II is not connected to Washington through only the fact Huynh and Marel are located in Washington. Rather, it purposefully reached into Washington and formed this broad Washington connection. Purposeful availment was present here.

2. The trial court correctly held that Huynh's action arises out of AKAS II's Washington contacts.

The second prong is a "but for" test, which is satisfied if the plaintiff would not have suffered an injury but for the defendants' forum contacts. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 769-70, 772, 783 P.2d 78 (1989). It makes "no difference where the cause of action matured, so long as it could not have arisen but for the activities of the nonresident firm in the forum where it is ultimately sued." *Id.*

The trial court correctly held that, but for AKAS II entering the *Antarctic Sea* contract with Marel, Huynh would not have been on *Antarctic Sea* in Uruguay where AKAS II negligently caused him injury. CP 1146-47. Thus, his action arose from AKAS II's connections with Washington. CP 1146-47.¹² The order should be affirmed in this regard.

AKAS bases its appeal as to this jurisdictional prong on a two-part argument that the but for test should be abandoned. First, it argues the test is subject to extensive criticism. However, our Supreme Court has already acknowledged such complaints and criticisms and has dispensed with them:

“The ‘but for’ test has been criticized. However, any criticism that the ‘test’ reaches too far is answered by the federal court’s tempering of its ‘but for’ test with an additional consideration. ‘If the connection between the defendant’s forum related activities [and the claim] is ‘too attenuated,’ the exercise of jurisdiction would be unreasonable’. While other tests or rules have been suggested, we do not consider them appropriate for adoption by this court.”

Shute, 113 Wn.2d at 769-71 (alteration in original). In fact, in its most recent intentional tort decision, *Pruczinski v. Ashby*, 185 Wn.2d 492, 374 P.3d 102 (2016), the Supreme Court reaffirmed that the significant connection that must exist between a defendant’s forum-related activities and contacts and

¹² AKAS II’s citations to cases finding contracts irrelevant, to the extent the cases do, are not on point. *See Brief of Resp.* at 19 n.15. The contracts in those cases did not cause the plaintiff to leave his state to perform his employer’s contract where he was injured by the defendant. Courts reviewing facts analogous to the present case found contracts relevant to the relatedness test. *Theunissen v. Matthews*, 935 F.2d 1454, 1461 (6th Cir. 1991); *Ratledge v. Norfolk*, 958 F. Supp. 2d 827, 833-37 (E.D. Tenn. 2013); *Burdick v. Dylan Aviation*, No. CV 10-48, 2011 U.S. Dist. LEXIS 64369, at *15- 16 (D. Mont. June 17, 2011).

a plaintiff's claim is still guided by the jurisdictional test's reasonableness prong. *Id.* at 501-02. That holding illustrates that the reasonableness prong remains the but-for test's "tempering". *Shute*, 113 Wn.2d at 769-71. The but for test is the law in Washington, despite any criticisms.

Second, AKAS II again argues that *Walden* effected a significant alteration in pre-*Walden* law by requiring that courts look only to conduct establishing the elements of a cause of action. This is incorrect. As Huynh details above, *supra*, the Court's use of the term "suit-related conduct" is simply a reiteration of the well-established tenet that a defendant's own purposeful actions must form suit-related minimum contacts to establish jurisdiction. *Walden* is easily distinguishable from the present action and installed no requirement. *See supra*; *see also Havel*, 2014 U.S. Dist. LEXIS 140983, at *26-27. The trial court properly looked to AKAS II's purposeful, substantial interjection into Washington,¹³ and but for this conduct and the contacts, Huynh would not have been injured.

AKAS II's cite to *Picot*, requires no different result. There, both a contract cause of action, to which the purposeful availment analysis applied, and an intentional tort, to which a purposeful direction test applied, were

¹³ AKAS II also again argues that it committed no tort in, and directed no tortious conduct to, Washington. *Brief of Resp.* at 20-21. AKAS II need not commit a tort in Washington to be subject to jurisdiction, and the purposeful availment test, which applies here, does not require that it direct tortious conduct to Washington, as noted *supra*.

involved. 780 F.3d at 1212. AKAS II cites to a quote that includes the phrase “challenged conduct” to argue that *Picot* applied *Walden*’s “new requirement”. But the Ninth Circuit did not discuss the phrase “challenged conduct” anywhere in the purposeful availment analysis. *Id.* at 1212-13. Rather, like the Supreme Court, it used the phrase only when applying the purposeful direction effects test to the intentional tort to determine whether the defendant had expressly aimed its intentionally tortious conduct at the forum. *Id.* at 1214-15. The purposeful direction test does not apply here, and the Ninth Circuit did not hold that only tortious conduct could be considered under purposeful availment.¹⁴

¹⁴ AKAS II states that “[a]ll courts applying *Walden* have” applied it as AKAS II suggests. *Brief of Resp.* at 25 (emphasis added). First, that is untrue. *See, e.g., Havel*, 2014 U.S. Dist. LEXIS 140983, at *26-27; *Leader’s Inst., LLC v. Jackson*, No. 3:14-cv-3572-B, 2015 U.S. Dist. LEXIS 96668, at *41-42 & n.10 (N.D. Tex. July 24, 2015); *Broadus v. Delta Air Lines, Inc.*, 101 F. Supp. 3d 554, 560-61 (M.D.N.C. 2015). In fact, when this action was before the Western District of Washington, it did not apply *Walden* in that way. *Huynh v. Aker BioMarine Antarctic AS*, No. C13-0723, 2014 U.S. Dist. LEXIS 103887 (W.D. Wash. July 29, 2014). Second, the cases it cites are distinguishable. First it cites to a line of intentional tort consumer cases that involved foreign entities requesting credit reports or conducting garnishment actions in foreign states. The courts dismissed because the foreign entities’ only connection to the forum was the fact that the plaintiff lived in and felt the effects of those entities’ actions in the forum. *Cole v. Capital One, NA*, No. GJH-15-1121, 2016 U.S. Dist. LEXIS 60184 (D. Mar. May 5, 2016); *Michael v. New Century Fin. Servs.*, No. 13-cv-03892, 2015 U.S. Dist. LEXIS 41030 (N.D. Cal. Mar. 30, 2015); *Zellerino v. Roosen*, 118 F. Supp. 3d 946 (E.D. Mich. 2015). It also cites to a line of intentional tort infringement cases. These courts also dismissed because the infringement occurred outside the forum and the defendants had no connections to the forum relevant to the claim other than the plaintiff was in, and felt the effect in, the forum. *Presby Patent Trust v. Infiltrator Sys.*, No. 14-CV-5452, 2015 U.S. Dist. LEXIS 71562 (D.N.H. June 3, 2015); *Pub. Impact v. Boston Cons.*, 117 F. Supp. 3d 732 (M.D.N.C. 2015). It further cites to a line of intentional tort employment cases in which a plaintiff company sued a foreign company that hired a former employee, who was also not located in the forum, for intentional interference and related torts. Again, the courts dismissed because the foreign companies’ only connection to the forum was that the prior employer plaintiff was in the forum and

Nor does *Sutcliffe v. Honeywell Int'l*, No. CV-13-01029, 2015 U.S. Dist. LEXIS 40382 (D. Ariz. Mar. 30, 2015), suggest a different result. It simply held that Canadian plaintiffs injured in a plane crash in Canada could not establish personal jurisdiction over a Spanish aircraft manufacturer in Arizona simply because it bought the engines that failed from Arizona. The fact that the Spanish defendant purchased engines in Arizona that killed and injured an aircrew in Canada was too attenuated. *Id.* at *7-8.

Here, AKAS II solicited and entered a large-scale contract with a Washington entity that necessitated sending Washington workers, covered by Washington industrial insurance, to Uruguay to install Washington-built equipment on AKAS II's vessel. *Sutcliffe's* attenuated relation is easily distinguished. Huynh has shown that AKAS II purposefully availed itself of Washington and that, but for those contacts, Huynh's injury would not have occurred. *Shute*, 113 Wn.2d at 769-70, 772.

The Sixth Circuit in *Theunissen v. Matthews*, found but for causation on indistinguishable facts. There, an Ontario, Canada lumber yard entered a contract for carriage with a Michigan entity requiring that the Michigan entity send a truck to load and transport lumber from the yard. 935 F.2d

felt the effects in the forum. *Anaqua, Inc. v. Bullard*, No. SUCV201401BLS1, 2014 Mass. Super. LEXIS 219 (Mass. Super. July 24, 2014); *ClearOne, Inc. v. Revolabs, Inc.*, 2016 UT16, 369 P.3d 1269 (Utah 2016). All of these decisions are direct applications of *Walden's* facts.

1454, 1461 (6th Cir. 1991). The Michigan entity sent its Michigan driver. *Id.* While the driver was at the lumber yard, the Canadian entity’s employee negligently injured the Michigan truck driver’s hand. *Id.* The court held that “[plaintiff’s] cause of action—his injured hand—resulted from the conduct of [defendant’s] employee while [plaintiff] was present at his place of business pursuant to what [plaintiff] alleges was a contract for carriage [defendant] executed with [plaintiff’s Michigan employer]. Thus, but for [defendant’s] alleged business contacts with his employer, [plaintiff] would have sustained no injury.” *Id.*; see also *Ratledge v. Norfolk S. Ry. Co.*, 958 F. Supp. 2d 827, 833-37 (E.D. Tenn. 2013). The same is true here. Huynh’s claim arises from AKAS’ contacts.¹⁵

3. The trial court properly concluded that exercising jurisdiction over AKAS II is reasonable and comports with due process.

Because Huynh established that AKAS II purposefully availed itself of Washington and that his claim arose from those contacts, AKAS II must make a compelling case that jurisdiction is unreasonable. *Optronics*, 180 Wn. App. at 914-15. Courts consider ““the quality, nature, and extent of the

¹⁵ AKAS II’s criticism of *Theunissen* is misplaced. See *Brief of Resp.* at 26 n.20. After the court remanded, the trial court held, after a hearing that established the facts were different than on the first appeal, that personal jurisdiction did not exist, and the matter was appealed for a second time. On the second appeal, in an unpublished decision, the Sixth Circuit held only that, after the trial court’s hearing, the facts as now understood did not support a finding that the Michigan long-arm statute itself was satisfied. *Theunissen v. Matthews*, No. 92-1271, 1993 U.S. App. LEXIS 7843, at *7 (6th Cir. Apr. 5, 1993). Thus, it refused to review the due process considerations under which it originally had concluded that jurisdiction would exist. Nothing about the decision alters the first jurisdictional analysis.

defendant's activity in Washington, the relative convenience of the plaintiff and the defendant in maintaining the action here, the benefits and protection of Washington's laws afforded the parties, and the basic equities of the situation." *LG*, 375 P.3d at 1044. AKAS II must show that the exercise of jurisdiction would make litigation "so gravely difficult and inconvenient that it unfairly [places AKAS II] at a 'severe disadvantage' in comparison to [its] opponent." *FutureSelect*, 175 Wn. App. at 893-94.

AKAS II's contract with Marel required significant work to occur in Washington, as well as ongoing, expected future purposeful injection into the State. Its intentional relationship with Marel led directly to Huynh and other Washington residents, covered by Washington industrial insurance, traveling abroad, Marel's specialty building millions of dollars of equipment in Seattle, continued equipment requests and payments into Washington, and future work, even after Huynh's injury, which continues now. AKAS II itself reached into Washington and formed the relationship. In *Precision Lab. Plastics v. Micro Test*, 96 Wn. App. 721, 981 P.2d 454 (1999), the Court held that a non-resident defendant that contacted a Washington entity and asked that it manufacture specific vials over a three-year period purposefully

availed itself of the benefits and protections of Washington law; thus, jurisdiction was reasonable. *Id.* at 726-27, 728-29. The same is true here.¹⁶

Washington is also the most convenient forum. Most witnesses are in Washington. Huynh and his family are in Washington. CP 942. Pertinent Marel employees are in Washington. *E.g.*, CP 943. Pertinent Aker Seafoods US representatives, like Sverre Johansen, are in Washington. CP 947. Other than emergency care in Uruguay, Huynh received all medical care in Washington; all 21 healthcare providers are in Washington. *See* CP 439-47. And, all general damages witnesses are in Washington. Therefore, while *Antarctic Sea* is in Uruguay, most witnesses are in Washington.

Washington also afforded benefits and protections. “By purposefully availing itself of the privilege of conducting business in Washington, a foreign corporation acquires the benefits and protections of Washington law.” *Byron Nelson*, 95 Wn. App. at 465. For example, AKAS II would have been entitled to initiate actions against Huynh in Washington if he caused damage to AKAS II’s equipment or other interests during the project.

The equities all favor Washington as well. Huynh and his family, unlike AKAS, are not multinational corporations. Their expenses, if forced

¹⁶ AKAS II argues that it “merely purchased some goods and services from Washington vendors,” purchases “were modest and required little to no performance in Washington,” and its “involvement with Washington business was minimal.” *Brief of Resp.* at 29. These arguments are disconnected from the facts and reality.

to litigate in Norway or Uruguay would be insurmountable. AKAS has litigated cases in, has a presence in, and has hired attorneys in the United States. *See, e.g.*, CP 532-55. Huynh has no knowledge of the Norwegian or Uruguayan justice systems and has no presence in either country.¹⁷

Washington also has a strong interest. It “obviously has an interest in protecting its citizens against the tortious conduct of others, including negligence”. *Grange Ins. Assoc. v. State*, 49 Wn. App. 551, 561, 744 P.2d 366 (1987), *rev’d on other grounds*, 110 Wn.2d 752 (1988). But, it also has a direct pecuniary interest, highly protected by state law. RCW 51.24.060.

Washington aggressively protects its worker’s compensation fund. *Maxey v. Dep’t of Labor & Indus.*, 114 Wn.2d 542, 547, 789 P.2d 75 (1990). In third-party claims, an injured worker must give notice of an election to seek damages and provide the Department with a copy of any complaint. RCW 51.24.030(2); .060; .080(1). The Department may intervene as a party to protect its interest. *Id.* And, any compromise for less than the entitlement without authorization is void; if so voided, the Department may seek a court order assigning the action to the Department. RCW 51.24.090.¹⁸

¹⁷ AKAS II’s argument as to the equities is only a rehashing of its argument that the first two prongs of the test are not met. *Brief of Resp.* at 30. Because they are, its argument fails.

¹⁸ The Legislature also mandated that the industrial insurance program maintain a broad geographic reach and encompass out-of-state employers. RCW 51.12.120 (extraterritorial coverage). Workers injured outside Washington are covered if employment is principally located in the state, a contract of hire was made in the state for work not principally located in any state or principally located outside of the United States, or a contract of hire was made in Washington for employment in another state if that state does not require coverage.

The Department has spent \$256,948 for Huynh's injuries so far, and has set its claim reserve at \$1,896,259. CP 123. If the claim were dismissed and Huynh were for practical reasons unable to bring suit in Norway, it is likely the Department will never recover. *Id.*

B. Huynh's reply regarding his appeal: The trial court incorrectly dismissed AKAS for lack of personal jurisdiction for its own direct negligence.

1. The trial court incorrectly held that AKAS was not an *Antarctic Sea* contract party; since it was, personal jurisdiction exists over AKAS for its own direct negligence based on those contacts.

a. *The contract issue is subject to de novo review.*

Whether AKAS was also party to the *Antarctic Sea* contract between AKAS II and Marel is subject to *de novo* review. While the trial court held a hearing and considered and weighed evidence, Huynh does not argue here that the trial court's factual findings or the agreed facts upon which the trial court relied to reach its conclusion are incorrect.¹⁹ Rather, he argues that the trial court misapplied the agreed or established facts to contract law to reach its conclusion. "The application of the law to the facts is a question of law", *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712, 334 P.3d

Id. (1). Further, the Department has jurisdiction over an out-of-state employer that has an employee injured within the State, and if the out-of-state employer is not covered under another state and has not qualified as a self-insurer, the out-of-state employer is subject to the same penalties as other employers for failing to comply. *Id.* (4)(b).

¹⁹ Thus, Huynh does not ask this Court to weigh the evidence, disregard the trial court's factual findings, evaluate the evidence, or assess witness credibility. Rather, he requests that this Court review the trial court's application of the facts to contract law.

116 (2014), and “[a]n error of law is ‘an error in applying the law to the facts as pleaded and established’”. *Spokane Cty. v. State*, 136 Wn.2d 644, 649, 966 P.2d 305 (1998). Courts review a “trial court’s conclusions of law pertaining to contract interpretation *de novo*.” *Viking*, 183 Wn. App. at 712. Thus, *de novo* review is proper here.²⁰

b. *Contract law demonstrates AKAS was a party.*

“The touchstone of contract interpretation is the parties’ intent.” *Go2net, Inc. v. CI Host, Inc.*, 115 Wn. App. 73, 83-84, 60 P.3d 1245 (2003) (quoting *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)). Washington law is clear that a court must focus its analysis on “objective manifestations of the agreement, rather than on the [unilateral and] unexpressed subjective intent of the parties.” *Hearst Commc’ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005); *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

In responding to Huynh’s contract argument, AKAS fails to address the following agreed and/or established facts that existed prior to, and at the time of, contract formation in early November 2011: (1) AKAS, not AKAS

²⁰ For example, the trial court held that “the dispositive evidence regarding the parties’ intent with respect to the contracting entities”, CP 1142, was the few emails, which ask only that the invoices be changed and do not discuss the contract, that occurred *one to two months after contract formation*. The trial court opted to disregard the objective manifestations that occurred prior to and contemporaneous with formation. This is clearly a misapplication of the law to the facts. *De novo* review is the proper standard.

II, engaged in a continuous pre-*Antarctic Sea* relationship with Marel that involved the two large-scale *Saga* and *Navigator* contracts over a five-year period, (2) the *Antarctic Sea* contract's subject matter and objective were substantively identical to the prior contracts, (3) Marel maintained extensive contact with AKAS' project lead, Skjong, throughout the pre-*Antarctic Sea* projects, and Eikrem negotiated, for AKAS, the *Navigator* contract with Marel and headed that project; (4) Eikrem negotiated and entered the pre-*Antarctic Sea* 20-year secrecy agreement/preferred provider agreement, on AKAS' behalf, with Marel; (5) the *Antarctic Sea* project required Marel to incorporate the unused equipment from the *Navigator*, which AKAS, not AKAS II, owned; (6) AKAS, not AKAS II, via Skjong, initially contacted Marel about the *Antarctic Sea* project;²¹ (7) Marel sent the initial invoices to Eikrem, directed to AKAS, consistent with the prior course of dealing and Skjong's instruction to "to invoice the usual way", RP 73-74 (08.17.15); and (8) despite all pre-*Antarctic Sea* dealings, when Eikrem negotiated and formed the *Antarctic Sea* contract with Marel, neither Eikrem, Skjong, nor any other AKAS director, officer, or employee, told Marel that Eikrem or Skjong represented AKAS II, that AKAS II, and not AKAS, intended to enter the contract, or that AKAS II even existed.

²¹ AKAS II did not in fact exist when AKAS' employee Skjong first approached Marel about *Antarctic Sea*. CP 945, 950. Moreover, Eikrem testified at his deposition that AKAS was the party to the *Antarctic Sea* contract. RP 68-70 (06.26.15).

All the objective manifestations, made prior to and at the same time as the November 2011 contract formation, demonstrate AKAS was entering the contract, as it had in the past. Indeed, that is the only interpretation Marel could draw; AKAS chose not to tell Marel that AKAS II even existed. RP 48, 49-50 (06.26.15). Marel intended to contract with the same “customer” it always had, and it believed it was doing so. AKAS’ claim that AKAS II was the only contract party is demonstrably the product of an unexpressed, subjective intent that is wholly at odds with the parties’ prior course of dealing and AKAS and its agents’ objective manifestations.²²

Nevertheless, the trial court and AKAS II focus on emails the parties exchanged well after contract formation in early November 5, 2011. CP 1142; RP 93 (08.17.15). However, the emails do not address the contracting parties’ identities. *See* Exs. 4, 101-107. The only issue these post-contract-formation emails address is the entity that Marel should bill. *Id.* None of the emails address the contracting party issue and do not change the fact a contract already existed between AKAS/AKAS II and Marel.

Discussing the emails at the hearing, Olsen testified that he changed the entity that Marel would bill from AKAS to AKAS II simply to send the

²² AKAS’ argument that the prior course of dealing between was not specifically between Marel and AKAS, but rather between Marel and *Saga*’s or *Navigator*’s owner, is meritless. *Brief of Resp.* at 37-38. AKAS was always the only contracting entity prior to the *Antarctic Sea* contract. Marel did not base its pre-*Antarctic Sea* contracts on the fact that AKAS was the vessel owner; it based its contract on the fact that AKAS was the only entity involved.

invoices as requested, that he was not involved in forming or negotiating the *Antarctic Sea* contract—which was not his job, he had no dealings in determining the prices, he had no involvement in determining the scope of the work, he had no dealings in determining who the parties to the contract were, and that all that was performed by Marel’s president. RP 69-70 (08.17.15). He also testified that, other than speculating at the hearing, he did not know AKAS II existed prior to Eikrem’s January 3, 2012 emails, RP 70-71 (08.17.15), and when he originally sent the invoices to AKAS, he believed he was sending them to the contracting party. RP 72 (08.17.15). In fact, he stated that “[t]he only thing [Eikrem] asked [him] to do was change the invoice.” RP 75-76 (08.17.15). Indeed, Eikrem himself testified that, even though he sent the emails to Olsen, he never told Olsen that AKAS II was the only party to the contract. RP 103-04, 148-49 (08.17.15).

These email communications occurred well after the *Antarctic Sea* contract’s formation, do not address the contract party issue, discuss only billing, and were exchanged with Olsen, who does not engage in contract negotiations and played no part in negotiating or defining the terms of the *Antarctic Sea* contract. Rather than bear on the contracting party issue, these emails are entirely irrelevant to the contract law analysis the trial court was required to conduct. The trial court improperly determined that the emails factor into the analysis, and it improperly failed to consider the parties’ pre-

formation and formation objective manifestations, all of which demonstrate that AKAS was a party to the contract²³—the only conclusion that Marel could have drawn, as it was unaware AKAS II existed.²⁴

c. Apparent authority also demonstrates AKAS was a party.²⁵

Huynh also provides extensive argument that demonstrates apparent authority likewise renders AKAS a party to the *Antarctic Sea* contract. *See Brief of App.* at 19-22. AKAS presents no argument addressing Huynh’s apparent authority argument. Thus, the trial court’s order should be reversed as to the contract issue on apparent authority grounds as well.

2. *Harbison v. Garden Valley Outfitters* grants independent personal jurisdiction over AKAS for its direct liability even had AKAS not been party to the *Antarctic Sea* contract.

The trial court misapplied *Harbison*, 69 Wn. App. 590, when it held that it could not consider the contacts AKAS II imputed to AKAS in their

²³ Since these emails occurred substantially post-formation, do not address the contracting parties, and were made with a person, Olsen, who was not involved in negotiating the contract, they would likewise be irrelevant even had a substantial evidence review applied. *See Brief of Resp.* at 34-35. For the same reasons, the emails do not, as AKAS II argues—without citation to any legal authority—constitute the parties’ objective manifestations and assent to, or demonstrate consideration for, releasing AKAS from the original contract, “clarifying” the contract, or adding an express term. *See id.* at 36-37.

²⁴ Huynh does not request that this Court “transform the contract to comport with an initial mistaken understanding on the part of Marel”. *Brief of Resp.* at 35 n.27. At the time of contract formation, AKAS and AKAS II were the only parties that knew AKAS II existed. Thus, Marel was not mistaken. Rather, it, unlike AKAS and AKAS II, had no idea AKAS II existed. *Restatement (Second) of Contracts* § 20(2)(b) (1965) (“The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.”).

²⁵ This issue is subject to *de novo* review for the same reasons as the contract issue.

merger to establish jurisdiction over AKAS for claims based on its direct negligence. *Brief of App.* at 22-25. AKAS' arguments to the contrary fail.

Harbison directly addressed a successor's individual liability for its own out of state conduct. There, an Idaho entity that provided Idaho hunting expeditions (Idaho 1) sold its assets to another Idaho entity that provided such expeditions (Idaho 2). 69 Wn. App. at 592. Idaho 2 sold a hunting expedition to a plaintiff at a Seattle booth, but then "return[ed] the business" to Idaho 1. *Id.* Idaho 1 assumed Idaho 2's liabilities, including the contract, and sent a letter to the plaintiff stating it had bought Idaho 2, his trip would be honored, and it expects "a banner year". *Id.* at 592-93. Plaintiff was displeased with the trip and sued Idaho 1 in Washington, and Idaho 1 moved to dismiss. *Id.* at 593. The Court held that jurisdiction existed. *Id.* at 601.

In reviewing the jurisdiction issue, the Court noted that the tort was not complete until after the merger occurred. *Id.* at 597-98 ("Here, the last event [comprising the tort] was [Idaho 1's] alleged failure to provide the services as represented by [Idaho 2]."). Thus, Idaho 2 had no tort liability to transfer; the tort was not complete until Idaho 1 failed, by its own direct out-of-state actions, to provide the expedition represented. *Id.*

Concluding that, through successor liability principles, Idaho 1 had assumed the responsibility to honor the plaintiff's contract (which it then, through its own out-of-state actions, failed to do) the Court determined that

successor liability’s rationale also applied to personal jurisdiction, *id.* at 599, permitting the Court to consider *both* Idaho 1’s and Idaho 2’s forum contacts. *Id.* at 598 (noting the question as whether Idaho 2’s contacts could *also* be considered); 599 (noting that consideration of the minimum contacts question “will *include* consideration of” Idaho 2’s contacts); 600 n.4 (finding that, because Idaho 2’s contacts satisfied the test, the Court did not need to “address whether the letter written by [Idaho 1 post-merger] would alone be” sufficient). Thus, the Court considered both Idaho 1’s and Idaho 2’s forum contacts to establish jurisdiction over Idaho 1 for its own out-of-state acts and omissions. The trial court should have done the same here.²⁶

Moreover, nothing about *Harbison*’s holding offends the long-arm statute, RCW 4.28.185, or the principle that jurisdiction must exist for each claim. *Harbison* holds that a predecessor’s jurisdictional contacts become a successor’s jurisdictional contacts in a merger. Since those contacts impute to the successor, they may be used to establish jurisdiction for successor liability or direct liability, as long as the cause of action stated arises from the contacts. Because both Huynh’s direct and successor causes of action

²⁶ AKAS’ argument that *Simmers v. American Cyanamid Corp.*, 576 A.2d 376, 394 Pa. Super. 464 (Pa. Super. 1990), upon which *Harbison* relies, involved only successor liability is irrelevant. That argument does not change the facts that existed in *Harbison*. Moreover, in *FutureSelect*, 175 Wn. App. 840, this Court did not limit *Harbison* to only successor liability; rather, it used *Harbison* to illustrate that liability theories, as practical policy considerations, may be considered when determining if jurisdiction exists. *Id.* at 892.

against AKAS arise from contacts properly attributable to AKAS, either through its own purposeful contacts or through contacts it assumed in its merger with AKAS II, RCW 4.28.185 is satisfied.

3. The trial court failed to conduct a jurisdictional analysis of AKAS' independent, non-contract contacts, which establish that jurisdiction exists even had AKAS not been an *Antarctic Sea* contract party.

The record—specifically the trial court's order—makes it clear that the trial court did not conduct an independent jurisdictional analysis of AKAS' non-*Antarctic Sea* contract contacts. Nowhere in the order does the trial court analyze AKAS' non-contract contacts or apply those contacts to the law; rather, the trial court simply dismisses AKAS as an afterthought in a footnote at the end of its order. CP 1148. Indeed, AKAS concedes that the trial court's order does not set forth any analysis on the issue. *Brief of Resp.* at 42.²⁷ Because the trial court failed to apply the law to the facts as pleaded

²⁷ Though AKAS cites to the trial court's statements that it would read and consider all evidence submitted, that it noted it was well apprised of the issues and that the issues had been thoroughly briefed, and that it considered all materials before it, *Brief of Resp.* at 41, the order presents no analysis or conclusions as to an independent jurisdictional analysis of AKAS' non-contract contacts. Moreover, AKAS' argument that the analysis is evident from the order is meritless. *See id.* at 42-43. Though the trial court's order shows it concluded that Huynh's injury arose from the *Antarctic Sea* contract and that AKAS was not a party to that contract, those conclusions do not demonstrate, and in fact belie, AKAS' argument that the order makes clear the Court considered AKAS' non-contract contacts. Those parts of the order demonstrate that the trial court's analysis ended with its conclusion that AKAS was not a party to the *Antarctic Sea* contract. AKAS' citation to *State v. Haydel*, 122 Wn. App. 365, 95 P.3d 760 (2004), is also unavailing. That case states that “[t]he absence of a finding of fact in favor of the party with the burden of proof about a disputed issue is the equivalent of a finding against that party on that issue.” *Id.* at 373 (quoting *Wallace v. Real Estate Inv., Inc. v. Groves*, 72 Wn. App. 759, 773 n.9, 868 P.2d 149 (1994)). It does not stand for the proposition that an absence of any findings or analysis as to an entire cause of action is the equivalent of an entire analysis against that party.

and established, *de novo* review of this issue is proper, *Viking*, 183 Wn. App. at 712; *Spokane*, 136 Wn.2d at 649, which AKAS does not contest. *See Brief of Resp.* at 41-42.

Huynh has demonstrated in detail that AKAS purposefully availed itself of Washington. *Brief of App.* at 27-34. AKAS fails to respond, except to briefly state that AKAS committed no tort in, and did not direct tortious conduct to, Washington. However, as Huynh details *supra*, this argument is irrelevant. Purposeful availment is present, *Brief of App.* at 27-34, which AKAS presents no argument to refute.

Huynh has also demonstrated that AKAS' contacting Marel for two vessel projects during a five-year, pre-*Antarctic Sea* period, all of which contemplated significant work in Washington, Washington workers covered by Washington industrial insurance traveling abroad, and Marel's ongoing, continuing work, led directly to AKAS II entering the *Antarctic Sea* contract with Marel. *Id.* at 34-36. In fact, AKAS, not AKAS II, first contacted Marel about the project. CP 950. And, under the *Antarctic Sea* contract, Huynh traveled to Uruguay where AKAS II negligently caused him injury while he was performing the contracted work.²⁸ The but for test is easily satisfied.

²⁸ Contrary to AKAS' argument, Huynh does not claim that his injuries arise out of AKAS' purchases of vessel-related services from other vendors. *Brief of Resp.* at 43-44. While those contacts demonstrate AKAS' extensive involvement with Washington concerning its vessel projects, Huynh's injury arose from AKAS' long, continuous Marel relationship.

Omeluk v. Langsten Slip & Batbygger, 52 F.3d 267 (9th Cir. 1995), is easily distinguished. There the plaintiff was hurt on a vessel when a deck grate gave way and dropped him to a deck below. *Id.* at 268-69. He sued the Norwegian company that refurbished the vessel in Norway (including grate work). *Id.* at 269. The court held that the defendants' Washington purchases of electronics and nets for the refurbishment and attendance at the vessel's christening in Washington had nothing to do with the fall; the grating would have failed regardless of those Washington purchases or visits. *Id.* at 272.

The opposite is true here. It is specifically AKAS' acts of reaching out to Marel in Washington that led to plaintiff traveling to Uruguay where he was injured. Absent the contacts, Huynh would not have been in Uruguay and the accident could not have happened. *See Theunissen*, 935 F.2d 1461.

Finally, AKAS carries the burden of making a compelling case that jurisdiction is unreasonable, *Optronics*, 180 Wn. App. at 914-15, but it offers no argument in that regard. Thus, it fails to carry its burden.

4. The trial court failed to consider pendent personal jurisdiction.

The long-arm statute, RCW 4.24.185, allows Washington courts to exercise pendent personal jurisdiction.²⁹ Under the statute, our Legislature

²⁹ Numerous federal courts that have confronted the issue as to whether they can exercise pendent personal jurisdiction in state-law-only diversity cases have concluded they can exercise jurisdiction. *See Ex Parte Dill, Dill, Carr, Stonbraker & Hutchings*, 866 So.2d 519, 545 (Ala. 2003) (See, J., dissenting), *cert. denied sub nom. Austin v. Dill, Dill, Carr, Stonbraker & Hutchings, PC*, 540 U.S. 949, 124 S. Ct. 416, 157 L. Ed. 2d 281 (2003). This

set forth a broad jurisdictional policy, extending the State’s jurisdictional reach to the full extent of due process. *Pruczinski*, 185 Wn.2d at 500-01.³⁰ Thus whether Washington courts can exercise pendent personal jurisdiction focuses on due process. Linda Sandstrom Sinard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 Ohio St. L.J. 1619, 1661 n.198 (2001) (noting that due process long-arm statutes “obviate the need for a specific analysis of the long-arm.”).

Due process presents no bar to Washington’s courts exercising such jurisdiction. AKAS’ sole argument that such exercise would violate due process is that courts “must have jurisdiction over at least one claim against the defendant in order to compel that defendant to answer a ‘pendent’ claim.” *Brief of Resp.* at 47. But, the trial court already properly concluded that it does have jurisdiction over AKAS based on the successor liability claim. CP 1148. AKAS cites to no authority that states that a court may not exercise such jurisdiction over a claim against a defendant when the court has already established that personal jurisdiction exists over that same

includes RCW 4.28.185. *E.g.*, *T-Mobile USA, Inc. v. Huawei Device USA*, 115 F. Supp. 3d 1184, 1202 n.8 (W.D. Wash. 2015); *Ridemind v. S. China Ins.*, No. 14-489, 2014 U.S. Dist. LEXIS 78314, at *14-15 (W.D. Wash. June 9, 2014); *Fluke Elecs. v. CorDEX Instr.*, No. C12-2082, 2013 U.S. Dist. LEXIS 19540, at *31 (W.D. Wash. Feb. 13, 2013).

³⁰ AKAS notes that *Pruczinski* conducted a detailed analysis of RCW 4.28.185(1)(b), which requires that a defendant commit a tort in Washington. *See Brief of Resp.* at 46 n.36. That was the only section upon which the plaintiff tried to establish jurisdiction, and there was a significant dispute as to whether the defendant had committed a tort in Washington.

defendant based on successor liability.³¹ Personal jurisdiction over a claim for successor liability is personal jurisdiction over the defendant.

Moreover, even had the statute not extended to due process limits, the exercise of such jurisdiction would still comply with the statute's terms. It provides that "[o]nly causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him or her is based upon this section." RCW 4.28.185(3). The trial court properly held it could exercise jurisdiction over AKAS for successor liability claims based on the contacts AKAS II imputed to AKAS. CP 1148. The direct liability claims against AKAS are directly related to the claims over which the trial court held it could exercise jurisdiction and also arise, in part, from the same imputed contacts. Indeed, the claims arise from a common nucleus of operative facts, as pendent personal jurisdiction requires. *United States v. Botefuhr*, 309 F.3d 1263, 1272-73 (10th Cir. 2002). Thus, the direct

³¹ *Poor Boy Prods. v. Fogerty*, No. 3:14-cv-00633, 2015 U.S. Dist. LEXIS 113086 (D. Nev. Aug. 26, 2015), is irrelevant. *Poor Boy* stated that, to exercise pendent personal jurisdiction, a federal court must first have personal jurisdiction over the defendant for a claim over which the court has original subject matter jurisdiction. *Id.* at *10-11. There, the court did not have personal jurisdiction over the defendant as to a claim over which the court also had original subject matter jurisdiction, *e.g.*, a claim based on diversity or arising under the laws of the United States, 28 U.S.C. §§ 1331-1332. *Poor Boy*, 2015 U.S. Dist. LEXIS 113086, at *13-14. Thus, it held it could not exercise personal jurisdiction over the purely state law claims—under which it must exercise supplemental subject matter jurisdiction, 28 U.S.C. § 1367—to then exercise pendent personal jurisdiction as to claims for which original jurisdiction does exist. *Poor Boy*, 2015 U.S. Dist. LEXIS 113086, at *13-14, 18-20. Here, the trial court had subject matter jurisdiction over the successor liability claim and properly concluded it has personal jurisdiction as to that claim as well. *Poor Boy* presents no due process bar to the application of the doctrine here.

liability claim is related to and also arises from AKAS' conduct and contacts, imputed and otherwise, that grant jurisdiction for the imputed liability claim.

V. CONCLUSION

This Court should reverse the trial court's order to the extent that it dismisses AKAS for claims based on AKAS' direct negligence. It should affirm the order to the extent that it holds personal jurisdiction exists over AKAS II (and AKAS for successor liability claims). The Court should also award Huynh costs on appeal.

Respectfully submitted this 8th day of September, 2016.

/s/ Philip A. Talmadge
Philip A. Talmadge, WSBA # 6973
Attorney for Appellants

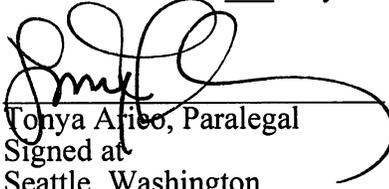
/s/ C. Steven Fury
C. Steven Fury, WSBA # 8896
Scott David Smith, WSBA # 48108
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

W.L Rivers Black III, WSBA 13386 Christopher W. Nicoll, WSBA 20771 Nicoll Black & Feig 1325 4 th Ave., Suite 1650 Seattle, WA 98101 Fax: (206) 838-7515 Defendant Aker BioMarine AS	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-Mail
Jennifer K. Sheffield, WSBA 41929 Lane Powell PC 1420 Fifth Avenue, Suite 4200 Seattle, WA 98111-9402 Fax: (206) 223-7107 SheffieldJ@lanepowell.com Defendant Marel Seattle, Inc.	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-Mail
Joshua D. Yeager Cremer Spina, et al One North Franklin St., 10 th Floor Chicago, IL 60605 Fax: (312) 726-3818 jyeager@cremerspina.com Defendant Marel Seattle, Inc.	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-Mail
Michael Patjens Department of Labor and Industries Third Party Section P.O. Box 44288 Olympia, WA 98504 patj235@lni.wa.gov	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-Mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 8th day of September, 2016.


Tonya Arico, Paralegal
Signed at
Seattle, Washington

APPENDIX OF UNPUBLISHED AUTHORITIES

<u>Case</u>	<u>Appendix</u>
<i>Anaqua, Inc. v. Bullard</i> , 2014 Mass. Super. LEXIS 219 (Mass. Super. Jul. 24, 2014)	1
<i>Burdick v. Dylan Aviation</i> , 2011 U.S. Dist. LEXIS 64369 (D. Mont. June 17, 2011).....	2
<i>Cole v. Capital One, NA</i> , 2016 U.S. Dist. LEXIS 60184 (D. Mar. May 5, 2016).....	3
<i>Eclipse Aerospace, Inc. v. Star 7</i> , 2016 U.S. Dist. LEXIS 27597 (N.D. Ill. Mar. 3, 2016).....	4
<i>Fluke Elecs. Corp. v. CorDEX Instruments</i> , 2013 U.S. Dist. LEXIS 19540 (W.D. Wash. Feb. 13, 2013).....	5
<i>Havel v. Honda Motor Eur.</i> , 2014 U.S. Dist. LEXIS 140983 (S.D. Tex. Sept. 30, 2014)	6
<i>Huynh v. Aker BioMarine Antarctic</i> , 2014 U.S. Dist. LEXIS 103887 (W.D. Wash. Jul. 29, 2014)	7
<i>Leader’s Inst., LLC v. Jackson</i> , 2015 U.S. Dist. LEXIS 96668 (N.D. Tex. July 24, 2015)	8
<i>Michael v. New Century Fin. Servs.</i> , 2015 U.S. Dist. LEXIS 41030 (N.D. Cal. Mar. 30, 2015).....	9
<i>Poor Boy Prods. v. Fogerty</i> , 2015 U.S. Dist. LEXIS 113086 (D. Nev. Aug. 26, 2015)	10
<i>Presby Patent Trust v. Infiltrator Sys.</i> , 2015 U.S. Dist. LEXIS 71562 (D.N.H. June 3, 2015).....	11
<i>Priority Env’tl. Solutions, Inc. v. Stevens Co.</i> , 2015 U.S. Dist. LEXIS 170230 (E.D. Wisc. Dec. 18, 2015).....	12

<i>Ridemind v. S. China Ins.</i> , 2014 U.S. Dist. LEXIS 78314 (W.D. Wash. June 9, 2014).....	13
<i>Sutcliffe v. Honeywell Int'l</i> , 2015 U.S. Dist. LEXIS 40382 (D. Ariz. Mar. 30, 2015).....	14
<i>Theunissen v. Matthews</i> , 1993 U.S. App. LEXIS 7843 (6th Cir. Apr. 5, 1993).....	15

APPENDIX 1



Positive

As of: September 8, 2016 1:52 PM EDT

[Anaqua, Inc. v. Bullard](#)

Superior Court of Massachusetts, at Suffolk

July 24, 2014, Decided; July 24, 2014, Filed

Opinion No.: 131580, Docket Number: CV2014-01491-BLS1

Reporter

2014 Mass. Super. LEXIS 219; 33 Mass. L. Rep. 106

Anaqua, Inc. v. Mark Bullard et al.

Subsequent History: Affirmed by, in part *Anaqua, Inc. v. Bullard*, 88 Mass. App. Ct. 1103, 2015 Mass. App. Unpub. LEXIS 877, 36 N.E.3d 79 (2015)

Case Summary

Overview

HOLDINGS: [1]-In a breach of contract action involving a non-competition agreement, the new employer's motion to dismiss the complaint against it for lack of personal jurisdiction was granted because the connections with the forum state were exclusively through plaintiff, the former employer, and its contacts with Massachusetts, although satisfying [Mass. Gen. Laws ch. 223A, § 3\(d\)](#), were not so pervasive as to subject it to general jurisdiction.

Outcome

Motion to dismiss allowed as to new employer; motion for preliminary injunction allowed as to the employee.

Judges: [*1] Thomas P. Billings, Justice of the Superior Court.

Opinion by: Thomas P. Billings

Opinion

MEMORANDUM AND ORDER ON (1) DEFENDANTS' MOTION TO DISMISS, AND (2) PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The plaintiff ("Anaqua") has sued its former employee ("Bullard") and his new employer ("Lecorpio") to enforce a letter agreement of employment ("Letter Agreement") and a "Proprietary Information, Non-Competition and

Inventions Agreement" ("Inventions Agreement") into which Anaqua and Bullard entered on February 1, 2008. The Complaint is in three counts: Count 1 ("Breach of Contract Against Mr. Bullard (Competition)"); Count 2 ("Breach of Contract Against Mr. Bullard (Trade Secrets)"); and Count 3 ("Tortious Interference With Contractual Relations Against Lecorpio").

Before me are cross motions, of a sort: the plaintiff's request for preliminary injunction (Prayers A and B of the Complaint), and the defendants' Motion to Dismiss (Paper #20). Anaqua's entitlement to injunctive relief being largely dependent on the merits of its claims, I have considered these in reverse order.

For the reasons that follow, the Motion to Dismiss is ALLOWED as to Lecorpio but DENIED as to Bullard, and the Motion for Preliminary [*2] Injunction is ALLOWED as to Bullard.
MOTION TO DISMISS

A. Allegations of the Complaint

The Complaint alleges the following facts, among others, which are hereby taken as true for present purposes. I have additionally taken note of the terms of the Letter Agreement and the Inventions Agreement, which are referenced and quoted in substantial part in the Complaint.¹ Bullard signed the Letter Agreement and the Inventions Agreement on or about February 1, 2008, and began work as Anaqua's Business Development Director. The Inventions Agreement included the following terms:

Bullard agreed to hold in confidence, and not to use except in his work for Anaqua, the company's proprietary information, and agreed that documents

¹ See [Marram v. Kobrick Offshore Fund, Ltd.](#), 442 Mass. 43, 45 n.4, 809 N.E.2d 1017 (2004); [Harhen v. Brown](#), 431 Mass. 838, 840, 730 N.E.2d 859 (2000); [Schaer v. Brandeis University](#), 432 Mass. 474, 477, 735 N.E.2d 373 (2000).

belonging to the company would be returned to it upon request. (¶¶1, 2, 3.)

There were provisions for inventions not at issue here. (¶¶4, 5, 6, 7, 8.)

There was a non-competition and non-solicitation clause with a duration of twelve months after Bullard left Anaqua's employ, by which Bullard agreed not to participate, as employee, contractor, officer, director, or equityholder, in "any business which is competitive, directly or indirectly, with the business of the Company anywhere [*3] in the world," and not to solicit its employees (etc.) or its actual or prospective clients or customers. (¶9.)

There was the standard acknowledgment of enforceability through injunctive relief, and the employer's right to attorneys fees if it came to that. (¶10.)

Bullard acknowledged

that my responsibilities, duties, positions, compensation, title and/or other terms and conditions of employment may change from time to time or I may have a break in service or employment with the Company and, notwithstanding any change in any terms and conditions of employment or a break in service or employment, this Agreement shall remain in full force and effect. (¶12 (III).)

And finally:

The provisions of this Agreement are severable. If any term or provision hereof (or the application thereof) is held invalid or unenforceable for any reason, the remaining provisions shall not be affected but rather shall remain in full force and effect and shall be enforced to the fullest extent permitted by law. The laws of the Commonwealth of Massachusetts shall govern the interpretation, validity and effect of this Agreement without regard to the place of performance thereof or principles of choice of law. I hereby [*4] agree that any and all suits regarding this agreement shall be brought in [*sic*] solely and exclusively in the Commonwealth of Massachusetts and I hereby consent to the jurisdiction of the state or federal courts of the Commonwealth of Massachusetts. (¶14.)

While employed by Anaqua, Bullard came into

possession of its proprietary and confidential information and trade secrets, including "client lists, prospective client lists, knowledge of Anaqua's pricing methods, Anaqua's pricing to current customers, knowledge of Anaqua's negotiations with and offers to prospective clients, product development roadmaps, and corporate strategy plans."

Bullard left Anaqua on September 20, 2013, telling Anaqua "that he intended to write books."² On April 28, 2014, however, Anaqua learned through a LinkedIn posting that he had accepted employment at Lecorpio. Anaqua sent Bullard a cease-and-desist letter the next day, but two days after that, Lecorpio issued a press release announcing that

Mark Bullard has also joined Lecorpio's team as vice president of product management. In this role Mark will help drive Lecorpio's customer driven product strategy. Prior to joining Lecorpio, Mark was vice president [*5] of sales for Lecorpio competitor Anaqua.

Anaqua alleges that in Bullard's work for Lecorpio, he will inevitably disclose and use Anaqua's confidential information. It adds, on information and belief, that Lecorpio knew of Bullard's post-employment restrictions and induced him to breach them.

In its Motion to Dismiss, Lecorpio has grouped its arguments under four headings: Personal Jurisdiction, Forum Non Conveniens, Choice of Law, and Failure to State a Claim, and they are here discussed in that order. Both sides, in connection with their arguments as to personal jurisdiction and forum non conveniens, have come forward with additional facts, which are summarized as necessary below.

B. Personal Jurisdiction

On a motion to dismiss for lack of personal jurisdiction [*6] pursuant to rule 12(b)(2), "the plaintiff[] bear[s] the burden of establishing sufficient facts on which to predicate jurisdiction over the defendant." For purposes of reviewing the

² Evidence submitted outside the Complaint discloses that in fact, Bullard had been working on a novel before and during the period that he was working for Anaqua, and that he finished it after he left, then devoted time to promoting the book and consulting part-time to a winery. The book, titled *Pillows for your Prison Cell*, is published by Brainsquall Books. Lecorpio contacted him via LinkedIn, and he began work there on April 23, 2014.

ruling on the motion to dismiss, [the Court is to] accept as true assertions in the plaintiff's affidavit[s], including any which controvert assertions in the defendant's affidavit[s].

[*Diamond Group, Inc. v. Selective Distribution Intern., Inc.*, 84 Mass.App.Ct. 545, 548, 998 N.E.2d 1018 \(2013\)](#) (citations omitted).

The defendants' affidavits aver the following. While he worked for Anaqua, Bullard was a resident of the state of Washington. Anaqua hired him as Business Development Director, in which position he sold Anaqua products and services to customers in the western United States. He had no management responsibilities and received commissions only on sales that he made. In 2011, Bullard was promoted to Vice President of Sales. Now, he was in charge of a five-member sales team that sold Anaqua products across North America, and was a member of the company's Executive Team, which addressed company-wide issues. He was compensated based partly on his team's sales performance and in part based on the performance of the company as a whole. He did not, at the time of the promotion, renew the terms of the Inventions Agreement or execute any other agreement relating [*7] to post-employment restraints.

Bullard left Anaqua on September 20, 2013. He began work with Lecorpio in late April 2014, working out of its headquarters in Fremont, California.

Lecorpio has no offices or employees in Massachusetts. It conducts on-line advertising directed nationally and participates in national trade shows that attract attendees from all over the company. It has only one customer in Massachusetts.

Anaqua's materials do not controvert the above, but add evidence that while he was an Anaqua employee, Bullard traveled to Massachusetts at least four times a year on Anaqua business—two sales kick-off meetings, an annual executive meeting, and an annual review meeting. There were weekly executive team meetings in Boston, which Bullard attended by teleconference. He communicated with Anaqua personnel multiple times daily via email, Skype, and telephone. He was paid out of Boston and reported to Anaqua's CEO, who was based in Boston.

Since starting as a Lecorpio employee, Bullard has rented an apartment and obtained a driver's license in California. He has not registered to vote there, and his wife and children still live in Washington and intend to

remain there.

Lecorpio's sole [*8] Massachusetts client pays it subscription fees in the "five figures," accounting for 3.47% of its revenues in 2012, 2.99% in 2013, and 2.02% for YTD 2014. Lecorpio markets and licenses its products throughout the United States and globally, and since January 1, 2012 has exchanged at least 106 communications (emails, snail-mail, and phone calls) with seven corporate entities located in Massachusetts for the purposes of potential sales, research, or product development. It has met face-to-face in Massachusetts with one potential client, has held four web sales meetings with Massachusetts companies, has met with foreign subsidiaries of Massachusetts companies, and sent two representatives (its COO and another) to the IP Business Congress in Massachusetts for three days in 2013.

While they were still in discussions, Bullard sent Lecorpio a copy of the Inventions Agreement so that its legal counsel could look into it, advise on whether California (as Bullard had heard) would refuse to enforce a noncompetition agreement, and advise on whether or not this depended on Bullard's becoming a California resident. Later, Lecorpio agreed in writing to indemnify Bullard against any claim by Lecorpio [*9] arising out of his commencement of employment with Lecorpio.

The personal jurisdiction issue must be examined separately as to Bullard, who signed a contract with Anaqua that included a forum selection clause, and Lecorpio, which did not.

1. Bullard

A forum selection clause will be enforced "if it is fair and reasonable to do so." [*Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 419 Mass. 572, 575, 646 N.E.2d 741 \(1995\)](#). "A party resisting the enforcement of a forum selection clause must establish that 'trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court';" [*Boland*](#) at 825, quoting [*The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18, 92 S. Ct. 1907, 32 L. Ed. 2d 513 \(1972\)](#); accord, [*Cambridge Biotech Corp. v. Pasteur Sanofi Diagnostics*, 433 Mass. 122, 130, 740 N.E.2d 195 \(2000\)](#); [*Baby Furniture Warehouse Store, Inc. v. Meubles D&F Ltee*, 75 Mass. App. Ct. 27, 32, 911 N.E.2d 800 \(2009\)](#); or that the contractual choice of forum was procured by "fraud, duress, the abuse of economic power, or any other unconscionable means." [*Melia v. Zenhire, Inc.*](#),

[462 Mass. 164, 169, 967 N.E.2d 580 \(2012\)](#) (employment agreement). Additional factors to be considered are whether the statutes of limitation in the alternative forum would result in an action filed here in timely fashion being time-barred there, or whether the alternative forum "will not entertain [the] action[]" for other reasons contrary to Massachusetts law. [Jacobson at 579-80](#); see [Ajemian v. Yahoo!, Inc., 83 Mass.App.Ct. 565, 579, 987 N.E.2d 604 \(2013\)](#).³

It is fair and reasonable to enforce the forum selection clause in this case. Anaqua is a Massachusetts resident. Bullard, its employee, lived elsewhere but worked for a Massachusetts employer, reported to a Massachusetts boss, traveled here regularly on company business, and communicated with headquarters daily. From 2011 on, he supervised a sales force that sold Anaqua products and services across the continent. Neither he nor Anaqua was a resident of California—now, his preferred forum—when the contract was signed, or at any time during its term. They agreed that their relationship would be governed by Massachusetts law, which will enforce reasonable post-employment restrictions including a noncompetition agreement; California generally will not (see below).

Bullard protests, however, that because his title, job description, and mode of compensation changed in 2011 without the parties signing a new Inventions Agreement or formally renewing the old one, it should be deemed "abandoned and rescinded by mutual consent." [*11] If so, then the original contract "was inoperative when the defendant terminated his employment with the plaintiff." [F.A. Bartlett Tree Expert Co. v. Barrington, 353 Mass. 585, 587-88, 233 N.E.2d 756 \(1968\)](#).

The difficulty with this argument is that *Bartlett* did not, as some trial court opinions have since suggested, hold that "[e]ach time an employee's employment relationship with the employer changes materially such that they have entered into a new employment relationship a new restrictive covenant must be signed." [Iron Mountain Information Mgmt., Inc. v. Taddeo, 455 F.Supp.2d 124, 132-33 \(E.D.N.Y. 2005\)](#). *Bartlett* held only that on the facts of that case, "[t]he conduct of the

³Both *Jacobson* and *Ajemian* addressed whether the Massachusetts court in which the case was filed should enforce a contractual agreement [*10] to litigate elsewhere. This case is the mirror image of those, but I can't think of a reason why the considerations articulated in those cases should not apply here as well.

parties from 1960 to the date the defendant terminated his employment relationship with the plaintiff [was] inconsistent with an intention that the 1948 contract be continued in effect." [353 Mass. at 588](#).

Here, by contrast, the parties' intentions were crystal clear and in writing: Bullard

acknowledge[d] and agree[d] . . . that my responsibilities, duties, positions, compensation, title and/or other terms and conditions of employment may change from time to time or I may have a break in service or employment with the Company and, notwithstanding any change in any terms and conditions of employment or a break in service or employment, this Agreement shall remain in full force and effect. (Inventions Agreement ¶12(III).)

Where, as here, [*12] the parties' clearly expressed intent is that the agreement for post-employment restraints is to survive a change in the terms of employment, that intent is to receive the same respect that *Bartlett* accorded the parties' apparent intent to the contrary.⁴

Finally, Bullard argues that the Inventions Agreement—forum selection clause and all—is invalid because the noncompetition clause is unlimited in its geographic

⁴See, e.g., [Leibowitz v. Aternity, Inc., 2010 U.S. Dist. LEXIS 70844, 2010 WL 2803979 \(U.S. Dist. Ct. E.D.N.Y., July 14, 2010\) at *22](#) (no abrogation where non-compete agreement expressly stated, "Any subsequent change or changes in [employee's] duties, salary or compensation will not affect the validity or scope of this Agreement"; applying Massachusetts law); [A.R.S. Services, Inc. v. Morse, 2013 WL 2152181 \(Mass. Super. 2013\) \(Leibensperger, J.\) \[31 Mass. L. Rptr. 227\]](#) (similar); cf. [Carl Getman & Cleary Schultz Ins., Inc. v. USI Holdings Corp., 2005 WL 2183159 \(Mass. Super. 2005; Gants, J.\) \[19 Mass. L. Rptr. 679\]](#) (change in salary and commission did not abrogate agreement which had not specified the rate for either). This is not a case in which, for example, the employer at the time of the change tendered a new noncompetition agreement and the employee expressed his contrary intent by refusing to sign, as in [AFC Cable Sys. v. Clisham, 62 F.Supp.2d 167, 173 \(D. Mass. 1999\)](#), and [Grace Hunt IT Solutions, LLC v. SIS Software, LLC, 29 Mass. L. Rptr. 460, 2012 WL 1088825 \(Mass. Super. 2012; Lauriat, J.\)](#), or where the employer materially breached the employment agreement, as in [Protedge Software Servs. v. Colameta, 2012 WL 3030268 \(Mass. Super. 2012; Kirpalani, J.\) \[30 Mass. L. Rptr. 127\]](#), and [Lantor, Inc. v. Ellis, 1998 WL 726502 \(Mass. Super.; Gants, J.\) \[9 Mass. L. Rptr. 221\]](#).

scope. In the era of global commerce, a worldwide restriction is not necessarily unreasonable *per se*. See, e.g., *Genzyme Corp. v. Laidlaw*, 84 Mass.App.Ct 1134, 3 N.E.3d 110, 2014 WL 470409 (2014) (Rule 1:28 decision); *A.R.S. Servs. v. Morse*, 2013 Mass. Super. LEXIS 52, 2013 WL 2152181 (Mass.Super. 2013; *Leibensperger, J.*); *EMC Corp. v. Allen*, 1997 WL 1366836 (Mass.Super. 1997; *Kottmyer, J.*) [8 Mass. L. Rptr. 21]. Anaqua [*13] has offices in the United States, Europe and India, clients there and in China and Japan, and (more importantly) major competitors in the United States, Europe and Japan. In any event, the Inventions Agreement has an express "blue pencil"/severability clause (see *Edgecomb v. Edmonston*, 257 Mass. 12, 20, 153 N.E. 99 (1926)) that obviates any suggestion that an overreaching noncompete should void the contract in its entirety.

The forum selection clause therefore survives and applies, and Bullard is properly before the Court.

2. Lecorpio

For a Massachusetts court to exercise jurisdiction over Lecorpio—a nonresident and a non-party to the Inventions Agreement and its forum selection clause—"there must be a statute authorizing jurisdiction and the exercise of jurisdiction must be 'consistent with basic due process requirements mandated by the United States Constitution.'" *Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth*, 457 Mass. 210, 215, 929 N.E.2d 293 (2010). The statutory and constitutional issues are to be analyzed separately. *Id.* Once jurisdiction is challenged, the plaintiff has the burden of production as to the requisite jurisdictional facts. *Id.* at 219; *Cepeda v. Kass*, 62 Mass.App.Ct. 732, 737-38, 819 N.E.2d 979 (2004).

Anaqua has carried its burden on the purely statutory requirement. G.L.c. 223A, the Massachusetts longarm statute, provides in [section 3](#):

A [Massachusetts] court may exercise personal jurisdiction over a [*14] person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's (a) transacting any business in this commonwealth; (b) contracting to supply services or things in this commonwealth; (c) causing tortious injury by an act or omission in this commonwealth; [and] (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from

goods used or consumed or services rendered, in this commonwealth.

[G.L.c. 223A, §3](#). The term 'person' is defined in [G.L.c. 223A, §1](#), to include a corporation. See [Intech, Inc., 444 Mass. at 125](#).

None of the first three subparts of [c. 223A, §3](#) apply here: although Lecorpio did some business in the Commonwealth, there are no claims "arising from" that business, or from its contracting to supply services or things here, or from a tortiously injurious act or omission committed here.

There is, however, jurisdiction under the literal terms of [subpart \(d\)](#)—"causing tortious injury in this commonwealth by an act or omission outside this commonwealth if [the defendant] regularly does or solicits business, or engages in any other persistent [*15] course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth." Lecorpio has one significant Massachusetts client and has solicited seven more in the past two and one-half years. It has communicated electronically with these Massachusetts prospects at least 106 times in the same period; has sent a representative to visit with one of them; and three of its top managers have attended a trade show here. The one Massachusetts client pays Lecorpio somewhere between \$10,000 and \$99,999.99 annually, which accounted for 3.47% of its revenues in 2012, 2.99% in 2013, and 2.02% for YTD 2014 (the percentage decline being, hopefully, a sign of overall growth).

"It is well settled under Massachusetts law that "substantial revenue" is not an absolute amount nor an absolute percentage of total sale. All that is required is literal satisfaction of the statutory requirement." [Keds Corp. v. Renee Intern. Corp.](#), 888 F.2d 215 (1989) (holding that "[t]he sale of 6000 pairs of shoes for \$15,000 easily meets this requirement"), citing [Heins v. Wilhelm Loh Wetzlar Optical Machinery GmbH](#), 26 Mass.App.Ct. 14, 21 n.5, 522 N.E.2d 989 (1988) (noting that "[c]ourts construing similar provisions in other State statutes have recognized the susceptibility of the test to both qualitative (ratio of local revenue to total revenue) [*16] and quantitative (absolute) approaches"), and [Mark v. Obear & Sons Co.](#), 313 F.Supp. 373, 375-76 (D.Mass. 1970) (holding \$5,000 in sales sufficient); see [Darcy v. Hankle](#), 54 Mass.App.Ct. 846, 768 N.E.2d 583 (2002) (sales to Massachusetts customers of \$14,152.62 in ten months). The literal requirements of

subsection 3(d) of the longarm statute, therefore, are satisfied as to Lecorpio.

It is under the constitutional test that the jurisdictional argument hits a snag. "The constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant established "minimum contacts" in the forum state," [Bulldog, 457 Mass. at 217](#) (citations omitted), but there is more to it than this.

The doctrine of *in personam* jurisdiction is divided into general and personal jurisdiction. Lecorpio's contacts with Massachusetts, although satisfying [section 3\(d\)](#) of the longarm statute, are not so pervasive as to subject it to general jurisdiction.⁵ Where the issue is one of specific jurisdiction,

[t]he due process analysis entails three requirements. First, minimum contacts must arise

⁵ There is general jurisdiction when the defendant's "affiliations with the State are so 'continuous and systematic as to render [it] essentially at home in the forum State.'" [Daimler AG v. Bauman, 134 S.Ct. 746, 754, 187 L. Ed. 2d 624 \(2014\)](#), quoting [Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 131 S.Ct. 2846, 2851, 180 L. Ed. 2d 796 \(2011\)](#), and referencing, as "the textbook case of general jurisdiction," [Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146 \(1952\)](#). There, the court held there was jurisdiction in Ohio over a claim against a Philippines corporation for issuance of stock certificates and dividends, because management had pulled up stakes during the Japanese occupation and moved to Ohio, where the president kept an office, maintained the corporate files, and "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company." [342 U.S. at 448](#). Where, as in *Perkins*, the defendant is an actual or *de facto* resident of the forum, the courts of the forum "may hear any and all claims against [it]," whether or not they arose in, or are otherwise related to, the forum. [Daimler at 754](#).

[Section 3\(d\) of Chapter 223A](#) has sometimes been said to be "predicated on general [*18] jurisdiction." [Fern v. Immergut, 55 Mass.App.Ct. 577, 581 n.9, 773 N.E.2d 972 \(2002\)](#), quoting [Connecticut Nat'l Bank v. Hoover Treated Wood Prods., 37 Mass.App.Ct. 231, 233-34 n.6, 638 N.E.2d 942 \(1994\)](#). If so, the low threshold that the cases have set for the statutory "substantial revenue" requirement (see text *supra*) seems misplaced, because it falls far short of the constitutional requirements for general jurisdiction. In this case, for example, while it has a paying customer and some prospects here, there is no viable contention that Lecorpio is "essentially at home" in Massachusetts.

from 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." Second, the claim must arise out[*17] of or relate to the defendant's contacts with the forum. Third, "the assertion of jurisdiction over the defendant must not offend 'traditional notions of fair play and substantial justice.'"

[Bulldog, 457 Mass. at 217](#) (citations omitted).

The requirement that the claim "arise out of or relate to the defendant's contacts with the forum" is central to the exercise of specific jurisdiction, as the U.S. Supreme Court has emphasized in two decisions earlier this year. In [Daimler AG v. Bauman, 134 S.Ct. 746, 187 L. Ed. 2d 624 \(2014\)](#), the court held that a federal court in California, where the defendant did business, lacked jurisdiction over claims by Argentine residents that defendant's subsidiary had collaborated with state security forces during Argentina's 1976-1983 "Dirty War" to kidnap, detain, torture, and kill plaintiffs or their relatives. The court explained:

*International Shoe's*⁶ conception of "fair play and substantial justice" presaged the development of two categories of personal jurisdiction. The first category is represented by *International Shoe* itself, a [*19] case in which the in-state activities of the corporate defendant "ha[d] not only been continuous and systematic, but also g[a]ve rise to the liabilities sued on." *International Shoe* recognized, as well, that "the commission of some single or occasional acts of the corporate agent in a state" may sometimes be enough to subject the corporation to jurisdiction in that State's tribunals with respect to suits relating to that in-state activity. *Adjudicatory authority of this order, in which the suit "aris[es] out of or relate[s] to the defendant's contacts with the forum," is today called "specific jurisdiction."*

[Id. at 754 \(2014\)](#) (citations omitted; emphasis supplied).

Here, unlike in [Daimler](#), the plaintiff is a resident of the forum, seemingly a point in favor of specific jurisdiction. Six weeks after its *Daimler* decision, however, the court

⁶ [International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 \(1945\)](#), "[t]he canonical opinion in this area." [Daimler at 754](#).

decided [Walden v. Fiore, 134 S.Ct. 1115, 188 L. Ed. 2d 12 \(2014\)](#). The plaintiffs were Nevada residents who alleged that the petitioner (the defendant below), a Georgia policeman deputized as a DEA agent, had intercepted them at Atlanta's Hartsfield-Jackson airport and unlawfully confiscated \$97,000 in cash for forfeiture as drug proceeds. The cash was later returned, but the petitioners [*20] lost the use of it in the meantime. The plaintiffs brought suit in Nevada federal court.

In a unanimous opinion, the court held that the plaintiffs could not pursue their claim in Nevada, notwithstanding their assertions that the defendant knew they lived there and that his actions had "caused them 'foreseeable harm' in Nevada." [Id. at 1121](#). The reason was that the defendant's tortious acts—whatever their consequences in Nevada—took place exclusively in Georgia.

"Specific" or "case-linked" jurisdiction "depends on an 'affiliatio[n] between the forum *and the underlying controversy*' (i.e., an "activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation").

[Id. at 1121 n.6](#) (emphasis supplied; citation omitted).

For a State to exercise jurisdiction consistent with due process, *the defendant's suit-related conduct must create a substantial connection with the forum State*. Two related aspects of this necessary relationship are relevant in this case.

First, the relationship must arise out of contacts that the "defendant himself" creates with the forum State . . . We have consistently rejected attempts to satisfy the defendant-focused "minimum contacts" inquiry by demonstrating [*21] contacts between the plaintiff (or third parties) and the forum State.

* * * *

Second, our "minimum contacts" analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there.

* * * *

[T]he plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him . . . To be sure, a defendant's contacts with the forum State may be

intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.

[Id. at 1121-23](#) (emphasis supplied; citations omitted).

Other remarks in the opinion underscore the point that it is the defendant's "suit-related conduct," not other, unrelated conduct or contacts, that must make the connection with the forum.

[N]one of *petitioner's challenged conduct* had anything to do with Nevada itself.

[134 S.Ct. at 1125](#) (emphasis supplied).

Well-established principles of personal jurisdiction are sufficient to decide this case. The proper focus of the "minimum contacts" [*22] inquiry in intentional-tort cases is "the relationship among the defendant, the forum, *and the litigation*." And it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State. In this case, the application of those principles is clear: *Petitioner's relevant conduct occurred entirely in Georgia*, and the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction.

[Id. at 1126](#) (citations omitted).

Along the way, the *Walden* court explained the limitations on the so-called "effects test" of its earlier decision in [Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 \(1984\)](#). In *Calder*, the court had held that the California courts had jurisdiction over a Florida newspaper (the *National Inquirer*) of national circulation, in a libel action brought by a California resident. Observing that the defendants—the newspaper's editor and a reporter—were "primary participants in an alleged wrongdoing directed at a California resident," that "the brunt of the harm . . . was suffered in California," and that the defendants knew this would be so, the court held, "jurisdiction over them is proper on that basis." [Id. at 788-90](#).⁷

⁷ As one commentator has noted, "[c]ourts across the United States [*23] have struggled with the import of *Calder* by failing to define a consistent limit for application of the effects test . . ." T.R. Fulford, Case Comment: Civil Procedure—Forum Injury May Constitute Forum Contact for Relatedness Prong of Specific Jurisdiction Injury—[Astro-Med, Inc. v Nihon Kohden](#)

In *Walden*, however, the court pointed out that in *Calder*, the defendant newspaper's contacts with California went well beyond the harm inflicted on the plaintiff: the paper had relied on California sources and focused on the plaintiff's activities in California; it had a circulation there of 600,000; and the plaintiff was injured, and the tort complete, only when those and other readers saw the story about her. [134 S.Ct. at 1123-24](#). There were, in other words, direct connections among the tortfeasor, the tort, and the forum stemming from the defendant's conduct, not solely from the residence of the defamed plaintiff.

Returning to the present case: the plaintiff's argument for jurisdiction over Lecorpio relies heavily on the First Circuit's decision in [Astro-Med, Inc. v. Nihon Kohden America, Inc., 591 F.3d 1 \(1st Cir. 2009\)](#). There, citing the *Calder* case (among others), the court found jurisdiction over the defendant employer on facts that are indistinguishable [*24] in any material respect from those before me: the defendant employer (a California company) knew when it hired the defendant employee (a Florida resident) that his former employer (the plaintiff) was located in the forum state (Rhode Island); it knew that the employment contract contained a noncompete, other restrictive covenants, and forum selection and choice of law clauses specifying Rhode Island courts and law; and it "had sought and obtained legal advice that by hiring [the employee defendant], it was exposing itself to some legal risk." "[T]his formidable array of Rhode Island connections," the court held, was enough to confer specific jurisdiction over the defendant employer. [Id. at 10](#).

The connections with the forum state, however—both in *Astro-Med* and here—were exclusively through the plaintiff, not the corporate defendant, and they were a lot less formidable after *Watson* than before. Lecorpio's motion to dismiss under Rule 12(b)(2) is therefore ALLOWED.

C. Forum Non Conveniens

Although labeled "the doctrine of forum non conveniens," Bullard's argument⁸ here is that because California law generally refuses, on public policy grounds, to enforce a covenant not to compete (see

[America, Inc., 591 F.3d 1 \(1st Cir. 2009\)](#), Suffolk University Law Review Vol. XLIV:775 at 780 (2011).

⁸For the most part, the defendants join in each of the arguments for dismissal. Given Lecorpio's success on the personal jurisdiction issue, the discussion from here on out will focus on Bullard.

[Section 16600 of the California Business and Professions Code](#)), and because both defendants [*25] are California citizens, a Massachusetts court should not enforce it.

The merits and demerits of covenants such as that at issue here are fairly debatable; as the defendants point out, our own Legislature has lately been debating them in connection with various proposals (S846, H1715 and H1729), now amended and consolidated as House Bill 4082. As the public policy of Massachusetts is presently understood, however, "[a] covenant not to compete contained in a contract for personal services will be enforced if it is reasonable, based on all the circumstances." [All Stainless, Inc. v. Colby, 364 Mass. 773, 778, 308 N.E.2d 481 \(1974\)](#).

This is not, however, an issue of forum non conveniens in the strict sense. There is no mention in the defendants' papers, for example, of such matters as "access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, [and] the cost of obtaining attendance of willing witnesses," [Joly v. Albert Larocque Lumber, Ltd., 397 Mass. 43, 44, 489 N.E.2d 698 \(1986\)](#), although "the enforceability of a judgment if one is obtained" (*id.*) is an issue.

This is instead a choice-of-law question, [*26] and it is resolved by the fact that Bullard and Anaqua agreed that Massachusetts would supply not only the forum for resolution of disputes relating to the Inventions Agreement, but also the governing law. The forum selection clause is enforceable, see discussion *supra*, and so is the choice of law clause. "As a rule, [w]here the parties have expressed a specific intent as to the governing law, Massachusetts courts will uphold the parties' choice as long as the result is not contrary to public policy." [Hodas v. Morin, 442 Mass. 544, 549-50, 814 N.E.2d 320 \(2004\)](#) (citations omitted).

The Restatement similarly presumes that the law the parties have chosen applies, unless "(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state" and is the State whose law would apply under §188 of the Restatement "in the absence of an effective choice of law by the parties."

[Id. at 550](#), quoting [Restatement \(Second\) of Conflict of](#)

[Laws, §187\(2\).](#)

Massachusetts has a substantial relationship to Anaqua (which is located here), Bullard (who worked for Anaqua), and their contract. Application of Massachusetts [*27] law to the noncompetition clause might contravene the public policy of California, but California, where Bullard is now employed, has no greater interest—certainly, not a "materially greater interest"—than does Massachusetts in a dispute over a Massachusetts contract whose breach will affect a Massachusetts resident and employer. See *Aspect Software, Inc. v. Barnett*, 787 F. Supp. 2d 118, 125-27 (D.Mass. 2011).

Although at least one Massachusetts judge has deemed it pointless to enjoin violation of a noncompete by a former employee now working in California, see *Aware, Inc. v. Ramirez-Mireles*, 2001 WL 755822 (Mass.Super. 2001; *van Gestel, J.*) [13 Mass. L. Rptr. 257], another has not, see *EMC Corp. v. Donatelli*, 2009 WL 1663651 (Mass.Super. 2009; *Neel, J.*) [25 Mass. L. Rptr. 399], and I do not; at least, not ineluctably so.⁹ Where an employee of a Massachusetts company has agreed to a post-employment restraint that is enforceable under Massachusetts law that both parties reasonably agree shall apply, but later relocates to a jurisdiction where such restraints are unenforceable, it is "unfair to apply the law of the non-enforcing state and thereby allow the employee to escape the obligations of the contract by, in essence, fleeing the jurisdiction." *Oxford Global Resources, Inc. v. Guerriero*, No. 03-12078-DPW, 2003 U.S. Dist. LEXIS 23503, 2003 WL 23112398, at *6

⁹It is an open question whether a foreign court's decree enforcing a noncompete will be honored in California, whose public policy against such covenants may or may not be subject to a "trade secret exception." *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937, 945-46 & n.4, 81 Cal. Rptr. 3d 282, 189 P.3d 285 (2008); *Dowell v. Biosense Webster, Inc.*, 179 Cal.App.4th 564, 577-78, 102 Cal.Rptr.3d 1 (Cal.App.2d Dist. 2009); see *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 466, 11 Cal. Rptr. 2d 330, 834 P.2d 1148 (1992) (California courts will enforce a choice of law clause if the chosen state has a substantial relationship to the parties or their transaction, or if there is any other reasonable basis for the parties' choice of law, and "provided the chosen state's law is not contrary to a fundamental policy of California"). Bullock, however, also has connections in the State of Washington, whose "[c]ourts enforce noncompete agreements that are validly formed and are reasonable," much as Massachusetts courts do. *Labriola v. Pollard Group, Inc.*, 152 Wash.2d 828, 833, 100 P.3d 791 (2004).

(*D.Mass., Dec. 30, 2003*). Whether or not the requested decree can be enforced against [*28] Bullock, how, and where, is for another day and, perhaps, another forum.

D. Failure to State a Claim

Count I of the Complaint asserts a claim against Bullard for breach of the covenant not to compete; Count II, for misappropriation of trade secrets. Two of the grounds for Bullard's motion to dismiss—that the noncompetition clause is invalid because its geographic reach is overbroad, and because of the change in Bullard's [*29] job responsibilities and compensation—have already been discussed.

The third—that the Complaint does not allege a business interest that is legitimately protectable by a covenant not to compete—proceeds from the premise that "[a] plaintiff has no cognizable trade secret claim until it has adequately identified the specific trade secrets that are at issue," *Cambridge Internet Solutions, Inc. v. Avicon Group*, 1999 WL 959673 (Mass.Super. 1999; *Quinlan, J.*) [10 Mass. L. Rptr. 539], and Bullard's assertion that the complaint in this case fails to do so. Under well-settled Massachusetts law,

[a] covenant not to compete contained in a contract for personal services will be enforced if it is reasonable, based on all the circumstances. In determining whether a covenant will be enforced, in whole or in part, the reasonable needs of the former employer for protection against harmful conduct of the former employee must be weighed against both the reasonableness of the restraint imposed on the former employee and the public interest. If the covenant is too broad in time, in space or in any other respect, it will be enforced only to the extent that is reasonable and to the extent that it is severable for the purposes of enforcement.

All Stainless, Inc. v. Colby, 364 Mass. 773, 778, 308 N.E.2d 481 (1974) (citations omitted).

Employee covenants not to compete generally are enforceable only [*30] to the extent that they are necessary to protect the legitimate business interests of the employer. Such legitimate business interests might include trade secrets, other confidential information, or, particularly relevant here, the goodwill the employer has acquired through dealings with his customers. Protection of the employer from ordinary competition, however, is not a legitimate business interest, and a covenant not to compete designed solely for that purpose will

not be enforced.

[*Marine Contractors, Inc. v. Hurley*, 365 Mass. 280, 287-88, 310 N.E.2d 915 \(1974\)](#) (citations omitted).

The Complaint does not suggest that Bullard—who was out of the direct sales business during his last two years at Anaqua—is in a position to capitalize on customer goodwill to the detriment of Anaqua. It does, however, allege that

while employed at Anaqua, Mr. Bullard served on Anaqua's executive team. In this role, Mr. Bullard obtained Anaqua's confidential and proprietary information and trade secrets regarding matters ranging from roadmaps for future products to lists of prospective clients. (Complaint, ¶2.)

* * * *

Mr. Bullard came into possession of Anaqua's proprietary and confidential information and trade secrets. This information included, but is not limited to, client lists, [*31] prospective client lists, knowledge of Anaqua's pricing methods, Anaqua's pricing to current customers, knowledge of Anaqua's negotiations with and offers to prospective clients, product development roadmaps, and corporate strategy plans. (Complaint, ¶19.)

The Complaint also quotes a press release by Lecorpio, announcing its hire of Bullard "as vice president of product management," in which position he "will help drive Lecorpio's customer driven product strategy." The press release observes that "[p]rior to joining Lecorpio, Mark was vice president of sales for Lecorpio competitor Anaqua."

It is certainly true that the Complaint does not go into much detail in describing the confidential information at stake. Specificity is a matter of degree, however, and the more specificity employed in a public filing, the less confidentiality survives. In the circumstances, the allegation that Bullard had high-level access to Anaqua's future product and sales strategy, coupled with the fact that he apparently now has a high-level position with Lecorpio in its product development function, is enough to survive a motion to dismiss. The motion to dismiss is therefore denied as to Counts I and II, against [*32] Bullard.

MOTION FOR PRELIMINARY INJUNCTION

A. Standard for Issuance of a Preliminary Injunction

The nature of the proceedings on a motion for preliminary injunction, and the standard for its issuance, are familiar:

By definition, a preliminary injunction must be granted or denied after an abbreviated presentation of the facts and the law. On the basis of this record, the moving party must show that, without the requested relief, it may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits. Should the injunction issue, however, the enjoined party may suffer precisely the same type of irreparable harm. Since the judge's assessment of the parties' lawful rights at the preliminary stage of the proceedings may not correspond to the final judgment, the judge should seek to minimize the "harm that final relief cannot redress," by creating or preserving, in so far as possible, a state of affairs such that after the full trial, a meaningful decision may be rendered for either party.

Therefore, when asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. [*33] If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue.

[*Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 616-17, 405 N.E.2d 106 \(1980\)](#) (citations and footnotes omitted).

B. Likelihood of Success

As discussed already, Anaqua is likely to prevail on its arguments that the Inventions Agreement survives Bullard's promotion and accompanying changes in his title, duties, and compensation structure, because the parties explicitly agreed that it would. Also, the agreement's forum selection clause and choice-of-law clause are enforceable; therefore, there is jurisdiction in this Court over Mr. Bullard, and Massachusetts law applies. Although California law may or may not impede

the enforcement of any order this Court might issue [*34] to enforce the covenant not to compete, it ought not impede the issuance of such an order if otherwise proper under Massachusetts law. And the Complaint, which articulates a legitimate business reason behind the noncompete clause, states a claim.

Surviving a motion to dismiss, however, does not necessarily mean entitlement to a preliminary injunction. The two sides have submitted affidavits and deposition testimony addressing the central issues of whether and to what extent Bullard had access to confidential information at Anaqua that he might use at Lecorpio to Anaqua's detriment. The two sides agree on some important facts and disagree on some details.

It is undisputed that Anaqua and Lecorpio offer similar products and services (software to enable the customer to manage its intellectual property), aimed at the same need and the same customers, for whom the two companies (and others in the same field) sometimes compete head-to-head. There likewise appears to be agreement that Bullard did not leave Anaqua with formulas, recipes, source code, industrial processes, or similar technical data.

The concern Anaqua expresses is rather over strategic business information to which Bullard was [*35] exposed in teleconferences of its nine-member Executive Team, which it characterizes as follows:

Anaqua's financial status, including, concerns and plans for Anaqua's long-term financial strategy, Anaqua's cash flow, Anaqua's multi-year financial projections, revenue composition, and gross margins on business items.

Anaqua's product development plans and 36-month roadmaps for added functionality, improvements and enhancements to its software and other products.

Sales processes including progress with potential clients.

Anaqua's methods of calculating and promoting its Return on Investment value proposition for clients.

Anaqua's marketing efforts, including its strategic analysis of the market and Anaqua's competitors, marketing plans and strategy, strategic leads and methods for developing leads.

(Affidavit of Jack Morgan in Support of Preliminary Injunction, ¶13.)

Not all of these concerns deserve equal weight. Bullard now works as Lecorpio's Vice President for Product Management, and is unlikely to have much use for information concerning Anaqua's financial condition. Its pricing, sales pitches, and the present functionality of its products are known to its customers, who may be pleased [*36] to share it with Lecorpio and others in the field in the interest of getting the best solution at the best price. There is evidence that at any given moment, Anaqua has an idea of which among its own clients and prospects Lecorpio has in its sights, and reason to suppose that Lecorpio has similar information about what Anaqua is up to from its own discussions with customers and prospects.

It is difficult, however, to ignore the connection between Anaqua's plans for future product development and Bullard's work, formerly for Anaqua but now more directly for Lecorpio. As Bullard described his current position as Lecorpio's VP of Product Management:

So my primary responsibilities—well, let's see. Two primary responsibilities would be evaluating our product in the market place, to look for opportunities to expand our offering through either adding new functionalities requiring other companies or partnering with other companies. So that's one big piece. The second big piece would be working with our customers to identify how it can improve the product to meet their needs.

* * * *

I think that's it. I think one last thing I guess would be—well, the nature of a small business is that you have [*37] thought on whatever, so that's kind of the nature of a small business. But as far as my responsibilities go, I think the third one would potentially be product marketing, which is basically the—defining how we describe the capabilities. So if I'm hearing from customers they want to do bla, bla and bla, and let's say three or four of our customers requested that and then we build it, then I need to be able to explain to our customers and also to our company so that we can sell that capability. What it is. What it is that we've done. So that's product marketing.

(Deposition of Mark Bullard, pp. 41, 46-47.) Asked whether one of his responsibilities was to help Lecorpio differentiate itself from Anaqua, Bullard replied, "Yes. Not the primary responsibilities, but that is a piece of what I'm responsible for as well as differentiating ourselves from all of the market." (*Id.* at 50.)

Comprehensive knowledge of the product, current and planned, is inseparable from good salesmanship. Unlike many commodities, software is updated regularly (here, with several releases per year), partly to fix bugs but also to make functional improvements. In a close race among a small field, some changes will inevitably [*38] be responsive to—or in anticipation of—developments in the competitors' products. Both of these companies look to their customers for suggested improvements, but it is hard to doubt the value of knowledge of a direct competitor's plans and the competitive advantage it might bring, at least for a time.

Bullard has averred that he takes care not to divulge Anaqua's confidential information now that he works for Lecorpio, and there are copies of emails suggesting that both Bullard and Lecorpio are making a sincere effort to avoid forbidden territory. There is no solid reason to doubt their good faith in this regard.

The emails underscore the fact, however, that Bullard *does* possess confidential information concerning Anaqua's business, including its plans for future product development. Knowing such plans for the next three years—or even one—¹⁰ would be a significant advantage for a Lecorpio employee tasked with keeping its own products even with, or ahead of, the competition. It would be difficult, if not impossible, for him put such information out of his mind, particularly if he is motivated to turn in his best possible performance.

That Anaqua cannot point to direct evidence of misuse of its confidential information is not a bar to enforcing the noncompetition covenant. Such covenants, of course, are "scrutinized carefully," because "an ordinary employee typically has only his own labor or skills to sell and often is not in a position to bargain with his employer." [Alexander & Alexander, Inc. v. Danahy, 21 Mass.App.Ct. 488, 496, 488 N.E.2d 22 \(1986\)](#). That they are permitted at all is due, in part, to the difficulty of detecting, then proving, a former employee's misuse of confidential information. The covenant, if tailored to the employer's legitimate interests, serves as a prophylactic protection for the plaintiff's secrets in the hands of its

¹⁰ Bullard, in his affidavit, denies that he was privy to [*39] "any product road maps longer than 12 months." The difference is not as material as it may seem on its face, since plans and projections tend to be less reliable the farther out they go. Plans for the next year are bound to have greater predictive power than those for years two and three, as the parties seem to have acknowledged implicitly with the one-year duration of the covenant not to compete.

former employee. See [Affinity Partners v. Drees, 1996 WL 1352635 at *5 \(Mass.Super. 1996; Cowin, J.\) \[5 Mass. L. Rptr. 163\]](#) ("If material is disclosed to a competitor for whom Drees may work, Affinity would have no means of ascertaining (or proving) [*40] that fact"); cf. [Boulanger v. Dunkin' Donuts, Inc., 442 Mass. 635, 643 n.12, 815 N.E.2d 572 \(2004\)](#) (covenant in franchise agreement; "working for a competitor of the [franchise] makes it likely that the information the [franchisee] possesses will be used, yet it might be impossible to detect or prove").

Anaqua has established that it is likely to succeed on its claim that Bullock, by accepting employment with Lecorpio, has breached an enforceable covenant not to compete.

C. Balance of Harms

Finally, there is the balance of harms. Although the risk of harm to Anaqua is real, it is difficult to quantify. Bullard has already been with Lecorpio for three months. Whether he has yet used his knowledge of Anaqua's plans for product development, or whether he will in the future, is unknown. What *is* known is that he possesses such information; it may be used to the advantage of a competitor and the detriment of Anaqua; and for this reason, he and Anaqua agreed that he would not work for a competitor until a year had passed.

The potential harm to Bullard is more readily quantifiable. He left Anaqua on September 20, 2013 and began work for Lecorpio on April 23, 2014, with just under five months to go on his one-year covenant not to compete. Anaqua requests that Bullard be enjoined [*41] from competing with it for the five months that it is "owed," which is reasonable. While I do not discount the cost to Bullard and his family of putting him out of work in this field for five months, I note that he was promoting his book and consulting part-time to a winery—not engaged in an active job search—when Lecorpio recruited him earlier this year.

Finally, although it is not cash in hand, any potential harm from a wrongly-ordered injunction can be bonded under [Mass.R.Civ.P. 65\(c\)](#), which I will order.¹¹ Considered in conjunction with the parties' respective likelihood of success, the balance of harms tilts in favor

¹¹ Although the record reflects that Bullard's compensation with Lecorpio includes salary, bonus, and option components, it does not supply figures. The bond amount is therefore a not-very-informed best estimate of what Bullard may lose by being out of work for 150 days.

of issuing the requested injunction.

ORDER

For the foregoing reasons,

1. Defendants' Motion to Dismiss is ALLOWED for lack of personal jurisdiction as to defendant Lecorpio, but DENIED as to defendant Bullard; and

2. Plaintiff's Motion for Preliminary Injunction is ALLOWED as follows. Defendant Bullard is preliminarily enjoined, [*42] until further order of the Court, from:

a. Employment with defendant Lecorpio, LLC for a period of 150 days after the date of entry of this

injunction, this aspect of the injunction being conditioned on the plaintiff posting security under Mass.R.Civ.P. 65(c) in the form of a bond, or payment into court, in the sum of \$150,000; and

b. Disclosing or providing to Lecorpio or others any confidential information and/or trade secrets belonging to Anaqua.

Thomas P. Billings

Justice of the Superior Court

Dated: July 24, 2014

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APPENDIX 2



Cited

As of: September 8, 2016 1:42 PM EDT

Burdick v. Dylan Aviation, LLC

United States District Court for the District of Montana, Billings Division

June 17, 2011, Decided; June 17, 2011, Filed

Cause No. CV 10-48-BLG-RFC

Reporter

2011 U.S. Dist. LEXIS 64369; 2011 WL 2462577

MARK TERRY BURDICK, deceased, by and through his executrix, BRENDA JUNE BURDICK, and BRENDA JUNE BURDICK, executrix, on behalf of the heirs of MARK TERRY BURDICK, Plaintiffs vs. DYLAN AVIATION, LLC, a Pennsylvania Limited Liability company, ROLLS-ROYCE OF NORTH AMERICA, INC., ROLLS-ROYCE CORPORATION, ALLISON ENGINE COMPANY, STANDARD AERO, INC., STANDARD AERO LIMITED and JOHN DOES I-IV, Defendants

Counsel: [*1] For Mark Terry Burdick, deceased, by and through his executrix, Brenda June Burdick, Brenda June Burdick, executrix, on behalf of the heirs of Mark Terry Burdick, Plaintiffs: Philip L. McGrady, Roger W. Frickle, LEAD ATTORNEYS, EDWARDS FRICKLE ANNER-HUGHES & COOK, Billings, MT; A. Clifford Edwards, EDWARDS FRICKLE & CULVER, Billings, MT; R. Timothy Hogan, PRO HAC VICE, ATTORNEY AT LAW, Murfreesboro, TN; , PRO HAC VICE, BURGER SCOTT & McFARLIN, Murfreesboro, TN.

For Dylan Aviation, LLC, a Pennsylvania Limited Liability Company, Defendant, Cross Defendant, Cross Claimant: Gary M. Zadick, LEAD ATTORNEY, UGRIN ALEXANDER ZADICK & HIGGINS, Great Falls, MT; James G. Lare, PRO HAC VICE, MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN, Philadelphia, PA.

For Rolls-Royce of North America, Inc., Rolls-Royce Corporation, Defendants: William J. Mattix, LEAD ATTORNEY, Matthew Scott Brahana, CROWLEY FLECK, Billings, MT.

For Standard Aero, Inc., Standard Aero Limited, Defendants, Cross Claimants: Harlan B. Krogh, LEAD ATTORNEY, CRIST LAW FIRM, Billings, MT; Dane Benjamin Jaques, Donald Charles Weinberg, PRO HAC VICE, DOMBROFF GILMORE JAQUES & FRENCH, McLean, VA.

For Standard Aero Limited, [*2] Standard Aero, Inc., Cross Defendant: Harlan B. Krogh, LEAD ATTORNEY, CRIST LAW FIRM, Billings, MT; Dane Benjamin Jaques, DOMBROFF GILMORE JAQUES & FRENCH, McLean, VA; Donald Charles Weinberg, PRO HAC VICE, DOMBROFF GILMORE JAQUES & FRENCH, McLean, VA.

Judges: RICHARD F. CEBULL, UNITED STATES DISTRICT COURT JUDGE.

Opinion by: RICHARD F. CEBULL

Opinion

ORDER

Currently before the Court is a Motion to Dismiss for Lack of Personal Jurisdiction filed by Defendant Dylan Aviation, LLC. Plaintiffs' oppose said motion. Arguments on this motion were heard May 26, 2011.

BACKGROUND

Mark Burdick was killed in a crash involving a helicopter owned by Dylan Aviation, LLC (Dylan) on May 28, 2007. On the day of the crash, Kley Lucas was piloting the helicopter, and Russell Carey was seated in the front. Burdick was seated in the rear. The three men were performing a visual inspection of a power line in Stillwater County for Montana Power through their employment with Haverfield Corporation (Haverfield). The helicopter was hovering 120 feet above ground level when it lost power and crashed. A fire started a few minutes after impact. Lucas and Carey were seriously injured and Burdick died from blunt traumatic chest injuries and severe [*3] burn injuries.

Dylan is a limited liability company whose sole business is buying helicopters and leasing them to Haverfield. Haverfield provides aerial power line inspection and

maintenance services throughout the United States. Each member of Dylan is also an employee of Haverfield. At the time of the crash, the seven members of Dylan held titles with Haverfield: Darryl Ed was manager; Brian Parker was executive vice president; Robert Burns was vice president of sales and marketing; Russell Shannon was maintenance manager; Michael Pastovic was project coordinator; Lori Steinour was accounting coordinator; and Christine Cassell was chief financial officer.

Dylan purchased the helicopter — a Hughes 369D, N765HV, in May of 2004. At the time of the purchase, Dylan was doing business as Helibase, LLC. Dylan leased N765HV to Haverfield and Haverfield paid Dylan \$250.00 per flight hour, with a guaranteed minimum of 90 hours per month. Dylan and Haverfield later changed the lease for the purpose of establishing new rent payments, and on March 1, 2005, a second lease took effect. Under the new lease, Dylan received a monthly payment of \$12,000, plus \$150.00 per flight hour.

As part of the lease, [*4] Dylan agreed that N765HV was airworthy, that all the logs, books and records were complete and accurate, and that N765HV was in compliance with all legal requirements. The lease required that Dylan provide the component parts for N765HV. Dylan was also responsible for providing the hardtime and overhauled components.¹ Dylan also had the right to inspect the helicopter and the logs, books and records. Dylan was responsible for ensuring that Haverfield was meeting regulatory commitments.

Dylan is a named insured in the March 1, 2005 lease. Dylan was covered throughout the "continental U.S. and U.S. territories." The insurance policy covers Dylan and provides a settlement up to \$100,000 for each passenger for death or bodily injury related to N765HV.

Christine Cassell acted as director of administration for Haverfield and later became chief financial officer of Haverfield. Doc. 38, Ex. A, p. 16. She also acted as a member director of administration of Dylan. *Id.* at 11. Cassell [*5] testified at her deposition that Dylan had "general knowledge" of where Haverfield was doing business. *Id.* at 78. When Cassell prepared the formation documents for Dylan (formed as Helibase), she utilized Haverfield's computers to do so. *Id.* at 34.

¹ A hardtime component is a FAA regulated component that is only allowed so many hours before the part is retired and replaced. Overhauled components are components that can be considered airworthy after an overhaul.

When Cassell assisted with the preparation of tax returns for Dylan, she was being paid by Haverfield. *Id.* at 35. And Dylan's records for N765HV are maintained in Haverfield's office, only in a different filing cabinet. *Id.* at 75.

Dylan received the insurance proceeds from the totaled helicopter. *Id.* at 73. The insured value of N765HV was \$400,000. Despite the fact that the lease required Haverfield to give written notice of a loss, Haverfield did not do so because "the principals were the same." *Id.* at 74.

In March of 2007, Dylan began a corporate restructuring in which the ownership of Dylan was "rolled into" a new company, Haverfield Holdings Corporation. Haverfield Holdings Corporation was to be the sole shareholder of Haverfield International, Inc. (formerly Haverfield Corporation), which, at the same time, became the sole member of Dylan. Based upon the Amended and Restated Limited Liability Company Agreement of Dylan Aviation, LLC, [*6] Haverfield stopped making lease payments to Dylan on March 31, 2007. The Amended and Restated Limited Liability Company Agreement of Dylan Aviation, LLC, specifically provided Dylan Aviation, LLC was formed for the purpose of: "own[ing] and operat[ing] rotary aircraft engaged in power line inspection and repair, and related fields. . ." See *Plaintiff's Exhibit L at Bates No. DA0377*. On June 13, 2007, all of Dylan's helicopters were transferred to Haverfield, except N765HV. Accordingly, N765HV was owned by Dylan at the time of the crash on May 28, 2007 and no lease payments had been made since March 31, 2007.

After evaluating the evidence presented by Plaintiff, and considering the extensive corporate interrelationship between Dylan and Haverfield, it is apparent that Dylan knew where Haverfield was doing business on May 28, 2007.

ANALYSIS

I. Jurisdiction

In determining whether this Court has personal jurisdiction, two questions must be asked: first, whether an applicable state statute potentially confers jurisdiction; second, whether assertion of such jurisdiction comports with due process. [Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp.](#), 633 F.2d 155, 157 (9th Cir. 1980). Personal [*7] jurisdiction can be either general or specific. [Threlkeld v. Colorado](#), 2000 MT 369,

[¶ 10, 303 Mont. 432, 16 P.3d 359.](#)

When a court considers a motion to dismiss for lack of personal jurisdiction on affidavits and discovery materials alone, "a plaintiff need only make a prima facie showing of jurisdictional facts to defeat the motion." [Myers v. Bennett Law Offices, 238 F.3d 1068, 1071 \(9th Cir. 2001\)](#). If the facts are in conflict, any conflict must be resolved in the plaintiff's favor when considering a motion to dismiss. [Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1129 \(9th Cir. 2003\)](#).

A. General Jurisdiction

General jurisdiction exists over "[a]ll persons found within the state of Montana. . ." See Rule 4B(1), M.R.Civ.P.; [Simmons Oil Corp. v. Holly Corp. \(1990\), 244 Mont. 75, 83, 796 P.2d 189, 194](#). A nonresident defendant is "found within" Montana for general jurisdiction purposes if its activities in the state are either "substantial" or "continuous and systematic." [Simmons Oil Corp., 244 Mont. at 83, 796 P.2d at 194](#) (citations omitted). If a nonresident defendant derives "substantial" economic benefit, then a nonresident defendant can still be found [*8] within Montana for general jurisdiction purposes. [Threlkeld v. Colorado, 2000 MT 369, ¶ 14, 303 Mont. 432, 16 P.3d 359](#). If general jurisdiction does not exist, the court may still exercise specific jurisdiction over a defendant.

B. Specific Jurisdiction

Specific jurisdiction arises from one of the six activities found in Mont.R.Civ.P. 4B(1).

(1) Subject to jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

- (a) the transaction of any business within this state;
- (b) the commission of any act which results in accrual within this state of a tort action;
- (c) the ownership, use or possession of any property, or of any interest therein, situated within this state;

(d) contracting to insure any person, property or risk located within this state at the time of contracting;

(e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or

(f) acting as director, [*9] manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state, or as personal representative of any estate within this state.

Specific long-arm jurisdiction is appropriate over nonresident defendants when "the alleged tort accrued in Montana." [Bunch v. Lancair International, Inc., 2009 MT 29, ¶ 40, , 349 Mont. 144, 202 P.3d 784](#). There is no doubt that Burdick's tort claims accrued in Montana.

C. Traditional Notions of Fair Play and Substantial Justice

If specific or general jurisdiction exists, the exercise of jurisdiction must not offend "traditional notions of fair play and substantial justice." [Simmons Oil Corp., 244 Mont. at 85, 796 P.2d at 195](#). In [Simmons v. State, 206 Mont. 264, 276, 670 P.2d 1372, 1378 \(1983\)](#), the Montana Supreme Court adopted the Ninth Circuit test for determining whether the exercise of jurisdiction comports with due process:

- (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking its laws.
- (2) The claim must be one which [*10] arises out of or results from the defendant's forum-related activities.
- (3) The exercise of jurisdiction must be reasonable.

See [Simmons Oil Corp. v. Holly Corp., 244 Mont. 75, 85, 796 P.2d 189, 195 \(Mont. 1990\)](#).

"The plaintiff need not demonstrate each of the above three elements to establish jurisdiction. Once the plaintiff shows that the defendant has purposefully availed itself of the privilege of conducting activities in the forum, a presumption of reasonableness arises, which the defendant can overcome only by 'presenting a compelling case that jurisdiction would be

unreasonable." [*Simmons Oil Corp. v. Holly Corp.*, 244 Mont. at 85](#), citing [*Brand v. Menlove Dodge*, 796 F.2d 1070, 1074 \(9th Cir.1986\)](#).

1. Has Dylan Purposely Availed Itself of the Montana Forum?

"A nonresident defendant purposefully avails itself of the benefits and protections of the laws of the forum state when it takes voluntary action designed to have an effect in the forum." [*Simmons Oil Corp.*, 244 Mont. at 86, 796 P.2d at 195](#), citing [*Boit v. Emmco Ins. Co.*, 271 F.Supp. 366, 369 \(D.Mont.1967\)](#). See also [*Farmers Ins. Exch. v. Portage La Prairie Mutual Ins. Co.*, 907 F.2d 911 \(9th Cir.1990\)](#). Conversely, a defendant does [*11] not purposefully avail itself of the forum's laws when its only contacts with the forum are random, fortuitous, or attenuated or due to the unilateral activity of a third party. [*Simmons Oil Corp.*, 244 Mont. at 86, 796 P.2d at 195](#), citing [*Brand*, 796 F.2d at 1074](#). The defendant that invokes the laws of the forum state by purposefully availing itself of the privilege of conducting activities within the forum should reasonably anticipate being haled into court in the forum state. Therefore, the exercise of jurisdiction over such a defendant is fundamentally fair. [*Simmons Oil Corp.*, 244 Mont. at 86, 796 P.2d at 195](#).

Dylan engaged in the affirmative conduct of leasing N765HV to Haverfield, with the knowledge that N765HV would be used in "the continental U.S. and U.S. territories." See *Plaintiff's Exhibit G at Bates No. DA130*. N765HV was not brought into Montana by the unilateral act of a disinterested third party. Instead, N765HV was brought into Montana by the members of Dylan, who are also the managers of Haverfield. Dylan was very aware of the actions of Haverfield because the decision makers for both companies are the exact same. Dylan's contact with Montana was voluntary and financially [*12] beneficial to Dylan.

Dylan's business enterprise is to purchase helicopters so that its parent corporation, Haverfield, can use them throughout the United States. Dylan does not lease helicopters to anyone except Haverfield. Dylan's attempt to minimize physical contacts with Montana through the use of Haverfield does not alter the "basic existence of [Dylan's] involvement in, and its pecuniary benefit from, a full exploitation of the market." See [*Gullett v. Qantas Airways, Ltd.*, 417 F.Supp. 490, 496 \(M.D. Tenn. 1975\)](#).

Dylan's argument that it is not physically located in Montana is not sufficient to defeat personal jurisdiction.

Jurisdiction "may not be avoided merely because the defendant did not physically enter the forum State." [*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 \(1985\)](#). Therefore, "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, [courts] have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.*

Dylan also argues that it did not control or direct where the helicopter was used or flown. This argument fails. The corporate interrelationship between Dylan [*13] and Haverfield is such that Haverfield knew what Dylan was doing and Dylan knew what Haverfield was doing. The members of Dylan were the officers of Haverfield. When asked whether Haverfield gave Dylan "notice of loss" as required by the lease during the deposition of Christine Cassell, she responded it was not necessary because "the principals were the same." Doc. 38, Ex. A, p. 74.

Dylan cannot claim surprise at being brought into a Montana Court. Dylan leased the helicopters to Haverfield for use "in the continental U.S. and U.S. Territories." Dylan was insured for liability related to N765HV in the continental United States. Additionally, Dylan derived financial benefits from lease payments and insurance proceeds resulting from the use of N765HV in Montana. These facts are sufficient to establish purposeful availment.

Further, the Amended and Restated Limited Liability Company Agreement of Dylan Aviation, LLC, which went into effect as of March 29, 2007, specifically provided Dylan Aviation, LLC was formed for the purpose of: "own[ing] and operat[ing] rotary aircraft engaged in power line inspection and repair, and related fields. . ." See *Plaintiff's Exhibit L at Bates No. DA0377*.

[*14] On June 13, 2007, all of Dylan's helicopters were transferred to Haverfield, except N765HV. Accordingly, N765HV was owned by Dylan at the time of the crash on May 28, 2007 and no lease payments had been made since March 31, 2007.

An unpublished opinion from Hawaii demonstrates this point and is comparable to this situation. In [*Pacific Fisheries Corp. v. Power Transmission Products, Inc.*, 2000 U.S. Dist. LEXIS 20612, 2000 WL 1670917 \(D. Hawai'i 2000\)](#), Pacific Fisheries filed suit in Hawaii as a result of an explosion involving a steel ammonia tank stored on the deck of a fishing vessel which was located in Hawaii. Pacific Fisheries owned the fishing vessel and alleged that defendant Airgas owned the tank and

leased it to another defendant, Power Transmission, a few years before the accident. Power Transmission allegedly subleased the tank to Pacific Fisheries. Pacific Fisheries claimed that Airgas and/or Power Transmission asked another defendant, Oxarc, to fill the tank with ammonia, that the tank was overfilled, and that the tank was thereby rendered dangerously defective. [2000 U.S. Dist. LEXIS 20612, \[WL\] at *1](#). Plaintiff filed suit seeking exoneration of its liability due to the acts of the defendants. *Id.* Power Transmission moved to dismiss [*15] for lack of personal jurisdiction.

The court held Power Transmission purposefully availed itself of the privilege of conducting activities in Hawaii because it "'knew or should have known' that the ammonia tank would be transported to Hawaii." [2000 U.S. Dist. LEXIS 20612, \[WL\] at *6](#). The court concluded it was "not a unilateral act by Pacific that brought the ammonia tank to Hawaii. The tank was brought to Hawaii because Power Transmission subleased it to Pacific and allowed it to be brought here." *Id.* Additionally, the court concluded "Power Transmission received a direct economic benefit by subleasing the ammonia tank to Pacific and allegedly authorizing its transport to Hawaii." *Id.* Therefore, due to Power Transmission's "ownership interest in property located in Hawaii when the [fishing vessel] took the ammonia tank there . . . Power Transmission affirmatively availed itself of the privilege and benefit of having its equipment stored and operated in Hawaii." *Id.* Thus, "Power Transmission should have reasonably anticipated being haled into court in Hawaii." *Id.*

2. Does the Burdick Estate's Cause of Action Arise out of Forum Related Activities?

The second prong asks whether the claims arose out of or resulted from [*16] forum-related activities. The Ninth Circuit relies on a "but for" test to determine whether a particular claim arises out of forum-related activities and thereby satisfies the second requirement for specific jurisdiction. [Myers v. Bennett Law Offices, 238 F.3d 1068, 1075 \(9th Cir. 2001\)](#), citing [Ballard v. Savage, 65 F.3d 1495, 1500 \(9th Cir. 1995\)](#). Plaintiffs must show that they would not have suffered an injury "but for" Defendant's forum related conduct. *See id.*

But for Dylan's purchasing and leasing N765HV to Haverfield, as well as the corporate interrelationship with Haverfield, N765HV would not have been leased to Haverfield and Burdick would not have been in Montana and killed in the crash. It is reasonable to infer that Dylan's affirmative acts and associations with Haverfield

was a "but for" cause of Dylan's helicopter being in Montana.

3. Is the Exercise of Jurisdiction over Dylan Reasonable?

The third prong of the due process analysis requires that the exercise of jurisdiction must be reasonable. In [Jackson v. Kroll, Pomerantz and Cameron, 223 Mont. 161, 166, 724 P.2d 717, 721 \(1986\)](#), the Montana Supreme Court enumerated several factors to be considered when examining the reasonableness [*17] of jurisdiction:

1. The extent of defendant's purposeful interjection into Montana;
2. The burden on defendant of defending in Montana;
3. The extent of the conflict with the sovereignty of defendant's state;
4. Montana's interest in adjudicating the dispute;
5. The most efficient resolution of the controversy;
6. The importance of Montana to plaintiff's interest in convenient and effective relief; and
7. The existence of an alternative forum.

[Simmons Oil Corp., 244 Mont. at 87-88](#).

These factors are not mandatory tests, each of which the plaintiff must pass in order for the court to assume jurisdiction. Rather, the factors simply illustrate the concept of fundamental fairness, which must be considered in each jurisdictional analysis. [Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1332 \(9th Cir.1984\)](#), cert. denied, [471 U.S. 1066, 105 S.Ct. 2143, 85 L.Ed.2d 500 \(1985\)](#).

When considering the extent of personal interjection into Montana, Dylan leased helicopters to Haverfield knowing that they would be used all over the "continental U.S. and U.S. Territories." Additionally, Dylan received lease payments from Haverfield for the N765HV, as well as insurance proceeds from the totaled helicopter.

Dylan [*18] argues that it would be burdensome to defend this action in Montana because it is also defending the claims of two passengers from the same incident in Pennsylvania. The Court does recognize that

it is easier to try a case all at once. However, given the ability of the parties to commute easily with air travel and communication is always accessible with the latest advances in technology, the burden is not so great as to require dismissal of this matter.

Third, Dylan has not shown a conflict of laws between Montana and Pennsylvania. The claims against Dylan will require the application of Montana law.

With regard to the forum state's interest in adjudicating the dispute, Montana is interested in protecting and regulating the conduct of parties who do business within the state, even if the parties are not residents of the state. See *Simmons Oil Corp.*, 244 Mont. at 89. The crash occurred in Montana, the investigation occurred in Montana, and the damaged remains of N765HV are stored in Montana.

When considering the most efficient judicial resolution, this does not weigh in favor of either party. The pilot of N765HV is a resident of Michigan. The post-crash investigation occurred in Bozeman [*19] and Indianapolis, Indiana. The totaled helicopter is stored in Montana. At least one NTSB investigator was from Montana and the NTSB "investigator-in-charge" was from the Western region of the United States. Mark Burdick's executrix is a resident of Tennessee, and the other Defendants are incorporated in states other than Montana and Pennsylvania.

The sixth consideration is convenience and effectiveness for Plaintiff. Montana is an effective forum. Under Montana law, Burdick has the potential to recover damages for lost earnings, the present value of his reasonable earnings during his life expectancy, medical and funeral expenses, compensation for pain and suffering, and other special damages. *Swanson v. Champion Intern. Corp.*, 197 Mont. 509, 515 646 P.2d 1166, 1169. There is not an offset of lost future earnings for economic consumption. *Payne v. Eighth Jud. Dist. Ct.*, 2002 MT 313, ¶ 10, 313 Mont. 118, 60 P.3d 469. Montana law also compensates heirs for the damages they personally suffered as a result of the decedent's death. *Swanson*, 197 Mont. at 517, 646 P.2d at 1170. Furthermore, under Montana law, any subrogation right is not recognized until the claimant has been "made whole." [*20] *State Compensation Ins. Fund v. McMillan*, 2001 MT 168, ¶ 7, 306 Mont. 155, 31 P.3d 347. These considerations support the conclusion that Montana is the most effective forum for Burdick.

The seventh consideration is the existence of an

alternative forum. This is neutral to both parties because there is an alternative forum.

D. Dylan's Reliance on [49 U.S.C. § 44112](#) is Misplaced.

Dylan argues extensively in the briefing that it cannot be held liable because federal law prohibits liability against a lessor or owner of a civil aircraft. Title [49 U.S.C. § 44112](#) states as follows:

(a) Definitions.—In this section—

(1) "lessor" means a person leasing for at least 30 days a civil aircraft, aircraft engine, or propeller.

(2) "owner" means a person that owns a civil aircraft, aircraft engine, or propeller.

(3) "secured party" means a person having a security interest in, or security title to, a civil aircraft, aircraft engine, or propeller under a conditional sales contract, equipment trust contract, chattel or corporate mortgage, or similar instrument.

(b) Liability.—A lessor, owner, or secured party is liable for personal injury, death, or property loss or damage on land or water only when a civil [*21] aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor, owner, or secured party, and the personal injury, death, or property loss or damage occurs because of—

(1) the aircraft, engine, or propeller; or

(2) the flight of, or an object falling from, the aircraft, engine, or propeller.

The application of the statute to the facts in this case is not a jurisdictional question. Dylan's reliance on [49 U.S.C. § 44112](#) at this time is misplaced.

CONCLUSION

Plaintiff has made the prima facie showing of jurisdictional facts to defeat the motion to dismiss. Any facts that appeared to be in conflict at the hearing must be resolved in the plaintiff's favor when considering this motion.

Therefore, based upon the foregoing, Dylan is subject to specific Montana jurisdiction and Dylan's motion to dismiss is **DENIED**.

DATED this 17th day of June, 2011.

/s/ Richard F. Cebull

U.S. DISTRICT COURT JUDGE

RICHARD F. CEBULL

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APPENDIX 3

[Cole v. Capital One, N.A.](#)

United States District Court for the District of Maryland, Southern Division

May 5, 2016, Decided; May 5, 2016, Filed

Case No.: GJH-15-1121

Reporter

2016 U.S. Dist. LEXIS 60184

JENNIFER COLE, Plaintiff, v. CAPITAL ONE, NATIONAL ASSOCIATION, et al., Defendants.

Prior History: [Cole v. Capital One, Nat'l Assoc., 2016 U.S. Dist. LEXIS 5573 \(D. Md., Jan. 15, 2016\)](#)

Counsel: [*1] Jennifer Cole, Plaintiff, Pro se, Upper Marlboro, MD.

For Capital One, National Association, Defendant: Phillip C. Chang, McGuireWoods LLP, Washington, DC.

For Square Two Financial Services Corporation, Cach, LLC, Defendants: Lauren M Burnette, LEAD ATTORNEY, Marshall Dennehey Warner Coleman & Goggin, Jacksonville, FL.

For Portfolio Recovery Associates, L.L.C., Defendant: Keith Steven McGurgan, LEAD ATTORNEY, Portfolio Recovery Associates Inc, Norfolk, VA; Lauren M Burnette, LEAD ATTORNEY, Marshall Dennehey Warner Coleman & Goggin, Jacksonville, FL.

For Oliphant Financial, LLC, Defendant: Charles F Gormly, Law Office of Charles F Gormly, Washington, DC.

For JH Portfolio Debt Equities, LLC, Defendant: Lauren M Burnette, LEAD ATTORNEY, Marshall Dennehey Warner Coleman & Goggin, Jacksonville, FL.

For Herbert A. Rosenthal, Chartered, Defendant: Charles F Gormly, LEAD ATTORNEY, Law Office of Charles F Gormly, Washington, DC.

For Data Mortgage, Inc., Defendant: Walter Allen Pennington, LEAD ATTORNEY, Pennington Law Firm, San Diego, CA.

For Equifax Information Services, Llc., Defendant: Nathan Daniel Adler, Neuberger Quinn Gielen Rubin and Gibber PA, Baltimore, MD.

For Trans Union, Llc., Defendant: [*2] Henry Mark Stichel, LEAD ATTORNEY, Gohn Hankey Stichel & Berlage LLP, Baltimore, MD; Katherine Carlton Robinson, PRO HAC VICE, Schuckit and Associates PC, Zionsville, IN.

For Experian Information Solutions, Inc., Defendant: Sandy David Baron, LEAD ATTORNEY, Shulman Rogers Gandal Pordy and Ecker PA, Potomac, MD.

Judges: GEORGE J. HAZEL, United States District Judge.

Opinion by: GEORGE J. HAZEL

Opinion

MEMORANDUM OPINION

In this action, which was removed to this Court from the Circuit Court for Prince George's County, Maryland, Plaintiff Jennifer Cole alleges violations of the [Fair Credit Reporting Act \("FCRA"\)](#), [15 U.S.C. § 1681 et seq.](#) and the [Fair Debt Collection Practices Act \("FDCPA"\)](#), [15 U.S.C. § 1601 et seq.](#) against twenty-one defendants. Presently pending before the Court is a Motion to Dismiss filed by Defendant Data Mortgage, Inc. ECF No. 95. A hearing on the motion is not necessary. See [Loc. R. 105.6](#) (D. Md.). For the reasons that follow, Data Mortgage's Motion to Dismiss is granted.

I. BACKGROUND

In the Complaint, Plaintiff alleges various [FCRA](#) and [FDCPA](#) violations against the twenty one Defendants

named in this action.¹ Specifically, she first alleges that certain Defendants failed to perform a reasonable investigation after Plaintiff disputed the validity of certain [*3] charged-off accounts that were opened in her name.² ECF No. 2 at ¶¶ 11-19. Plaintiff alleges that she did not sign the applications to open those accounts, that they were fraudulently opened by another individual, and that a "reasonable investigation" of Plaintiff's dispute would have "involved the Defendants' verification of the Plaintiff's signature on the credit applications." *Id.* at ¶ 16.

Plaintiff next alleges that other Defendants are attempting to collect debts owed on the fraudulently [*4] opened accounts and that yet other Defendants are attempting to collect alleged medical bills owed by Plaintiff without proof that those Defendants have been authorized to collect such debts. *Id.* at ¶¶ 20-22. Plaintiff contends that she has disputed owing these debts but that they have been "verified as being accurately reported [to consumer reporting agencies] and continue to be reported on Plaintiff's credit reports." *Id.* at ¶ 22.

Finally, Plaintiff alleges that certain Defendants violated the [FCRA](#) by obtaining her credit report without a permissible purpose for doing so. *Id.* at ¶¶ 23-30. As is relevant to the present Motion, Plaintiff alleges that Data Mortgage obtained her credit report on June 5, 2014, and that "Plaintiff did not receive a firm offer of credit from [Data Mortgage] and therefore it did not access Plaintiff's credit report for a permissible purpose." *Id.* at ¶ 23. Plaintiff further alleges that Data Mortgage "knowingly and willfully used deception and false pretenses to obtain Plaintiff's consumer report, by falsely representing or certifying that the report was being obtained for a permissible purpose" and that

doing so violated the [FCRA](#).

Since this action was removed [*5] to this Court in April 2015, Plaintiff has voluntarily dismissed her claims against multiple Defendants. See ECF Nos. 59, 63, 69.71, 101 & 102. Several other Defendants have answered the Complaint. See ECF Nos. 26, 43, 49, 58, 67, 68, 82 & 83. On June 29, 2015, Plaintiff filed a Motion for Clerk's Entry of Default as to certain Defendants, and on November 6, 2015, she filed a "Renewed" Motion for Clerk's Entry of Default. ECF Nos. 74 & 105. The Court denied both motions on January 15, 2016.³ ECF Nos. 107 & 108.

Meanwhile, on September 25, 2015, Data [*6] Mortgage filed the pending Motion to Dismiss, arguing Plaintiff has failed to state a claim upon which relief can be granted and that the Court lacks personal jurisdiction over it.⁴ See ECF No. 95. Plaintiff has opposed the Motion, ECF No. 100, and the time for Data Mortgage to file a reply has expired.

II. DISCUSSION

A. Personal Jurisdiction

A motion to dismiss for lack of personal jurisdiction arises under [Federal Rule of Civil Procedure 12\(b\)\(2\)](#). "When a court's personal jurisdiction is properly challenged by a [Rule 12\(b\)\(2\)](#) motion, the jurisdictional question thus raised is one for the judge, with the burden on the plaintiff ultimately to prove the existence of a ground for jurisdiction by a preponderance of the evidence." [Combs v. Bakker, 886 F.2d 673, 676 \(4th Cir. 1989\)](#) (citation omitted). Discovery and an

¹ It is not always clear in the Complaint which Defendants are allegedly responsible for certain challenged conduct. For instance, with regard to Plaintiff's allegations that certain accounts were fraudulently opened in her name, Plaintiff references Defendant Capital One, National Association, CitiBank, N.A., and "Kohls." Kohls, however, is not a named Defendant in this case, and, in the remaining paragraphs discussing the disputed accounts, Plaintiff refers generally to "Defendants" without specifying which Defendants those allegations refer to.

² "Charge off" means the act of a creditor that treats an account receivable or other debt as a loss or expense because payment is unlikely." [Bartlett v. Portfolio Recovery Associates, LLC, 438 Md. 255, 91 A.3d 1127, 1132 n.4 \(Md. 2014\)](#) (quoting [Md. Rule 3-306\(a\)\(1\)](#)).

³ With respect to one Defendant for whom Plaintiff sought an entry of default, Equity Loans LLC, the Court noted that Plaintiff merely failed to follow the requirements of [Federal Rule of Civil Procedure 55\(a\)](#), namely, that she failed to show "by affidavit or otherwise" that an entry of default was warranted. See ECF No. 107 at 3-4. Plaintiff is reminded that she may file a motion for entry of default and default judgment as to Equity Loans, but she must "file with the clerk an affidavit, or certification in lieu of oath, under penalty of perjury, [28 U.S.C. § 1746](#), establishing that more than 20 days have elapsed since service of the summons and complaint, and that no answer has been served." [DeTore v. Local No. 245 of Jersey City Pub. Emp. Union, 511 F. Supp. 171, 176 \(D.N.J. 1981\)](#).

⁴ Data Mortgage also argues that venue is improper in this Court. Because the Court concludes that dismissal is appropriate, it need not reach this additional argument.

evidentiary hearing are not required to resolve a motion under [Rule 12\(b\)\(2\)](#), however. See generally 5B Wright & Miller, Federal Practice & Procedure § 1351, at 274-313 (3d ed. 2004, 2012 Supp.). Rather, the Court may, in its discretion, address personal jurisdiction as a preliminary matter, ruling solely on the motion papers, supporting [*7] legal memoranda, affidavits, and the allegations in the complaint. [Consulting Engineers Corp. v. Geometric Ltd.](#), 561 F.3d 273, 276 (4th Cir. 2009); see also [In re Celotex Corp.](#), 124 F.3d 619, 628 (4th Cir. 1997). In such a circumstance, the plaintiff need only make "a prima facie showing of a sufficient jurisdictional basis to survive the jurisdictional challenge." [Consulting Engineers Corp.](#), 561 F.3d at 276. "In deciding whether the plaintiff has made the requisite showing, the court must take all disputed facts and reasonable inferences in favor of the plaintiff." [Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.](#), 334 F.3d 390, 396 (4th Cir. 2003) (citing [Mylan Labs. Inc. v. Akzo, N.V.](#), 2 F.3d 56, 62 (4th Cir. 1993)).

Personal jurisdiction over a nonresident defendant is proper when "(1) an applicable state long-arm statute confers jurisdiction and (2) the assertion of that jurisdiction is consistent with constitutional due process." [Nichols v. G. D. Searle & Co.](#), 991 F.2d 1195, 1199 (4th Cir. 1993); see also [Fed. R. Civ. P. 4\(k\)\(1\)\(A\)](#). "In applying Maryland's long-arm statute, federal courts often state that '[the] statutory inquiry merges with [the] constitutional inquiry.'" [Dring v. Sullivan](#), 423 F.Supp.2d 540, 544 (D.Md.2006) (citing [Carefirst of Md.](#), 334 F.3d at 396-97; [Stover v. O'Connell Assocs., Inc.](#), 84 F.3d 132, 135 (4th Cir.1996) (additional citations omitted)). A court's exercise of personal jurisdiction over a defendant is consistent with due process so long as the defendant has established "minimum contacts" with the forum state such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." [Int'l Shoe Co. v. Washington](#), 326 U.S. 310, 316, 66 S.Ct. 154, 90 L. Ed. 95 (1945) (citation omitted). Put differently, the court must consider whether a defendant's contacts [*8] with the forum state are substantial enough that it "should reasonably anticipate being haled into court there." [World-Wide Volkswagen Corp. v. Woodson](#), 444 U.S. 286, 297, 100 S.Ct. 559, 62 L. Ed. 2d 490 (1980). The United States Court of Appeals for the Fourth Circuit has distilled these somewhat abstract concepts into three basic prongs: "(1) the extent to which the defendant 'purposefully avail[ed]' itself of the privilege of conducting activities in the State; (2) whether the plaintiffs' claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be

constitutionally 'reasonable.'" [ALS Scan, Inc. v. Digital Serv. Consultants, Inc.](#), 293 F.3d 707, 712 (4th Cir. 2002).

Plaintiff's Complaint alleges no jurisdictional facts with respect to Data Mortgage. The only facts alleged in the Complaint regarding Data Mortgage is that it is "in the business of brokering or procuring mortgage loans," and that it "obtained Plaintiff's credit report on June 5, 2015," without having a permissible purpose for doing so. ECF No. 2 at ¶¶ 7, 23. In its Motion to Dismiss, Data Mortgage indicates that it is a California entity whose business operations are solely within the state of California. ECF No. 95-1 at 1.⁵ Data Mortgage argues that Plaintiff has failed to satisfy her burden to allege that this Court can exercise personal jurisdiction [*9] over it. Plaintiff argues, however, that because she is a Maryland resident, see ECF No. 2 at ¶ 2, when Data Mortgage obtained her credit report, it "transact[ed] . . . business" in the state of Maryland and caused her tortious injury in Maryland. See ECF No. 100 at 4; [Md. Code Ann., Cts. & Jud. Proc. § 6-103\(b\)](#) (providing that "[a] court may exercise personal jurisdiction over a person, who directly or by an agent . . . [t]ransacts any business or performs any character of work or service in [Maryland]" or "[c]auses tortious injury in the state by an act or omission in [Maryland]").

In [Zellerino v. Roosen](#), 118 F. Supp. 3d 946 (E.D. Mich. 2015), the court rejected the same argument that Plaintiff raises here. [Zellerino](#) involved an [FCRA](#) action in which the plaintiff, a Michigan resident, alleged that the defendants impermissibly obtained her consumer report, which she alleged was an invasion of her privacy. The defendants, who conducted business in California, moved to dismiss the complaint for lack of personal jurisdiction. The plaintiff argued that the United States District Court for the Eastern District of Michigan could exercise personal jurisdiction over the defendants "because [*10] the defendants committed an intentional tort that caused consequences to occur in the State of Michigan." [Id.](#) at 950. In dismissing this argument, the [Zellerino](#) court relied on [Walden v. Fiore](#), 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014), in which the United States Supreme Court emphasized two important points with respect to personal jurisdiction: first, that the relationship between the defendant and the forum "must arise out of contacts that the 'defendant *himself* creates

⁵ All pin cites to documents filed on the Court's electronic filing system (CM/ECF) refer to the page numbers generated by that system.

with the forum State," *id. at 1122* (emphasis in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L. Ed. 2d 528 (1985)), and second, that the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there," *id.* (citing *Int'l Shoe*, 326 U.S. at 319). Considering these two points, the *Zellerino* court concluded as follows:

Applying those principles here, it is apparent that the defendants' conduct of accessing the plaintiff's credit report, which presumably took place in California, cannot furnish a basis for them to be sued in a Michigan court, even though the plaintiff felt the impact of that privacy breach in Michigan. None of the defendants' challenged conduct had anything to do with Michigan itself. The plaintiff does not allege that any of the defendants' alleged actions took place [*11] in Michigan. Instead, the complaint alleges that the defendants, California residents, obtained the plaintiff's consumer report from Equifax, a Georgia-based company, and falsely certified that the report was for a lawful purpose.

118 F. Supp. 3d at 952.

The Court finds *Zellerino's* reasoning persuasive. The mere fact that Data Mortgage obtained Plaintiff's credit report and that Plaintiff is a Maryland resident does not establish that Data Mortgage "purposefully avail[ed] itself of the privilege of conducting activities" in Maryland. *ALS Scan*, 293 F.3d at 712. To conclude otherwise would be to "improperly attribute[] a plaintiff's forum connections to the defendant and makes those connections 'decisive' in the jurisdictional analysis." *Walden*, 134 S. Ct. at 1125 (citation omitted). Accordingly, Data Mortgage's Motion to Dismiss for lack of personal jurisdiction must be granted.

B. Failure to State a Claim

Even assuming the Court could exercise personal jurisdiction over Data Mortgage, the claims alleged in the Complaint must be dismissed for failure to state a claim. On a motion to dismiss for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)*, a court "must accept as true all of the factual allegations contained in the complaint." and must "draw all reasonable inferences [from those [*12] facts] in favor of the plaintiff." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011) (citations

and internal quotation marks omitted). To survive a motion to dismiss invoking *Rule 12(b)(6)*, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The factual allegations must be more than labels and conclusions Factual allegations must be enough to raise a right to relief above the speculative level" *Twombly*, 550 U.S. at 555; see also *id.* ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action" (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, 235-36 (3d ed. 2004))). Although pleadings of self-represented litigants must be accorded liberal construction, see *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978), liberal construction does not mean a court can ignore a clear failure to allege facts that set forth a cognizable claim, see *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387 (4th Cir. 1990).

Although the Complaint alleges claims arising under the *FDCPA* against certain Defendants, the only allegations in the Complaint relating to Data Mortgage arise under the *FCRA*. The *FCRA* was enacted by Congress in 1970 "to ensure fair and accurate credit reporting, promote efficiency in[*13] the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007). The *FCRA* imposes civil liability on any person who willfully or negligently fails to comply with its requirements. See *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 899-900 (4th Cir. 2003); 15 U.S.C. §§ 1681n, 1681o. Section 1681b(f) prohibits persons from "us[ing] or obtain[ing] a consumer report for any purpose" unless that purpose is expressly authorized by the *FCRA*. Section 1681q also provides for damages when "any person knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses." "The standard for determining when a consumer report has been obtained under false pretenses will usually be defined in relation to the permissible purposes of consumer reports which are enumerated in 15 U.S.C. § 1681b." *Hansen v. Morgan*, 582 F.2d 1214, 1219 (9th Cir. 1978). "To state a claim for an improper use or acquisition of a consumer report, [a] [p]laintiff must plead the following elements: (1) that there was a consumer report; (2) that Defendant used or obtained it; (3) that Defendant did so without a permissible statutory purpose; and (4) that Defendant acted with the specified culpable mental state." *Bolden*

*v. McCabe, Weisberg & Conway, LLC, No. CIV.A. DKC 13-1265, 2013 U.S. Dist. LEXIS 182057, 2013 WL 6909156. at *3 (D. Md. Dec. 31, 2013)* (citations omitted). Moreover, "[t]o prevail on the theory of willful violation of the *FCRA*, the plaintiff must 'show [*14] that the defendant knowingly and intentionally committed an act in conscious disregard for the rights of the consumer.'" *2013 U.S. Dist. LEXIS 182057, [WL] at *3 n.5* (quoting *Ausherman, 352 F.3d at 900*).

The sparse factual allegations in the Complaint do not support an *FCRA* claim against Data Mortgage. Plaintiff merely asserts that Data Mortgage willfully obtained her credit report through false pretenses and without a permissible purpose in violation of *15 U.S.C. § 1681g*. ECF No. 2 at ¶ 36. These allegations are wholly devoid of any specificity. Rather, they are mere "labels and conclusions" and "a formulaic recitation of the elements" of Plaintiff's cause of action. *Twombly, 550 U.S. at 555*. Because Plaintiff has failed to provide any facts giving rise to a plausible claim that Data Mortgage willfully violated the *FCRA*, Plaintiff has not met her pleading burden. Accordingly, her claim against Data Mortgage for violation of the *FCRA* must be dismissed.

Additionally, this reasoning applies equally with respect to other Defendants named in the Complaint, namely, Equity Loans LLC, Sher Financial Group, Inc. ("Sher"), and American Trust Capital Lending, Inc. ("American Trust"), because the allegations in the Complaint with respect to these Defendants are identical to those alleged against Data Mortgage. [*15] See ECF No. 2 at ¶¶ 25, 27, 29. Moreover, with respect to Sher and American Trust, Plaintiff has yet to demonstrate that they have been properly served. See ECF Nos. 107 & 108 (denying Plaintiff's Motion for Default and directing Clerk to reissue summonses to certain Defendants). The Court will therefore also order that Plaintiff show cause within 28 days of this Memorandum Opinion and accompanying Order as to why the claims against these Defendants should not also be dismissed. See *Saifullah v. Johnson, 948 F.2d 1282 (4th Cir. 1991)* (per curiam) ("A court may, on its own initiative, dismiss a civil complaint for failing to state a claim" provided that the plaintiff is given "notice and an opportunity to be heard . . ." (citation omitted)).

III. CONCLUSION

For the foregoing reasons. Data Mortgage's Motion to Dismiss, ECF No. 95, is granted. Plaintiff's claims against Data Mortgage are dismissed, and Plaintiff is ordered to show cause as to why the Complaint should not also be dismissed as to Equity Loans, Sher, and American Trust. A separate Order follows.

Dated: May 5, 2016

/s/ George J. Hazel

GEORGE J. HAZEL

United States District Judge

ORDER

In accordance with the foregoing Memorandum Opinion, it is hereby **ORDERED**. by the United States [*16] District Court for the District of Maryland, that:

1. Defendant's Motion to Dismiss, ECF No. 95, is **GRANTED**;
2. Plaintiff's claim against Defendant Data Mortgage, Inc., is **DISMISSED**;
3. Plaintiff is granted 28 days from the date of this Order to **SHOW CAUSE** why the claims against Equity Loans LLC, Sher Financial Group, Inc., and American Trust Capital Lending, Inc., should not be dismissed for failure to state a claim and, with respect to Sher Financial Group, Inc., and American Trust Capital Lending, Inc., why service of process has not been effected;
4. Plaintiff is forewarned that failure to show cause will result in **DISMISSAL** of the claims against Equity Loans LLC, Sher Financial Group, Inc., and American Trust Capital Lending, Inc. without further notice; and
5. The Clerk SHALL SEND a copy of this Memorandum Opinion and Order to Plaintiff.

Dated: May 5, 2016

/s/ George J. Hazel

GEORGE J. HAZEL

United States District Judge

APPENDIX 4

Eclipse Aero., Inc. v. Star 7, LLC

United States District Court for the Northern District of Illinois, Eastern Division

March 3, 2016, Decided; March 3, 2016, Filed

Case No. 15 C1820

Reporter

2016 U.S. Dist. LEXIS 27597

ECLIPSE AEROSPACE, INC., Plaintiff, v. STAR 7, LLC, CULBERTSON CONTRACTORS, LLC, JAY CULBERTSON, Defendants.

Counsel: [*1] For Eclipse Aerospace, Inc., a Delaware Corporation, Plaintiff: Alan L. Farkas, LEAD ATTORNEY, SmithAmundsen LLC (Chgo), Chicago, IL; Katherine Josephine Calhoun, SmithAmundsen LLC, Chicago, IL.

For Star 7, LLC, a Foreign Limited Liability Company, Culbertson Contractors, LLC, a Foreign Limited Liability Company, Jay Culbertson, Individually, Defendants: Matthew John O'Hara, LEAD ATTORNEY, Leigh Christina Bonsall, Hinshaw & Culbertson LLP, Chicago, IL; Ambrose V. McCall, Hinshaw & Culbertson LLP, Peoria, IL.

Judges: SIDNEY I. SCHENKIER, United States Magistrate Judge.

Opinion by: SIDNEY I. SCHENKIER

Opinion

MEMORANDUM OPINION AND ORDER¹

Plaintiff Eclipse Aerospace, Inc. ("Eclipse") has sued defendants Star 7, LLC, Culbertson Contractors, LLC, and Jay Culbertson for breach of contract and tortious interference with prospective economic advantage under Illinois state law (doc. # 5: Am. Compl.). Eclipse brought suit in federal court based on diversity jurisdiction, 28 U.S.C. § 1332(a)(2) (*Id.* ¶ 7). Defendants have moved to dismiss the complaint under Federal

Rule of Civil Procedure 12(b)(2), on the ground that [*2] they are not subject to the personal jurisdiction of this Court (doc. # 19). We allowed an extended period for discovery on the motion, which is now fully briefed (doc. # 40: Pl.'s Resp.; doc. # 42: Defs.' Reply). For the reasons described below, we grant defendants' motion to dismiss.

I.

A party asserting personal jurisdiction need only make out a *prima facie* case. Philos Techs., Inc. v. Philos & D. Inc., 802 F.3d 905, 912 (7th Cir. 2015). However, once a defendant has moved for a dismissal based on the lack of personal jurisdiction, "the plaintiff bears the burden of demonstrating the existence of jurisdiction." Kipp v. Ski Enter. Corp. of Wisconsin, 783 F.3d 695, 697 (7th Cir. 2015) (citing Purdue Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 782 (7th Cir. 2003)). "The affidavit of the party asserting personal jurisdiction is presumed true only until it is disputed. Once disputed, the party asserting personal jurisdiction . . . must prove what it has alleged." Durukan Am., LLC v. Rain Trading, Inc., 787 F.3d 1161, 1163-64 (7th Cir. 2015); see also Purdue, 338 F.3d at 783 (once the defendant has submitted affidavits or other evidence in opposition to the exercise of jurisdiction, the plaintiff must go beyond the pleadings and submit affirmative evidence supporting the exercise of jurisdiction).

If material facts about personal jurisdiction are in dispute, "particularly when the court is required [*3] to assess credibility in order to resolve factual disputes," a court "must hold an evidentiary hearing to resolve them." Philos, 802 F.3d at 912 (quoting Hyatt Int'l Corp. v. Coco, 302 F.3d 707, 713 (7th Cir. 2002)). No party has sought an evidentiary hearing, which is unnecessary in this case because the parties do not dispute the facts relevant to the question of personal jurisdiction. We thus turn to a summary of the material facts.

¹ On May 8, 2015, by consent of the parties and pursuant to 28 U.S.C. § 636(c) and Local Rule 73.1, this case was assigned to the Court for all proceedings, including entry of final judgment (docs. ## 9, 14).

II.

Eclipse is an aircraft manufacturer that provides maintenance and ancillary services for its products (Am. Compl. ¶ 9). It is a Delaware corporation with its principal place of business in New Mexico (*Id.* ¶ 3). Eclipse has maintenance facilities in Albuquerque, New Mexico and Wheeling, Illinois (*Id.*; see also Pl.'s Resp., Ex. B: Decl. of Andy Neild ¶ 2).

In May 2011, Star 7 owned an Eclipse 500 Jet ("the Aircraft") (Am. Compl. ¶ 14). Star 7 was then owned by Robert Davis (Pl.'s Resp., Ex. A: Decl. of Patrick Broderick ¶ 2). Star 7 is a limited liability company organized under the laws of Louisiana, with its principal place of business in Louisiana (Am. Compl. ¶ 4).

On or about May 26, 2011, Star 7 and Eclipse entered into an agreement ("the Contract") for Eclipse to perform an avionics upgrade ("the Upgrade") on the Aircraft at a discounted [*4] price (Am. Compl. ¶¶ 15, 21-23). Under the Contract, Star 7 agreed (subject to exceptions not relevant here) that it would not market or resell the Aircraft for 24 months following the completion of the Upgrade (*Id.* ¶¶ 17, 20).

Mr. Davis signed the Contract on behalf of Star 7 in Louisiana (Pl.'s Resp., Ex. B1: Contract, at 4). Neither the Contract nor the parties' submissions on the motion disclose the course of negotiations leading to the Contract or where those negotiations occurred. The Contract did not specify whether the Upgrade work would be performed at Eclipse's Albuquerque facility or at its Wheeling facility, and under the Contract, Eclipse reserved the right to subcontract any portion of the work to be performed to another maintenance facility or individual (*Id.*, ¶ 1(b)).

After the one-page work order for the Upgrade, identifying the specific Aircraft and the scope of work to be performed on it, the Contract appears to be standard, form terms and conditions used by Eclipse as an attachment to the work order (Contract, at 1-4). The Contract includes a choice of law and choice of venue clause stating: "This Order shall be construed, interpreted and enforced in accordance with the laws of the State of Illinois. [*5] . . . Customer [Star 7] agrees that its sole choice of venue to bring any action against [Eclipse] shall reside in the county of Cook, state of Illinois" (*Id.*, ¶ 20c). The Contract did not provide that the County of Cook would be the sole venue -- or a proper venue -- in which Eclipse could bring suit against Star

7.²

On August 24, 2012, Shawn (Patrick) Broderick, a pilot for Star 7, confirmed with the general manager of the Eclipse Wheeling facility, Andy Neild, that the Upgrade would be performed in the Illinois facility (Am. Compl., ¶ 7). Thereafter, on January 25, 2013, Mr. Davis transferred Star 7 to Culbertson Contractors (Pl.'s Resp., Ex. J: Star 7 Purchase Agreement). Defendant Jay Culbertson, a resident [*6] of Louisiana and/or Mississippi (Am. Compl., ¶ 6), is the managing member of Culbertson Contractors, which is a limited liability company organized under the laws of Mississippi, with its principal place of business in Mississippi (*Id.*, ¶ 5). Culbertson Contractors became the only officer and sole member of record for Star 7, and Mr. Culbertson became the managing member of Star 7 (*Id.*, ¶ 4).

On one or more occasions between the end of 2012 and the beginning of 2013, Mr. Culbertson and Mr. Broderick participated in telephone calls with Ken Ross, then President of Global Sales and Services for Eclipse (Pl.'s Resp., Ex. C: Decl. of Ken Ross, ¶ 1). Mr. Culbertson sought to obtain the Aircraft with the Upgrade, and Mr. Culbertson was told that if he wished to get the same discounted pricing for the Upgrade that was offered to Star 7, he would have to purchase Star 7, not just the Aircraft (*Id.*, ¶ 3). The parties do not reveal where they were located when these telephone calls occurred.

On January 23, 2013, two days before the transfer of Star 7, Mr. Culbertson, his pilot, Josh Reed, and Mr. Neild met in the Wheeling maintenance hangar to discuss damage to and repairs needed for a different [*7] Eclipse aircraft that Mr. Culbertson already owned (Neild Decl., ¶ 8). Mr. Culbertson also met with Mr. Ross in his executive office at the Wheeling facility to discuss Mr. Culbertson taking over Star 7 in order to obtain the Upgrade with the discounted pricing that Star 7 and Eclipse had agreed to in the Contract (*Id.*, ¶ 9; Ross Decl., ¶¶ 4-5).

On or about February 21, 2013, about one month after the transfer of Star 7, Mr. Reed flew the Aircraft to the Wheeling, Illinois facility so that Eclipse could perform

²The Contract also provided for the mediation and arbitration of any dispute that "arises from or relates to this contract or the breach thereof," and that any arbitration would take place in "the State of Illinois and county where the [Eclipse] corporate facility is located, or any other place selected by mutual agreement of the parties" (Pl.'s Resp., Ex. B, at 3). For reasons that they have not revealed, the parties have agreed to waive the arbitration provision (Pl.'s Resp. at 6).

the Upgrade (Neild Decl. ¶ 11; Pl.'s Resp., Ex. D: Dep. of Josh Reed at 47). Between February 21 and April 20, 2013, the date Eclipse completed the Upgrade on the Aircraft, Mr. Reed exchanged several emails with Beau Klingbeil, the lead aircraft technician at the Eclipse Wheeling facility, regarding additional maintenance and repairs (referred to as "MRFs") to the Aircraft (Am. Compl., ¶ 24; Pl.'s Resp., Exs. L-P). Culbertson Contractors completed payment for the Upgrade on June 6, 2013, by wiring the remaining money it owed Eclipse to a bank in San Francisco, California (Neild Decl., ¶ 15; Ex. B6).

On or about December 5, 2014, Mr. Culbertson, on behalf of Star 7, sold the Aircraft, [*8] which was located at the time in Louisiana, to a Louisiana company, Voaralto, LLC (Am. Compl., ¶¶ 34-36; Pl.'s Resp., Ex. R). Mr. Culbertson signed the bill of sale as managing member of Star 7 (Am. Compl., ¶ 37; Pl.'s Ex. R). That sale occurred fewer than 24 months after the Upgrade had been performed. Eclipse filed this federal lawsuit three months later, in March 2015. In Count I, Eclipse alleges that Star 7 breached the Contract's covenant not to transfer when it sold the Aircraft less than 24 months after the Upgrade was completed (Am. Compl., at 9). In Count II, plaintiff alleges that Star 7's corporate veil should be pierced in order to extend liability for that alleged breach to Mr. Culbertson and/or Culbertson Contractors (*Id.* at 10). In Count III, Eclipse alleges a claim of tortious interference with prospective economic advantage against Mr. Culbertson and/or Culbertson Contractors (*Id.* at 13).

III.

A federal district court sitting in diversity applies the personal jurisdiction rules of the state in which it sits. See *Hyatt*, 302 F.3d at 713. Illinois's long-arm statute permits its courts to exercise personal jurisdiction up to the limits of the *Due Process Clause of the Fourteenth Amendment*. *Kipp*, 783 F.3d at 697. See 735 ILCS 5/2-209(c) ("A court may also exercise jurisdiction on any other basis [*9] now or hereafter permitted by the Illinois Constitution and the Constitution of the United States."). Generally, there is "no operative difference" between Illinois and federal constitutional limits on personal jurisdiction. *Philos*, 802 F.3d at 912-13. Where, as here, the parties have not argued that the state's constitutional standards differ from federal law, we apply the federal due process limitations on personal jurisdiction. *Id.*

Under the *Fourteenth Amendment's Due Process*

Clause, a court may exercise personal jurisdiction over an out-of-state defendant when that defendant has "minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). "The defendant must have deliberately established these contacts, or, in other words, he must have purposefully availed himself of the forum state, 'such that he should reasonably anticipate being haled into court there.'" *Philos*, 802 F.3d at 913 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). "It is the defendant—not the plaintiff or third parties—that must create the contacts in the forum state, and those contacts must be 'with the forum State itself, not . . . with persons who reside there.'" *Philos*, 802 F.3d at 913 (quoting *Walden v. Fiore*, U.S. , 134 S.Ct. 1115, 1122, 188 L. Ed. 2d 12 (2014)). "[T]he plaintiff cannot be the only link between the defendant and the forum." [*10] *Walden*, 134 S.Ct at 1122.

There are two categories of personal jurisdiction: general and specific. "General jurisdiction is 'all-purpose'; it exists only 'when the [party's] affiliations with the State in which suit is brought are so constant and pervasive as to render it essentially at home in the forum State.'" *Kipp*, 783 F.3d at 697-98 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011)). By contrast, "[s]pecific jurisdiction is case-specific." *Kipp*, 783 F.3d at 698. Eclipse contends that this Court has specific (not general) jurisdiction over defendants (Pl.'s Resp. at 6). In order to warrant the exercise of specific personal jurisdiction, "the defendant's contacts with the forum state must 'directly relate to the challenged conduct or transaction.'" *N. Grain Mktg., LLC, v. Greving*, 743 F.3d 487, 492 (7th Cir. 2014) (quoting *Tamburo v. Dworkin*, 601 F.3d 693, 702 (7th Cir. 2010)). Moreover, "[f]or a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 801 (7th Cir. 2014) (quoting *Walden*, 134 S. Ct. at 1121).

This need to closely link a defendant's activity in the forum state to the actionable conduct is central to the distinction between general and specific personal jurisdiction. When a defendant's activities in a jurisdiction are so pervasive as to create general personal jurisdiction, there is no reluctance for a court to

require a defendant to answer a suit in that [*11] state even for actionable conduct that may have occurred elsewhere (assuming proper venue). [Kipp, 783 F.3d at 698](#). But where a defendant does not have a general presence in the jurisdiction, due process requires more. "Specific jurisdiction must rest on the *litigation-specific* conduct of the defendant in the proposed forum state," [Advanced Tactical, 751 F.3d at 801](#) (emphasis in original); see also [N. Grain Mktg., 743 F.3d at 492](#) (the alleged injury must "arise[] out of the defendant's forum related activities").

Eclipse claims defendants engaged in the following specific jurisdictional contacts: "arranged for work to be performed in Illinois; delivered its aircraft into Illinois; negotiated the scope of services to be performed; paid for the work; and, came into Illinois to pick up the airplane" (PL's Resp. at 7). Plaintiff also contends that the Illinois choice of law clause in the Contract, and the fact that the Contract contained an Illinois forum selection clause for lawsuits brought by Star 7, creates the necessary contacts for specific jurisdiction in Illinois (*Id.* at 6, 15).

Defendants do not dispute these contacts. Rather, they argue that these contacts are not sufficient for a court to establish personal jurisdiction over them in Illinois. We agree.³

A.

As plaintiff recognizes, the foregoing contacts do not show the kind of pervasive presence necessary to establish general jurisdiction (Pl.'s Resp. at 6). As a result, we must look for more than merely the existence of some activity by defendants in Illinois; we must focus on whether defendants' contacts with Illinois "directly relate to the challenged conduct or transaction." [N. Grain Mktg., 743 F.3d at 492](#). The "challenged conduct" in this case is the sale by Star 7 of the Aircraft fewer than 24 months after the completion of the Upgrade. That conduct took place not in Illinois, but in Louisiana

(where the Aircraft was located), some 19 months after the Upgrade was performed. [*13] None of the conduct that plaintiff says occurred in Illinois is the challenged conduct, or "directly relates" to that conduct.

First, Mr. Culbertson did not come to Illinois in January 2013 for the sole purpose of discussing the Upgrade to the Aircraft. Rather, Mr. Culbertson met with Mr. Neild and Mr. Reed in the Wheeling maintenance hangar to discuss the scope of damage and repairs needed for a different Eclipse jet Mr. Culbertson owned (Neild Decl., ¶ 8). Afterward, Mr. Culbertson met with Mr. Ross in Illinois to discuss the Upgrade to the Aircraft (*Id.*, ¶ 9; see also Ross Decl., ¶¶ 4-5). These discussions did not constitute negotiations for Eclipse to Upgrade the Aircraft; the Contract between Star 7 and Eclipse was already in place for the Upgrade. To the extent, as plaintiff argues, the discussions resulted in the Culbertson defendants purchasing Star 7 from Mr. Davis and not just the Aircraft, that acquisition took place wholly outside of Illinois. These discussions were not alleged to be the offending conduct, and we are unpersuaded that they directly relate to the offending conduct.

Second, the fact that the Upgrade took place in Wheeling, and defendants came to Illinois to [*14] deliver and pick up the Aircraft, is not conduct that directly relates to the action that plaintiff says breached the Contract and tortiously interfered with it -- the sale of the Aircraft in Louisiana 19 months later. Mr. Culbertson's and the Aircraft's "physical entry into the State . . . is certainly a relevant contact." [Walden, 134 S. Ct. at 1122](#). However, defendants' actions did not constitute sufficient contacts with Illinois "simply because" they directed conduct at a plaintiff with Illinois connections. *Id.* at 1125. The performance of the Upgrade in Wheeling rather than Albuquerque has nothing to do with the challenged conduct; that is, plaintiff would make the same contract and tort claims irrespective of where the Upgrade was performed.

Unlike in [Madison Consulting Grp. v. State of South Carolina, 752 F.2d 1193 \(7th Cir. 1985\)](#), and [Citadel Grp. Ltd. v. Washington Reg'l Med. Ctr., 536 F.3d 757 \(7th Cir. 2008\)](#) -- cases relied upon by Eclipse -- the place of plaintiff's performance of the contract is not directly related to the plaintiff's claims in the lawsuit. In *Madison Consulting*, many of the documents relevant to the breach of contract action were located in Wisconsin, where the contracted-for consulting work was performed. *Id.* at 1204-05. By contrast, in the case at hand, the details of the Upgrade and the maintenance

³ Plaintiff contends that [*12] this Court should consider not only Star 7's own activities directed toward Illinois, but also the activities of Mr. Reed, as Star 7's agent (Pl.'s Resp. at 7). While defendants do not admit that Mr. Reed was an agent of Star 7, they argue, for purposes of their motion, that even if Mr. Reed was an agent of Star 7, his contacts with Illinois were too limited to establish specific jurisdiction (doc. # 42: Defs.' Reply at 5 n.2). We agree, that Mr. Reed's actions fail to advance plaintiff's effort to establish personal jurisdiction over Star 7.

work are not important to Eclipse's claims as there is no [*15] issue as to the scope or quality of the Upgrade, and plaintiff does not contend that any documents relevant to the lawsuit are located in Illinois. Rather, the issue in Eclipse's lawsuit is defendants' actions in selling the Aircraft with the Upgrade (while the Aircraft was located outside of Illinois) to a buyer located outside of Illinois in alleged violation of a provision in a Contract that was entered into outside Illinois, by non-Illinois parties.

Likewise, in [Citadel, 536 F.3d at 764](#), at issue was a contract for ongoing consulting, or administrative, services. The Seventh Circuit held that the defendant should have reasonably anticipated being haled into court in Illinois because the defendant authorized the Illinois-based plaintiff to begin project development, and the plaintiff proceeded to perform a series of administrative services almost entirely in Illinois. *Id.* By contrast, the Contract at issue in this case was for a one-time performance of an Upgrade to the Aircraft, and the Contract was silent as to the location of the Upgrade -- with no foreseeable (or, indeed, actual) contacts with Illinois beyond that.

What is directly related to the challenged conduct (allegedly jumping the gun on the sale [*16] of the Aircraft) is the Contract itself, which plaintiff says forbid that conduct. However, plaintiff has not offered evidence to show that the Contract was formed in Illinois. In determining whether specific jurisdiction exists in a breach of contract case, a court "must take into account prior negotiations, contemplated future consequences, the terms of the contract and the parties' course of actual dealing with each other" to determine whether the defendant purposefully has established minimum contacts within the forum. [Purdue, 338 F.3d at 781](#). "Illinois courts use a multi-factor test for determining whether personal jurisdiction exists in these types of situations. They consider '(1) who initiated the transaction; (2) where the contract was negotiated; (3) where the contract was formed; and (4) where performance of the contract was to take place.'" [Philos, 802 F.3d at 913](#) (quoting [Estate of Isringhausen ex rel. Isringhausen v. Prime Contractors & Assocs., Inc., 378 Ill. App. 3d 1059, 883 N.E.2d 594, 600-01, 318 Ill. Dec. 363 \(Ill. App. 2008\)](#)).

Eclipse, however, has not alleged or offered evidence to show that the Contract was initiated, negotiated, formed or executed in Illinois or that any payments made pursuant to the Contract were sent to Illinois (Defs.' Mem. at 9). Indeed, the evidence shows that the

payment for the Upgrade was sent to a bank in California (Neild Deck, ¶ 15; Ex. [*17] B6).⁴ Nor does plaintiff allege that Culbertson Contractors and Mr. Davis initiated, negotiated, formed or executed the agreement to purchase Star 7 in Illinois. And, as to the place of performance, the Contract did not require the Upgrade to be performed in Illinois.⁵ While Mr. Culbertson met with Mr. Ross in Illinois in January 2013 before deciding to purchase Star 7, these were not contract negotiations with Eclipse. The agreement to

⁴ Although Eclipse does not allege in its Amended Complaint or in its Response brief that Star 7 took any action in connection to Illinois with regard to the formation of the Contract in May 2011, we note that in his affidavit, Mr. Neild said that the Work Order Authorization was executed and provided to Eclipse's Wheeling facility (Neild Decl., ¶ 5). However, Mr. Neild does not state where Star 7 signed the Contract, and the Contract does not specify in which state the Contract was executed, formed or signed. The simple fact that the Contract was provided to the Illinois [*18] facility does not provide support for plaintiff's argument that Star 7 had the necessary minimum contacts with Illinois. See, e.g., [Reserve Capital, LLC v. CLB Dynasty Trust 2002, No. 05 C 6556, 2006 U.S. Dist. LEXIS 30093, 2006 WL 1037321, at *7 \(N.D. Ill. Apr. 17, 2006\)](#) (where the defendants signed the contracts in a state other than Illinois, then forwarded them to the plaintiff for its signature in Illinois, that factor alone is not enough to tilt the balance in favor of asserting personal jurisdiction). In this case, unlike [Reserve Capital](#), there is no evidence that the Contract was even signed in Illinois, and thus no evidence that any contractual event of import was connected to Illinois.

⁵ Plaintiff also argues that this Court should attribute Star 7's contacts with Illinois to Mr. Culbertson and Culbertson Contractors because of its claims in Count II, that Star 7's veil should be pierced because its corporate form was illegal under Illinois and federal aviation law (Pl.'s Resp. at 9-13). Although due process generally requires that each defendant's contacts with the forum state be assessed individually, see [Purdue, 338 F.3d at 784-85](#), courts may "impute a shell corporation's contacts with a State to a shareholder who exercises 'an abnormal level of involvement or control' over the corporation's affairs." [Riverdale Plating & Heat Treating, LLC v. Andre Corp., No. 15 C 3255, 2015 U.S. Dist. LEXIS 138282, 2015 WL 5921896, at *4 \(N.D. Ill. Oct. 9, 2015\)](#) (quoting [*19] [KM Enters., Inc. v. Global Traffic Techs., Inc., 725 F.3d 718, 733-34 \(7th Cir. 2013\)](#)) (holding that fact that individual defendant was corporation's president and sole shareholder was not enough to subject individual to personal jurisdiction in Illinois, as shareholders do not inherit a corporation's contacts with a State). Here, however, we need not reach the merits of plaintiff's veil piercing argument because Star 7 itself does not have sufficient contacts with Illinois to be subject to specific jurisdiction in this state.

purchase Star 7 was signed between Mr. Davis and Mr. Culbertson, and the Contract for the Upgrade had been entered into by Mr. Davis and Eclipse more than one and a half years earlier.

B.

Moreover, defendants' contacts with Illinois cannot be considered "substantial." Defendants did not, through the contacts listed above, "deliberately engage[] in significant activities within" Illinois. [Purdue, 338 F.3d at 781](#). The Seventh Circuit's opinion in [Philos](#) granting the defendants' motion to dismiss for lack of personal jurisdiction is instructive.

In that case, the plaintiff, an Illinois corporation, sued the defendants, a Korean company and Korean citizens, for breach of contract for unlawfully retaining equipment that the plaintiff had contracted to ship to the Korean company. [Philos, 802 F.3d at 908](#). The Seventh Circuit described the Korean defendants' contacts with Illinois, including a tour of the plaintiff's Illinois facilities before the contract was signed, as "mostly incidental [*20] interactions." [Id. at 914-15](#). The contract at issue was "neither highly structured nor long-lasting; instead, it was in essence a contract for the provision of goods to a Korean company." [Id. at 915](#). The court held that the fact that the plaintiff produced those goods in Illinois -- even if at the behest of the defendant -- was "largely incidental to the jurisdictional analysis." [Id.](#) The court reasoned that the *Philos* defendants "neither solicited the Illinois company to enter into an agreement nor travelled to the state for the purpose of conducting business with that company." [Id.](#) Cf. [Eagle Air Transp., Inc. v. Nat'l Aerotech Aviation Delaware, Inc., 75 F. Supp. 3d 883, 889-90 \(N.D. Ill. 2014\)](#) (specific jurisdiction in Illinois was present where the Delaware defendant initiated contact with the Illinois plaintiff to sell the plaintiff an airplane, and the Delaware defendant knew that if the aircraft needed warranty work in the future, such work would -- and did -- take place in Illinois).

Like the contract in [Philos](#), in this case, the Contract between Eclipse and Star 7 was a straightforward contract to purchase an Upgrade for the Aircraft at a discounted price. That the plaintiff performed the Upgrade in Illinois is largely incidental to this Court's jurisdictional analysis and defendants here had very few other [*21] contacts with Illinois. One such contact was when Mr. Culbertson traveled to Eclipse's Illinois maintenance facility and discussed with Mr. Ross the possibility that Culbertson Contractors would purchase

Star 7. However, as in *Philos*, defendants did not solicit Eclipse to enter into an agreement or conduct business with Eclipse; rather, the discussions were preliminary to Mr. Culbertson's decision to have Culbertson Contractors purchase Star 7, and tangential to the Contract regarding the Upgrade.

b.

Eclipse also argues that the choice of law, choice of venue, and arbitration provisions in the Contract made it foreseeable to defendants that they could be haled into court in Illinois, and that personal jurisdiction in this Court is thus proper (Pl.'s Resp. at 6). We first consider plaintiffs reliance on the choice of law and venue provisions.

Paragraph 15 of the Contract, entitled "Applicable Law and Attorneys Fees" states, in relevant part, that: "This Order shall be construed, interpreted and enforced in accordance with the laws of the State of Illinois exclusive of any choice of law rule of that State, or any other Jurisdiction which could cause any other matter to be referred to the [*22] law or jurisdiction other than that State. Customer agrees that its sole choice of venue to bring any action against EAI [Eclipse] shall reside in the county of Cook, state of Illinois . . ." (Contract, ¶ 15).

"[C]hoice of law provisions may be some indication that a defendant purposefully has availed itself of the protection of the laws of a particular jurisdiction . . ." [Purdue, 338 F.3d at 786-87](#) (citing [Burger King, 471 U.S. at 482](#)). However, in this case, there are several reasons why we do not find the choice of law or choice of venue clause to be an indication that defendants established minimum contacts with the State of Illinois.

First, while the choice of venue clause states that Star 7 may only bring an action under the Contract against Eclipse in Cook County, Illinois, the Contract is silent on where Eclipse may bring an action against Star 7 (Contract, ¶ 15). In Illinois, "there is a presumption against provisions that easily could have been included in a contract but were not." [Thompson v. Gordon, 241 Ill. 2d 428, 948 N.E.2d 39, 51, 349 Ill. Dec. 936 \(Ill. 2011\)](#). The parties easily could have mandated a choice of venue for Eclipse as well as Star 7, but they did not, and "a court cannot alter, change or modify existing terms of a contract or add new terms or conditions to which the parties do not appear to have assented, [*23] write into the contract something which the parties have omitted[,] take away something which the parties have included . . . [or] add another term about which the agreement is silent." [Gallagher v. Lenart, 367 Ill. App.](#)

[3d 293, 854 N.E.2d 800, 807, 305 Ill. Dec. 208 \(Ill. App. 2006\)](#) *aff'd*, [226 Ill. 2d 208, 874 N.E.2d 43, 314 Ill. Dec. 133 \(Ill. 2007\)](#). Thus, we find that the Contract's silence on a choice of venue for an action brought by Eclipse, in contrast to the clause mandating that Star 7 bring suit in Illinois, undermines plaintiff's argument that defendants should have known that they could be haled into court in Illinois.⁶

Second, the Contract contemplates that lawsuits could be brought in jurisdictions outside of Illinois. It states that Illinois law applies regardless of the choice of law rule in the Illinois court "or any other Jurisdiction . . ." (Contract, ¶ 15). "A contract must be construed as a whole, viewing each provision in light of the other provisions," and "contracts should not be construed in a manner that would nullify or render provisions meaningless." [United States v. Rogers Cartage Co., 794 F.3d 854, 861 \(7th Cir. 2015\)](#) (citing [Thompson, 948 N.E.2d at 47](#)). If, as plaintiff contends, the choice of venue as Illinois was obvious from the terms of the Contract, [*24] the clause about "any other Jurisdiction" would not be necessary. Yet, no one would assert that this clause made it reasonable for defendants to expect that they could be sued by Eclipse in every state in the Union. Therefore, we do not find that the terms of the Contract put defendants on notice that they could be subject to jurisdiction in Illinois.

The arbitration clause provides no better support for plaintiff's attempt to establish specific personal jurisdiction. We recognize that the arbitration clause mandates that any arbitration take place in Illinois unless the parties agree otherwise. However, an agreement to arbitrate in a particular jurisdiction is different than an agreement to be amenable to suit in a particular jurisdiction or court. A party may consent to a speedy and streamlined arbitration in a particular jurisdiction when it would not agree to travel to that jurisdiction to engage in full-blown litigation in federal or state court.

Indeed, we know of no court that has held that a defendant who agrees to arbitrate in a particular forum also consents to litigate in that forum. Rather, courts in this district have concluded that an agreement to

arbitrate in a particular [*25] forum is not sufficient to establish personal jurisdiction over a lawsuit filed in that forum. See, e.g., [Guaranteed Rate, Inc. v. Lapham, No. 12 C 6776, 2012 U.S. Dist. LEXIS 174851, 2012 WL 6138947, at *2 \(N.D. Ill. Dec. 6, 2012\)](#) (Kennelly, J.); [United Fin. Mortg. Corp. v. Bayshores Funding Corp., 245 F.Supp.2d 884, 892-93 \(N.D. Ill. 2002\)](#) (St. Eve, J.). Thus, we will not infer that by agreeing to arbitrate in Illinois, Star 7 would foresee that it could be sued in an Illinois court, particularly where: (1) the Contract specifies where Star 7 may sue Eclipse, but not where Eclipse may sue Star 7; (2) the arbitration agreement is set forth in a form agreement prepared by Eclipse, without any evidence that this term was a subject of negotiation; and (3) the Contract could have included a forum selection clause for litigation brought by Eclipse, but did not do so.

IV.

The foregoing analysis focuses on plaintiff's contract claim. Plaintiff also alleges that Mr. Culbertson and Culbertson Contractors committed a tort by intentionally interfering with the Contract when they sold the Aircraft with the Upgrade prior to the expiration of 24 months, in express violation of the Contract (Am. Compl., ¶¶ 78-82, 85). Plaintiff claims that defendants unjustly profited from the sale of the Aircraft while causing harm to plaintiff's reasonable expectation to enter into future business relationships (*Id.*).

Our analysis [*26] explaining why there is no specific personal jurisdiction for the contract claim applies to the tort claim. In *Philos*, the Seventh Circuit explained that its conclusion that there was no personal jurisdiction "would remain the same if [they] read Philos Tech's complaint to raise a claim of conversion, rather than breach of contract," because the same contacts of the defendant with the forum state were at issue in both the contract and the tort claims: "as we have just discussed, the defendants did not have sufficient contacts with Illinois such that the exercise of personal jurisdiction over them would conform to constitutional standards. Philos Tech cannot avoid that conclusion by a simple shift in the state-law theory that supports its claim." *Id.*⁷

⁶ By contrast, in [Keller v. Henderson, 359 Ill. App. 3d 605, 834 N.E.2d 930, 932-33, 937, 296 Ill. Dec. 125 \(Ill. App. 2005\)](#), a case heavily cited by plaintiff, the contract provided that any disputes arising out of the contract "shall be" litigated in Illinois.

⁷ Again, the case cited by plaintiff, [Keller, 834 N.E.2d at 933, 937-38](#), is distinguishable. In *Keller*, the Illinois Appellate Court held that it had personal jurisdiction over the defendant because the defendant sought and hired an Illinois resident to fly an airplane that the plaintiff alleged was unsafe, resulting in the Illinois resident's death.

Moreover, plaintiff's effort to establish personal jurisdiction for the tort claim fails for an additional reason. "Illinois [*27] courts have stated that they may exercise personal jurisdiction over defendants in tort suits 'if the defendant performs an act or omission that causes an injury in Illinois and the plaintiff alleges the act was tortious in nature.'" [Philos, 802 F.3d at 915](#) (quoting [Kalata v. Healy, 312 Ill. App. 3d 761, 728 N.E.2d 648, 653, 245 Ill. Dec. 566 \(Ill. App. 2000\)](#); [735 ILCS 5/2-209\(a\)\(2\)](#)). In this case, Eclipse alleges only an economic injury. As Eclipse has no contacts with Illinois besides its maintenance hangar, we do not find persuasive Eclipse's contention that the injury allegedly caused by defendants occurred or was felt in Illinois — as opposed to where the company and its finances are based. The Seventh Circuit has stated that for a tort claim to be the basis for personal jurisdiction in Illinois, it requires a forum-state injury and "something more" directed at that state, such as if the defendant acted with the purpose of interfering with sales originating in Illinois. [Tamburo, 601 F.3d at 702](#). That "something more" is not present in this case.

Based on the totality of these considerations, we conclude that Eclipse has failed to make a *prima facie* showing of specific jurisdiction over any of the defendants in this case. "The record simply will not support the conclusion that [defendants] purposefully availed [themselves] of the benefits [*28] of conducting business in [Illinois] with respect to this litigation." [Purdue, 338 F.3d at 786-87](#).⁸

⁸ Both parties also separately address the question of whether exercising personal jurisdiction would "offend traditional notions of fair play and substantial justice" (Pl.'s Resp. at 14-15; Defs.' Mem. at 14-15). However, this question is not separate from the minimum contacts analysis. As the Supreme Court explained in *International Shoe*, a court may exercise personal jurisdiction over an out-of-state defendant when that defendant has "minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." [Int'l Shoe, 326 U.S. at 316](#). Where, as in this case, the defendants do not have minimum contacts (as the case law has defined and developed this phrase over the last 70 years) with Illinois, then an exercise of personal jurisdiction by this court *would* offend traditional notions of fair play and substantial justice. As such, we need not separately address the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in [*29] obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental

CONCLUSION

For the foregoing reasons, defendants' [Rule 12\(b\)\(2\)](#) motion is granted (doc. # 19). The claims are dismissed without prejudice. See [Sikhs for Justice v. Badal, 736 F.3d 743, 751 \(7th Cir. 2013\)](#) (a dismissal for want of personal jurisdiction is without prejudice, "[f]or without personal jurisdiction, a court has no authority to adjudicate a case on the merits").

ENTER:

/s/ Sidney I. Schenkier

SIDNEY I. SCHENKIER

United States Magistrate Judge

DATE: March 3, 2016

substantive social policies." [Tamburo, 601 F.3d at 709](#) (quoting [Burger King, 471 U.S. at 477](#)). Because defendants do not have minimum contacts with Illinois, these factors would weigh in favor of not subjecting defendants to the jurisdiction of this Court.

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APPENDIX 5

[Fluke Elecs. Corp. v. CorDEX Instruments, Inc.](#)

United States District Court for the Western District of Washington

February 13, 2013, Decided; February 13, 2013, Filed

CASE NO. C12-2082JLR

Reporter

2013 U.S. Dist. LEXIS 19540; 2013 WL 566949

FLUKE ELECTRONICS CORPORATION, Plaintiff, v. CORDEX INSTRUMENTS, INC., et al., Defendants.

Subsequent History: Motion to strike denied by, Motion denied by [Fluke Elecs. Corp. v. Cordex Instruments, Inc., 2013 U.S. Dist. LEXIS 80628 \(W.D. Wash., June 7, 2013\)](#)

Counsel: [*1] For Fluke Electronics Corporation, Plaintiff: Jason P Stiehl, Michael D. Wexler, LEAD ATTORNEYS, PRO HAC VICE, CHICAGO, IL; Zachary Tomlinson, LEAD ATTORNEY, DAVIS WRIGHT TREMAINE (SEA), SEATTLE, WA; Gregory A Hendershott, DAVIS WRIGHT TREMAINE (BELL), BELLEVUE, WA.

For Cordex Instruments Inc, a North Carolina corporation, Scott Lang, Gregg Purple, Defendants: Ralph Ritch Roberts, III, LEAD ATTORNEY, PRO HAC VICE, HELMS ROBERTS & DIAZ LLP, DALLAS, TX; Steven W Fogg, CORR CRONIN MICHELSON BAUMGARDNER & PREECE, SEATTLE, WA.

Judges: JAMES L. ROBERT, United States District Judge.

Opinion by: JAMES L. ROBERT

Opinion

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR EXPEDITED DISCOVERY

I. INTRODUCTION

Before the court are (1) Defendants CorDEX Instruments, Inc. ("CorDEX"), Scott Lang, and Gregg Purple's motion to dismiss the complaint for lack of personal jurisdiction and improper venue (Dkt. # 12), and (2) Plaintiff Fluke Electronics Corporation's ("Fluke")

motion for expedited discovery (Dkt # 9). The court has considered the motions, all of the parties' submissions filed in support and opposition thereto, the balance of the record, and the applicable law.¹ Being fully advised, the court DENIES Defendants' [*2] motion to dismiss and Fluke's motion for expedited discovery.

II. BACKGROUND

The following facts are taken from the complaint and are presumed to be true for purposes of the motion to dismiss. Fluke manufactures, distributes, and services electronic test tools and software. (Compl. (Dkt. # 1) ¶ 15.) Although its headquarters are in Everett, Washington, Fluke has offices throughout the world. (*Id.* ¶ 17.) Part of Fluke's business includes a market segment known as thermography, or the study of the radiation emitted by objects. (*Id.* ¶ 21.)

In December 2008, Fluke acquired Hawk IR ("Hawk"), a British company involved in the manufacture and sale of thermal windows designed for infrared inspection of switchgear boxes, as well as the camera designed to aid in such inspections. (*Id.* ¶¶ 1, 28.) Prior to its acquisition of Hawk IR, Fluke manufactured and sold thermal imaging cameras to the thermography market segment, which allowed technicians to study and isolate problems in visible locations. (*Id.* ¶ 22.) In some circumstances, however, such as with switchgears [*3] or transformers, a technician may not be able to access a trouble spot safely. (*Id.*) Using intelligent infrared windows, or IR windows, a technician can take infrared readings without entering a potentially dangerous location. (*Id.*) Thus, in 2008, Fluke identified the IR window as a natural addition to its product line, which culminated in the purchase of Hawk in December 2008, including all of Hawk's assets and intellectual property. (*Id.* ¶¶ 25, 28.) Fluke also retained key Hawk

¹ No party has requested oral argument, and the court deems it to be unnecessary with respect to the disposition of the referenced motions.

employees including Hawk's owner/operator, Tony Holliday, and Defendants Lang and Purple, who were retained as sales managers. (*Id.* ¶¶ 27, 31, 53.) Defendants Lang and Purple entered into non-solicitation/non-competition and confidentiality agreements with Fluke. (*Id.* ¶¶ 54-56.)

Fluke alleges that Mr. Holliday never intended to actually let go of the business he had developed in Hawk. (*Id.* ¶ 2.) Instead, Fluke alleges that Mr. Holliday immediately began efforts to create a new business with his former outside counsel, Gary Copeland, to compete with Hawk and offer the same products. (*Id.* ¶¶ 2, 48-52.) Fluke also alleges that Mr. Holliday made little effort to expand Fluke's business during his three-year contract [*4] with Fluke. (*Id.* ¶ 2, 37-46.) Within two months Fluke's purchase of Hawk, Mr. Copeland had formed CorDEX which manufactured photographic and cinematographic equipment. (*Id.* ¶ 50.)

In 2011, Mr. Holliday's employment with Fluke ended. (See *id.* ¶¶ 44-47, Ex. A.) Almost immediately after leaving Fluke, CorDEX appointed Mr. Holliday to the position of Managing Director. (*Id.* ¶ 52.) Fluke alleges that Mr. Holliday was working behind the scenes during his employment with Fluke to recreate the thermal IR window market for CorDEX using Fluke's intellectual property thereby undercutting the business he sold to Fluke. (*Id.* ¶ 5, see *id.* ¶¶ 62-67.) In addition, Mr. Holliday recruited Mr. Lang and Mr. Purple from Fluke, despite knowing that they had signed non-compete and confidentiality agreements which prohibited them from engaging in the activity for which Mr. Holliday hired them. (*Id.* ¶ 6, see *id.* ¶¶ 66-67.)

Fluke filed suit against CorDEX, Mr. Lang, and Mr. Purple on November 28, 2011. (See *generally id.*) In its complaint, Fluke asserts causes of action for misappropriation of trade secrets against all defendants (*id.* ¶¶ 68-76), interference with prospective business advantage against CorDEX [*5] and Mr. Purple (*id.* ¶¶ 77-82), and breach of contract against Mr. Purple and Mr. Lang (*id.* ¶¶ 83-88).

On December 6, 2012, Fluke moved for expedited discovery against CorDEX. (See *generally* Disc. Mot. (Dkt. # 9).) Defendants did not immediately respond to Fluke's motion. Rather, on December 21, 2012, Defendants filed their own motion for dismissal based on lack of personal jurisdiction and venue. (See *generally* Mot. to Dismiss (Dkt. # 12).) Fluke timely responded to Defendants' motion to dismiss. (Resp. (Dkt. # 14).) Defendants ultimately filed a response to

Fluke's motion for expedited discovery on January 29, 2012. (Disc. Resp. (Dkt. # 20).)²

III. ANALYSIS

A. Personal Jurisdiction

As Plaintiff, Fluke bears the burden of establishing that personal jurisdiction exists with respect to Defendants. See, e.g., [Zigler v. Indian River Cnty.](#), 64 F.3d 470, 473 (9th Cir. 1995). Because the court is resolving the motion to dismiss without holding an evidentiary hearing,³ Fluke "need make only a prima facie showing of jurisdictional facts to withstand the motion." [Wash. Shoe Co. v. A-Z Sporting Goods, Inc.](#), 704 F.3d 668, 2012 U.S. App. LEXIS 25667, 2012 WL 6582345, at *2 (9th Cir. 2012); [Ballard v. Savage](#), 65 F.3d 1495, 1498 (9th Cir. 1995). That is, Fluke "need only demonstrate facts that if true would support jurisdiction over [Defendants]." *Id.*; see [Bancroft & Masters, Inc. v. Augusta Nat'l Inc.](#), 223 F.3d 1082, 1085 (9th Cir. 2000) ("Where . . . the district court does not hold an evidentiary [*7] hearing but rather decides the jurisdictional issue on the basis of the pleadings and supporting declarations, we will presume that the facts set forth therein can be proven.").

In addition to Fluke's complaint, the parties have submitted affidavits both in support and opposition to the motion. (See, e.g., Maday Aff. (Dkt. # 15); Purple Aff. (Dkt. # 12-1 (Ex. A)); Lang Aff. (Dkt. # 12-1(Ex. B)); Holliday Aff. (Dkt. # 12-1(Ex. C)); Purple Aff. II (Dkt. # 17-1).) In determining whether Fluke has met its burden of making a prima facie showing of jurisdictional facts, the court considers uncontroverted allegations in Fluke's

² Defendants assert that Fluke did not properly serve its motion for expedited discovery and accordingly Defendants were under no obligation to respond. (Disc. Resp. at 1, n.1.) Defendants nevertheless did ultimately respond "because they would prefer to move forward and resolve this issue on the merits." (*Id.*) Fluke disputes Defendants' assertions concerning improper service and argues that Defendants' response was due no later than December 12, 2012. (Disc. Reply (Dkt. # 23) at 2, n.2.) Because Defendants' response was untimely (in Fluke's view), [*6] Fluke asserts that Defendants' response should be struck. (*Id.*) Fluke, however, has had an opportunity to file a reply memorandum to Defendants' response. (See *generally id.*) Thus, even assuming Defendants filed their response late, Fluke has suffered no prejudice. Accordingly, the court exercises its discretion to consider Defendants' responsive memorandum and other submissions.

³ No party has requested an evidentiary hearing.

complaint as true, and resolves conflicts between facts contained in the parties' affidavits in Fluke's favor. See [Doe v. Unocal Corp.](#), 248 F.3d 915, 922 (9th Cir. 2001); [AT & T v. Compagnie Bruxelles Lambert](#), 94 F.3d 586, 588 (9th Cir. 1996).

Because there is no federal statute that governs personal jurisdiction in this case, Washington State's long-arm rule applies. [Wash. Shoe](#), [F.3d](#), 2012 U.S. App. LEXIS 25667, 2012 WL 6582345, at *2. Washington's long-arm statute extends jurisdiction over a defendant to the fullest extent permitted by the [*8] *Due Process Clause of the Fourteenth Amendment*. *Id.* (citing [RCW 4.28.185](#); [Shute v. Carnival Cruise Lines](#), 113 Wn.2d 763, 783 P.2d 78, 82 (Wash. 1989)). Because Washington's long-arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional analysis under state law and with respect to federal due process are the same. [AT & T Co. v. Compagnie Briaelles Lambert](#), 94 F.3d 586, 588 (9th Cir. 1996). "The relevant question, therefore, is whether the requirements of due process are satisfied by the exercise of personal jurisdiction over [Defendants] in Washington." *Id.* Federal due process requires that a defendant have sufficient minimum contacts with the forum state that the exercise of personal jurisdiction will not offend traditional notions of fair play and substantial justice. See [Int'l Shoe Co. v. Washington](#), 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

Fluke does not attempt to argue that the court may exercise general personal jurisdiction over Defendants. (See Resp. at 6.) "For general jurisdiction to exist, a defendant must engage in 'continuous and systematic general business contacts,' . . . that 'approximate physical presence' in the forum state." [Marvix Photo, Inc. v. Brand Technologies, Inc.](#), 647 F.3d 1218, 1223-24 (9th Cir. 2011) [*9] (quoting [Helicopteros Nacionales de Colombia, S.A. v. Hall](#), 466 U.S. 408, 416, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984); [Bancroft & Masters, Inc.](#), 223 F.3d at 1086). "The standard for general jurisdiction 'is an exacting standard, as it should be, because a finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world.'" *Id.* at 1224 (quoting [Schwarzenegger v. Fred Martin Motor Co.](#), 374 F.3d 797, 801 (9th Cir. 2004)). Fluke acknowledges that Defendants' contacts with Washington State are not "so substantial, continuous and systematic that [Defendants] can be deemed to be present in the forum for all purposes." (Resp. at 6 (quoting [Menken v. Emm](#), 503 F.3d 1050, 1057 (9th Cir. 2007).))

Rather, Fluke asserts that the relationship between Defendants' forum contacts and Fluke's claims provides a basis for the court's exercise of specific personal jurisdiction. (Resp. at 6.) The Ninth Circuit applies a three-part test for specific jurisdiction. Specific personal jurisdiction exists if (1) the defendant purposefully directs his activities or consummates some transaction with the forum or a resident thereof, or performs some act by which [*10] he purposefully avails himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws, (2) the claim arises out of or relates to the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable. See, e.g., [CollegeSource, Inc. v. AcademyOne, Inc.](#), 653 F.3d 1066, 1076 (9th Cir. 2011); see also [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 472-76, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). Fluke bears the burden of establishing the first two prongs. [CollegeSource, Inc.](#), 653 F.3d at 1076. The burden then shifts to Defendants to set forth a "compelling case" that the exercise of jurisdiction would be unreasonable. *Id.* (quoting [Rudzewicz](#), 471 U.S. at 476-78). The court will address each of the three factors.

1. Purposeful Activities or Direction

The first prong of the specific personal jurisdiction test refers to both purposeful direction and purposeful availment. Although often "clustered together under a shared umbrella," purposeful availment and purposeful direction "are, in fact, two distinct concepts." [Brayton Purcell LLP v. Recordon & Recordon](#), 606 F.3d 1124, 1128 (9th Cir. 2010) (quoting [Pebble Beach Co. v. Caddy](#), 453 F.3d 1151, 1155 (9th Cir. 2006)). [*11] A purposeful availment analysis is most often used in suits sounding in contract, and a purposeful direction analysis is used in suits sounding in tort. [Schwarzenegger](#), 374 F.3d at 802. Fluke has brought intentional tort claims against all three defendants, including misappropriation of trade secrets against all Defendants (Compl. ¶¶ 68-76) and interference with prospective business advantage against CorDEX and Mr. Purple (*id.* ¶¶ 77-82). Fluke has asserted a breach of contract claim against only Mr. Purple and Mr. Lang (*id.* ¶¶ 83-88). Accordingly, the court considers the purposeful direction analysis.⁴

In tort cases, the court inquires whether a defendant

⁴ The court notes that the first prong is satisfied by a finding of either purposeful availment or purposeful direction. See [Brayton Purcell](#), 606 F.3d at 1128.

purposefully directs his activities at the forum state and applies an "effects" test that focuses on the forum in which the defendant's actions were felt, whether or not the actions themselves occurred within the forum. [CollegeSource, 653 F.3d at 1077](#). The "effects" test requires that "the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at [*12] the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Id.* (citing [Brayton Purcell, 606 F.3d at 1128](#)).

a. Intentional Acts

The first element of the effects test, the "intentional act" requirement, "refer[s] to an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act." [Brayton Purcell, 606 F.3d at 1128](#). Fluke has alleged that CorDEX "is utilizing [Fluke's] confidential information regarding sales opportunities in the Houston market to interfere with prospective Fluke business, targeting a customer about which CorDex would not have known but for its improper hiring of Purple and Lang and using information gained from those gentlemen related to that opportunity." (Compl. ¶ 67.) In addition, Fluke alleges that "CorDex, Purple and Lang have improperly gained access to [Fluke's] confidential and proprietary information and threaten[ed] to use, or ha[ve] actually used, Fluke's trade secrets." (*Id.* ¶ 71.) Further, Fluke alleges that "CorDex and Purple intentionally and without justification contacted and induced Fluke's existing and potential customers to not contract [*13] with Fluke, but with CorDex, and attempted to divert that business and those contractual arrangements to [their own] benefit" (*Id.* ¶ 81.) Such allegations satisfy the first prong of the effects test.

Defendants assert that "[t]here is neither allegation nor evidence to suggest that Lang and Purple learned any of the alleged trade secrets in Washington State." (Mot. to Dismiss at 12.) Further, Defendants asserts that "any alleged misuse of Fluke's trade secrets would have occurred, if at all, . . . where Purple and Lang currently live and work," specifically in Texas and Illinois. (*Id.*) Contrary to Defendants' argument, there is no requirement that the alleged intentional act occurs within Washington. See, e.g., [Sleep Science Partners v. Lieberman, No. C 09-04200 CW, 2009 U.S. Dist. LEXIS 117932, 2009 WL 4251322, at *3 \(N.D. Cal. Nov. 23, 2009\)](#) ("[T]he effects test does not require that the intentional act be committed in the forum, only that the wrongful conduct individually target a known forum resident.") (citing [Bancroft & Masters, 223 F.3d at 1087](#);

[Brainerd v. Governors of the Univ. of Alberta, 873 F.2d 1257, 1259-60 \(9th Cir. 1989\)](#) (holding that Arizona court had jurisdiction over Canadian residents [*14] who, in response to calls directed at them in Canada, made defamatory statements about a person they knew resided in Arizona)). Thus, the court finds that Fluke has met its burden with respect to the first prong of the effects test - that each defendant has committed an alleged intentional act. See, e.g., [Glud & Marstrand A/S v. Microsoft Corp., No. C05-01563RSM, 2006 U.S. Dist. LEXIS 62363, 2006 WL 2380717, at *5 \(W.D. Wash. Aug. 15, 2006\)](#) (plaintiff satisfied the "intentional act" requirement of the effects test by alleging that defendant disclosed plaintiff's proprietary information after agreeing to keep it confidential); [Menken, 503 F.3d at 1059](#) (plaintiff satisfied intentional act requirement by alleging that defendant intentionally interfered with plaintiff's contractual relations).

Defendants nevertheless argue that Fluke cannot establish that CorDEX committed an intentional act because CorDEX "exists solely to facilitate payroll to employees of CorDEX Ltd. in the United States and to receive payments on behalf of CorDEX Instruments Ltd." (Holliday Aff. (Dkt. # 12-1) ¶ 3.) After leaving Fluke, Mr. Lang and Mr. Purple state that they began working not for CorDEX Instruments, Inc. (the named defendant in [*15] this action), but rather for CorDEX Instruments, Ltd. (See Purple Aff. (Dkt. # 12-1) ¶¶ 6, 16-17; Lang Aff. (Dkt. # 12-1) ¶¶ 6, 15-17.) Defendants provide testimony that the named defendant—CorDEX Instruments, Inc.—has no employees, sells no products, maintains no contacts with distributors, has no customers or potential customers, does not solicit business, does not earn revenue, does not build or develop any products, does not own intellectual property or equipment, and has never done business in Washington State. (*Id.* ¶¶ 4-18.)

In contravention of this testimony, Fluke provides an affidavit in which a Fluke employee states that "Fluke learned that Cordex [Instruments, Inc.] is utilizing Fluke's confidential information regarding sales opportunities . . . to interfere with prospective Fluke business, targeting an employee about which Cordex would not have known but for its improper hiring of Purple and Lang, and using information gained from those gentlemen related to that opportunity." (Maday Aff. (Dkt. # 15) ¶ 12.)⁵ In addition, Fluke provides

⁵ Defendants also argue that Mr. Maday's affidavit is inadmissible because it is not based solely on his personal knowledge. (Reply (Dkt. # 17) at 6-7.) Defendants assert that

testimony that Cordex Instruments, Inc. "improperly gained access to and/or utilized Fluke's confidential and proprietary information and [*16] threaten [sic] to use, or have actually used such information to harm Fluke." (Id. ¶ 13.) Finally, Fluke also provides testimony that "Cordex [Instruments, Inc.] . . . intentionally . . . contacted and induced Fluke's existing and potential customers to not contract with Fluke, but with Cordex [Instruments, Inc.], and attempted to divert that business and those contractual arrangements . . ." (Id. ¶ 14.) Thus, the dueling affidavits provided by Fluke and Defendants create disputed issues of fact, which in the context of this motion must be decided in Fluke's favor. See [Unocal Corp., 248 F.3d at 922](#).⁶

b. Expressly Aimed at the Forum State

The second prong of the effects test is that Defendants' acts must have been expressly aimed at the forum state. This requirement is satisfied "when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." [Washington Shoe, ___ F.3d ___, 2012 U.S. App. LEXIS 25667, 2013 WL 6582345, at *5](#) [*18] ("We have repeatedly stated that the 'express aiming' requirement is satisfied, and specific jurisdiction exists, when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.") (internal quotations omitted) (citing [Dole Food Co. v.](#)

Mr. Maday's entire affidavit is disqualified by the statement in paragraph four—that "[b]ased on my personal knowledge and on information that has been provided to me, the allegations contained in Fluke's Complaint are true and accurate." (Id. (citing Maday Aff. ¶ 4).) The court disagrees. Although paragraph 4 of the affidavit may be inadmissible, the remainder of Mr. Maday's affidavit is not. In paragraph one, [*17] Mr. Maday states, "If called as a witness in this case, I could competently testify on personal knowledge to the facts below." (Maday Aff. ¶ 1.) Accordingly, Mr. Maday's statement in paragraph four concerning the basis of his knowledge qualifies his statement in that paragraph only, but not his entire affidavit. Mr. Maday's statement in paragraph one is sufficient to establish that he made the remainder of the statements in his affidavit based on his personal knowledge. Although the court disregards paragraph four of Mr. Maday's affidavit, it declines to accept Defendants' argument that the entirety of Mr. Maday's affidavit is inadmissible.

⁶In any event, without deciding the issue, the court notes that if Fluke has used a misnomer with respect to one of the parties, the issue may be more appropriately decided under [Federal Rule of Civil Procedure 15\(c\)](#).

[Watts, 303 F.3d 1104, 1111 \(9th Cir. 2002\)](#)); see also [Bancroft & Masters, 223 F.3d at 1087](#) ("['E]xpress aiming' encompasses wrongful conduct individually targeting a known forum resident."); [Menken, 503 F.3d at 1059](#).

The Ninth Circuit has cautioned, however, that foreign acts with foreseeable effects in the forum state do not always give rise to personal jurisdiction. [Bancroft & Masters, 223 F.3d at 1087](#); see also [Schwarzenegger, 374 F.3d at 804-5](#). "Instead, . . . 'something more' is required to establish that the defendant expressly aimed its conduct at the forum." [Medinah Mining, Inc. v. Amunategui, 237 F.Supp.2d 1132, 1137 \(D. Nev. 2002\)](#). In order for the "express aiming" element of the effects test to be satisfied, the defendant must know that the plaintiff is a resident of the forum state and that the harm resulting from the intentional act will be suffered in the [*19] forum state. [Bancroft & Masters, 223 F.3d at 1087](#); [Medinah Mining, 237 F.Supp.2d at 1137](#); see also [Callaway Golf Corp. v. Royal Canadian Golf Ass'n, 125 F. Supp. 2d 1194, 1200-01 \(C.D. Cal. 2000\)](#).

Fluke is a Washington corporation with its principal place of business and headquarters located in Everett, Washington. (Compl. ¶ 9; Maday Aff. ¶ 5.) Thus, Fluke is a resident of Washington State. Both Mr. Purple and Mr. Lang, as former Fluke employees, knew that Fluke was headquartered in Washington, knew that Fluke conducted its business from Everett, Washington, and attended business meetings at Fluke's Washington headquarters several times a year. (Maday Aff. ¶¶ 8-9.) Indeed, both Mr. Purple and Mr. Lang have acknowledged traveling to Washington multiple times during their employment with Fluke. (Purple Aff. ¶ 13; Lang Aff. ¶ 13.) Although Mr. Lang and Mr. Purple may have worked in different parts of the country, the purpose of their activities on behalf of Fluke was to generate sales and business to benefit Fluke in Washington State. (Maday Aff. ¶ 7.) Further, Mr. Holliday, who is the Managing Director of CorDEX, also attended a high level strategy meeting at Fluke's headquarters in Washington [*20] State while he was employed by Fluke. (Maday Aff. ¶ 8.) Defendants' prior employment dealings with Fluke demonstrate that they knew Fluke to be located in Washington. See [Sky Capital Grp., LLC v. Rojas, No. 1:09-CV-00083-EJL, 2009 U.S. Dist. LEXIS 37132, 2009 WL 1197956, at *5 \(D. Idaho Apr. 30, 2009\)](#).

The allegations in this case are that Defendants accessed Fluke's proprietary information and trade secrets while they (or in CorDEX's case while its current

employees or agents) were employed at Fluke and later used this information to wrongfully compete with and inflict damage upon Fluke. (See *generally* Compl. ¶¶ 1-8, 15-76.) Defendants alleged actions were not merely contacts that could have foreseeable effects in Washington; they were intentional and aimed at a specific Washington company. Defendants allegedly used their former employment (or the former employment of CorDEX's current employees or agents) with a Washington company to access that company's trade secrets and then use that information to compete with the same Washington business. If true, it was foreseeable that their conduct would harm Fluke in Washington. "A defendant's acts are purposefully directed at [the forum state] if they were committed [*21] in order to compete against a plaintiff in [the forum state]." See *Alternative Legal Solutions, Inc. v. Ferman Mgmt. Servs., Corp.*, No. 07-880-ST, 2008 U.S. Dist. LEXIS 1051, 2008 WL 65584, at *6 (D. Or. Jan. 4, 2008). "For example, defendants [a]re subject to personal jurisdiction in [the forum state] if they s[ee]k to 'steal' confidential information and 'use[] trade secrets wrongfully in their position as a direct competitor of plaintiff.'" *Id.* (citing *Unicru, Inc. v. Brenner*, No. Civ. 04-248-MO, 2004 U.S. Dist. LEXIS 31743, 2004 WL 785276, at *8 (D. Or. Apr. 13, 2004)). Thus, the court is persuaded that Fluke has sufficiently established for purposes of responding to Defendants' motion to dismiss for lack of personal jurisdiction that Defendants "engaged in wrongful conduct targeted at a plaintiff whom the defendant[s] kn[ew] to be a resident of the forum state." *Washington Shoe Co.*, F.3d , 2012 U.S. App. LEXIS 25667, 2012 WL 6582345, at *5.⁷

c. Causing Harm in the Forum

Finally, Fluke must make a prima facie showing that Defendants' conduct "caused harm that they knew was likely to be suffered" in Washington. See *Brayton Purcell*, 606 F.3d at 1131. This third prong "is satisfied when [a] defendant's intentional act has foreseeable

⁷ See also *Brayton Purcell*, 606 F.3d at 1129-30 (finding the "express aiming" prong satisfied where a non-resident defendant knew of the plaintiff's existence in the forum state, targeted plaintiff's business, and entered into direct competition with the plaintiff); *Mont. Silversmiths, Inc. v. Taylor Brands, LLC*, 850 F. Supp. 2d 1172, 1182 (D. Mont. 2012) [*22] (finding conduct was expressly aimed at Montana where defendants, two of plaintiff's former employees, misappropriated trade secrets from plaintiff, a Montana corporation).

effects in the forum." *Id.* Fluke has alleged that it was injured in Washington as a result of Defendants' alleged acts. (Compl. ¶ 14.) Further, as discussed above, Defendants were aware that Washington State is Fluke's principal place of business. (See *Maday Aff.* ¶¶ 8-9.) The Ninth Circuit has "repeatedly held that a corporation incurs economic loss, for jurisdictional purposes, in the forum of its principal place of business." *CollegeSource*, 653 F.3d at 1077 (citing *Dole Food*, 303 F.3d at 1113-14; *Panavision Int'l, L.P. v. Toepfen*, 141 F.3d 1316, 1322 n. 2 (9th Cir. 1998); *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1487 (9th Cir. 1993)). In *Washington Shoe*, the Ninth Circuit explained that the defendant "knew or should [*23] have known that the impact of its willful infringement of [plaintiff's intellectual property] would cause harm to be suffered in the forum" because the plaintiff's principal place of business was in Washington. *Washington Shoe*, F.3d , 2012 U.S. App. LEXIS 25667, 2012 WL 6582345, at *9; see also *Sky Capital Grp.*, 2009 U.S. Dist. LEXIS 37132, 2009 WL 1197956, at *5. Thus, the court concludes that Fluke has met its burden of establishing that it suffered harm in Washington as a result of Defendants' alleged misappropriation of trade secrets and tortious interference, and that such harm was foreseeable.⁸

2. Claims Arise out of or Relate to Defendants' Forum Related Activities

The second part of the test for specific personal jurisdiction directs that the court must determine whether Fluke's claims "arise[] out of or relate[]" to the defendant's forum-related activities." *Washington Shoe*, F.3d , 2012 U.S. App. LEXIS 25667, 2012 WL 6582345, at *2. To do so, the Ninth Circuit has adopted a "but for" analysis. *Gordon*, 680 F. Supp. 2d at 1286. Thus, specific personal jurisdiction is proper only if "but for" Defendants' alleged Washington-related activities, Fluke's injuries would not have occurred. Based on the

⁸ In their reply memorandum, Defendants assert a variety of arguments concerning the quality of Fluke's allegations or the sufficiency of its evidence in support of its claims. (See Reply at 3-5, 7-10.) These issues go to the merits of Fluke's claims and are best resolved on a motion to dismiss based on *Federal Rule of Civil Procedure 12(b)(6)* or summary judgment under *Federal Rule of Civil Procedure 56*. See *Alternative Legal Solutions, Inc.*, 2008 U.S. Dist. LEXIS 1051, 2008 WL 65584, at *8. The standard applicable to Defendants' motion to dismiss based on lack of personal jurisdiction is different than either of those substantive motions, and as described in the [*24] body of this order, Fluke meets the applicable standard here.

discussion of the claims and Defendants' alleged conduct above, the court finds that Fluke satisfies the second part of the test for specific personal jurisdiction for each defendant.

3. Reasonableness of Exercising Jurisdiction

The burden now shifts to Defendants to "present a compelling case" that the exercise of jurisdiction over them would be "unreasonable and therefore violate due process." [CollegeSource, Inc., 653 F.3d at 1079](#). The court must determine whether the exercise of jurisdiction is reasonable looking at seven factors: (1) the extent [*25] of the defendants' purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Even though the court has already determined that Defendants purposefully directed their alleged tortious conduct at Washington State, the degree of interjection is nonetheless a factor in assessing the overall reasonableness of jurisdiction under this prong. [Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1132 \(9th Cir. 2003\)](#). Defendants assert that any purposeful interjection into Washington State's affairs was minor. (See Mot. to Dismiss at 17-18.) Defendants argue that "[a]t best, the facts show only that the Defendants wished to live their lives and conduct their ordinary business in other forums." (*Id.* at 18.) Defendants, however, are alleged to have stolen trade secrets from a Washington [*26] company while either they or one of their current employees were employed by that company. Further, Defendants, or their agents, are alleged to have travelled to Washington to attend meetings at the Washington company's headquarters while Defendants (or an agent thereof) were employed by the Washington company. This type of activity is sufficient to find that this factor weighs in favor of Fluke. See, e.g., [Alternative Legal Solutions, Inc., 2008 U.S. Dist. LEXIS 1051, 2008 WL 65584, at *9](#) (finding that purposeful interjection factor weighed in favor of plaintiff where defendants stole trade secrets from forum company but had only one meeting in the forum state "which created no continuing obligation with any [forum] residents," and had no other

physical contact with the forum state).⁹

Defendants also assert that the burden of proceeding in this forum is great because Mr. Lang and Mr. Purple are individuals [*27] living in Texas and CorDEX is a small company in comparison to Fluke. (Mot. to Dismiss at 18.) If this factor weighs in Defendants' favor, it does so only slightly. First, Defendants provide no evidence in support of this argument despite bearing the burden on this issue. Further, the Ninth Circuit has noted that "modern advances in transportation and communications have significantly reduced the burden of litigation in another country." [Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1133](#). Certainly, the burdens associated with litigating in another state are reduced even more in light of our many modern conveniences. Thus, to the extent Defendants have demonstrated that this factor weighs in their favor, it does so only marginally.

Defendants assert that the factor involving conflict with the sovereignty of another state weighs in their favor because the court may need to apply the law of another state or impose injunctive relief with respect to out-of-state defendants. Although this factor might weigh somewhat in Defendants' favor, these are not issues with which federal courts exercising diversity jurisdiction are unfamiliar. Accordingly, to the extent this factor weighs in Defendants' [*28] favor, similar to the previous factor, it does so only marginally.

The fourth factor, the forum state's interest, decidedly favors Fluke. The Ninth Circuit has indicated that a forum state has a strong interest in resolving the tort claims of its residents. [Roth v. Garcia Marquez, 942 F.2d 617, 624 \(9th Cir. 1991\)](#); see also [Meyers v. DCT Technologies, Inc., No. 11-cv-05595 RBL, 2012 U.S. Dist. LEXIS 57479, 2012 WL 1416264, at *7 \(W.D. Wash. Apr. 24, 2012\)](#). Washington, therefore, has a strong interest in having Fluke's tort claims resolved in this forum.

Defendants have failed to carry their burden with respect to the fifth factor—the efficient resolution of the controversy. Defendants argue that "Texas would provide a convenient forum not only for all of the parties

⁹ Even if Defendants' contacts were too attenuated for this factor to weigh in Fluke's favor, it would not weigh heavily in Defendants' favor given the court's finding that their contacts were sufficient to meet the purposeful direction prong. See [Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1488 \(9th Cir. 1993\)](#).

to this action, but also for the potential witnesses Fluke's complaint implicates." (Resp. at 19.) Defendants assert that Mr. Lang and Mr. Purple live in Texas and that Fluke maintains operations in Texas. (*Id.*) However, Defendants have provided no evidence of these facts to the court. Fluke did not address this factor, but because Defendants bear the burden of presenting a "compelling case," the court cannot conclude that this factor weighs in Defendants' [*29] favor. At best, it is neutral.

The sixth factor, the importance of the forum to the plaintiff, decidedly favors Fluke. Washington State is Fluke's chosen forum and its headquarters are located here. Finally, the seventh factor, the existence of an alternative forum, favors Defendants' position. Defendants assert, and Fluke does not dispute, that Texas is an available alternative forum.

In sum, the court has found that Defendants have carried their burden only with respect to factors two, three and seven, and only slightly with respect to factors two and three. Accordingly, on balance, the court concludes that Defendants have not demonstrated a compelling case that the court's exercise of personal jurisdiction over Defendants would be unreasonable or violate due process.¹⁰

¹⁰ In their reply memorandum, Defendants request for the first time jurisdictional discovery from Fluke "in order to offer the Court a more complete record." (Reply at 12.) Defendants, however, fail to explain what information they need that is in Fluke's possession (and not their own) with respect to personal jurisdiction, or how this additional information might assist the court with respect to Defendants' motion. [*30] In any event, "[t]he district court need not consider arguments raised for the first time in a reply brief." Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007). Further, such a request must be brought as a motion, and not asserted in a reply memorandum, providing no opportunity to respond. That being said, nothing prevents Defendants from issuing discovery related to jurisdictional issues in the ordinary course of this litigation. Should subsequent discovery reveal new evidence that is pertinent and not presently before the court, the parties may bring such motions as are appropriate under the Federal Rules of Civil Procedure or raise the issue again at trial. See, e.g., Fiore v. Walden, 688 F.3d 558, 575 n.13 ("If the plaintiff succeeds in meeting that prima facie burden, then the district court may still order an evidentiary hearing or the matter may be brought up again at trial."); Metropolitan Life Ins. Co. v. Neaves, 912 F.2d 1062, 1064 n.1 (9th Cir. 1990) (citing 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1373 at 557 (1990) ("The determination of a defense on a motion prior to trial is not so final that it prevents the court from reconsidering its ruling at any [*31] time prior to judgment.")).

B. Pendent Personal Jurisdiction

Having established personal jurisdiction over Defendants with respect to Fluke's tort claims, the court must also determine whether it has jurisdiction with respect to Fluke's contract claim. The Ninth Circuit has explicitly adopted the concept of pendent personal jurisdiction. CE Distrib., LLC v. New Sensor Corp., 380 F.3d 1107, 1113 (9th Cir. 2004). Under this doctrine, "a defendant may be required to defend a 'claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction.'" *Id.* (quoting Action Embroidery v. Atlantic Embroidery, 368 F.3d 1174, 1180 (9th Cir. 2004)). Whether to exercise pendent personal jurisdiction is within the discretion of the district court. *Id.* Fluke's tort claims and its claim for breach of contract arise from a common nucleus of operative facts. Accordingly, the court finds that the exercise of pendent personal jurisdiction with respect to Fluke's contract claim is appropriate here.

C. Venue

Venue is proper in the judicial district "in which a substantial [*32] part of the events or omission giving rise to the claims occurred." 28 U.S.C. § 1391(b)(2). Similar to their arguments regarding lack of personal jurisdiction, Defendants assert that venue is improper in the Western District of Washington under § 1391(b)(2) because "a substantial portion of the events giving rise to Fluke's claims did not occur here." (Mot. to Dismiss at 21.) The court disagrees.

As discussed above, Defendants alleged improper tortious actions were directed at Fluke in the Western District of Washington. (See *supra* § III.A.1.) When determining venue under 28 U.S.C. § 1391(b)(2), the Ninth Circuit has given substantial weight to "the locus of the injury" allegedly caused by tortious actions. See, e.g., Myers v. Bennett Law Offices, 238 F.3d 1068, 1076 (9th Cir. 2001) (finding, where one of the plaintiffs' alleged "harms" was felt in Nevada, that "a substantial part of the events giving rise to the claim occurred in Nevada"); see also Fiore, 688 F.3d 558, 587 (9th Cir. 2012) ("In *Myers*, the fact that at least one of the harms suffered by Plaintiffs was felt in Nevada was sufficient to make venue proper in Nevada.") (internal quotations and alterations omitted). The fact [*33] that Defendants' alleged tortious conduct was directed at Fluke, a resident of the Western District of Washington, is sufficient to show that a substantial part of the events

giving rise to Fluke's claims occurred within this judicial district. ¹¹ See, e.g., [Astro-Med, Inc. v. Nihon Kohden America, Inc.](#), 591 F.3d 1 (1st Cir. 2009) (court is not required to determine the best venue, only a proper venue; venue could be found in forum state, where plaintiff was headquartered and where one of the harms in a trade secret case was alleged to have occurred, even though the defendants were residents of two other states); [Meyers v. DCT Techs., Inc.](#), No. 11-cv-05595 RBL, 2012 U.S. Dist. LEXIS 57479, 2012 WL 1416264, at *9 (W.D. Wash. Apr. 24, 2012) (ruling that venue was appropriate in Washington where plaintiff relied upon defendants' misrepresentations and suffered harm in Washington). ¹² Accordingly, the court denies Defendants' motion to dismiss for improper venue.

D. Fluke's Discovery Motion

Fluke has moved for an order granting it expedited discovery from Defendants, along with an order directing Defendants to preserve all [*35] relevant evidence. (See generally Disc. Mot.) The court will address each request in turn.

1. Expedited Discovery

¹¹ Venue is not limited to the district with the most substantial events or omissions; rather, § 1391 contemplates that venue can be appropriate in more than one district. See [Nw Envtl. Def. Center v. U.S. Army Corps of Eng'rs](#), No. 10-1129-AC, 2011 U.S. Dist. LEXIS 43034, 2011 WL 1527598, at *7 (D. Or. Apr. 20, 2011); [*34] [Unicru, Inc. v. Brenner](#), No. Civ. 04-248-MO, 2004 U.S. Dist. LEXIS 31743, 2004 WL 785276, at *12 (D. Or. Apr. 13, 2004).

¹² See also [Open Road Ventures, LLC v. Daniel](#), No. C-09-02041 RMW, 2009 U.S. Dist. LEXIS 67085, 2009 WL 2365857, at *4 (N.D. Cal. July 30, 2009) ("Because the injury occurred in California, venue is proper [t]here"); [Williamson v. American Mastiff Breeders Council](#), No. 3:08-CV-336-ECR- VPC, 2009 U.S. Dist. LEXIS 53974, 2009 WL 634231, at *7 (D. Nev. Mar. 6, 2009) ("The defendants' actions . . . were directed at [the plaintiff] in Nevada; [the plaintiff] felt the harm in Nevada; venue is proper in Nevada."); [Mathis v. Cnty. of Lyon](#), No. 2:07-CV-00628-KJD-GWF, 2007 U.S. Dist. LEXIS 84791, 2007 WL 3230142, at *1 (D. Nev. Oct. 24, 2007) ("The locus of the injury has been deemed to be a substantial part of the events giving rise to the claim in a tort action."); [City of L.A. v. Cnty. of Kern](#), No. CV 06 5094 GAF(VBKX), 2006 U.S. Dist. LEXIS 81417, 2006 WL 3073172, at *6 (C.D. Cal. Oct. 24, 2006) ("Plaintiffs' alleged injuries in the Central District constitute substantial events giving rise to the cause of action, and thus venue is proper").

Fluke asserts that expedited discovery is necessary because it intends to move for a preliminary injunction and absent expedited discovery "it will be forced to present its case at the hearing . . . on an incomplete record" (*Id.* at 4, ¶ 17.) Defendants respond that Fluke has not yet moved for either a temporary restraining order or a preliminary injunction and has otherwise failed to meet the standard for an order authorizing expedited discovery. (See generally Disc. Resp.)

Pursuant to [Federal Rule of Civil Procedure 26\(d\)](#), a party "may not seek discovery from any source" prior to the conference required by [Rule 26\(f\)](#). [Fed. R. Civ. P. 26\(d\)\(1\)](#). Courts within the Ninth Circuit generally use a "good cause" standard to determine whether to permit discovery prior to a [Rule 26\(f\)](#) conference. See, e.g., [Millennium TGA, Inc. v. Doe](#), No. 2:11-cv-03080 MCE KJN, 2012 U.S. Dist. LEXIS 38636, 2012 WL 968074 at *2, n.4 (E.D. Cal. Mar. 21, 2012) ("District courts within the Ninth Circuit have permitted expedited discovery prior to the [Rule 26\(f\)](#) conference upon a showing of 'good cause.'"); [Semitool, Inc. v. Tokyo Electron America, Inc.](#), 208 F.R.D. 273, 276 (N.D. Cal. 2002).

[*36] "Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." [Semitool](#), 208 F.R.D. at 276. Although the "good cause" standard may be satisfied where a party seeks a preliminary injunction, it is not automatically granted merely because a party seeks this type of relief. [Am. Legalnet, Inc. v. Davis](#), 673 F. Supp. 2d 1063, 1066 (C.D. Cal. 2009). In considering whether good cause exists, factors courts may consider include "(1) whether a preliminary injunction is pending; (2) the breadth of the discovery request; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made." *Id.* at 1067.

The first factor does not weigh in favor of finding "good cause." Although Fluke asserts that it needs expedited discovery for purposes of filing a motion for preliminary injunction, no such motion has been filed despite the fact that this action has been pending for nearly two and a half months. Other courts have granted such relief after a motion for preliminary injunction [*37] has been filed but prior to the hearing in order to ensure presentation of a full and complete record to the court. See, e.g., [Quia Corp. v. Mattel, Inc.](#), No. C10-01902 JF (HRL), 2010 U.S. Dist. LEXIS 68237, 2010 WL 2179149, at *1-2 (N.D. Cal. May 27, 2010) (granting in

part defendants' motion for expedited discovery in connection with plaintiff's pending motion for a temporary restraining order and a preliminary injunction); [Kremen v. Cohen, No. 5:11-cv-05411-LHK, 2011 U.S. Dist. LEXIS 141273, 2011 WL 6113198, at *10 \(N.D. Cal. Dec. 7, 2011\)](#) (granting plaintiff's request for expedited discovery "related to his motion for a preliminary injunction and . . . narrowly tailored to discover evidence necessary [for that motion]"). Although there are undoubtedly circumstances where granting a motion for expedited discovery in the absence of a motion for preliminary equitable relief is warranted, the absence of such a pending motion in this case undermines a finding of good cause.

The second and fourth factors—the breadth of the requests and the burden on the opposing party—also weigh against a finding of "good cause." Contrary to its assertion that it seeks discovery "limited in scope and narrowly tailored to the issues underlying Fluke's claims for preliminary [*38] relief" (Disc. Mot. at 4, ¶ 18), Fluke seeks wide, sweeping discovery related to its case in total. For example, in its proposed interrogatories to each defendant, Fluke seeks the identity of every witness Defendants intend to call at any hearing, deposition, or trial. (Disc. Mot. Ex. A at 7, Ex. C at 6, Ex. E at 6.) Fluke also seeks the identity of all opinion witnesses and all exhibits or evidence that defendants intend to use at any hearing, deposition, or at trial. (*Id.* Ex. A at 7, Ex. C at 6, Ex. E at 7.) In its proposed requests for production of documents, Fluke seeks "[a]ny and all [d]ocuments and/or materials that you intend to use or offer into evidence at any hearing, deposition or trial in this matter." (*Id.* Ex. B at 8, Ex. D at 7, Ex. F at 7.) Finally, Fluke seeks to image "any and all electronic devices [of Defendants] that may contain Fluke's confidential information and/or trade secrets, including but not limited to any home and/or work computers, hard drives, flash drives, iPod, iPads, PDAs and other external storage devices." (See Proposed Order (Dkt. # 9-1) at 1 ¶ 3.)¹³ Fluke's proposed discovery requests are too broad for the court to plausibly conclude that they [*39] are "narrowly tailored" to the issues Fluke envisions raising in a motion for preliminary injunction. Given the broad scope of the requested discovery, the court also concludes that it would be overly burdensome to require Defendants to

respond in an expedited fashion.

The third factor, Fluke's asserted purposes for requesting expedited discovery, also does not weigh in its favor. Fluke's asserted purposes are (1) "to present the facts of this case to the Court as completely as possible . . . [with respect to] Fluke's motion for preliminary injunction," and (2) "to discover the full extent of Defendants' unlawful activities and the corresponding damage being done or already done to Fluke." (Disc. Mot. at 3, ¶ 13.) As Defendants note, after nearly two and half months, Fluke has not filed any motion for preliminary relief—either a motion for a temporary restraining order or a motion for preliminary injunction. [*40] Thus, there is no pending hearing for which to prepare making expedited discovery necessary. Further, Fluke's purpose—to discover the extent of the alleged harm—is not a legitimate basis for expedited discovery because it merely attempts to substitute expedited discovery for normal discovery. See, e.g., [Palermo v. Underground Solutions, Inc., No. 12cv1223-WQH \(BLM\), 2012 U.S. Dist. LEXIS 80616, 2012 WL 2106228, at *3 \(S.D. Cal. June 11, 2012\)](#) (Plaintiff's proposed expedited discovery "requests are not narrowly tailored to obtain evidence relevant to [Plaintiff's] motion for preliminary injunction," but "[i]nstead . . . appear[] to be a vehicle to conduct the entirety of his discovery prior to the *Rule 26(f)* conference.") (citing [Better Packages, Inc. v. Zheng, 2006 U.S. Dist. LEXIS 30119, 2006 WL 1373055, at *5 \(D.N.J. May 17, 2006\)](#) (finding that granting expedited discovery requests "would lead to the parties conducting nearly all discovery in an expedited fashion under the premise of preparing for a preliminary injunction hearing, which is not the purpose of expedited discovery").

Finally, the court has ordered the parties to conduct their *Federal Rule of Civil Procedure 26(f)* conference no later than March 4, 2013. (Min. Ord. (Dkt. # 16) [*41] at 1.) Thus, Fluke may begin the discovery process in less than one month. For the foregoing reasons, Fluke has failed to show good cause for expedited discovery in this matter. Rather, the broad discovery that Fluke seeks "should be pursued more properly within the structure afforded by a court-approved scheduling order." [Am. Legalnet, Inc., 673 F. Supp. 2d at 1072](#) (citation omitted).

2. Preservation Order

Fluke also seeks a preservation order "to preserve all evidence relevant to the facts and circumstances

¹³The court notes that this request is so broad that it would include computers and other electronic devices that may be used by non-parties to this lawsuit (such as Defendants' family members) and makes no provision with respect to the privacy and confidentiality of these non-parties.

alleged in Fluke's Complaint." (Disc. Mot. at 5, ¶ 20.) *Federal Rule of Civil Procedure 26(f)* requires the parties to discuss preservation issues during their Rule 26 conference. *Fed. R. Civ. P. 26(f)(2)*. "However, as the Rule 26 Advisory Committee notes make clear, '[t]he requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders.'" *Margolis v. Dial Corp., No. 12-CV-0288-JLS (WVG), 2012 U.S. Dist. LEXIS 92355, 2012 WL 2588704, at *2 (S.D. Cal. July 3, 2012)* (quoting 2006 Advisory Comm. Notes to *Rule 26(f)*). Although federal courts have the implied or inherent authority to issue preservation orders as part of their general authority to manage their [*42] own affairs so as to achieve the orderly and expeditious disposition of cases, because of their very potency, inherent powers must be exercised with restraint and discretion. *Am. Legalnet, Inc., 673 F. Supp. 2d at 1071* (citing cases).

In determining whether to grant a request for a preservation order, some courts have adopted a two prong test that requires the proponent to demonstrate that the order is necessary and not unduly burdensome.¹⁴ *Id. at 1071-72* (citing *Pueblo of Laguna v. United States, 60 Fed. Cl. 133, 135-36 (2004)*). Other courts have adopted a balancing test considering three factors: (1) the level of concern the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence; (2) any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation; and (3) the capability of an individual, entity, or party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation. [*43] *Id. at 1072* (quoting *Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429, 433-34 (W.D. Pa. 2004)*). "The difference

between these two tests lies in what the moving party must show with respect to the content of the evidence that is in danger of being destroyed. However, the distinction is more apparent than real." *Id.* (quoting *Treppel v. Biovail Corp., 233 F.R.D. 363, 370 (S.D.N.Y. 2006)*).

Here, Fluke has failed to meet its burden under either standard. First, Fluke has presented no basis [*44] for the court to conclude that any evidence has been lost or destroyed. Fluke has not even alleged this circumstance. (See generally Disc. Mot.) Second, Fluke has made no showing that the order would not be burdensome. (See generally *id.*) Accordingly, the court finds that entry of a preservation order is unwarranted at this time and denies Fluke's request for a preservation order. See *id. at 1072-73* (denying a motion on same grounds).

The court notes that "[i]tigators owe an uncompromising duty to preserve what they know or reasonably should know will be relevant evidence in a pending lawsuit even though no formal discovery requests have been made and no order to preserve evidence has been entered." *United Factory Furniture Corp. v. Alterwitz, No. 2:12-cv-00059- KJD-VCF, 2012 U.S. Dist. LEXIS 48795, 2012 WL 1155741, at *3 (D. Nev. Apr. 6, 2012)* (internal quotations omitted). This includes preserving electronically stored information that would otherwise be automatically deleted and may extend to personal and home computers and other devices. See *id.* (citing *Se. Mech. Servs., Inc. v. Brody, 657 F.Supp.2d 1293, 1300 (M.D. Fl. 2009)* (holding that the "wiping" of laptops and Blackberries led to spoliation of evidence). [*45] Fluke filed its complaint on November 28, 2012, and Defendants appeared in this action on December 21, 2012. (See Dkt. ## 1, 11.) Defendants' duty to preserve evidence attached at least by this later date, if not before. See *United Factory Furniture Corp., 2012 U.S. Dist. LEXIS 48795, 2012 WL 1155741, at *3*. Absent any evidence to the contrary, the court assumes that all parties have complied with these obligations.

IV. CONCLUSION

Based on the foregoing, the court DENIES Defendants' motion to dismiss for lack of personal jurisdiction and for improper venue (Dkt. # 12). The court also DENIES Fluke's motion for expedited discovery (Dkt. # 9).

Dated this 13th day of February, 2013.

/s/ James L. Robart

¹⁴ "To meet the first prong of this test, the proponent ordinarily must show that absent a court order, there is significant risk that relevant evidence will be lost or destroyed—a burden often met by demonstrating that the opposing party has lost or destroyed evidence in the past or has inadequate retention procedures in place. More than that, the proponent must show that the particular steps to be adopted will be effective, but not overbroad—the court will neither lightly exercise its inherent power to protect evidence nor indulge in an exercise in futility." *Am. LegalNet, Inc., 673 F. Supp. 2d at 1072* (quoting *Pueblo of Laguna v. United States, 60 Fed. Cl. 133, 138 (2004)*).

JAMES L. ROBERT

United States District Judge

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APPENDIX 6

[Havel v. Honda Motor Europe Ltd.](#)

United States District Court for the Southern District of Texas, Houston Division

September 30, 2014, Decided; September 30, 2014, Filed

CIVIL ACTION NO. H-13-1291

Reporter

2014 U.S. Dist. LEXIS 140983; 2014 WL 4967229

DAN HAVEL, and DEAN RUCK, Plaintiffs, VS. HONDA MOTOR EUROPE LTD., DENTSU MCGARRY BOWEN LLC, DENTSU MCGARRY BOWEN UK LTD., THE MILL (FACILITY) LIMITED, ROGUE FILMS LTD., AND DOES 1-3, Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part [Havel v. Dentsu McGarry Bowen UK Ltd., 2014 U.S. Dist. LEXIS 181327 \(S.D. Tex., Sept. 30, 2014\)](#)

Counsel: [*1] For Dan Havel, Dean Ruck, Plaintiffs: James D Petruzzi, Mason & Petruzzi, Houston, TX; Arthur S Feldman, Berg Feldman Johnson Bell, LLP, Houston, TX.

For Dentsu MCGarry Bowen LLC, Rogue Films Ltd., Defendants: Peter D Kennedy, Graves Dougherty et al, Austin, TX.

Judges: Lee H. Rosenthal, United States District Judge.

Opinion by: Lee H. Rosenthal

Opinion

MEMORANDUM AND OPINION

In 2005, Houston artists Dan Havel and Dean Ruck used wooden house boards to create a jagged, portal-like conical sculpture that drew the viewer from the front to the back of a house located in the city's eclectic Montrose neighborhood. The sculpture, entitled *Inversion*, has a registered copyright. *Inversion* was torn down later that year, but photographs—also copyrighted—remain. Havel and Ruck maintain a website featuring some of these photographs. Roughly seven years after *Inversion's* creation and destruction, employees at a London-based British advertising

agency stumbled on some of these images on the internet while working on a pitch to present to Honda Motor Europe Ltd. (Honda Europe) to create a commercial for the European debut of a CR-V model Honda vehicle.¹ The advertising agency used the *Inversion* images in its final presentation to Honda [*2] Europe and received the production contract. The *Inversion* images played an increasingly prominent role in the production team's evolving concept of the Honda CR-V commercial. Presumably concerned about the copyright, the commercial's producer called Dean Ruck in Houston. The parties dispute the result of the phone and email communications that ensued. Ruck believed that the commercial might feature the general concept of a portal stretching through a wooden house structure but would not use *Inversion* images or anything too similar. The commercial's producer, on the other hand, believed that Ruck consented to the agency's use of his copyrighted material as long as the commercial did not use an actual image of *Inversion*.

The agency's production team used the photograph and built a replica of *Inversion* to use in filming the commercial. When Ruck learned that the advertising agency had built what was close to an *Inversion* replica, he promptly notified the agency that he disputed its right to do so. Ruck told the agency that it had misinformed him in the earlier call and emails. The producer and Ruck exchanged a few more emails but were unable to [*3] resolve their disagreement. The television commercial began airing in Europe in October 2012.

Several months later, Ruck and Havel sued the London-based production company and the London-based advertising agency (along with several other foreign defendants, including Honda Europe) in Texas federal court, alleging copyright infringement and state-law fraud. The parties conducted jurisdictional discovery. The defendants moved to dismiss for lack of personal

¹ The Honda CR-V is a sport-utility-vehicle.

jurisdiction and *forum non conveniens*, (Docket Entry Nos. 28, 29), and the court heard oral argument.

Based on the pleadings, the motion, the briefs, the record, and the applicable law, the court denies in part and grants in part the defendants' motion to dismiss for lack of personal jurisdiction. The court denies the remaining defendants' motion for dismissal based on *forum non conveniens*. The reasons are stated in detail below.

I. Background

A. Factual Background

1. The Parties

a. The Plaintiffs

Dan Havel and Dean Ruck live in Houston, Texas. In 2005, they designed and built a wooden contemporary art sculpture entitled *Inversion*. Havel and Ruck published the sculpture on May 1, 2005 in Houston, Texas. *Inversion* is an original work that [*4] enjoys copyright protection under U.S. law. *Inversion* is a sculpture made from wooden boards shaped into a portal-like conical structure leading from the front of a house to the back. Boards of varying colors flare outward in varying lengths along the cone's periphery. The cone is widest at the front of the house and tapers back, through the house, towards the cone tip. (Docket Entry No. 26, Amended Compl. ¶ 17).

Inversion was removed from the site later in 2005 and no longer has a physical presence, the piece has persisted in images and renderings that are copyrighted. Some of these images and renderings may be viewed on the internet.

b. The Defendants

Honda Motor Europe Ltd. (Honda Europe), based in Slough, United Kingdom, is a wholly owned subsidiary of Honda Motor Company, Ltd., a Japanese parent corporation. Honda Europe coordinates the import and distribution of Honda-trademarked products in Europe. It purchases motor vehicles from separate Honda affiliates and distributes those vehicles through a European network of Honda subsidiaries and distributors, who in turn supply the vehicles to independent dealers. (Docket Entry No. 28-3 ¶ 2).

Denstu McGarry Bowen LLC (McGarry Bowen US) [*5] and Dentsu McGarry Bowen UK Ltd. (McGarry Bowen

UK) are distinct corporate entities that form part of a world-wide advertising parent organization known as the Dentsu Network. (Docket Entry No. 28-6 ¶ 8). McGarry Bowen US is a limited-liability company based in New York City with offices there and Chicago. It provides advertising and marketing services to companies that sell goods and services, including the conception, development, and production of television, print, and digital advertisements. (Docket Entry No. 28-5 ¶¶ 1-4).

McGarry Bowen UK is a corporation organized under United Kingdom law and based in London. It provides advertising and marketing services to companies selling goods and services in Europe. The services include the conception, development, and production of European television, print, and digital advertisements. (Docket Entry No. 28-6 ¶¶ 3-4).

The Mill (Facility) Limited (The Mill UK), a United Kingdom corporation operating in London, provides editing and digital effects in video services for the advertising, television, and film industries. (Docket Entry No. 28-4 ¶¶ 3-4).

Rogue Films Ltd. (Rogue) is a London-based corporation organized under United Kingdom law. [*6] Rogue provides film production services to advertising agencies and record companies in Europe. (Docket Entry No. 28-9 ¶¶ 4-5).

2. The Honda CR-V Commercial

a. The initial prepitch collaboration between McGarry Bowen UK and McGarry Bowen US

In May 2012, Honda Europe invited McGarry Bowen UK to "pitch" a potential television advertisement for the Honda CR-V's European debut. Jim Kelly, McGarry Bowen UK's chief executive officer in London, emailed Gordon Bowen, a McGarry Bowen founder who worked at McGarry Bowen US in New York City. Kelly Told Bowen that McGarry Bowen UK would "need help on this one" from McGarry Bowen US in New York because the new CR-V was already in the United States and "you are ahead of us." (Docket Entry No. 37-5, at 2). Bowen forwarded this email to Brandon Cooke, McGarry Bowen US's New York Managing Director.²

² Gordon Bowen also wrote Honda-UK's chief officer that "working with Honda Motors Europe would be one of the highlights of [his] career . . ." (Docket Entry No. 37-3, at 2). If "given the opportunity," Bowen promised, he would "not fail you." (*Id.*).

(*Id.*). Cooke summarized an internal "Strategic Discussion" between the New York and London McGarry Bowen offices, copying six New York personnel (including Gordon Bowen), noting that "London and New York will share background and research," and stating that he would "work with London to define a clear and efficient process for sharing and approving of each [*7] key output of the pitch journey (strategy, creative ideas, campaign recommendations, presentation deck and team) with leadership in New York and London." (Docket Entry No. 37-5, at 3).

By the end of May 2012, Alexandra Gardner, a Creative Director working in McGarry Bowen US's New York office, sent an email to McGarry Bowen US and UK managers, stating that she was "putting together and [sic] action plan for the Honda CR-V pitch." (Docket Entry No. 37-5, at 5). Gardner later distributed a list of the "McGarry Bowen Team," which included eleven New York employees (including eight Creative Directors) and five London employees. (Docket Entry No. 37-5, at 9).

Once the pitch date became final, Stewart Owen, another McGarry Bowen US founder working in the New York office, wrote to a Managing Director in London that although he would not be joining the pitch because there needed to be a role for "you and for Gordon," he would "mak[e] sure that the work [*8] is in the right place and make[] sure that Brandon [Cooke] provides the support to make it a killer presentation." (Docket Entry No. 37-5, at 14). Cooke directed the New York team members on the storyline, casting, video quality, and editing work—all "key items that [were] critical for [them] to get right or else Gordon [Bowen] would not want to use it for the pitch." (Docket Entry No. 37-5, at 15; see also *id.* at 18 (directing the New York team "to uncover some additional insight into our target and blow the Honda team away for our pitch"))).

b. Developing the "Portal" Concept

As the pitch-development work unfolded, the McGarry Bowen UK creative team members narrowed the concept to a portal evoking a sense of entering "another universe." The creative team envisioned several portal types using different materials, such as concrete, brick, or wood, with different locations. One of these portal concepts closely resembled Dan Havel and Dean Ruck's *Inversion*, both in material (wooden boards) and style (long, conical, and with a trumpet-head like opening). According to the defendants, two McGarry Bowen UK employees, Remco Graham and Richard Holmes, primarily originated and developed the portal

idea, [*9] and "were at the center of all creative decisions with regard to the idea." (Docket Entry No. 28-6, ¶ 20).³ On June 14, 2012, Graham downloaded and saved two *Inversion* images from Pinterest,⁴ a website that allows its users to "pin" what interests them onto virtual bulletin boards for others to see.⁵ (Docket Entry No. 37-7, at 4). Graham and Holmes placed these two *Inversion* images in a preliminary creative deck. One day later, on June 15, another McGarry Bowen UK employee emailed the deck to the McGarry Bowen US office in New York.

c. The Pitch

On June 22, 2012, McGarry Bowen UK's creative team delivered the pitch in London. Several collaborating members of McGarry Bowen US were present. The pitch deck included two *Inversion* images, each with a Honda CR-V superimposed in front of the conical hole. (Docket Entry Nos. 37-3, at 21, 27; 37-7, at 4). Honda Europe awarded McGarry Bowen UK the advertising contract about a week later. Gordon Bowen of McGarry Bowen US sent the following email to the "Team," which included both the New York and London members:

Team, You've done it! Honda, one of the biggest automotive brands in the world, has officially selected mcgarrybowen as its agency. I've been involved in many new business wins over the course of my career, but I am not sure I have ever witnessed a bigger "team" victory. This was truly a case of incredible talent within a global network coming together to WOW a client. Together we developed the right strategy, created a BIG, ORGANIZING idea, and proved to Honda that mcgarrybowen will be the agency that will take

³The plaintiffs appear to dispute that these two individuals conceived the portal idea, but they offer no evidence to rebut the sworn declaration of McGarry Bowen UK's corporate officer. (Docket Entry No. 37, at 15). The plaintiffs do, however, point to evidence showing that members of McGarry Bowen US's New York office also helped cultivate the portal concept, before and after the pitch.

⁴ www.pinterest.com.

⁵ Because Pinterest is a user-driven website that changes frequently, a record of the precise *Inversion* images that the advertisement teams discovered on the website is not available. The plaintiffs contend that most of the *Inversion* Pinterest photos clearly [*10] indicate that the sculpture is copyrighted and based in Houston, Texas. At the motion to dismiss stage, the court accepts this factual allegation as true.

their [*11] brand into the ICONosphere.
(Docket Entry No. 37-3, at 30).

McGarry Bowen UK and Honda Europe negotiated and signed an agreement for producing the television advertisement for the European CR-V campaign. The contract authorized McGarry Bowen UK to hire its own production team and to retain McGarry Bowen US. McGarry Bowen UK subcontracted with Rogue Films to produce the television spot featuring *Inversion* and with The Mill UK to provide postproduction editing work.

d. Production

On July 17, 2012, Jim Kelly, McGarry Bowen UK's CEO, circulated an email entitled "Houston Hole house video" to five McGarry Bowen UK employees. (Docket Entry No. 37-4, at 38). The email contained a hyperlink to a video depiction of *Inversion* on the website www.arteryhouston.org. (Docket Entry No. 37-6, at 17). The www.arteryhouston.org website is administered by Artery Media Project, "a Houston based organization created to support the promotion of interdisciplinary works of art focusing on local Houston artists." (Docket Entry No. 37-8, at 2). According to the organization's founder, Mark Larsen, the link Kelly circulated in 2012 would have accessed a "video depicting the creation and final installation of Dan [*12] Havel and Dean Ruck's sculpture, *Inversion*." (*Id.*). The website "prominently displays a copyright notice on all of its pages, noting expressly 'all rights reserved,'" and the "website makes clear that we are based in Houston, including by providing our mapped Houston address and, of course, through use of the name of the website." (*Id.*). The next day, July 18, one of the McGarry Bowen UK recipients (Helen Whiteley) forwarded the email with the hyperlink to James Howland at Rogue Films. Howland forwarded the email to a Rogue colleague and to The Mill UK's Matthew Williams, who circulated it to his company's support staff. (Docket Entry No. 37-6, at 17).

Before filming, McGarry Bowen UK consulted closely with the film's director, Sam Brown of Rogue. On July 21, 2012, Brown presented his "Director's Treatment" to McGarry Bowen UK and sent it to Honda Europe. The Treatment included two *Inversion* photos. (Docket Entry No. 37-2, at 2). In this presentation, Brown said the following about the portal concept:

It's important that we consider the personality of this portal. . . . In looking at the picture references I felt a much warmer response to the wooden portal than

the brick one, which felt [*13] a little cold and trap-like. Graphically, it works much better that the wooden boards run invitingly towards the hole. The whiteness of the wood helps to offset the darkness of the hole itself. I also like the idea that it's a home instead of an industrial/corporate building: again, it brings a much-needed warmth to the portal. . . . The portal would not only suck back deeply into itself . . . beautiful shards of wood could also splay dramatically outwards like the house in your references.

(Docket Entry No. 37-6, at 6). Honda quickly approved the Treatment. (Docket Entry No. 37-3, at 36).

e. Communications with the Plaintiffs

Roughly one week later, on August 1, 2012, Rogue Producer Kate Hitchings contacted Dean Ruck in Houston to discuss the copyright issues of using images resembling *Inversion* in the commercial. According to Ruck, Hitchings asked whether Rogue could use a portal through a wooden house in an advertising campaign for Honda. (Docket Entry No. 37-4, at 55). Ruck asked to see a mockup of the advertisement. Later that afternoon, Hitchings sent over what she represented to be Director "Sam [Brown's] treatment," stating that "we haven't designed our portal yet" and that she [*14] didn't know whether "Sam is preferring a location that lends itself to a wooden house." (Docket Entry No. 37-1, at 2).

Despite the fact that Brown included two *Inversion* photos in his "Director's Treatment" presentation to McGarry Bowen UK just one week earlier, Hitching's attachment of Brown's "treatment" contained generic versions of conical mockups, none bearing any resemblance to *Inversion*. Hitchings sent an email the following day to her colleagues at McGarry Bowen UK, stating that she had changed the actual version of the "Director's Treatment" by "removing picture references [of *Inversion*], highlighting the trumpet shape [from another image] and losing some description of how the wooden version may look." (Docket Entry No. 37-4, at 55).

Based on Hitchings's assurances that the proposed advertisement would not copy *Inversion*, Ruck responded that he did not believe a generic portal created a copyright issue. See First Amended Complaint (Docket Entry No. 26, at ¶ 25; see also Docket Entry No. 37-1, at 19). Ruck emailed his partner, Havel, stating that he did not think Rogue was asking to use images of *Inversion*, just the general idea "of a

portal through a wood house." (Docket Entry [*15] No. 37-1, at 18). Ruck emailed Hitchings that he did not think he and Havel had "any grounds for objecting to the concept of a portal through a wood frame house structural" as long as there was no use of "actual images of our Inversion project in any way, digitally manipulated or otherwise." (Docket Entry No. 28-6, Ex. A). The email made clear that using actual images "in any way" would require addressing "copyright and/or credit." (*Id.*).

The Rogue production team moved forward with constructing a wooden portal on the set in Vancouver, Canada. Two of The Mill UK's effects artists, Adam Grint and Alex Hammond, traveled from London to Vancouver for the shoot. (Docket Entry No. 28-4 ¶ 6).⁶ When Ruck learned about how closely the constructed portal at the CR-V commercial set in Vancouver, Canada resembled *Inversion*, he promptly complained to Hitchings and demanded that Rogue "cease and desist."⁷ (Defendants' Oral Argument PowerPoint Presentation, at 12). Hitchings responded that she "underst[ood] [Ruck's] concern" but assured him that the finished film would be "purely influenced by [his] work and not plagiarised [sic]." (Defendants' Oral Argument PowerPoint Presentation, at 13). Hitchings later sent Ruck a website link containing the near-finished video. (Docket Entry No. 26 ¶ 26).

On October 22, 2012, the date of the commercial's European debut, Hitchings emailed Ruck, asking whether he and Havel wanted to receive credit for their "inspiring" of the portal concept and offering a "goodwill gesture of \$10,000." (Docket Entry No. 28-6, Ex. B). Ruck responded that he would take the offer "into consideration with counsel." (*Id.*). Pending a decision, "[i]n the meantime, the proper credit would be read as 'Inspired by *Inversion*, created by Dan Havel and Dean Ruck of Havel Ruck Projects' or to that effect." (*Id.*). Later that day, McGarry Bowen UK issued a press release promoting the new television advertisement. The promotion noted that it was "inspired by *Inversion*, created by Dan Havel and Dean Ruck of Havel Ruck Projects." (Docket Entry No. 41, at 60). According to the plaintiffs, "[t]he final advertisement depicted a Honda

CR-V being driven into *Inversion's* large opening" accompanied by Garrison Keillor's⁸ voice-over narration. (Docket [*17] Entry No. 28-6, Ex. B).⁹

That same month, a McGarry Bowen employee placed the finished Honda CR-V advertisement on the www.mcgarrybowen.com website, which is used by both McGarry Bowen US and UK for "general marketing purposes, but is not 'interactive.'" (Docket Entry No. 37-10, at 9). "Any user may enter a direct URL to view location-based content" on the website "regardless of the user's current location." (*Id.*). The website is hosted on Amazon Web Services. (*Id.*). The advertisement has remained on the website since then. (*Id.*).

McGarry Bowen UK and Rogue Films also uploaded the commercial to Vimeo,¹⁰ which allows third parties to share videos. (Docket Entry No. 28-6 ¶ 18; 28-9 ¶ 13). Rogue Films uploaded the advertisement to YouTube,¹¹ another video-sharing website, and to its own websites, www.roguefilms.co.uk and www.roguefilms.com. (Docket Entry No. 28-9 ¶¶ 12-13). The Mill UK posted the commercial on its own website. (Docket Entry No. 28-4 ¶ [*18] 8). One of The Mill UK's freelance artists posted (without authorization) "the making of" video on her personal website, www.anibalsantaella.com. (*Id.*).

B. Procedural Background

In May 2013, the plaintiffs sued McGarry Bowen UK, McGarry Bowen US, Rogue Films, and several other defendants in the United States District Court for the Southern District of Texas, asserting copyright infringement under U.S. and U.K. law, as well as state-law fraud/misrepresentation. (Docket Entry No. 1). The defendants moved to dismiss, (Docket Entry Nos. 15, 16, 22), and the plaintiffs amended their complaint, mooting the defendants' motion. (Docket Entry No. 26). The amended complaint removed some defendants and added new ones, including The Mill UK and Honda Europe. McGarry Bowen US, McGarry Bowen UK, and Rogue Films remained. After targeted jurisdictional

⁶The Mill UK performed post-production [*16] editing and digital effects in London. (Docket Entry No. 28-9 ¶ 10).

⁷Ruck and Havel had seen pictures on Reddit, a website where registered community members can submit content for entertainment, social networking, or news purposes (among others).

⁸Garrison Keillor, of National Public Radio's "Little House on the Prairie," recorded the voice-over from Minnesota. (Docket Entry No. 28-6 ¶ 12).

⁹The court has seen the video, (Docket Entry No. 41, Ex. 13), and agrees the resemblance is striking.

¹⁰www.vimeo.com.

¹¹www.youtube.com.

discovery, the defendants moved under [Rule 12\(b\)\(2\)](#) to dismiss the amended complaint based on lack of personal jurisdiction and *forum non conveniens*. (Docket Entry Nos. 28, 29). The plaintiffs responded, the defendants replied, and the court heard argument.¹²

II. The Defendants' Motion to Dismiss for Lack of Personal Jurisdiction

A. The Legal Standard for Personal Jurisdiction

Under [Federal Rule of Civil Procedure 12\(b\)\(2\)](#), the "plaintiff bears the burden of establishing a district court's jurisdiction over a non-resident." [Johnston v. Multidata Sys. Int'l Corp.](#), 523 F.3d 602, 609 (5th Cir. 2008). A plaintiff must make a *prima facie* showing that the defendant is subject to personal jurisdiction; "[p]roof by a preponderance of the evidence is not required." [Bullion v. Gillespie](#), 895 F.2d 213, 217 (5th Cir. 1990) (citing [D.J. Invs. Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.](#), 754 F.2d 542, 545-46 (5th Cir. 1985)). At the motion stage, "uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor." *Id.*

"A federal court sitting in diversity may exercise personal jurisdiction over a non-resident defendant (1) as allowed under the state's long-arm statute; and (2) to the extent permitted by the *Due Process Clause of the Fourteenth Amendment*." [Mullins v. TestAmerica, Inc.](#), 564 F.3d 386, 398 (5th Cir. 2009). The Texas long-arm statute extends to the limits of due process. *Id.* To satisfy due process, the plaintiff must demonstrate "(1) that the non-resident purposefully availed himself of the benefits and protections of the forum state by [*20] establishing 'minimum contacts' with the state; and (2) that the exercise of jurisdiction does not offend 'traditional notions of fair play and substantial justice.'" [Johnston](#), 523 F.3d at 609 (citation omitted).

"A defendant establishes minimum contacts with a state if 'the defendant's conduct and connection with the forum state are such that [he] should reasonably anticipate being haled into court there.'" [Nuovo Pignone, SpA v. Storman Asia M/V](#), 310 F.3d 374, 379 (5th Cir.

2002) (quoting [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). "There are two types of 'minimum contacts': those that give rise to specific personal jurisdiction and those that give rise to general personal jurisdiction." [Lewis v. Fresne](#), 252 F.3d 352, 358 (5th Cir. 2001). The plaintiffs in this case do not argue general jurisdiction. (Docket Entry No. 37, at 22). The issue is specific jurisdiction.

Specific personal jurisdiction "is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" [Goodyear Dunlop Tires Operations, S.A. v. Brown](#), 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011) (citation omitted). The question is "whether there was 'some act by which the defendant purposefully avail[ed] [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Id.* at 2854 (quoting [Hanson v. Denckla](#), 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct [*21] must create a substantial connection with the forum State." [Walden v. Fiore](#), 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12 (2014).

A court considers two issues in deciding whether a defendant's suit-related conduct creates a sufficient relationship with the forum state. See *id.* at 1122. "First, the relationship must arise out of contacts that the 'defendant himself' creates with the forum State." *Id.* (quoting [Burger King](#), 471 U.S. at 475). The limits imposed on a state's "adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of the plaintiff[] or third parties." *Id.* (citing [World-Wide Volkswagen Corp. v. Woodson](#), 444 U.S. 286, 291-92, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)). The Supreme Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Id.* (citing [Helicopteros Nacionales de Colombia, S.A. v. Hall](#), 466 U.S. 408, 417, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)). The "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Id.* "Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.'" *Id.* (quoting [Rush v. Savchuk](#), 444 U.S. 320, 332, 100 S. Ct. 571, 62 L. Ed.

¹² The plaintiffs moved under [Rule 41](#) to dismiss three other defendants—Honda Motor Company [*19] Ltd., Honda of the U.K. Manufacturing Ltd., and the Mill Group, Inc.—without prejudice. The court granted the unopposed motion. (Docket Entry Nos. 45, 46).

[2d 516 \(1980\)](#)).

"Second, [the] 'minimum contacts' [*22] analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* (citations omitted). A "plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Id.* "[A] defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id. at 1123*. "Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State." *Id.* (quotation omitted); see [AllChem Performance Prods., Inc. v. Aqualine Warehouse, LLC, 878 F. Supp. 2d 779, 787 \(S.D. Tex. 2013\)](#) ("[S]pecific jurisdiction may not be based on the mere fortuity that a plaintiff is a Texas resident").

B. Application

Personal jurisdiction must be assessed on an individual-defendant basis. See [Rush v. Savchuk, 444 U.S. 320, 332, 100 S. Ct. 571, 62 L. Ed. 2d 516 \(1980\)](#) ("The requirements of *International Shoe* . . . must be met as to each defendant [*23] over whom a state court exercises jurisdiction."). The court considers each defendant in turn.

1. Rogue Films

Accepting the plaintiffs' well-pleaded allegations, Sam Bowen and Kate Hitchings—two production workers hired by Rogue—played an active role in infringing the plaintiffs' copyrights and defrauding the plaintiffs into consenting to Rogue's use of their copyrighted material in the CR-V commercial. Sam Bowen, the commercial's director, knew that *Inversion* was protected by copyright belonging to the Houston-native plaintiffs. Bowen nonetheless prominently featured copyrighted pictures of *Inversion* in his "Director's Treatment" used to finalize the commercial and to produce it in Vancouver. (Docket Entry No. 37-6, at 6) (envisioning that "beautiful shards of wood could also splay dramatically outwards *like the house in your references*." (emphasis added)).

Kate Hitchings, the commercial's producer, had even

stronger connections to the plaintiffs and Houston. Hitchings knew that the plaintiffs had created *Inversion* and had it copyrighted. The photographs and images on the internet were clearly copyrighted. Hitchings initiated the contact with Ruck in Houston, Texas via phone and email [*24] to secure his consent to the defendants' use of the concept and images. When Ruck asked to see the images to determine whether they would be infringing, Hitchings sent what she represented as Director Bowen's "treatment," which she altered to omit the *Inversion* images. Hitchings explained in emails she sent to McGarry Bowen UK saying that she had "remov[ed] picture references [of *Inversion*], highlighting the trumpet shape [from another image] and losing some description of how the wooden version may look." (Docket Entry No. 37-4, at 39). When Ruck saw pictures of the production set and told Hitchings that it too closely resembled *Inversion*, Hitchings emailed him multiple times, once to assuage his concerns when he asked her to "cease and desist," once to share a near-final version of the commercial, and a third time to ask how to credit Ruck and offering \$10,000 in "goodwill."

The defendants argue that the Supreme Court's recent decision in [Walden v. Fiore, 134 S. Ct. 1115, 188 L. Ed. 2d 12 \(2014\)](#), prevents this court's exercise of personal jurisdiction. That case is distinguishable. Unlike the defendant in [Walden](#), nothing about Hitchings's contacts with Ruck and Houston was "random, fortuitous, or attenuated," *id. at 1123*. As another court has recently observed: [*25]

In *Walden*, the officer was stationed at the Atlanta airport, and seized a bag that could have been headed anywhere. The officer's purpose was to investigate potential criminal activity occurring in the Atlanta airport, regardless of the origin or destination of any evidence or person he investigated. The officer did not purposefully target Nevada or any Nevada citizen, nor did he intend for any action taken at the Atlanta airport to have consequences in Nevada. That consequences occurred in Nevada was, as the Supreme Court stated, random and attenuated to the defendant officer's action in Georgia.

[Allianz Global Corporate & Specialty v. Advantage Aviation Techs., Inc., F. Supp. 2d , No. 13-cv-14439, 32 F. Supp. 3d 849, 2014 U.S. Dist. LEXIS 99212, 2014 WL 3586556, at *6 \(E.D. Mich. July 22, 2014\)](#). Here, by contrast, Hitchings purposefully targeted the plaintiffs and their protected intellectual property in Houston, Texas, by unsolicited contacts via

phone and email.¹³ And, by contrast, Hitchings intended her action to have the consequences in Texas that the plaintiffs would not interfere with the defendants' completion of the commercial using the plaintiffs' copyrighted work.

The defendants argue that because "copyright infringement claims arise out of the distribution of the copyrighted [works]," [Collins v. Doe, No. H-10-2882, 2012 U.S. Dist. LEXIS 56492, 2010 WL 1414246, *5 \(S.D. Tex. Apr. 23, 2010\)](#), and the distribution here occurred only in Europe, these contacts cannot support personal jurisdiction under *Walden* and *Calder*. Although the connection between a defendant's suit-related conduct and the forum state will clearly be strongest when that conduct forms one of the elements of the intentional tort alleged—for example, for a libel claim, the publication of false material in the forum state—*Walden* and *Calder* do not limit "suit-related conduct" to the elements of a tort. See [Walden, 134 S. Ct. at 1123-24](#) (recognizing that [t]he strength of that connection" in *Calder* between the defendants and California "was largely a function of the nature of the libel tort" but observing that "various facts . . . [*27] . gave the [libelous] article a California focus," including "phone calls to 'California sources' for the information in their article" about "the plaintiff's activities in California").

Even assuming the defendants' interpretation is correct, the plaintiffs' have plausibly alleged a state-law claim of fraud or misrepresentation that clearly arises out of Hitchings's phone call and emails directed to Texas. The defendants argue that Ruck's discovery of the defendants' use of *Inversion* before the commercial debuted defeats any claim based on Hitching's deception because Ruck could not have detrimentally relied on them after that point. But Ruck relied on Hitching's misrepresentation of the extent to which the

commercial appropriated *Inversion* in concluding that he had no authority to stop them from proceeding before they completed planning and building the set to film the commercial. Ruck relied on the misrepresentation when he told Hitchings to go ahead with the generic portal/wooden house plans. Once the defendants had built the set to produce the commercial, they decided to proceed because of the amount spent. Ruck sent Hitchings an email demanding a "cease and desist," without effect. [*28] (Defendants' Oral Argument Powerpoint Presentation, at 12). That Ruck might have tried to do more later does not diminish Hitchings's earlier misrepresentations. (See Docket Entry No. 26 ¶ 36) (alleging that "Havel and Ruck relied on the false representations or nondisclosures to a material degree, including by losing any ability to demand payment in advance for the use of their copyrighted work, and because they were induced by fraud to forbear taking legal remedies and seeking an injunction prior to the airing of the commercial").

Rogue's "suit-related conduct" created "a substantial connection with" Texas. Exercising jurisdiction does not offend traditional notions of fair play and substantial justice.¹⁴ [Walden, 134 S. Ct. at 1123-24](#). Rogue's motion to dismiss for lack of personal jurisdiction is denied.

2. McGarry Bowen UK

The plaintiffs allege that McGarry Bowen UK was involved in [*29] the portal concept from start to finish. The plaintiffs' allegations raise a plausible inference that McGarry Bowen UK and its employees had a front-row seat to, and at times an active role in, appropriating *Inversion*, a copyrighted Houston-based sculpture, from Houston-based artists. McGarry Bowen UK's creativeteam members discovered *Inversion* images (which were necessarily taken in Houston) on Pinterest, added *Inversion* images with superimposed Honda CR-Vs to their pitchbook, and included *Inversion* images in their final presentation to Honda Europe. Many images of *Inversion* credit the sculpture's artists and location, and carry copyright notices. The plaintiffs plausibly allege that McGarry Bowen UK employees knew the Houston location of the sculpture and its creators

¹³For similar reasons, this case is different from the Fifth Circuit's recent application of *Walden* in [Monkton Insurance Services, Ltd. v. Ritter, 768 F.3d 429, 2014 U.S. App. LEXIS 18480, 2014 WL 4799716 \(5th Cir. Sept. 26, 2014\)](#). The defendant "entered into an account contract with . . . a Cayman company, in Cayman, not with Ritter, [*26] a Texas resident." [2014 U.S. App. LEXIS 18480, \[WL\] at *4](#). The defendant could "not be said to have sent anything to Texas" and the "communications between [the Texas plaintiff] and [the defendant] and the wire transfers facilitated by [the defendant] were initiated by Ritter [the Texas plaintiff] or [the Cayman company]" and were "insufficient to confer jurisdiction." *Id.* (citing [Walden, 134 S. Ct. at 1122](#)) (emphasis added).

¹⁴None of the defendants argues that even if minimum contacts exist, exercising jurisdiction would offend traditional notions of fair play and substantial justice. Exercising jurisdiction over a company that may have been complicit in an intentional tort directed at plaintiffs in Texas does not offend fair play and substantial justice.

throughout.

Viewed in isolation, these contacts are too "random, fortuitous, or attenuated" to satisfy due process because they stemmed more from Ruck and Havel's (and *Inversion's*) connection to Houston than they did from McGarry Bowen UK's own activities connected to Texas. *Walden*, 134 S. Ct. at 1123 (quotation omitted). But when viewed alongside McGarry Bowen UK's subsequent acts connecting them to Houston, Texas and to the intellectual property [*30] created and displayed there, "not just to a plaintiff who lived there," these contacts are enough. See *Walden*, 134 S. Ct. at 1124. After the successful pitch and during the development process, but before the set was built, McGarry Bowen UK's CEO, Jim Kelly, circulated an email to five members of the creative team entitled "Houston Hole house video." (Docket Entry No. 37-4, at 38) (emphasis added). Helen Whiteley, one of the McGarry Bowen UK recipients, forwarded the email to the production team working on the commercial. The email included a link to a video on www.arteryhouston.org, a Houston-based website with Houston-based servers that promotes Houston-based artwork. Artery's founder and principal, Mark Larsen, provided a sworn declaration, attached to plaintiffs' response, in which he states that the website at that time would have displayed a video demonstrating how the plaintiffs constructed *Inversion* in Houston. (Docket Entry No. 37-8).

Larsen's sworn declaration also states that the *Inversion* video on the Artery Houston website prominently displayed a copyright notice. (Docket Entry No. 37-8 ¶ 2). The website made it clear that *Inversion* and its creators were firmly tied to Houston. (See Docket Entry [*31] No. 37-8, at 3). Although no defendant admits clicking the link or watching the video, or using the video to build the set in Vancouver, they are reasonable inferences under [Rule 12\(b\)\(2\)](#).

Even if the above contacts are not sufficient, they surely are enough when paired with internal emails suggesting that McGarry Bowen UK executives knew of and condoned, or actively supported, Hitchings's deceptive phone call with and emails to Houston to obtain permission from Houston residents Dean Ruck and Dan Havel to use the design and images of their Houston sculpture, *Inversion*. As noted above, Hitchings sent an email to Helen Whiteley at McGarry Bowen UK about the call she placed to Houston. Hitchings acknowledged that in the call, she "[c]ame at it as though [she] was doing this alone"—that is, "as though" she was not

working with McGarry Bowen US and McGarry Bowen UK. (Docket Entry No. 37-4, at 55) (emphasis added). Hitchings wrote Whiteley that she had "sent [Ruck] a tweaked treatment—see attached, removing [*Inversion*] picture references, highlighting the trumpet shape [of another image] and losing some description of how the wooden version may look." (*Id.*). Hitchings wrote that she was "hoping he reads this [*32] [tweaked treatment] first and is encouraged we never set out to copy his work." (*Id.*). Whiteley forwarded Hitchings's email to her colleagues at McGarry Bowen UK (including its chairman, Simon North) under the subject heading "preliminary overture to the *Houston house people*." (*Id.*) (emphasis added). North's response: "Let's keep 'em crossed." (*Id.*).

McGarry Bowen UK put the completed commercial on its own website (www.mcgarrybowen.com) for "general marketing purposes," and on Vimeo, a globally popular video-sharing site, knowing that it copied Ruck and Havel's copyrighted Houston sculpture design and that Texans would be among those able to access the video on the websites. Although a "passive website, one that merely allows the owner to post information on the internet . . . will not be sufficient to establish personal jurisdiction," *Revell v. Lidov*, 317 F.3d 467, 470 (5th Cir. 2002) (quotations omitted), it is a relevant factor. Cf. *McZeal v. Fastmobile, Inc.*, 2006 U.S. Dist. LEXIS 23569, 2006 WL 801175 (S.D. Tex. 2006), judgment *aff'd*, 219 Fed. Appx. 988 (Fed. Cir. 2007) (holding that there was no jurisdiction over a defendant in a trademark infringement action based on forum contacts limited to responding to unsolicited correspondence and operating a passive website (emphasis added))

McGarry Bowen UK's "suit-related conduct" created "a substantial [*33] connection with" Texas, such that exercising jurisdiction does not offend traditional notions of fair play and substantial justice. The court denies McGarry Bowen's motion to dismiss for lack of personal jurisdiction.

3. McGarry Bowen US

Although the portal idea appears to have originated with McGarry Bowen UK's creative team, McGarry Bowen US employees and other defendants played a role in developing this concept as the pitch evolved. On June 15, just one day after McGarry Bowen UK employees downloaded the *Inversion* images from Pinterest and placed them in the preliminary creative deck, Alex McNamara of McGarry Bowen UK emailed the deck to three McGarry Bowen US employees in New York.

(Docket Entry No. 37-7, at 4; 37-3, at 10). On June 17, 2012, someone at McGarry Bowen UK circulated an internal email saying that "Rich and Rem"—who the defendants contend came up with the portal concept and discovered the *Inversion* images—had to "rework[] following Gordon[Bowen]'s comments." (Docket Entry No. 37-3, at 8). That same email had five attachments, four of which were ".png" files—that is, images—with "portal" in the title. (*Id.*) Gordon Bowen of McGarry Bowen US rejected one specific manifestation [*34] of the portal concept—driving through an open door—because it too closely resembled a copyrighted advertisement for another vehicle. He also personally emailed Honda Europe executives about McGarry Bowen UK's pitch proposal:

Portals. You will see that every piece of our campaign is unified around a portal or transformative gateway. These are used in movies and literature from Harry Potter and Alice in Wonderland through Stargate and The Matrix. As far as we know, they haven't been used as a key campaign device in advertising, and yet they are the perfect metaphor for our target audience to experience the liberation and exploration that they crave at this time of their lives. The portal device is very in tune with "Power of Dreams" and you will see that the CR-V is the enabling vehicle which bestows the gift to our drivers to follow their own dreams.

(Docket Entry No. 37-2, at 4).

After Honda awarded McGarry Bowen UK the advertising contract, Gordon Bowen remained involved. Bowen wrote Honda Europe's CEO, "assur[ing]" him of his "attention at all times" and emphasizing that "if you have any concerns about the team or the program at any point I want to hear them personally." (Docket Entry No. 37-5, [*35] at 31). He emailed McGarry Bowen UK's CEO Jim Kelly, telling him, "[y]ou need to get the creative in front of new york [McGarry Bowen US] right now." (Docket Entry No. 37-5, at 28). He worked on Honda's proposed changes to the campaign, and gave his reactions to McGarry Bowen UK's work, the budget, the film director selection, and gave detailed suggestions on later versions of the work. (Docket Entry Nos. 37-3, at 37; 37-5, at 27, 29-30). In September 2012, two McGarry Bowen UK employees sent Gordon Bowen an email with a link to show him "where we are with the CR-V film." (Docket Entry No. 37-3, at 37). Bowen responded that he thought it was "much better" and provided feedback on several aspects. (*Id.*) In early October, Bowen sent an email entitled "Fw: CR-V" to

McGarry Bowen UK CEO Jim Kelly. Bowen wrote, "[w]hether the Japanese like it or not I would like a new ending line written for the launch spot that we record with a different voice per previous specs." (Docket Entry No. 37-3, at 39). Even the defendants acknowledge that "Mr. Bowen was occasionally consulted for general feedback as McGarry Bowen UK produced the advertisement." (Docket Entry No. 41, at 64). The record shows that Bowen was [*36] asked for and provided more.

The plaintiffs argue that Bowen's involvement in developing the portal concept and monitoring the project from its pre-*Inversion* start to post-*Inversion* (and allegedly infringing) finish supports jurisdiction. Even taking those allegations as true, however, the plaintiffs do not allege—and jurisdictional discovery does not support an inference—that Bowen directed activity towards Texas, either by himself or with McGarry Bowen UK. Unlike the executives at McGarry Bowen UK, the record and the pleadings suggest that Bowen knew that: *Inversion* was based in Houston; *Inversion*'s copyrights belonged to Havel and Ruck; or others working on the commercial made efforts to obtain the copyright holders' permission to use *Inversion*. Without allegations or evidence connecting Bowen's (or his US-based employees') "conduct to [Texas]," as opposed to "plaintiff[s] who lived there," McGarry Bowen US's own contacts with Texas are too "random, fortuitous, or attenuated" to satisfy due process. [*Walden*, 134 S. Ct. at 1123-24](#) (quotation omitted).

The plaintiffs alternatively argue that this court should ignore the corporate formalities between McGarry Bowen US and McGarry Bowen UK and "fuse the two together for jurisdictional [*37] purposes." [*Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 346 \(5th Cir. 2004\)](#) (quoting [*Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 \(5th Cir. 1983\)](#)). "As a general rule . . . the proper exercise of personal jurisdiction over a nonresident corporation may not be based solely upon the contacts with the forum state of another corporate entity with which the defendant may be affiliated." [*Id.* at 346](#). "In determining whether a plaintiff asserting personal jurisdiction has overcome the presumption of corporate separateness, [a] Court considers the following nonexhaustive factors: (1) the amount of stock owned by the parent of the subsidiary; (2) whether the entities have separate headquarters, directors, and officers; (3) whether corporate formalities are observed; (4) whether the entities maintain separate accounting systems; and (5) whether the parent exercises complete control over the subsidiary's general

policies or daily activities." *Id.* (citing [Hargrave, 710 F.2d at 1159](#)). McGarry Bowen US and McGarry Bowen UK have separate officers and directors, observe corporate formalities, and do not own or control one another. (Docket Entry No. 41, Ex. 6 §§ 7-8). The plaintiffs have not met their burden to rebut "the presumption of institutional independence of related corporate entities" by "clear evidence." [Freudensprung, 379 F.3d at 346](#) (quotation omitted).

The court grants McGarry Bowen [*38] US's motion to dismiss for lack of personal jurisdiction.

4. The Mill UK

The Mill UK's employees helped build the *Inversion*-like structure in Vancouver and provided post-production services in London. They also received a forwarded hyperlink to the www.arteryhouston.org video showing the creation of *Inversion*. The subject line was "Houston Hole house video." (Docket Entry No. 37-6, at 17). McGarry Bowen UK CEO Jim Kelly circulated the hyperlink to McGarry Bowen UK employees. Helen Whiteley in turn forwarded the link to Rogue Films employees, who forwarded it to Matthew Williams at The Mill UK. (*Id.*). Williams forwarded the same email—including the subject line—with the same link to four members of The Mill UK's staff. (Docket Entry No. 37-6, at 21). Watching the video makes the copyright protection for the Houston-based work clearer.

But this is not enough. The Mill UK's employees may have been on notice that they were potentially causing injury in Texas, but their "suit-related conduct" was focused more toward the plaintiffs than toward the forum state. Unlike Rogue and McGarry Bowen UK, there is no evidence that The Mill UK's employees knew of, participated in, or condoned Hitchings's [*39] allegedly fraudulent communications with the Houston-based plaintiffs, in Houston, to wrongfully obtain permission to use their copyrighted material.

Nor is the company's posting of the commercial on its website enough to establish personal jurisdiction. As the Fifth Circuit has explained, a "passive website, one that merely allows the owner to post information on the internet . . . will not be sufficient to establish personal jurisdiction." [Revell v. Lidov, 317 F.3d 467, 470 \(5th Cir. 2002\)](#) (quotation omitted). The Mill UK's website is passive. And because the company only seeks customers in the United Kingdom, it did not "direct[]" its website posting at Texas residents.

The court concludes that exercising personal jurisdiction over The Mill UK would offend due process under [Walden](#). The Mill UK's motion to dismiss for lack of personal jurisdiction is granted.

4. Honda Europe

The plaintiffs argue that McGarry Bowen UK's contacts may be imputed to Honda Europe under a corporate agency theory. Some courts have treated agency theories of personal jurisdiction as separate from alter-ego theories. See [Maurice Pierce & Assocs., 608 F. Supp. 173, 176 \(N.D. Tex. 1985\)](#) ("Two theories have been employed by the courts in determining whether the business activities of one corporate entity may be imputed to a [*40] related corporate entity for purposes of personal jurisdiction. These theories are (1) the agency theory and (2) the control or the alter ego theory." (citations omitted)).¹⁵ The Supreme Court recently confirmed that "[a]gency relationships . . . may be relevant to the existence of specific jurisdiction." [Daimler AG v. Bauman, 134 S. Ct. 746, 759 n.13, 187 L. Ed. 2d 624 \(2014\)](#) (emphasis omitted).

"As such, a corporation can purposefully avail itself of a forum by directing its agents [*41] or distributors to take action there." *Id.* (citing [Asahi, 480 U.S. at 112](#) (opinion of O'Connor, J.) (defendant's act of "marketing [a] product through a distributor who has agreed to serve as the sales agent in the forum State" may amount to purposeful availment); [International Shoe, 326 U.S. at 318](#) ("the commission of some single or occasional acts of the corporate agent in a state" may sometimes "be deemed sufficient to render the corporation liable to suit" on related claims)). "Under Texas law, an agency relationship must be affirmatively established[;] it may not be presumed." [Coffey v. Fort Wayne Pools, Inc., 24](#)

¹⁵ It is unclear whether the Fifth Circuit uses the *Hargrave* factors in analyzing those two theories of personal jurisdiction. See [Freudensprung, 379 F.3d at 346](#) (noting that "our cases generally . . . demand proof of control [by one corporation] over the internal affairs of another corporation to make the other its agent or alter ego" before stating that the *Hargrave* factors are the appropriate test to "overcome the presumption of corporate separateness"); see also [O'Quinn v. World Indus. Const., 68 F.3d 471 \(5th Cir. 1995\)](#) (unpublished) ("According to well-established law, a defendant may be found subject to personal jurisdiction as a result of the actions of an agent. . . . [I]n order for a principal-agent relationship to be established, the principal must have the right to control both the means and details of the process by which the agent accomplishes the actions at issue.").

[F. Supp.2d 671, 677 \(N.D. Tex. 1998\)](#) (citations omitted). An agency relationship requires "evidence from which the court could conclude that [t]he alleged principal [had] the right to control both the means and details of the process by which the alleged agent [was] to accomplish the task." *Id.*

The plaintiffs point to the "Agency Agreement" that the two companies negotiated and signed after Honda Europe selected McGarry Bowen UK to produce the CR-V commercial. The plaintiffs cite several provisions of the Agreement, including the following:

3. APPOINTMENT OF AGENCY

3.1 The Client [Honda UK] hereby appoints the Agency [McGarry Bowen UK] to carry out and the Agency agrees to provide the Services to the Client [*42] on the terms set out in this Agreement. Agency Agreement § 3.1 (Docket Entry No. 37-3, at 44).

The plaintiffs contend that this clause "appoint[ed]" McGarry Bowen UK as Honda Europe's "[a]gen[t]." But as the defendants point out, the plaintiffs' argument relies too heavily on the use of the word "agency" without recognizing that the context is a contract with an advertising *agency*. Properly read, the word "agency" in the agreement merely refers to McGarry Bowen UK, the "advertising agency," and does not create an agency role for McGarry Bowen UK with Honda Europe as the principal.

Considering the Agreement's other provisions, however, makes it clear that Honda Europe had the right to control both the means and details of the process by which McGarry Bowen UK was to accomplish its work. Section 11 of the Agreement required McGarry Bowen UK to obtain "written approval" from one of four "Authorised Person[s]" at Honda Europe to receive funding and before completing many tasks. Agency Agreement § 11.1. Section 11.3 requires the "Agency" to obtain written approval for the campaign's overall budget as well as for specific expenditures on copy, layouts, artwork, storyboards, scripts, and various advertising items. See *id.* §§ 11.3.1-2. Without such approval, [*43] the Agency would lack authorization to "purchase production materials and prepare proofs," "publish," "enter into production contracts and engage performers," or "transmit" films and recordings. *Id.* §§ 11.4-5. While the Agency could appoint "suppliers" and negotiate the "terms and conditions of such appointment," on Honda Europe's request, the "Agency shall obtain more than one quote for a particular supply and discuss these with [Honda Europe] before placing

an order." *Id.* § 14.1 (emphasis added).

The Agreement required McGarry Bowen UK to "obtain all usage rights in Existing Material and Commissioned Material as are deemed necessary by the Agency at the time such material is selected or obtained," *id.* § 18.2 (Docket Entry No. 37-3, at 51). This duty was conditioned on McGarry Bowen UK warranting that its work product did not "infringe the Rights of any third party," *id.* § 22.1.2, "include any material copied wholly or in part from any third party copyright work," *id.* § 22.3.2, and did not "infringe any copyright anywhere in the world which belongs to any third party," *id.* § 22.3.4. The Agreement also required McGarry Bowen UK to indemnify Honda against infringement claims and to obtain indemnity insurance. See *id.* §§ 20, 22.5. (Docket [*44] Entry No. 37-3, at 54, 56-57). McGarry Bowen viewed two Honda employees as "running the show." (Docket Entry No. 37-3, at 37). Honda sent representatives to oversee the filming in Vancouver and approve it.

Despite these allegations and evidence, the plaintiffs may not impute McGarry Bowen UK's contacts to Honda Europe in this case because Honda Europe never directed McGarry Bowen UK to "take action" with respect to the State of Texas. [Bauman, 134 S. Ct. at 759 n.13](#). Apart from Honda Europe's approval of the ad campaign and monitoring of the production process—both of which necessarily involved overseeing the use of *Inversion* images and the construction of the replica—the plaintiffs have not alleged or shown how Honda Europe "direct[ed] its agents or distributors to take action" with respect to Houston, Texas. The plaintiffs do not allege or point to any evidence that Honda Europe played any role in contacting them by phone or email and misrepresenting the ad campaign to obtain their consent to the ad design and contents. The plaintiffs do not meet the burden necessary to impute McGarry Bowen UK's contacts to Honda Europe. Nor have they shown that Honda Europe itself had minimum contacts with Texas as needed for personal jurisdiction. [*45] The court grants Honda Europe's motion to dismiss for lack of personal jurisdiction.

In summary, the court grants the motion to dismiss for lack of personal jurisdiction as to defendants McGarry Bowen US, The Mill UK, and Honda Europe, and denies the motion as to defendants Rogue Films and McGarry Bowen UK. The issue as to the remaining defendants is *forum non conveniens*.

III. The Defendants' Motion to Dismiss for Forum

Non Conveniens

A. The Legal Standard for Forum Non Conveniens

"The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." [Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 \(1947\)](#). "A court's authority to effect foreign transfers through the doctrine of *forum non conveniens* derives from the court's inherent power, under Article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice, or oppression." [Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 828 \(5th Cir. 1993\)](#) (citation omitted). "When an alternative forum has jurisdiction to hear the case and when trial in the plaintiff's chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's [*46] convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,' the court may, in exercise of its sound discretion, dismiss the case." [Kempe v. Ocean Drilling & Exploration Co., 876 F.2d 1138, 1141 \(5th Cir. 1989\)](#) (quoting [Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524, 67 S. Ct. 828, 91 L. Ed. 1067 \(1947\)\).](#)

"[A] *forum non conveniens* dismissal must be based on the [court's] finding that, when weighed against plaintiff's choice of forum, the relevant public and private interests strongly favor a specific, adequate and available forum." [Veba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243, 1245 \(5th Cir. 1983\)](#). The movant "bears the burden of invoking the doctrine and moving to dismiss in favor of a foreign forum." [In re Air Crash, 821 F.2d 1147, 1164 \(5th Cir. 1989\)](#). "This burden of persuasion runs to all the elements of the *forum non conveniens* analysis." *Id.* The defendants must "demonstrate (1) the existence of an available and adequate alternative forum and (2) that the balance of relevant private and public interest factors favors dismissal." [Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 671 \(5th Cir. 2003\)](#). "In addition to the balancing of relevant private interest factors, the court must give 'the relevant deference' to the plaintiff's choice of forum." [Alpine View Co. v. Atlas Copco AB, 205 F.3d 208, 221-22 \(5th Cir. 2000\)](#) (quoting [In re Air Crash, 821 F.2d at 1165\). To meet this relatively high burden, the remaining defendants "must supply the Court with enough information for it to conduct a meaningful inquiry and balance the parties' interests." \[*47\] \[Blum v. Gen. Elec.\]\(#\)](#)

[Co., 547 F. Supp. 2d 717, 725 \(W.D. Tex. 2008\)](#) (citing [Empresa Lineas Maritimas Argentinas, S.A. v. Schichau—Unterweser, A.G., 955 F.2d 368, 371 \(5th Cir. 1992\)\).](#)

"The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." [Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257, 102 S. Ct. 252, 70 L. Ed. 2d 419 \(1981\)](#).

B. Application

1. The Existence of an Available and Adequate Alternative Forum

The first issue is whether the UK is an available and adequate alternative forum. The UK defendants whose suit-related conduct led to the alleged copyright infringement are amenable to process in the UK. The defendants also argue that the UK provides an adequate forum for resolving the plaintiffs' copyright claims. A sworn declaration from a British barrister specializing in intellectual property law attests to the method of service and types of remedies available under UK copyright law, (Docket Entry No. 28-8). Because UK copyright law would apply to any infringing distribution in Europe under the Berne Convention, the defendants contend, a UK court would be both available and adequate to resolve [*48] the plaintiffs' claims. See [Intercontinental Dictionary Series v. De Gruyter, 822 F. Supp. 662, 680 \(C.D. Cal. 1993\)](#) ("[T]he unrefuted evidence submitted to the Court substantiates that a United States copyright would be given protection in Australia, since both parties are signatories to the Berne Convention."). The defendants contend that the UK provides an available and adequate forum to resolve any additional claims of US copyright law violations.

Although the plaintiffs do not challenge the UK's adequacy as a forum, they respond that the UK is not, as a threshold matter, a suitable alternative forum because it fails to guarantee compulsory process for McGarry Bowen US, which is based in New York. See [Piper Aircraft, 454 U.S. at 254-55 n. 22](#) ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other

jurisdiction.").

The court concludes that the defendants have met their burden to show that the UK is an available and adequate forum to resolve the plaintiffs' dispute. The court has already dismissed McGarry Bowen US, the sole American defendant, for lack of personal jurisdiction. The remaining defendants—Rogue Films and McGarry Bowen UK—are "amenable [*49] to process" in the UK. (Docket Entry No. 29-8, at 4) (declaring that the three England-based defendants are "subject to the jurisdiction of the English courts and proceedings could be served on them without the permission of the Court"); *see also Tajik Aluminum Plant v. Hydro Aluminum AS* [2005] EWCA Civ 1218; [2006] 1 W.L.R. 767; [2005] 4 All E.R. 1232. The record shows that the plaintiffs' UK and US copyright claims may both be tried in the English courts, where similar remedies are available for both. (Docket Entry No. 29-8, at 2-3).

2. The Private and Public Interest Factors

The defendants must also show that the balance of relevant private and public interest factors strongly favors dismissal. "Normally, there is a 'strong presumption in favor of the plaintiff's choice of forum that may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum.'" *Blum, 547 F. Supp. 2d at 726* (quoting *Schexnider v. McDermott, Int'l, Inc.*, 817 F.2d 1159, 1163 (5th Cir. 1987)); *see also Tendeka, Inc. v. Glover, No. H-13-1764, 2014 U.S. Dist. LEXIS 31749, 2014 WL 978308, at *9 (S.D. Tex. Mar. 12, 2014)*. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *DTEX LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 794 (5th Cir. 2007) (quoting *Gulf Oil Corp.*, 330 U.S. at 508).

a. The Private Factors

In evaluating the private-interest factors, the court considers:

- (i) the relative ease of [*50] access to sources of proof;
- (ii) availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;
- (iii) possibility of view of [the] premises, if view would be appropriate to the action;
- (iv) all other practical problems that make trial of a case easy, expeditious and inexpensive . . . enforceability of judgment[; and whether] the plaintiff [has sought to] vex, harass, or

oppress the defendant.

DTEX, LLC, 508 F.3d at 794 (quoting *Gulf Oil, 330 U.S. at 508*). Each is addressed below.

i. Ease of Access to Evidence

The defendants argue that the officers and directors of Rogue, McGarry Bowen UK, and Honda Europe are in the United Kingdom; the remaining witnesses outside the defendants' control are largely in London; and the relevant documents are in London.

The plaintiffs argue that:

0 many of witnesses are in New York, not London, making Houston more convenient for receiving their testimony;

0 determining the source of the advertisement's portal concept will require testimony from McGarry Bowen US employees and executives like Gordon Bowen;

0 even assuming that most relevant documents are located in the United Kingdom, the defendants have not demonstrated that the "documents are so voluminous [*51] or difficult to obtain in Houston as to weigh in favor of dismissing the claims" against them, *Tendeka, 2014 U.S. Dist. LEXIS 31749, 2014 WL 978308, at *10*;

0 the plaintiffs created *Inversion* in Houston and live and work there.

The plaintiffs also argue that the holding in *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for the Western Dist. of Texas*, 134 S. Ct. 568, 581, 187 L. Ed. 2d 487 (2013)—that courts should not consider the private-interest factors in evaluating a motion to transfer venue if the parties' contract includes a valid forum-selection clause—should be extended to intentional torts resulting from a defendant's purposeful reach into the forum state.

The ease of access to evidence weighs slightly in favor of dismissal. As the defendants observe, many (if not most) of the relevant witnesses are in the UK. The following McGarry Bowen UK witnesses are in England: Simon North, the agency's former executive vice president; Remco Graham and Richard Holmes, the creative directors who discovered *Inversion*; Paul Jordan and Angus Macadam, the executive creative directors who developed the pitch; and Alex McNamara

and Richard Oakes, the Honda account executives. Apart from McGarry Bowen UK, many other material witnesses not under its control but relevant to the plaintiffs' claims are in London: director Sam Brown; producer Kate Hitchings; independent producer Helen [*52] Whiteley; budget consultant David Prys-Owen; and several employees from Honda Europe and The Mill UK. (Docket Entry No. 40, at 16). The court also rejects the plaintiffs' invitation to extend *Atlantic Marine* beyond its facts (a contract dispute involving an enforceable, bargained-for forum-selection clause) to any and every case involving an intentional tort directed at a forum state. That extension would collapse the *forum non conveniens* and personal jurisdiction analyses, which *Atlantic Marine* does not support.

Although the plaintiffs are important fact witnesses, and although Gordon Bowen may also provide relevant testimony, the defendants have shown that this factor weighs slightly in favor of dismissal. The number of critical witnesses in London, as well as the presence of many documents there, tips the balance. See [Glenn v. BP p.l.c., F. Supp. 2d No. 13-cv-3660, 27 F. Supp. 3d 755, 2014 U.S. Dist. LEXIS 83087, 2014 WL 2765777, at *5 \(S.D. Tex. June 18, 2014\)](#) ("Most of the relevant evidence concerns the actions of BP's Board; this evidence will be found in England, which *slightly* tips the scale in favor of an English forum." (emphasis added)).

ii. Availability of Compulsory Process

The defendants argue that the UK offers compulsory process over many more material witnesses than does the [*53] Southern District of Texas. They argue that McGarry Bowen UK and the other defendants lack control over critical witnesses whose presence cannot be compelled in Texas but could in London. In particular, the defendants identify former vice-chairman Simon North, independent producer Helen Whiteley, independent consultant David Prys-Owen, former Honda Europe employee Ellie Tory, former Starcom MediaVest employee David Palmer, and former The Mill UK employees Matthew Williams and Adam Grint. (Docket Entry No. 29, at 21).

The plaintiffs respond that the defendants have offered no evidence suggesting any of these witnesses would be unwilling to testify voluntarily, and that, if they refuse to come to the United States to testify, depositions could be taken where the witness could be compelled to appear. The defendants respond that this is unsatisfactory because "fix[ing] the place of trial at a

point where litigants cannot compel personal attendance and may be forced to try their cases on deposition is to create a condition not satisfactory to litigants." [DTEX, LLC, 508 F.3d at 799](#) (quoting [Perez & Compania \(Cataluna\), S.A. v. M/V Mexico I, 826 F.2d 1449, 1453 \(5th Cir. 1987\)](#)). The plaintiffs observe that "only one" of these witnesses—Helen Whiteley—appears to "have been directly involved in the decision to [*54] wrongfully copy *Inversion*," and she used a McGarry Bowen email address. (Docket Entry No. 39, at 9). The plaintiffs note that this court, but not the London courts, would be able to compel New York residents to appear and testify in Texas.

This factor weighs in favor of dismissal. Helen Whiteley and several other material witnesses (including Simon North, who has since left McGarry Bowen UK) no longer work for the defendants and cannot be compelled to testify in Texas. Because these witnesses live in London, they could be compelled to testify in an English court. The plaintiffs' suggest this court rely on depositions, but as the Fifth Circuit has noted, that is an unsatisfactory condition. See [DTEX, LLC, 508 F.3d at 799](#). Moreover, given the court's dismissal of McGarry Bowen US for lack of personal jurisdiction and its location in New York, the court cannot compel its employees to testify. Although the English courts might be unable to compel attendance of McGarry Bowen US's employees, the company has "expressly agree[d] not to contest personal jurisdiction in the United Kingdom, should this Court dismiss this lawsuit and the Plaintiffs choose to file suit against it there." (Docket Entry No. 40, at 15).

iii. Possibility [*55] of Viewing the Premises

As defendants note, *Inversion* no longer exists in tangible form, so there is "no possibility of viewing the work at issue." (Docket Entry No. 29, at 17). This factor is neutral.

iv. Other Factors

The defendants argue that the practical problems of a trial in Texas weigh in favor of dismissal. In addition to the absent witness availability and evidence issues, the cost of transporting London-based witnesses to Texas would be "enormous," (Docket Entry No. 29, at 17), and outweighs the burden imposed on the two plaintiffs. See [DTEX, 508 F.3d at 801](#) (rejecting plaintiff's claim of financial hardship based on two American witnesses having to testify in Mexico compared to many Mexican witnesses having to travel to Texas). They also contend

that the plaintiffs would have an easier time enforcing a judgment by a UK court than an American court because the relevant defendants are subject to jurisdiction in the UK (but not Texas). The plaintiffs respond that they should not have to shoulder the financial burden of suing in the UK when the defendants' tortious conduct that gave rise to this suit. They note that the expense and inconvenience for the New York witnesses will be lower if the litigation [*56] stays in Texas, and that the defendants have not presented evidence that litigating in Texas will be more expensive than in the UK.

This factor is neutral. One side or the other will likely incur significant expenses and inconvenience depending on where the litigation proceeds. And enforcing a U.S. judgment against UK companies may be difficult. But because a "successful motion under *forum non conveniens* requires dismissal of the case" and "inconveniences plaintiffs in several respects," [Atlantic Marine, 134 S. Ct. 583 n.8](#) (quoting and altering [Norwood v. Kirkpatrick, 349 U.S. 29, 32, 75 S. Ct. 544, 99 L. Ed. 789 \(1955\)](#)), this factor is neutral.

v. Summary of the Private-Interest Factors

The plaintiffs' choice of forum is presumptively valid. Although the defendants have shown that two private-interest factors weigh in favor of dismissing this action, only one of these factors weighs strongly in favor of dismissal.

b. The Public-Interest Factors

The public-interest factors include:

- (i) the administrative difficulties flowing from court congestion;
- (ii) the local interest in having localized controversies resolved at home;
- (iii) the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action;
- (iv) the avoidance of unnecessary problems in conflict [*57] of laws, or in application of foreign law; and
- (v) the unfairness of burdening citizens in an unrelated forum with jury duty.

[DTEX, LLC, 508 F.3d at 795](#) (quoting [Dickson Marine, Inc. v. Panalpina, Inc., 179 F.3d 331, 342 \(5th Cir. 1999\)](#)).

i. Administrative Difficulties

The defendants largely repeat what they said about witnesses and evidence in arguing that this factor

weighs in favor of dismissal. They also argue that the fact that this court will have to interpret and apply foreign law weighs in favor of dismissal. The plaintiffs contend that the case involves straightforward application of copyright law, foreign and domestic). The foreign legal issues presented in this case are not particularly complex or novel. The reasons discussed above on the availability of the evidence, particularly witnesses, make this factor weigh slightly in favor of dismissal.

ii. The Forum's Interest in Resolving the Controversy

Texas has an interest in this dispute. The plaintiffs are Texas residents who created and hold copyrighted intellectual property in Texas. The plaintiffs also allege that the defendants violated Texas state law in fraudulently inducing Ruck's consent through Hitchings's deceptive phone call and emails and the defendants' knowing use of the results. The defendants argue that the UK [*58] has a stronger interest in resolving this controversy because the alleged infringement occurred in London, not the U.S., making UK copyright law apply under the Berne Convention. See [Nimmer On Copyright § 17.05\[A\]](#) (2013) (stating that the Berne Convention does not make U.S. law applicable overseas, but rather, provides that signatories' citizens are "entitled to the same copyright protection in each other member state as such other state accords its own nationals"); [Rundquist v. Vapiano, 798 F. Supp. 2d 102, 126 \(D.D.C. 2011\)](#) ("[A]cts of infringement occurring outside the United States are not actionable under the Copyright Act because U.S. copyright law has no extraterritorial effect.").

The plaintiffs respond that the UK's interest is irrelevant to determining whether Texas has an interest in resolving the controversy. They also contend that when a foreign defendant "poaches" a plaintiff's intellectual property from the United States, the public factors weigh strongly against dismissal.

The United States undoubtedly has a strong interest in protecting its citizens' intellectual property from foreign "poaching." But the "poaching" cases carry less weight when, as here, the vast majority (if not all) of the infringing activity occurred in a foreign jurisdiction [*59] where the courts and law protect the intellectual-property holder. In [World Film Services, Inc. v. RAI Radiotelevisione Italiana S.p.A.](#), for example, the "allegedly infringing work [was] claimed to have been distributed in the United States generally, and

specifically in New York." [1999 U.S. Dist. LEXIS 985, 1999 WL 47206, at *9 \(S.D.N.Y. Feb. 3, 1999\)](#). Similarly, in *Hayes Bicycle Group, Inc. v. Muchachos International Co.*, federal trademark law applied to the plaintiff's claims because the defendant "marketed itself within the United States" and its "representatives visited Hayes's [Wisconsin] headquarters during contract negotiations." [2008 U.S. Dist. LEXIS 92360, 2008 WL 4830570, at *5 \(E.D. Wis. Oct. 31, 2008\)](#). In *CYBERSitter, LLC v. People's Republic of China*, the plaintiff based "four of its seven claims on California and federal law whereas only one claim [was] based on the law of China." [2010 U.S. Dist. LEXIS 128345, 2010 WL 4909958, at *8 \(C.D. Cal. Nov. 18, 2010\)](#). Finally, in *International Dictionary Series*, while the court recognized that the "United States . . . has an interest in the protection of its certificate of registration for copyright," it further observed that:

the unrefuted evidence submitted to the Court substantiates that a United States copyright would be given protection in Australia, since both parties are signatories to the Berne Convention.

[822 F. Supp. at 680-81](#).

The court concludes that both Texas[*60] and the United States have an interest in litigating this matter in a Texas federal court, but that interest is somewhat diminished by the extraterritorial focus of the alleged infringing activity and the effective availability there of legal remedies and courts willing to enforce them. This factor weighs only slightly against dismissal.

iii. The Governing Law

The parties dispute the law that applies. Both agree that UK copyright law applies to the alleged infringing actions and distribution in London. See [Rundquist v. Vapiano, 798 F. Supp. 2d 102, 126 \(D.D.C. 2011\)](#) ("[A]cts of infringement occurring outside the United States are not actionable under the Copyright Act because U.S. copyright law has no extraterritorial effect."). The plaintiffs assert that U.S. law applies as well because the alleged contributory infringement includes the defendants' actions in making their copyrighted material available on websites for infringing use in the United States. The defendants argue that the plaintiffs' allegations of contributory infringement under U.S. law are insufficient to state a claim, and in any event, UK copyright law will predominate because the alleged infringing activity largely occurred in London. They assert a "strong interest in trying [this] [*61] case

in a forum that is familiar" with that law. [Zermeno v. McDonnell Douglas Corp., 246 F. Supp. 2d 646, 664 \(S.D. Tex. 2003\)](#).

Although the plaintiffs' allegations of the infringing distribution in London would require the court to apply UK copyright law, their allegations of contributory infringement involving the United States implicate that country's law as well. "A defendant in an infringement action may be held liable for acts of infringement if that defendant is either contributorily or vicariously liable for another's direct act of infringement. Where those acts of infringement occur within the United States and a plaintiff seeks to hold a foreign defendant contributorily or vicariously liable for those acts, it has been held that subject matter jurisdiction may exist, and that the exercise thereof does not conflict with the doctrine of nonextraterritoriality." [Armstrong v. Virgin Records, Ltd., 91 F. Supp. 2d 628, 635 \(S.D.N.Y. 2000\)](#).

"One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." [Metro—Goldwyn—Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930, 125 S. Ct. 2764, 162 L. Ed. 2d 781 \(2005\)](#) (citations omitted). "A party is liable for contributory infringement when it, 'with knowledge of the infringing activity, induces, causes or materially contributes to [*62] infringing conduct of another.'" [Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 790 \(5th Cir. 1999\)](#) (quoting [Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 \(2d Cir. 1971\)](#)); accord [Papa Berg, Inc. v. World Wrestling Entertainment, Inc., No. 3:12-cv-2406-B, 2013 U.S. Dist. LEXIS 166960, 2013 WL 6159296, at *12 \(N.D. Tex. Nov. 25, 2013\)](#).

The plaintiffs' allegations establish that the remaining defendants uploaded the video, with knowledge of its potential for infringing use, to several websites available in the United States, including Vimeo and [www.mcgarrybowen.com](#). The record raises a plausible inference that McGarry Bowen US has engaged in some infringing behavior in the United States. See [Rundquist, 798 F. Supp. 2d at 127](#) ("At least one act by the alleged infringer or by the third-party must take place in the United States to trigger the protection of United States law and the subject matter jurisdiction of this Court."). This is sufficient at this stage for an inference that the defendants "induced, caused, or materially contributed to the infringing conduct" of McGarry Bowen US in the United States. [Alcatel, 166](#)

[F.3d at 790](#); [Rundquist, 798 F. Supp. 2d at 126](#).

Finally, the plaintiffs allege a plausible state-law claim for fraud based on the defendants' communications with Ruck to elicit his consent.

Because the plaintiffs alleged state-law fraud and contributory infringement under U.S. law,¹⁶ and the UK the copyright claim is not novel or unduly complex, this factor is [*63] neutral.

iv. The Burden on Citizens

This lawsuit involves plaintiffs who created copyrighted material in Texas, continue to hold that copyright in Texas, and live and work in Texas. Litigating their claims— under both UK and U.S. copyright law, as well as state law—will not unfairly burden Texas residents serving as jurors. See *id.* at 803. The defendants' argument that trying this case in Texas will force Texas jurors to determine "whether UK companies violated UK law," (Docket Entry No. 29, at 21), fails to recognize that the intellectual property and its owners have strong connections to Texas. This factor weighs against dismissal.

v. Summary of the Public-Interest Factors

The defendants have not shown that the public-interest factors weigh strongly in favor of dismissing the plaintiffs' copyright and state-law claims against them in Texas to permit litigation in the United Kingdom.

C. Conclusion as to *Forum Non Conveniens*

Although the defendants have met their burden to show the existence of an available and adequate alternative forum, they have not demonstrated that the [*64] private and public factors strongly weigh in favor of dismissal. The record does not support the "hars[h] result" of dismissing the entire case and forcing the plaintiffs to litigate in England, "inconvenienc[ing] [them] in several respects," [Atlantic Marine, 134 S. Ct. 583 n.8](#) (quotations omitted). The motion to dismiss based on *forum non conveniens* is denied.

VI. Conclusion

The defendants' motion to dismiss for lack of personal

jurisdiction (Docket Entry No. 28) is granted in part and denied in part. The court grants the motion as to McGarry Bowen US, The Mill UK, and Honda Europe, and denies the motion as to Rogue Films and McGarry Bowen UK. The remaining defendants' motion for *forum non conveniens*, (Docket Entry No. 29), is denied. An order of dismissal as to McGarry Bowen US, The Mill UK, and Honda Europe is separately entered.

SIGNED on September 30, 2014, at Houston, Texas.

/s/ Lee H. Rosenthal

Lee H. Rosenthal

United States District Judge

ORDER OF DISMISSAL

In accordance with the Memorandum and Opinion of today's date, Defendants Honda Motor Europe, Ltd., Dentsu McGarry Bowen LLC, and The Mill (Facility) Limited are dismissed from this proceeding without prejudice.

SIGNED on September 30, 2014, at Houston, Texas.

/s/ Lee H. Rosenthal

Lee H. [*65] Rosenthal

United States District Judge

¹⁶ Even if only UK copyright law applies, that factor "standing alone . . . does not justify dismissal," [Rundquist, 798 F. Supp. 2d at 132](#) (quotation omitted).

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APPENDIX 7

Nam Chuong Huynh v. Aker BioMarine Antarctic AS

United States District Court for the Western District of Washington

July 29, 2014, Decided; July 29, 2014, Filed

No. C13-0723RSL

Reporter

2014 U.S. Dist. LEXIS 103887; 2014 WL 3738636

NAM CHUONG HUYNH, et al., Plaintiffs, v. AKER BIOMARINE ANTARCTIC AS, et al., Defendants.

Counsel: [*1] For Nam Chuong Huynh, Lin R Bui, Husband and Wife, Plaintiffs: C Steven Fury, Francisco Alfredo Duarte, LEAD ATTORNEYS, FURY BAILEY, SEATTLE, WA.

For Aker Biomarine Antarctic AS, Aker Biomarine Antarctic AS II, Defendants: Christopher W Nicoll, Jeremy Jones, Ruby S Redshaw, LEAD ATTORNEYS, William Lawrence Black , III, NICOLL BLACK & FEIG PLLC, SEATTLE, WA.

Judges: Robert S. Lasnik, United States District Judge.

Opinion by: Robert S. Lasnik

Opinion

ORDER DENYING MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

This matter comes before the Court on "Defendants' Motion to Dismiss for Lack of Personal Jurisdiction." Dkt. # 44. Plaintiffs allege that defendants were negligent in providing defective equipment on a vessel in Montevideo, Uruguay, and are responsible for the injuries Mr. Huynh suffered when he came into contact with the equipment. Defendants, the Norwegian owner and operator of the vessel, move to dismiss the Amended Complaint pursuant to [Fed. R. Civ. P. 12](#) because the Court lacks personal jurisdiction over them. Having reviewed the memoranda, declarations, and exhibits submitted by the parties,¹ the Court finds as

follows:

Plaintiffs have the burden of demonstrating that the Court may exercise personal jurisdiction over defendants. [In re W. States Wholesale Natural Gas Antitrust Litig.](#), 715 F.3d 716, 741 (9th Cir. 2013). In evaluating defendants' jurisdictional contacts, the Court accepts uncontroverted allegations in the complaint as true. [Menken v. Emm](#), 503 F.3d 1050, 1056 (9th Cir. 2007). If a jurisdictional fact is disputed, however, plaintiffs cannot rely on the bare allegations of the complaint and must come forward with additional evidence. [Mavrix Photo, Inc. v. Brand Techs., Inc.](#), 647 F.3d 1218, 1223 (9th Cir. 2011). Conflicts in the evidence provided by the parties must be resolved [*3] in plaintiff's favor. [Schwarzenegger v. Fred Martin Motor Co.](#), 374 F.3d 797, 800 (9th Cir. 2004). Because the Court did not hear testimony or make findings of fact, plaintiffs "need only make a prima facie showing of jurisdiction to withstand a motion to dismiss." [Wash. Shoe Co. v. A-Z Sporting Goods, Inc.](#), 704 F.3d 668, 671-72 (9th Cir. 2012) (internal quotation marks omitted).

Pursuant to [Fed. R. Civ. P. 4\(k\)\(1\)\(A\)](#), federal courts ordinarily follow state law when determining the extent to which they can exercise jurisdiction over a person. [Daimler AG v. Bauman](#), U.S. , 134 S. Ct. 746, 753, 187 L. Ed. 2d 624 (2014). The Washington Supreme Court has held that, despite the rather narrow language used in Washington's long-arm statute, [RCW 4.28.185](#), the statute "extends jurisdiction to the limit of federal due process." [Shute v. Carnival Cruise Lines](#), 113 Wn.2d 763, 771, 783 P.2d 78 (1989). The Court therefore need determine only whether the exercise of

provided, Mr. Eikrem's conjecture regarding the source of merchandise supplied by Rena International, and Mr. Huynh's assertion that defendants requested his personal participation in the refitting of the M/V ANTARCTIC SEA.

This matter can be decided on the papers submitted. Plaintiffs' request for oral argument is therefore DENIED.

¹ Much of the evidence submitted by the parties is not based on the personal knowledge [*2] of the declarant or is otherwise inadmissible. The Court has not considered this information, including, among other things, Mr. Black's summation of employment documents that have not been

jurisdiction comports with federal constitutional requirements. [Easter v. Am. W. Fin., 381 F.3d 948, 960 \(9th Cir. 2004\)](#).²

In order to justify the exercise of jurisdiction [*4] over a non-resident under the federal constitution, plaintiffs must show that each defendant had "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." [Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 \(1945\)](#) (internal quotation marks omitted). Two different categories of personal jurisdiction have developed, namely "general jurisdiction" and "specific jurisdiction." "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." [Goodyear Dunlop Tires Operations, S.A. v. Brown, U.S. , 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 \(2011\)](#) (quoting [Int'l Shoe, 326 U.S. at 317](#)). Specific jurisdiction, on the other hand, "focuses on the relationship among the defendant, the forum, and the litigation" and exists when "the defendant's suit-related conduct [creates] a substantial connection with the forum State." [Walden v. Fiore, U.S. , 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12 \(2014\)](#) (internal quotation marks and citations [*5] omitted). Both types of jurisdiction are considered below.

(A) General Jurisdiction

Plaintiffs argue that defendants Aker BioMarine Antarctic AS ("AKAS") and Aker BioMarine AS II ("AKAS II") are subject to the general jurisdiction of Washington courts because a subsidiary of AKAS, Aker BioMarine Antarctic US, Inc. ("AKASUS"), has constant and pervasive contacts with this forum. The Court assumes, for purposes of this analysis, that AKASUS' contacts can be imputed to both of the named defendants.³ Nevertheless, there is no evidence from which one could plausibly infer that AKASUS is "at home" in Washington. The Supreme Court has recently made clear that the type of contacts that will make a

² Plaintiffs are not asserting that service on defendants was proper under [Fed. R. Civ. P. 4\(k\)\(2\)](#).

³ This assumption is dubious in light of the Supreme Court's rejection of a broad agency theory of jurisdiction ([Daimler AG, 134 S. Ct. at 758-60](#)) and the lack of an agency relationship between AKAS II and AKASUS.

corporation subject to jurisdiction for all purposes are, for both practical and fairness reasons, generally limited to the place of incorporation and principal place of business. "Those affiliations have the virtue of being unique — that is, each ordinarily indicates only one place — as well as easily ascertainable. These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." [Daimler AG, 134 S. Ct. at 760](#) (internal [*6] citations omitted).

AKASUS is a Delaware corporation with its principal place of business in New Jersey. Although it has a small office in Washington, neither it nor the named defendants can be deemed "at home" in the forum under [Daimler AG](#). General jurisdiction over defendants does not, therefore, exist.

(B) Specific Jurisdiction

Specific jurisdiction "depends on an affiliation between the forum and the underlying controversy (*i.e.*, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation)." [Walden, 134 S. Ct. at 1121 n.6](#). The state's authority to bind a non-resident defendant is justified only if there is a sufficient connection between the defendant, the forum, and the cause of action. [Helicopteros Nacionales de Colombia, SA v. Hall, 466 U.S. 408, 413-14, 104 S. Ct. 1868, 80 L. Ed. 2d 404 \(1984\)](#). The Ninth Circuit applies a three-prong test when determining whether to exercise specific jurisdiction over a non-resident:

- (1) The non-resident defendant must [*7] purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.*, it must be reasonable.

[Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1111 \(9th Cir. 2002\)](#).

(1) Purposeful Availment

Plaintiffs argue that defendants (or their related companies) engaged in a series of separate and distinct business transactions with plaintiff's employer, Marel Seattle, over an eight-year period, thereby purposefully availing themselves of the privilege of conducting activities in Washington and enjoying the benefit and protection of its laws. Having failed to establish this court's general, all-purpose jurisdiction over defendants, plaintiffs cannot simply compile all of defendants' contacts with Washington, regardless of whether they have any connection with plaintiffs' claims, in order to justify the exercise [*8] of specific jurisdiction. Specific jurisdiction is, by its nature, suit-related and limited to ensure that defendants "have fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) (Stevens, J., concurring). As described in *Burger King Corp. v. Rudzewicz*, the "fair warning" requirement is satisfied if defendants intentionally direct their activities at residents of the forum "and the litigation results from alleged injuries that arise out of or relate to those activities." 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (internal quotation marks omitted, emphasis added). "A court may exercise specific jurisdiction [as opposed to general jurisdiction] over a foreign defendant if his or her less substantial contacts with the forum give rise to the cause of action before the court. The question is whether the cause of action arises out of or has a substantial connection with that activity." *Doe v. Unocal Corp.*, 248 F.3d 915, 923 (9th Cir. 2001).

Plaintiffs offer no case law that would sanction the compilation of contacts that are factually and temporally remote from plaintiff's cause of action when evaluating contacts [*9] for specific jurisdiction purposes. Because the focus of the specific jurisdiction analysis is whether defendants' suit-related conduct created a substantial connection with the forum (*Walden*, 134 S. Ct. at 1121), the Ninth Circuit has not been willing to consider surrounding, unrelated contacts of the parties in this context. *Paramount Farms, Inc. v. Hai Jyi Foods Co.*, 121 F.3d 716 (9th Cir. 1997) ("[A]ctivities within the forum state unrelated to the claim at issue do not constitute grounds for specific jurisdiction.") (unpublished decision); *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980) [*10] (three and a half year relationship between the parties encompassing fifteen prior transactions would not be considered when determining whether defendant's actions with regard to the sixteenth contract constituted purposeful availment).

Because only the contacts related to the negotiation and performance of the M/V ANTARCTIC SEA contract arguably gave rise to plaintiffs' claims, the Court will consider only those contacts when evaluating whether defendants purposefully availed themselves of the privilege of conducting business in Washington.

In July 2011, AKAS contacted Marel Seattle to inquire whether it would provide a quote for fabricating and installing fish processing equipment in the M/V ANTARCTIC SEA, a vessel AKAS was then considering buying. All communications related to the negotiation of the contract occurred via telephone and email. AKAS II ultimately purchased the vessel, with AKAS managing its day-to-day operations.⁴ The parties anticipated that the installation of the fish processing equipment would occur in Uruguay, and defendants assert that it did not matter to them where Marel Seattle was based, where it would source the necessary equipment, where it would manufacture [*11] the machinery, or how it would staff the installation project. Decl. of Webjørn Eikrem (Dkt. # 26) at ¶ 9. Nevertheless, defendants were aware that it was contracting with a Washington company, Marel Seattle, Inc., not with its Danish predecessor or its Icelandic parent company. In addition, defendants knew that items installed on the M/V ANTARCTIC SEA would be fabricated in Seattle, that other items to be used in the conversion were then being warehoused in Seattle from a prior job, and that these items would be shipped from Seattle to Uruguay. Dkt. # 26-1 at 2. Marel Seattle's bid for the project was on a time and materials basis: Marel Seattle would invoice AKAS II monthly for payment. Dkt. # 26-1 at 3-4. The relationship between the parties was to be "governed and interpreted solely in accordance with the laws that apply in the country/state in which Seller has its registered offices" unless those laws conflicted with the United Nations Convention on the International Sale of Goods of 1980. Dkt. # 26-1 at 7. Defendants also agreed to submit any dispute arising out of the contract to arbitration in Seattle.⁵ Thus,

⁴ Defendants make no attempt to differentiate between the contacts of AKAS and those of AKAS II.

⁵ Defendants argue that "the laws that apply in Washington" actually means federal law because this is a maritime contract. Dkt. # 59 at 5. Not only is this not the most natural reading [*13] of the choice of law provision, but state law applies to maritime contracts as long as it does not prejudice the characteristic features of maritime law or interfere with the harmony and uniformity of that law. *Aqua-Marine Constructors v. Banks*, 110 F.3d 663, 668 (9th Cir. 1997). The Court need not decide the choice of law issue at this point: it is enough to

defendants created "continuing relationships and obligations with" [*12] a Washington entity: in this context, it is fair to "subject [defendants] to regulation and sanctions in [Washington] for the consequences of their activities." [Burger King, 471 U.S. at 473](#). The Court finds that defendants are not being haled into this jurisdiction through random, fortuitous, or attenuated contacts over which they had no control, but rather because of their own decision to reach into Washington to obtain services that would be performed both here and elsewhere, that would involve continuing contact and payments until the project was completed, and that compelled a Washington forum if defendants initiated the dispute resolution process. Having reviewed the relationship between the forum and the course of negotiations, the terms of the contract, and the anticipated future consequences, the Court finds that defendants engaged in purposeful activity invoking the benefits and protections of Washington.

(2) Arising Out Of

Defendants argue that, because plaintiffs have asserted a negligence claim, their cause of action does not arise out of the forum-related contacts, *i.e.*, their contract with Marel Seattle. Dkt. # 59 at 6-7. Once purposeful availment is shown, plaintiffs must establish only that their cause of action arose out of or relates to the contract. The nature of plaintiffs' claim is not determinative, nor must the contract be the proximate cause of Mr. Huynh's injuries. All that is required to satisfy the second prong of the specific jurisdiction analysis is a showing that plaintiffs would not have suffered an injury "but for" defendants' [*14] forum-related conduct. [Menken, 503 F.3d at 1058](#). The Sixth Circuit has approved of the exercise of jurisdiction in remarkably similar circumstances. In [Theunissen v. Matthews](#), the owner of a lumber yard in Canada who contracted with a Michigan trucking company to ship lumber to Michigan could be haled into the forum to answer for injuries suffered by the trucking company's employee while loading lumber in the yard. [935 F.2d 1454, 1461 \(6th Cir. 1991\)](#) (finding the "arising out of" prong satisfied because, "but for Matthews' alleged business contacts with his employer, Theunissen would have sustained no injury"). Had Mr. Huynh been injured while fabricating machines for the M/V ANTARCTIC SEA in Seattle there would be little doubt that his claims were related to the contract between his employer and

defendants. Defendants offer no explanation for why the location of the injury should affect the "related to" analysis. In both situations, had defendants not contracted with Marel Seattle for the refit of the vessel, Mr. Huynh would not have been in a position to suffer from defendants' alleged negligence. That is all that is required under the specific jurisdiction analysis.

(3) [*15] Reasonableness

Once plaintiff satisfies the first two prongs of the personal jurisdiction analysis, "the burden then shifts to the defendant to present a compelling case that the exercise of jurisdiction would not be reasonable." [Menken, 503 F.3d at 1057](#) (internal quotation marks and citations omitted). Having considered the seven factors set forth in [CE Distribution, LLC v. New Sensor Corp., 380 F.3d 1107, 1112 \(9th Cir. 2004\)](#), the Court finds that defendants' repeated forays into Washington over the past eight years, their willingness to arbitrate in this forum, Washington's interest in providing injured citizens with a remedy, and the location of plaintiff and his doctors support the conclusion that the exercise of jurisdiction in this case would be reasonable. The Court acknowledges that Norway's interests in regulating the conduct of the owners and operators of Norwegian-flagged vessels, its related interest in avoiding conflicting operational and safety requirements, and its willingness to hear plaintiffs' claim militates against the exercise of jurisdiction. The split of factors does not, however, weigh in defendants' favor and does not constitute a "compelling case" that the [*16] exercise of jurisdiction would be unreasonable.

For all of the foregoing reasons, defendants' motion to dismiss for lack of personal jurisdiction is DENIED.

Dated this 29th day of July, 2014.

/s/ Robert S. Lasnik

Robert S. Lasnik

United States District Judge

note that the contract defendants signed at least had the potential to subject them to Washington law and would, if a dispute arose, likely compel their participation in this forum.

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APPENDIX 8

[Leader's Inst., LLC v. Jackson](#)

United States District Court for the Northern District of Texas, Dallas Division

July 24, 2015, Decided; July 24, 2015, Filed

CIVIL ACTION NO. 3:14-CV-3572-B

Reporter

2015 U.S. Dist. LEXIS 96668; 2015 WL 4508424

THE LEADER'S INSTITUTE, LLC and DOUG STANEART, Plaintiffs, v. ROBERT JACKSON, MAGNOVO TRAINING GROUP, LLC, COLETTE JOHNSTON, and SHORT SPLICE, INC., Defendants.

Subsequent History: Motion granted by [Leader's Inst. LLC v. Jackson, 2016 U.S. Dist. LEXIS 103879 \(N.D. Tex., Aug. 8, 2016\)](#)

Counsel: [*1] For The Leaders Institute LLC, Doug Stanearth, Plaintiffs: Cynthia A Cook, LEAD ATTORNEY, Brown PC, Fort Worth, TX; Roxanne Edwards, Brown PC, Dallas, TX.

For Robert Jackson, Magnovo Training Group LLC, Defendants: Steven Griffith Cracraft, LEAD ATTORNEY, Amy Ann Rollins, Kevin Richard Erdman, PRO HAC VICE, Brannon Sowers & Cracraft PC, Indianapolis, IN; Daniel Dale Bohmer, Glenn Edward Janik, Janik Bohmer PLLC, Dallas, TX.

For Colette Johnston, Short Splice Inc, Defendants: Michael V Marconi, LEAD ATTORNEY, The Law Offices of Kent Davis, North Richland Hills, TX.

Judges: JANE J. BOYLE, UNITED STATES DISTRICT JUDGE.

Opinion by: JANE J. BOYLE

Opinion

MEMORANDUM OPINION AND ORDER

Before the Court are two motions to dismiss for lack of personal jurisdiction, one of which moves in the alternative for a transfer of venue to the U.S. District Court for the Southern District of Indiana. For the reasons that follow, the Court **GRANTS IN PART** and **DENIES IN PART** the Motion to Dismiss Plaintiffs' First

Amended Original Complaint Pursuant to [Fed. R. Civ. P. 12\(b\)\(2\)](#) (doc. 39) filed by Defendants Robert Jackson and Magnovo Training Group, LLC, which as explained below, results in the partial dismissal of the claims against these defendants and a denial of [*2] their alternative request for a venue transfer. Also discussed below, the Court **GRANTS** the Motion to Dismiss for Lack of Personal Jurisdiction (doc. 41) filed by Defendants Colette Johnston and Short Splice, Inc., and dismisses the claims against these defendants in their entirety.

I.

BACKGROUND

This case was brought by Plaintiffs The Leader's Institute, LLC ("TLI"), a Texas company headquartered in Arlington, Texas, and Doug Stanearth ("Stanearth"), a Texas resident and the founding owner and CEO of TLI. Doc. 36, Pls.' First Am. Compl. ("Am. Compl.") ¶¶ 1, 2, 45. Plaintiff TLI is "in the business of conducting corporate leadership, team-building and public speaking seminars." *Id.* ¶¶ 45-47. Integral to TLI's business are the various pieces of intellectual property owned by Plaintiffs, including registered trademarks for "Build-A-Bike(R)" and "BUILD-A-BIKE (R)," registered copyrights for materials used in TLI's presentations, and customer information lists that Plaintiffs maintain on a password-protected system housed in Texas. See *id.* ¶¶ 48, 52-65.

Plaintiffs filed this action against Defendants Robert Jackson ("Jackson"), Magnovo Training Group, LLC ("Magnovo"), Colette Johnston ("Johnston") [*3] and Defendant Short Splice, Inc. ("Short Splice"), who together have allegedly exploited Plaintiffs' intellectual property in such ways that allow them to unfairly compete with TLI in the corporate seminar industry. Defendants, who all hail from out of state, have filed two separate motions attempting to prevent Plaintiffs from further pursuing the claims filed against them in this

jurisdiction. The Court begins its review of these motions with a background discussion of the relevant facts regarding each pair of movants.¹

A. Background: Defendants Jackson and Magnovo

The first motion at issue was filed by Defendants Jackson and Magnovo. Jackson is a resident of Indiana, and has never lived or owned real estate in Texas. Doc. 40-1, Defs. Jackson's & Magnovo's App. Supp. Mot. ("Defs. Jackson's & Magnovo's App.") at 3 (Ex. A, Jackson Aff. ¶¶ 4-5). He is also the President and [*4] owner of Magnovo, which was registered as a limited liability company under the laws of Indiana in August 2009, and has remained headquartered there since. Defs. Jackson's & Magnovo's App. 7-8 (Ex. B, Jackson Aff. ¶¶ 3, 6).

Though Jackson served as an independent contractor for TLI as far back as 2006, he had a falling out with Plaintiffs in 2009, and his conduct during this initial relationship does not appear to be relevant to the present case. See Am. Compl. ¶ 70; Doc. 45, Pls.' App. Supp. Resp. Defs. Jackson's & Magnovo's Mot. ("Pls.' App. Opp'n Jackson's & Magnovo's Mot.") at 3 (Ex. A, Staneart Aff. ¶¶ 10-11). Instead, the conduct relevant to this case dates back to September 2010, at which time Jackson began reaching out to Staneart in Texas in an effort to re-establish his relationship with TLI. Pls.' App. Opp'n Jackson's & Magnovo's Mot. 3 (Ex. A, Staneart Aff. ¶ 12). Jackson continued to contact Staneart in both October and November of 2010, "offering to instruct classes [as a contractor for TLI] whenever available across the United States and to pay his own travel expenses." *Id.* at 4 (Ex. A, Staneart Aff. ¶¶ 13, 14). Staneart accepted Jackson's proposal in November 2010, and that [*5] month, Jackson flew to Texas at his own expense to lead a TLI event for a customer in Texas. *Id.* (Ex. A, Staneart Aff. ¶¶ 14, 15). During his trip, Jackson also met with Staneart in person, and continued to lobby for his return to TLI. *Id.* (Ex. A, Staneart Aff. ¶¶ 16, 17). In the face of "Jackson's persistent pleading," Staneart eventually "agreed to give Jackson a second chance as an independent contractor." *Id.*

Subsequently, Jackson signed a written agreement with TLI, and returned the contract to Staneart "in Texas via facsimile on approximately April 4, 2011." *Id.* (Ex. A, Staneart Aff. ¶ 18); see also *id.* at 13 (Ex. A-3, Agreement Dated 2/1/2011). This agreement was labeled "Independent Contractor Agreement" at the top, and provided, among other things, that client lists and instructional materials are the intellectual property of TLI, and that Jackson agreed not to use such materials "to compete with TLI for a period of 18 months" following termination. *Id.* at 13.

Pursuant to his Independent Contractor Agreement, Jackson thereafter began performing team building and leadership seminars for TLI's clients, and selling its services to prospective and established customers. *Id.* at 5 (Ex. A, Staneart Aff. ¶ 20). Jackson performed most of his work [*6] for TLI remotely—from his home in Indiana. See Defs. Jackson's & Magnovo's App. 5 (Ex. A, Jackson Aff. ¶ 17). Nevertheless, Plaintiffs show that, over the course of his relationship with TLI, Jackson contacted at least forty-seven Texas residents trying to sell TLI's services and collect a commission for himself, completed sales to these Texas customers on at least twenty-three occasions, and conducted eight seminars or workshops in Texas for TLI's clients. Pls.' App. Opp'n Jackson's & Magnovo's Mot. 5-6 (Ex. A, Staneart Aff. ¶¶ 21-23); *id.* at 14-33 (Exs. A-4, A-5). During this time, Jackson was also given access to TLI's password-protected customer database in Texas, became certified to teach TLI workshops and classes, and was exposed to and made aware of TLI's registered trademarks and copyrighted works. *Id.* at 5-6 (Ex. A, Staneart Aff. ¶¶ 20, 24).

On August 1, 2013, Jackson sent Plaintiffs written notice, via email, that he was terminating their contractual relationship. *Id.* at 7 (Ex. A, Staneart Aff. ¶ 28). Just one week prior to Jackson's resignation, "the website for Jackson's company, Magnovo, was refreshed with changes that included listing several of TLI's customers as companies that trust Magnovo, implying that they were [*7] or are customers of Magnovo." *Id.* (Ex. A, Staneart Aff. ¶ 31). Then, later in August 2013, Jackson, only weeks after resigning, traveled to Texas to conduct a workshop for Magnovo. *Id.* at 6 (Ex. A, Staneart Aff. ¶ 26); Defs. Jackson's & Magnovo's App. 4 (Ex. A, Jackson Aff. ¶ 7). Plaintiffs allege that this workshop was held for one of TLI's long-standing Texas customers: Statoil Gulf Services, LLC ("Statoil"). Pls.' App. Opp'n Jackson's & Magnovo's Mot. 6 (Ex. A, Staneart Aff. ¶¶ 25-26). Jackson and Magnovo admittedly contracted and performed at least two

¹ As discussed in more detail *infra*, this background discussion is guided by the applicable standard of review, which requires the Court to accept "all undisputed facts submitted by the plaintiff" and resolve "all facts contested in the affidavits" and other attachments "in favor of jurisdiction." [Luv N' care, Ltd. v. Insta-Mix, Inc.](#), 438 F.3d 465, 469 (5th Cir. 2006) (citing [Wyatt v. Kaplan](#), 686 F.2d 276, 280 (5th Cir. 1982)).

additional corporate workshops for Texas clients in October 2014, and while Plaintiffs are not aware of the identities of those customers, they believe both are former TLI customers, to whom Jackson gained access through his relationship with TLI. See *id.* at 6-7 (Ex. A, Stanearth Aff. ¶ 27); Defs. Jackson's & Magnovo's App. 4 (Ex. A, Jackson Aff. ¶ 7).

Also following Jackson's departure from TLI, Plaintiffs claim that Jackson and Magnovo began "using numerous domain names, marks, phrases and terms that are identical or nearly identical to the Build-A-Bike(R) mark to advertise and sell charity team building and related services in direct competition [*8] with TLI." Pls.' App. Opp'n Jackson's & Magnovo's Mot. 8 (Ex. A, Stanearth Aff. ¶ 34). These activities, Plaintiffs show, were carried out both on Magnovo's website and infringing domains registered by Jackson, such as www.letsbuildabike.com. *Id.* (Ex. A, Stanearth Aff. ¶¶ 34-39); *id.* at 60-79 (Exs. A-7, A-8, A-9, A-10, & A-11). And though Defendants say they removed all infringing marks in response to Plaintiffs' cease and desist letter in September 2014, see Defs. Jackson's & Magnovo's App. 9 (Ex. B, Jackson Aff. ¶ 15), the record suggests that Defendants' websites are still infringing on Plaintiffs' marks in various ways. See Pls.' App. Opp'n Jackson's & Magnovo's Mot. 9 (Ex. A, Stanearth Aff. ¶¶ 38-40); *id.* at 80-104 (Ex. A-12).

B. Background: Defendants Johnston and Short Splice

The second motion before the Court was filed by Defendants Johnston and Short Splice. Defendant Johnston is a resident of Florida, and like Jackson, formerly worked² for TLI on a remote basis from Florida, without ever residing or owning real property in Texas. Doc. 42, Defs. Johnston's & Short Splice's App. Supp. Mot. ("Defs. Johnston's & Short Splice's App.") at 1-2 (Ex. A, Johnston Decl. ¶¶ 5-10). Johnston is also the owner and principal operator [*9] of Short Splice, a corporation she formed under the laws of Florida in 2011, where its principal operations have remained ever since. *Id.* at 2 (Ex. A, Johnston Decl. ¶ 7).

²The parties dispute the legal characterization of Johnston's and TLI's former agency relationship: Johnston says she was an employee; TLI claims she was an independent contractor. As seen below, the issues presented herein do not require the Court to decide which of these two characterizations is applicable; it generally suffices to find that she was or was not an agent at relevant times in this case. As such, the Court hereinafter attempts to refer to Johnston, where appropriate, as simply an "agent" of TLI.

Johnston's relationship with TLI began in August 2008, around which time "TLI made some organizational changes" and decided to hire its subcontractors, including Johnston, directly. Docs. 47 & 48, Pls.' App. Supp. Resp. Defs. Johnston's & Short Splice's Mot. ("Pls.' App. Opp'n Johnston's & Short Splice's Mot.") at 3 (Ex. A, Stanearth ¶ 10). Thereafter, Jackson worked for TLI for five years as a "Corporate Specialist," initially providing both instructor and sales services and later working solely in sales. *Id.* at 3-4 (Ex. A, Stanearth [*10] Aff. ¶¶ 10, 16). As mentioned, Johnston performed most of these services for TLI remotely—from her home in Florida.

Plaintiffs, nonetheless, show that Johnston, during her five-year agency relationship with TLI, traveled to Texas on two different occasions: once for certification training as a TLI workshop instructor, and a second time to assist in a TLI workshop. *Id.* at 5 (Ex. A, Stanearth Aff. ¶ 23). Plaintiffs also assigned Johnston as a sales agent for 368 prospective and established clients in Texas, for whom "she submitted detailed sales proposals and to whom she ultimately made numerous sales," which earned her the commissions she was paid by TLI. *Id.* at 5-6 (Ex. A, Stanearth Aff. ¶¶ 24-26); *id.* at 20-156 (Exs. A-6, A-7, & A-8). Plaintiffs further point out that over Johnston's five-year tenure she submitted all payment requests to TLI's offices in Texas, received all payments from a bank located in Texas, and communicated with TLI's representatives and support personnel also located in Texas. *Id.* at 6-7 (Ex. A, Stanearth ¶¶ 27-32); *id.* at 169-269 (Ex. A-15). In addition, Johnston's sales position afforded her access to TLI's client lists and other intellectual property, "all of which [was] kept on and accessed via TLI's company computers located [*11] in Arlington, Texas." *Id.* at 4 (Ex. A, Stanearth Aff. ¶¶ 17, 18). Similarly, Johnston was provided a hard copy of TLI's 2013 corporate handbook, for which she signed a non-disclosure agreement dated April 16, 2013. *Id.* at 5 (Ex. A, Stanearth Aff. ¶ 20). This agreement provides, in relevant part, that "[t]he information contained in this document contains trade secrets of [TLI],"³ and that those "who receiv[e] this document, and the trade secrets contained within, ha[ve] a fiduciary responsibility . . . to protect and keep confidential these trade secrets." *Id.* at 17 (Ex. A-4, Agreement Dated 4/16/2013).

³The agreement defines "Trade Secrets" as including, "but not limited to, all client lists, sales and marketing strategies, and materials, instruction techniques, class and event materials, vendors, and the like." App. at 17 (Ex. A-4).

Unlike her relationship with TLI, Johnston denies that Short Splice ever had any sort of contacts or agency arrangement with TLI. See Defs. Johnston's & Short Splice's App. 4 (Ex. A, Johnston's Decl. ¶ 22). Plaintiffs, however, counter with averments from Staneart indicating that Johnston informed Plaintiffs in 2011 that she had formed Short Splice as a corporation, that her services from that point forward would be rendered "in her capacity as president of [*12] Short Splice," and that TLI should "pay all remuneration for her services directly to Short Splice." Pls.' App. Opp'n J& SS's Mot. 3 (Ex. A, Staneart Aff. ¶ 12). Plaintiffs additionally submit various documentation suggesting that the services Johnston provided to TLI were rendered in exchange for payments to her company, Short Splice. See *id.* at 11-16, 270-71 (Exs. A-1, A-2, A-3, A-16).

In July 2013, Johnston ended her relationship with TLI, and began working for Defendant Magnovo, providing substantially the same services she performed at TLI. *Id.* at 7-8 (Ex. A, Staneart Aff. ¶¶ 33, 36); *id.* at 157 (Ex. A-9). Plaintiffs claim that Johnston began using the confidential and proprietary information she gathered at TLI to sell Magnovo's services to past and prospective customers of TLI. See *id.* at 8 (Ex. A, Staneart Aff. ¶¶ 37, 39). Though Johnston denies these allegations, Staneart counters that, shortly after Johnston's departure, he received multiple calls from clients, to whom Johnston previously sold services on TLI's behalf, who mistakenly contacted TLI to pay for upcoming events sold to them by Johnston, but not on TLI's behalf. *Id.* at 7 (Ex. A, Staneart Aff. ¶ 35). Plaintiffs further submit evidence of team building events held by Magnovo after [*13] Johnston's departure for customers in Michigan to whom Johnston previously sold TLI's services. See *id.* at 158-64 (Exs. A-10 & A-11). Lastly, Plaintiffs additionally highlight demand letters sent by Johnston's counsel to Plaintiffs in Texas regarding commissions that TLI allegedly failed to pay Johnston upon terminating her agency relationship. See *id.* at 9 (Ex. A, Staneart Aff. ¶ 40); *id.* at 18-19 (Ex. A-5).

C. Procedural History

Based on the above allegations, Plaintiffs filed suit against all four Defendants in this Court on October 2, 2014. On December 30, 2014, Plaintiffs filed an Amended Complaint that is now before the Court, and which contains ten causes of action in total. Its first five causes of action are federal intellectual property claims asserted against Defendants Jackson and Magnovo, including claims for (i) trademark infringement under 15 U.S.C. § 1114(1), (ii) trademark counterfeiting under 15

U.S.C. §§ 1114 and 1116, (iii) statutory infringement and false designation of origin under 15 U.S.C. § 1125, (iv) Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), violations, and (v) copyright infringement under 17 U.S.C. § 501 et seq. See Am. Compl. ¶¶ 136-75. The next three are state law claims filed against all four Defendants, including (vi) unfair competition by misappropriation, (vii) Texas Theft [*14] Liability Act violations, and (viii) trade secret misappropriation. See *id.* ¶¶ 176-99. The Amended Complaint's last two claims are also filed pursuant to state law, and charge Defendants Jackson and Johnston individually with (ix) breach of contract, and (x) tortious interference with prospective business relations. See *id.* ¶¶ 200-11.

On January 30, 2015, Defendants Jackson and Magnovo moved to dismiss the Amended Complaint's claims against them for lack of personal jurisdiction, or alternatively, to sever and transfer these claims to the U.S. District Court for the Southern District of Indiana, pursuant to 28 U.S.C. § 1404(a). See Doc. 39, Defs. Jackson's & Magnovo's Mot. Dismiss Pls.' First Am. Compl.; Doc. 40, Defs. Jackson's & Magnovo's Br. Supp. Mot. Dismiss ("Defs. Jackson's & Magnovo's Mot."). That same day, Defendants Johnston and Short Splice also moved to dismiss the Amended Complaint's claims asserted against them for lack of personal jurisdiction. See Doc. 41, Defs. Johnston's & Short Splice's Mot. Dismiss & Supp. Br. ("Defs. Johnston's & Short Splice's Mot."). Plaintiffs timely responded to both motions on February 20, 2015. See Doc. 44, Pls.' Resp. to Defs. Jackson's & Magnovo's Mot. Dismiss [*15] & Br. in Supp. ("Pls.' Br. Opp'n Jackson's & Magnovo's Mot."); Doc. 46, Pls.' Resp. to Defs. Johnston's & Short Splice's Mot. Dismiss & Br. in Supp. ("Pls.' Br. Opp'n Johnston's & Short Splice's Mot."). On March, 3, 2015, Defendants filed their respective replies. See Doc. 52, Defs. Jackson's & Magnovo's Reply ("Defs. Jackson's & Magnovo's Reply"); Doc. 53, Defs. Johnston's & Short Splice's Reply ("Defs. Johnston's & Short Splice's Reply").

Defendants' motions, then, are now ripe for the Court's review. In doing so below, the Court starts with the respective challenges made to its personal jurisdiction over the Defendants, and then moves to Defendants Jackson's and Magnovo's request, in the alternative, for a transfer of venues.

II.

PERSONAL JURISDICTION

The Court begins by addressing the two pending motions to dismiss for lack of personal jurisdiction filed by Defendants Jackson and Magnovo, and Defendants Johnston and Short Splice, respectively. After reviewing the applicable law in the first subsection that follows, the Court will consider the contentions made by the parties regarding personal jurisdiction in this case.

*A. Legal Standard: Authority to Assert Personal Jurisdiction over [*16] Non-residents in Texas*

[Federal Rule of Civil Procedure 12\(b\)\(2\)](#) allows defendants to move to dismiss claims brought against them for lack of personal jurisdiction. In resolving a [Rule 12\(b\)\(2\)](#) motion, the Court may consider "affidavits, interrogatories, depositions, oral testimony, or any combination of the recognized methods of discovery." [Stuart v. Spademan, 772 F.2d 1185, 1192 \(5th Cir. 1985\)](#). Parties "seeking to invoke the power of the court bea[r] the burden of proving that jurisdiction [over the moving defendant] exists." [Luv n' Care, 438 F.3d at 469](#). But plaintiffs are not required to "establish jurisdiction by a preponderance of the evidence; a prima facie showing suffices." [Id. at 469](#). Moreover, any factual conflict contained in the parties' submissions must be resolved in the plaintiff's favor. [Cent. Freight Lines, Inc. v. APA Transp. Corp., 322 F.3d 376, 380 \(5th Cir. 2003\)](#).

Two preconditions must be satisfied before this Court may assert personal jurisdiction: (1) the defendant must be amenable to service of process under Texas' long-arm statute, and (2) the assertion of jurisdiction over the defendant must comport with the *Due Process Clause of the United States Constitution*. [Jones v. Petty-Ray Geophysical, Geosource, Inc., 954 F.2d 1061, 1067 \(5th Cir. 1992\)](#). Because Texas' long-arm statute has been held to extend to the limits of due process, only the second jurisdictional precondition must be examined. [Id. at 1067-68](#) (citing, *inter alia*, [Schlobohm v. Schapiro, 784 S.W.2d 355, 357 \(Tex. 1990\)](#)). For personal jurisdiction to comport with due process, the defendant, "if he [*17] be not present within the territory of the forum, [must] have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." [International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 \(1945\)](#) (citations and quotation marks omitted).

In determining whether such non-resident defendants have had sufficient "minimum contacts" with the forum state, courts "have differentiated between general or all-purpose jurisdiction, and specific or case-linked

jurisdiction." [Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 \(2011\)](#) (citing [Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 414, 104 S. Ct. 1868, 80 L. Ed. 2d 404 nn. 8, 9 \(1984\)](#)). General jurisdiction allows courts "to hear any and all claims against [a defendant]" based on that defendant's "continuous and systematic" contacts with that forum. [Id.](#) (citing [Int'l Shoe, 326 U.S. at 317](#)). Specific jurisdiction, by contrast, is based on the proposition "that 'the commission of some single or occasional acts of the [defendant] in a state' may sometimes be enough to subject the [defendant] to jurisdiction in that State's tribunals with respect to suits relating to that in-state activity." [Daimler AG v. Bauman, 134 S. Ct. 746, 754, 187 L. Ed. 2d 624 \(2014\)](#) (quoting [Int'l Shoe, 326 U.S. at 318](#)).

B. Analysis: General Jurisdiction

The Court begins its analysis by quickly disposing of general jurisdiction as a basis for personal jurisdiction over any of the four Defendants in this case. Recent Supreme [*18] Court precedent has made clear "that the proper consideration when determining general jurisdiction is whether the defendant's 'affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State.'" [Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 432 \(5th Cir. 2014\)](#) (quoting [Daimler, 134 S. Ct. at 761](#); [Goodyear, 131 S. Ct. at 2851](#)) (bracket omitted). This standard makes it "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business" of a business entity, or the residence of an individual. [Id.](#) (citing [Daimler, 134 S. Ct. at 760](#); [Helicopteros Nacionales, 466 U.S. at 414 nn. 8, 9](#)).

In this case, Plaintiffs do not appear to argue that general jurisdiction is proper over any of the four Defendants, each of whom hails from outside of Texas. But even if they did, none of the Defendants have contacts with Texas that "are so 'continuous and systematic' as to render [them] essentially at home in the forum State." [Daimler, 134 S. Ct. at 761](#) (citing [Goodyear, 131 S. Ct. at 2851](#)). Therefore, general jurisdiction is clearly not a proper constitutional basis for asserting personal jurisdiction in this forum over any of the non-resident Defendants.

C. Analysis: Specific Jurisdiction

The Court, then, focuses the remainder of its analysis on whether personal jurisdiction over the Defendants comports with due process [*19] under the specific

jurisdiction analysis. The specific jurisdiction analysis "focuses on the relationship among the defendant, the forum, and the litigation." [Walden v. Fiore](#), 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12 (2014) (quoting [Keeton v. Hustler Magazine, Inc.](#), 465 U.S. 770, 775, 104 S. Ct. 1473, 79 L. Ed.2d 790 (1984)). In the Fifth Circuit, courts generally employ a three-step test in analyzing specific jurisdiction, requiring "(1) minimum contacts by the defendant purposefully directed at the forum state, (2) a nexus between the defendant's contacts and the plaintiff's claims, and (3) that the exercise of jurisdiction over the defendant be fair and reasonable." *In re Chinese-Manufactured Drywall Products Liab. Litig.*, 753 F.3d 521, 540 (5th Cir. 2014) (citing [ITL Int'l, Inc. v. Constenla, S.A.](#), 669 F.3d 493, 498 (5th Cir. 2012)).

Plaintiffs bear the burden of making out a *prima facie* case with respect to the first two prongs of the specific jurisdiction analysis. [Monkton](#), 768 F.3d at 433 (citing [Seiferth v. Helicopteros Atuneros, Inc.](#), 472 F.3d 266, 271 (5th Cir. 2006)). The "touchstone" of the minimum contacts test under the first prong "is whether the defendant's conduct shows that it 'reasonably anticipates being haled into court.'" [McFadin v. Gerber](#), 587 F.3d 753, 759 (5th Cir. 2009) (quoting [Luv N' Care](#), 438 F.3d at 470). "This requirement can be satisfied by showing that the defendant purposefully directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there." [ITL Int'l](#), 669 F.3d at 498 (citation and quotation marks omitted). While specific jurisdiction is possible even if the defendant's forum contacts "are only isolated [*20] or sporadic," the relevant contacts "must be more than 'random, fortuitous, or attenuated, or of the unilateral activity of another party or third person.'" *Id.* at 498-99 (quoting [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 474, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528 (1985)).

Under the second prong, Plaintiffs must show that their claims are based on "alleged injuries that arise out of or relate to those activities" on which the defendant's minimum contacts are established. [Chinese-Manufactured Drywall Products](#), 753 F.3d at 543; [Burger King](#), 471 U.S. at 472. In other words, there must be a sufficient "nexus between the defendants' contacts with [the forum state] and the plaintiffs' [underlying] claims." [ITL Int'l](#), 669 F.3d at 500. The Fifth Circuit has suggested that this flexible standard aims to both ensure a "causal nexus between the [alleged] conduct and the purposeful contact" and account for "the foreseeability and fundamental fairness principles forming the foundation upon which the specific jurisdiction doctrine rests." [Chinese-Manufactured](#)

[Drywall Products](#), 753 F.3d at 543 (quoting [Oilfield v. Pueblo De Bahia Lora, S.A.](#), 558 F.3d 1210, 1223, 1224 (11th Cir. 2009)).

If Plaintiffs satisfy their burden at the first two prongs, the burden shifts to the Defendants to show that asserting specific jurisdiction over them is unfair or unreasonable. [Monkton](#), 768 F.3d at 433. The Fifth Circuit has observed that "it is rare to say the assertion [of jurisdiction] is unfair after minimum contacts have been shown." [McFadin](#), 587 F.3d at 759-60 (quoting [Wien Air Alaska, Inc. v. Brandt](#), 195 F.3d 208, 215 (5th Cir. 1999)) (brackets in original). [*21] The factors considered under this prong include: "(1) the burden on the nonresident defendant, (2) the forum state's interests, (3) the plaintiff's interest in securing relief, (4) the interest of interstate judicial system in the efficient administration of justice, and (5) the shared interest of the several states in furthering fundamental social policies." *Id.* at 760 (quoting [Luv N' Care](#), 438 F.3d at 473).

Having set forth the applicable law, the Court turns now to the specific jurisdiction contentions asserted in this case. Since personal jurisdiction "must arise out of contacts that the 'defendant himself' creates with the forum State," [Walden](#), 134 S. Ct. at 1122 (quoting [Burger King](#), 471 U.S. at 475) (emphasis in original), the Court individually considers the relevant assertions made for each of the four Defendants, as follows.

1. Defendant Jackson

The Court first addresses the parties' contentions as to whether specific jurisdiction over Defendant Jackson is proper. Plaintiffs submit that Jackson engaged in a number of contacts with Texas relevant to this suit, for which they claim that specific jurisdiction over Jackson is proper. See Pls.' Br. Opp'n Jackson's & Magnovo's Mot. 7-10. The Court summarizes these contacts as follows: (1) Jackson's efforts to re-establish [*22] his independent contractor relationship TLI through a series of telephone calls to Staneart in Texas between September and November 2010; (2) Jackson's trip to Texas in November 2010 taken at his own expense, where he performed a TLI team building event and met with Staneart in person to continue to lobby for a renewed relationship with TLI; (3) the Independent Contractor Agreement that Jackson signed with TLI in February 2011, and returned to Staneart in Texas; (4) the contacts Staneart had with TLI's Texas-based clients pursuant to his Independent Contractor Agreement, including forty-seven Texas customers he

contacted in an effort to sell TLI's services, twenty-three Texas customers to whom he sold TLI's services, and eight workshops that he conducted for TLI's customers in Texas; (5) Jackson's access to TLI's intellectual property in Texas during his independent contractor relationship, including certification training to teach team building workshops, his access to TLI's password-protected customer lists on servers in Texas, and his exposure to TLI's registered trademarks; (6) Jackson's alleged breach of his Independent Contract Agreement by selling Magnovo's competing services [*23] to TLI's customers in Texas while purporting to service those customers on TLI's behalf; (7) the three team building workshops Jackson conducted in Texas on behalf of Magnovo after leaving TLI, including one the same month he terminated his relationship with TLI for its former repeat customer Statoil; (8) the update Jackson made to the website of his company, Magnovo, just one week before terminating his relationship with TLI, in which he referenced TLI's customers in a way that suggested they were actually Magnovo's customers; (9) the webpages Jackson created for Magnovo's website that specifically targeted Texas cities for team building events; (10) the domains that Jackson registered on behalf of Magnovo after leaving TLI that allegedly infringe on Plaintiffs' registered trademarks; (11) the infringing marks Jackson included on Magnovo's website; and (12) the direct harm Jackson intentionally caused Plaintiffs in Texas. See *id.* 8-9.

Jackson counters with averments of his own regarding at least some of the above contacts. For example, while conceding that he performed seminars for Magnovo in Texas after leaving TLI in August 2013, Jackson avers that these seminars were performed for "clients [*24] that were not solicited from any client list of [Plaintiffs], but from other contacts who requested [Jackson's] services." Defs. Jackson's & Magnovo's App. 4 (Ex. A, Jackson Aff. ¶ 7). Jackson further claims that the few Texas seminars he has conducted on behalf of Magnovo are minimal compared to the seventy-eight total he has conducted nationwide since that time. *Id.* (Ex. A, Jackson Aff. ¶ 8). Jackson additionally says that he removed "all occurrences of 'build a bike' from all of [his] websites, domains, and other marketing materials" in response to Plaintiffs' cease and desist letter received in September 2014. *Id.* (Ex. A, Jackson Aff. ¶ 12). He also denies: signing TLI's Independent Contractor Agreement, using any of TLI's client lists post-August 2013, directly soliciting business from any of TLI's clients on behalf of Magnovo, using Plaintiffs' copyrighted materials without their consent, or receiving any trade secrets from Plaintiffs. *Id.* at 4-5 (Ex. A,

Jackson Aff. ¶¶ 13-17). For these reasons, Jackson argues that Plaintiffs have failed to demonstrate that he engaged in minimum contacts purposefully directed at Texas, or that his forum contacts are sufficiently related to the claims [*25] asserted against him. See Defs. Jackson's & Magnovo's Mot. 13-19; Defs. Jackson's & Magnovo's Reply 2, 3-6.

In determining whether it may exercise specific jurisdiction over Jackson, the Court divides its below discussion based on the different groups of claims asserted against Jackson and the relevant contacts underlying each group. See [Seiferth, 472 F.3d at 275](#) ("[I]f a plaintiff's claims relate to different forum contacts of the defendant, specific jurisdiction must be established for each claim.").

i. Trademark and Anticybersquatting claims

The Amended Complaint's first four causes of action allege, respectively, trademark infringement, trademark counterfeiting, false designation of origin, and cybersquatting on the part of Jackson. These four claims primarily arise from Jackson's internet-based misconduct, including his alleged display of marks similar or identical to Plaintiffs' registered trademarks on the website of his company, Magnovo, and Jackson's registration of internet domains allegedly designed in a way to profit from Plaintiffs' registered marks and divert business from Plaintiffs.

There does not appear to be any Supreme Court or Fifth Circuit precedent directly on point here, that is, the Court is [*26] unaware of any binding cases applying the minimum contacts test in the context of trademark-related claims of this nature. That said, district courts throughout Texas "have repeatedly held that 'the exercise of specific personal jurisdiction over an individual for his Internet activities, including allegations of trademark infringement and cybersquatting, is proper when a defendant intentionally directs his tortious activities toward the forum state.'" [First Fitness Int'l, Inc. v. Thomas, 533 F. Supp. 2d 651, 656 \(N.D. Tex. 2008\)](#) (Godbey, J.) (quoting [Carrot Bunch Co. v. Computer Friends, Inc., 218 F. Supp. 2d 820, 826 \(N.D. Tex. 2002\)](#) (Buchmeyer, J.); citing [Global 360, Inc. v. Spittin' Image Software, Inc., No. 3:04-CV-1857-L, 2005 U.S. Dist. LEXIS 4092, 2005 WL 625493, at *7 \(N.D. Tex. Mar. 17, 2005\)](#) (Lindsay, J.)) (brackets omitted).⁴

⁴ See also [IntelliGender, LLC v. Soriano, No. 2:10-CV-125-TJW, 2011 U.S. Dist. LEXIS 26301, 2011 WL 903342, at *12](#)

In *First Fitness*, for example, another court in this District held that personal jurisdiction over two non-resident defendants was proper based on evidence showing [*27] that the defendants "acted knowing that their use of [the plaintiff's] trademarks [on their websites] would cause harm in Texas." *Id.* at 654. The evidence on which the court relied in reaching this conclusion included the fact that the defendants previously maintained a "close relationship" with the plaintiff as one of its primary distributors, and that over the course of this relationship the defendants visited Texas on at least one occasion, received orders from Texas, and had other business-related contacts with Texas. *Id.* at 656. The court also found significant that the defendants "purported to operate their website from [a potentially false address] within Texas" just prior to learning of the plaintiff's impending suit. *Id.*

Similarly, in this case, Plaintiffs have shown that Jackson employed marks similar or identical to Plaintiffs' registered trademarks on websites specifically targeting Texas residents for purposes of procuring customers from TLI in Texas. From his long-standing business relationship with Plaintiffs, which ended shortly before the trademark violations allegedly began, the Court can infer that Jackson intended his alleged conduct to impact Plaintiffs in Texas—by diverting business [*28] from them to Magnovo—and to reach Plaintiffs' robust customer base in this forum. Indeed, during his time as an independent contractor with TLI, Jackson contacted numerous customers based in Texas, sold TLI's services to over twenty of these contacts, and traveled to Texas on at least eight occasions to teach workshops. These customers were comprised of a distinct group of individuals and entities: those in the market for corporate team building and leadership services. And it was this same group of potential clients that Jackson began specifically targeting soon after terminating his relationship with Plaintiffs. In doing so, Jackson employed marks identical or similar to the Build-a-Bike mark that he had witnessed TLI successfully use to attract clients in the very industry he targeted on Magnovo's behalf.

In addition to these contacts, Plaintiffs further show that Jackson had multiple direct contacts with Texas

(*E.D. Tex. Mar. 15, 2011*) ("As in *First Fitness*, the plaintiff has presented a prima facie case that Defendant HelloBaby has purposefully directed its activities at this forum by intentionally undertaking the tortious actions in an attempt to divert customers away from the plaintiff with intimate knowledge of the plaintiff, its location in Texas, and its valuable trademark rights and trade secrets.").

following his departure from TLI. Specifically, Plaintiffs highlight that Jackson admittedly traveled to Texas on three separate occasions to perform team building events on Magnovo's behalf. And at least one of these events, Plaintiffs assert, was held for Statoil—a former [*29] long-standing customer of Plaintiffs. While not definitive, this evidence is enough to suggest, at this early stage in the case, that Jackson not only caused purposeful harm to Plaintiffs in Texas, but intentionally used Plaintiffs' established trademarks to divert business from Plaintiffs in Texas, among other places.

To counter this evidence of his seemingly purposeful contacts, Jackson argues that his "use of the internet to advertize [Magnovo's] services throughout the nation, including Texas," was not purposeful, because his internet activities fall on the passive side of the sliding scale test set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). Defs. Jackson's & Magnovo's Mot. 17-18. Though not directly on point here, the Fifth Circuit has indeed drawn upon this so-called "Zippo sliding scale when a plaintiff argues that personal jurisdiction exists due to a defendant's website." *Monkton*, 768 F.3d at 432 (citing *Revell v. Lidov*, 317 F.3d 467, 470 (5th Cir. 2002)). The aim of the Zippo sliding scale is to "measure an internet site's connection to a forum state," which it attempts to do using a three-point spectrum of connectivity that includes: (i) a lowend marker for "passive" websites whose internet-based contacts are not sufficient to establish personal jurisdiction; (ii) a middle point [*30] for "sites with some interactive elements" that require deeper examination to determine whether such interactivity creates minimum contacts; and (iii) lastly, a high-end marker for websites that "engage in repeated online contacts with forum residents," for which personal jurisdiction is typically appropriate. *Revell*, 317 F.3d at 470 (discussing *Zippo*, 952 F. Supp. at 1124). Importantly, while the Zippo sliding scale remains a "factor in an internet-based personal jurisdiction analysis," the Fifth Circuit has more recently intimated that "internet-based jurisdictional claims must continue to be evaluated on a case-by-case basis, focusing on the nature and quality of online and offline contacts to demonstrate the requisite purposeful conduct that establishes personal jurisdiction." *Pervasive Software, Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 227 n.7 (5th Cir. 2012) (internal citation omitted).

Applying the guidance from these internet-based jurisdictional cases to these circumstances, the Court finds further support for its above conclusion that Jackson engaged in purposeful minimum contacts

relevant to the trademark claims asserted against him in this forum. As an initial matter, despite his generalized assertions that his company's website falls on the "passive" side of the *Zippo* sliding scale, Plaintiffs have presented [*31] evidence indicating that Jackson's internet activities more closely resemble the "interactive" variety set forth in *Zippo*. Specifically, Plaintiffs show that the website at issue does not simply advertise in Texas or provide general information accessible to Texas residents, but rather, the site allows users to request a quote, after which—in the words of the website itself—"one of [Magnovo's] specialists will contact you shortly." Pls.' App. Opp'n Jackson's & Magnovo's Mot. 47. This is the sort of exchange of commercial information that the *Zippo* sliding scale appears to contemplate under its "interactive" category. See, e.g., [Revell, 317 F.3d at 472](#) (finding a website to qualify as interactive on the *Zippo* sliding scale because it allowed users to "send information . . . and receive information . . . [on] an open forum hosted by the website").

Nevertheless, regardless of the "passive" or "interactive" nature of Jackson's internet activities under *Zippo*, the record reveals other relevant online and offline contacts that show Jackson's forum contacts were "sufficient" and "purposefully established." [Pervasive, 688 F.3d at 221](#) (quotation marks and citations omitted). For example, Plaintiffs show that Jackson's website singles out Dallas [*32] on national and regional maps as a "key" city for team building events, and specifically identifies a number of Texas cities in which team building events are offered. The website even provides separate pages dedicated to these Texas cities, with information regarding the suitability of each city for team building events, particular locations within each city capable of hosting such events, and details as to how prospective clients may go about booking such an event. This is all in addition to the offline contacts Jackson knowingly directed at this forum in an effort to glean Plaintiffs' customers in Texas using, among other things, the reputation and good will Plaintiffs built up around its registered trademarks. Accordingly, Jackson's internet-based contacts only bolster the case for exercising specific jurisdiction over him, and in no way diminish the Court's above findings.

Lastly, Jackson also purports to challenge Plaintiffs' showing at the second prong, arguing "[t]here is no sufficient nexus between [his] contacts with Texas and Plaintiffs' claims for infringement and anticybersquatting." Defs. Jackson's & Magnovo's Reply 5. Outside of this general assertion, however, Jackson

offers [*33] no insight as to why he believes the connection between his forum contacts and Plaintiffs' trademark-related claims is too attenuated. Instead, the thrust of his attack here goes to the merits of Plaintiffs' claims. For example, Jackson contends that "the alleged trademark violation was ceased prior to filing this lawsuit, so there is no cause of action that existed when this lawsuit was filed."⁵ Defs. Jackson's & Magnovo's Mot. 18. But even assuming such assertions are relevant to the personal jurisdiction analysis,⁶ they would not defeat specific jurisdiction over Jackson for present purposes. As discussed, Plaintiffs need only establish a *prima facie* case of specific jurisdiction at this point, and all factual disputes must be resolved in their favor. See, e.g., [Walk Haydel & Associates, Inc. v. Coastal Power Prod. Co., 517 F.3d 235, 242 \(5th Cir. 2008\)](#) (holding that "[b]ecause the district court did not conduct a full-blown evidentiary hearing, it should have required [the plaintiff] to establish only a *prima facie* case for personal jurisdiction"). And since Plaintiffs' allegations, affidavits, and documentary evidence controvert each of Jackson's veiled attacks on the merits of their claims, the Court need not explore this issue further at this time. Therefore, the Court concludes [*34] that Plaintiffs have made out a *prima facie* case of specific personal jurisdiction over the trademark and anticybersquatting claims asserted against Jackson.

ii. Copyright infringement claim

The Court next considers whether Plaintiffs have made out a *prima facie* case of specific jurisdiction over Jackson for purposes of their federal copyright infringement claim. This claim is based on Jackson's and Magnovo's purported use of Plaintiffs' copyrighted leadership principles and presentation manuals without Plaintiffs' authorization. See Am. Compl. ¶¶ 55, 166-75. But aside from a handful of conclusory allegations, see *id.*, the Amended Complaint offers no insight into the facts underlying this claim. One could arguably infer that this claim intends [*35] to charge Jackson with

⁵ See also Defs. Jackson's & Magnovo's Reply (purporting to attack second prong with argument that "[t]here is no reason for Jackson to believe that build-a-bike was a registered trademark and was valuable solely to Plaintiffs' business when so many others in the industry were using it").

⁶ But see [Seiferth, 472 F.3d at 276](#) (rejecting argument under the second prong, because it did "not bear on the jurisdictional question, but rather [went] to the merits of [the plaintiff's] claims").

employing copies or derivative versions of the copyrighted materials during events conducted on behalf of Magnovo, but even then, Plaintiffs would have fallen short in showing that such conduct took place in Texas. In fact, Plaintiffs' brief appears to altogether omit any discussion of the Court's specific jurisdiction over Jackson as it relates to the Amended Complaint's copyright claim.⁷

Given this lackluster showing, the Court cannot find that Plaintiffs have established a *prima facie* case of specific jurisdiction over their federal copyright claim asserted against Jackson. In contrast to the presentation they made with respect to their trademark and anticybersquatting claims, Plaintiffs make no attempt to connect Jackson's alleged copyright infringement to Texas, or his alleged Texas contacts to the copyright infringement allegations. Moreover, [*36] the mere fact that Plaintiffs' felt the effects of the alleged infringement in Texas is not enough, on its own, to establish specific jurisdiction over Jackson in this context. See, e.g., [Papa Berg, Inc. v. World Wrestling Entm't, Inc., No. 3:12-CV-2406-B, 2013 U.S. Dist. LEXIS 69235, 2013 WL 2090547, at *8 \(N.D. Tex. May 15, 2013\)](#) (holding that "even considering the alleged harm to" the plaintiff, a Texas resident, as a result of the defendants' alleged copyright infringement, "the effects test alone does not support personal jurisdiction over the [defendants]"). Based on these deficiencies, the Court is unable to conclude that personal jurisdiction over Jackson is proper for purposes of adjudicating the Amended Complaint's federal copyright infringement claim.

iii. State law claims

The last claims the Court must address, in evaluating its authority to exercise specific jurisdiction over Jackson, are Plaintiffs' five state law actions, which include unfair competition by misappropriation, trade secret misappropriation, Texas Theft Liability Act violations, breach of contract, and tortious interference with prospective business relations. These five claims, Plaintiffs point out, "all arise out of and relate to [Jackson's alleged] use of Plaintiffs' customer contact [*37] lists" in violation of the state laws asserted. Pls.' Br. Opp'n Jackson's & Magnovo's Mot. 17.

⁷ While Plaintiffs arguably mean to include the copyright claim in the "Specific Jurisdiction Over Infringement and Anticybersquatting Claims" section of their brief, there is no discussion in this section as to Jackson's alleged copyright violations or cases addressing specific jurisdiction over federal copyright claims.

Plaintiffs argue that personal jurisdiction over Jackson is proper for purposes of these five state law claims mainly because of Jackson's purposeful contacts in this forum leading up to the misconduct at issue. In particular, Plaintiffs highlight Jackson's repeated attempts to re-establish an independent contractor relationship with Plaintiffs in Texas, the written agreement that came out of these efforts, and the numerous contacts Jackson had with Plaintiffs' Texas customers pursuant to this contractual arrangement. See *id.* at 17-18. Plaintiffs argue that these contacts all relate to the "access" Jackson gained with respect to Plaintiffs' protected customer lists, which he later exploited in allegedly violating the various state laws asserted. *Id.* Additionally, Plaintiffs rely on the fact that "Defendants admittedly sold and provided their competing services to Texas residents, which included [TLI's] repeat customer, StatOil, and likely others." *Id.* at 18. Plaintiffs allege that Jackson unlawfully procured this and other business in Texas using Plaintiffs' protected customer lists "both during and after [*38] Jackson terminated his relationship with TLI." *Id.* at 17. "Such activities in Texas," Plaintiffs contend, "gave rise to each of the [state law] causes of action" brought against Jackson. *Id.*

Based on the above assertions, the Court determines that Plaintiffs have carried their burden of establishing the first two prongs of specific jurisdiction analysis as it relates to the five state law claims brought against Jackson. As the Supreme Court has long held, "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." [Burger King, 471 U.S. at 473, 105 S. Ct. at 2182](#) (quoting [Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647, 70 S. Ct. 927, 929, 94 L. Ed. 1154 \(1950\)](#)). And in this case, Plaintiffs show that it was Jackson's purposeful actions—in particular, his repeated pleas to Staneart in Texas, both over the phone and in person—that led to the formation of the parties' long-standing business relationship underlying the state law claims at issue. Jackson, furthermore, entered this relationship with the express understanding that he would not use Plaintiffs' customer contacts in competition with Plaintiffs for eighteen months following his termination, as demonstrated [*39] by the written contract he signed and returned to Plaintiffs in Texas. Nevertheless, Plaintiffs show that Jackson, thereafter, exploited his ongoing relationship with Plaintiffs to gain extensive access to their current and prospective clients based in Texas and elsewhere, only to later use these contacts to

compete with Plaintiffs in violation of the parties' express written agreement. Based on these purposeful contacts with Texas, all of which give rise or relate to Plaintiffs' state law claims, the Court concludes that Jackson's "conduct and connection with [Texas] are such that he should reasonably anticipate being haled into court there." [Burger King, 471 U.S. at 474, 105 S. Ct. at 2183](#) (quoting [World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 100 S. Ct. 559, 566, 62 L. Ed. 2d 490 \(1980\)](#)).

None of Jackson's contrary assertions defeat this *prima facie* showing made by Plaintiffs. For example, Jackson emphasizes that his work for TLI was primarily performed from his home in Indiana, and that the contacts he did have with Texas, both during his relationship with TLI and after, were "very minimal and sporadic." Defs. Jackson's & Magnovo's Reply 2, 5; see also Defs. Jackson's & Magnovo's Mot. 13-14. This argument, however, ignores that "specific jurisdiction may exist where there are only isolated or sporadic contacts." [*40] [ITL Int'l, 669 F.3d at 499-500](#) (citations omitted). Indeed, the Court determined above that Jackson had the requisite "minimum contacts," not because his contacts added up to some arbitrary quantity, but because the nature of his contacts suggests he purposefully availed himself of the privileges of this forum. See [Burger King, 471 U.S. at 475, 105 S. Ct. at 2183](#) (explaining that the "purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person") (internal quotation marks and citations omitted); [Gustafson v. Provider HealthNet Servs., Inc., 118 S.W.3d 479, 483-84 \(Tex. App. 2003\)](#) ("In analyzing minimum contacts, it is not the number but rather the quality and nature of the nonresident defendant's contacts with the forum state that are important.").

Jackson's repeated assertions that go to the merits of Plaintiffs' state law claims are similarly unavailing.⁸ As discussed before, the Court cannot accept such assertions at this point in the proceedings, as they run

⁸ See, e.g., Defs. Jackson's & Magnovo's Mot. 18 (arguing that the "alleged copy of an independent contractor agreement" produced by Plaintiffs "is fraudulent because it was not signed by Jackson"); *id.* at 18-19 (denying that Jackson has solicited any TLI clients or otherwise used Plaintiffs' customer lists); *id.* at 19 ("Jackson has not been privy to any trade secrets of Plaintiffs, and therefore could not misappropriate them.").

contrary to Plaintiffs' *prima facie* allegations and proof. See [Walk Haydel & Associates, 517 F.3d at 241](#) ("[U]nless there is a full and fair hearing, [a district court assessing personal jurisdiction] should not act as a fact finder and must construe all disputed facts in [*41] the plaintiff's favor and consider them along with the undisputed facts.") (citations omitted).

Lastly, the Court also finds unpersuasive Jackson's contentions that Plaintiffs' state law claims do not arise from or relate to his Texas contacts that pre-date his alleged misconduct.⁹ Jackson cites no authority for the proposition that contacts pre-dating the alleged wrongdoing underlying a claim are unrelated to that claim as a matter of law. On the contrary, the Supreme Court in *Burger King* found a breach of contract claim arose out of or related to the defendant's efforts to reach into the forum state and negotiate a long-term contract with a forum resident, even though these contacts all occurred *before* the misconduct at issue took place.¹⁰ [471 U.S. at 466-68, 479-80, 105 S. Ct. at 2179-80, 2186](#). Similarly, here, Plaintiffs' five [*42] state law claims arise out of or relate to the long-term contract that was formed as a result of Jackson's purposeful efforts to create an ongoing business relationship with TLI in Texas. Even though much of Jackson's alleged misconduct occurred after this relationship ended, the parties' dispute nonetheless "grew directly out of a contract which had a substantial connection with [Texas]." [Burger King, 471 U.S. at 479, 105 S. Ct. at 2186](#) (citation, quotation marks, and emphasis omitted). The Court, therefore, rejects Jackson's contentions that the nexus between these contacts and Plaintiffs' state

⁹ See, e.g., Defs. Jackson's & Magnovo's Mot. 14 ("Plaintiffs attempt to argue past activities in the State of Texas as though those activities are at issue, but do not show how those activities were the cause of the alleged injuries that are related to their alleged complaints."); Defs. Jackson's & Magnovo's Reply 5-6 ("Plaintiffs rely on Jackson's work as an independent contractor with TLI for several years prior to his resignation [*43] However, the claims in this case arise from Jackson's alleged actions taken after his resignation in August 2013.").

¹⁰ See also [Havel v. Honda Motor Europe Ltd., No. CIV.A. H-13-1291, 2014 U.S. Dist. LEXIS 140983, 2014 WL 4967229, at *10 \(S.D. Tex. Sept. 30, 2014\)](#) ("Although the connection between a defendant's suit-related conduct and the forum state will clearly be strongest when that conduct forms one of the elements of the intentional tort alleged[,] . . . [the Supreme Court has] not limit[ed] 'suit-related conduct' to the elements of a tort.") (citing [Walden, 134 S.Ct. at 1123-24](#)).

law claims is inadequate. And as such, the Court reaffirms its above conclusion that Plaintiffs have established a *prima facie* case of specific jurisdiction over the state law claims asserted against Jackson.

iv. Fair and reasonable

To recap, the Court concludes that Plaintiffs have carried their burden of establishing the first two prongs of the specific jurisdiction analysis as it relates to all causes of action asserted against Jackson, with the exception of the copyright infringement claim. Plaintiffs' copyright claim aside, the burden now shifts to Jackson to demonstrate that "the assertion of personal jurisdiction would [not] comport with 'fair play and substantial justice.'" [Burger King, 471 U.S. at 476, 105 S. Ct. at 2184](#) (citing [Int'l Shoe, 326 U.S. at 320, 66 S. Ct. at 160](#)).

On this point, Jackson offers no particular arguments as to why defending this suit in Texas would be unfair or unreasonable. Nor does he address the factors, detailed above, that courts typically consider under this third jurisdictional [*44] prong. Instead, he merely points to general inconveniences common to nearly all non-residents forced to defend suit in a forum outside their home state.¹¹ Such assertions fall well short of demonstrating the "rare" circumstances necessary to satisfy the third prong of the specific jurisdiction analysis. [McFadin, 587 F.3d at 759-60](#) (citation omitted). Accordingly, the Court finds that Jackson has failed to carry his burden of showing that the exercise of personal jurisdiction over him in Texas is unfair or unreasonable.

In sum, the Court concludes that Plaintiffs have established a *prima facie* case of personal jurisdiction over Jackson for purposes of adjudicating all claims asserted against him in the Amended Complaint, with the exception of Plaintiffs' copyright infringement claim, which is, therefore, subject to dismissal pursuant to [Rule 12\(b\)\(2\)](#). In all other respects, the Court denies Jackson's motion to dismiss for lack of personal jurisdiction [*45] based his failure to show that the Court's assertion of personal jurisdiction is unfair or

unreasonable.

2. Defendant Magnovo

The Court moves next to the issue of whether asserting specific personal jurisdiction over Defendant Magnovo accords with due process. The Court, of course, must evaluate personal jurisdiction here based on Magnovo's own contacts with Texas, rather than those attributable to Jackson alone. See [Rush v. Savchuk, 444 U.S. 320, 332, 100 S. Ct. 571, 579, 62 L. Ed. 2d 516 \(1980\)](#) (holding that while "[t]he parties' relationships with each other may be significant in evaluating their ties to the forum," the minimum contacts test "must be met as to each defendant over whom a state court exercises jurisdiction"). Nonetheless, Jackson's in-state contacts "may be relevant to the existence of specific jurisdiction" over Magnovo to the extent Jackson was acting as Magnovo's agent at the time. [Daimler AG, 134 S. Ct. at 759 n.13](#) (citation and emphasis omitted).

Plaintiffs assert that Magnovo engaged in the following relevant contacts with Texas: (1) "Magnovo expressly directed its infringing website at Texas residents, with knowledge of [TLI's] business, its registered trademark and its location in this forum"; (2) "Magnovo admittedly entered into at least three [] contracts with Texas residents [*46] and subsequently performed such contracts in the state of Texas"; and (3) "Magnovo's website is interactive and allows customers, including Texas residents, to request a quote for services and subsequently be contacted in Texas by a representative of Magnovo." Pls.' Br. Opp'n Jackson's & Magnovo's Mot. 10. As it did with Jackson, the Court proceeds to discuss whether these contacts are sufficient to confer specific jurisdiction over Magnovo with respect to the three groups of claims asserted against these two defendants.

First, in regards to their *trademark and anticybersquatting claims*, the Court finds that Plaintiffs have presented a *prima facie* case of specific jurisdiction over Magnovo. As they did for Jackson, Plaintiffs show that Magnovo purposefully directed its trademark infringing activities at customers in Texas via its interactive website, with the intention of harming Plaintiffs in Texas by diverting customers in this forum and elsewhere from TLI. Similarly, Plaintiffs demonstrate that Magnovo contracted to sell at least three seminars in Texas to former and/or prospective customers of TLI, which Jackson, acting on behalf of Magnovo, subsequently performed in this forum. [*47] Moreover, the Court, at this point in the proceedings,

¹¹ See, e.g., Defs. Jackson's & Magnovo's Mot. 16 ("[R]equir[ing] Jackson to defend this lawsuit in Texas . . . is unduly burdensome and inconvenient, given that Jackson resides in Indiana and does not maintain a presence in the state of Texas, and does not do business in Texas on a regular basis.").

can infer that Magnovo's Texas seminars sufficiently relate to its alleged efforts to divert customers from TLI using the infringing marks and domains. For these reasons, the Court concludes that Plaintiffs have adequately demonstrated Magnovo's purposeful minimum contacts with Texas, as well as a sufficient nexus between these contacts and the trademark and anticybersquatting claims asserted.

Second, with respect to their *copyright infringement claim*, the Court conversely determines that Plaintiffs have not met their burden of establishing specific jurisdiction over Magnovo. Like with Jackson, Plaintiffs make no effort to demonstrate a connection between Magnovo's alleged infringement and Texas or between Magnovo's Texas contacts and the alleged infringement. Likewise, the effects Plaintiffs allegedly felt in Texas as a result of Magnovo's infringement are not sufficient to establish specific jurisdiction in this context. Therefore, for the same reasons it found jurisdiction lacking over the copyright claim against Jackson, the Court determines that Plaintiffs have failed to show that personal jurisdiction is proper over the copyright [*48] claim against Magnovo.

Third, regarding their *state law claims* against Magnovo,¹² the Court additionally finds that Plaintiffs have not presented a *prima facie* case of specific jurisdiction over Magnovo. As an initial matter, most of Magnovo's forum contacts do not give rise or relate to the three state law claims alleged. Take, for example, Magnovo's internet activities directed at Texas and its interactive website; these asserted contacts do not relate in any known way to the state law claims brought against Magnovo, and Plaintiffs make no effort to argue to the contrary. See Pl.'s Br. Opp'n Jackson's & Magnovo's Mot. 17-19 (arguing which forum contacts form a sufficient nexus to Plaintiffs' state law claims, and omitting any reference to Magnovo's internet activities). Likewise, Jackson's contractual relationship with TLI and associated contacts with Texas—on which Plaintiffs heavily rely to establish specific personal jurisdiction over Jackson—are not forum contacts for which jurisdiction over Magnovo may be asserted. This is because Plaintiffs have not alleged or shown that these contacts on the part of Jackson, which seemingly took place in his capacity as an independent contractor [*49] for TLI, occurred while Jackson was acting as an agent of Magnovo or under its direction. See [Daimler AG, 134](#)

[S. Ct. at 759 n.13](#) ("A corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there.") (citation omitted); see also [Havel, 2014 U.S. Dist. LEXIS 140983, 2014 WL 4967229, at *15](#) (noting that "an agency relationship must be affirmatively established[;] it may not be presumed") (citation and internal quotation marks omitted, bracket in original).

That leaves just one set of forum contacts that could potentially confer specific jurisdiction over the state law claims against Magnovo: the three seminars Magnovo contracted and performed in Texas between August 2013 and October 2014. Applying the relatively low burden of proof applicable at this stage, these contacts appear to be sufficiently related to the state law claims at issue, which center on the clients Magnovo purportedly stole from Plaintiffs using, most notably, the customer contact list that Jackson allegedly misappropriated from Plaintiffs. The weight of these contacts, however, is diminished by the weak connection that Plaintiffs trace between the [*50] three Texas seminars and the general misconduct alleged. Plaintiff Stanearth, to illustrate, merely avers that he "believe[s] the customer" for whom Magnovo conducted one of its three Texas seminars "was Statoil, a long-term repeat customer of TLI," and that he similarly "believe[s]" that Magnovo's other two Texas seminars "were sold to contacts on TLI's customer list." Pls.' App. Opp'n Jackson's & Magnovo's Mot. 6-7 (Ex. A, Stanearth Aff. ¶¶ 26, 27). Stanearth does not, however, indicate the source of his stated beliefs, which contrast with the version of events told by Defendants—that these seminars were sold to "clients that were not solicited from any client list of [Plaintiffs], but from other contacts who requested [Magnovo's] services."¹³ Defs. Jackson's & Magnovo's App. 4 (Ex. A, Jackson Aff. ¶ 7). Moreover, Magnovo shows that its Texas seminars were just three of the seventy-eight total it conducted on a nationwide basis over this period, further diminishing the weight of Magnovo's few relevant contacts. Under these

¹³ While the Court must resolve all *factual* disputes in Plaintiffs' favor, it need not accept as true conclusory statements based solely "on information and belief." [Panda Brandywine Corp. v. Potomac Elec. Power Co., 253 F.3d 865, 869 \(5th Cir. 2001\)](#) (finding that "the district court correctly held that the prima-facie-case requirement does not require the court to credit conclusory allegations," which in this case included allegations "'on information and belief' that Appellee knew Appellants are Texas residents and knew its actions would intentionally cause harm to Appellants in Texas").

¹² These claims include unfair competition, trade secret misappropriation, and Texas Theft Liability Act violations.

circumstances, the Court finds Magnovo's minimal relevant contacts with this forum insufficient to show purposeful availment for purposes of asserting specific jurisdiction over the state [*51] law claims alleged. See, e.g., [Gen. Retail Servs., Inc. v. Wireless Toyz Franchise, LLC, 255 Fed. App'x 775, 793 \(5th Cir. 2007\)](#) ("While it is true that a single act can confer personal jurisdiction over a defendant if that act gives rise to the claim being asserted, General Retail has not carried its burden to show that these individuals could reasonably expect to be haled into court in Texas.") (citing [Wilson v. Belin, 20 F.3d 644, 648 \(5th Cir. 1994\)](#)) (internal citation omitted).

Lastly, with respect to the claims for which Plaintiffs have satisfied their burden of establishing Magnovo's minimum contacts, the burden now shifts to Magnovo to show that the exercise of personal jurisdiction over it is unfair or unreasonable. Like Jackson, Magnovo makes virtually no effort to satisfy its burden here. As such, the Court concludes [*52] that it may lawfully assert personal jurisdiction over the trademark and anticybersquatting claims against Magnovo. But since Plaintiffs failed to carry their burden with respect to their copyright infringement and state law claims against Magnovo, the Court concludes that exercising personal jurisdiction over these claims would not comport with due process.

3. Defendant Johnston

Next up, the Court considers whether exercising personal jurisdiction over the claims against Defendant Johnston, a Florida resident, accords with due process. As mentioned, only specific personal jurisdiction is at issue. Plaintiffs, therefore, must show that Johnston engaged in purposeful minimum contacts with Texas, and that those contacts give rise or relate to the state law claims asserted against her. These claims, as a reminder, seek relief for Johnston's alleged trade secret misappropriation, Texas Theft Liability Act violations, unfair competition, breach of contract, and tortious interference with Plaintiffs' prospective business relations. The asserted misconduct underlying each of these claims are allegations that Johnston, upon terminating her agency relationship with TLI, unlawfully used Plaintiffs' [*53] trade secrets, including their confidential customer lists, to unfairly compete with Plaintiffs on Defendant Magnovo's behalf.

In arguing that specific jurisdiction over Johnston is constitutional, Plaintiffs primarily rely on Johnston's Texas contacts during her five-year relationship with TLI

from August 2008 to July 2013. See Pls.' Br. Opp'n Johnston's & Short Splice's Mot. 3-9, 17-19, 20-22. These contacts include (1) the relationship itself; (2) Johnston's two trips to Texas (once for training and another to assist in a TLI workshop); (3) her numerous communications with Texas-based customers; (4) sales resulting from such communications; (5) the multiple event proposals she submitted to TLI for customers in Texas; (6) her various communications with TLI's support personnel in Texas; and (7) the payment requests she submitted to TLI in Texas along with the payments she received from TLI's bank in Texas. See *id.* at 17. Plaintiffs also show that during this five-year relationship (8) Johnston signed and returned to Plaintiffs in Texas a non-disclosure agreement promising not to disclose Plaintiffs' trade secrets, and (9) routinely accessed TLI's customers list and related intellectual [*54] property stored on servers located in Texas. See *id.* at 17, 20-21. In addition, Plaintiffs allege that Johnston had at least some contacts with Texas after terminating her five-year agency relationship with TLI in July 2013. These contacts include (10) Johnston's alleged use of Plaintiffs' trade secrets to compete with Plaintiffs in Texas and elsewhere, knowing the effect her unlawful conduct would have on Plaintiffs in Texas. See *id.* at 19, 21-22. Likewise, Plaintiffs point to (11) demand letters sent to Plaintiffs in Texas following Johnston's departure from TLI by an attorney retained by Johnston "in connection with commissions allegedly owed by TLI to Johnston for past services." *Id.* at 8-9.

Johnston counters that the majority of Plaintiffs' allegations "could be condensed to one simple and undisputed statement—Collette Johnston worked remotely from Florida for five years for Plaintiff TLI, a Texas company with its headquarters in Texas." Defs. Johnston's & Short Splice's Reply 3. But "simply working for a Texas company is not enough," Johnston argues, "to satisfy the exercise of personal jurisdiction against a non-resident." *Id.* Johnston similarly contends that her alleged contacts with Texas over the course of her relationship [*55] with TLI, "such as the fact that Johnston communicated with TLI's employees in Texas or received payments from Texas[,] are insufficient to establish specific jurisdiction because they relate only superficially to [her] employment relationship with Texas and not to the basis of the underlying claims." *Id.* at 5. Johnston additionally points out that "nowhere do Plaintiffs allege that any ostensible misuse or misappropriation of [their] information occurred in Texas." *Id.* at 6. Applying the holdings reached by other Texas courts faced with similar circumstances, Johnston posits, leads to the conclusion that "Plaintiffs have failed

to establish specific jurisdiction." *Id.* The Court, for the reasons that follow, finds Johnston's position here the more persuasive one.¹⁴

In [Gustafson v. Provider HealthNet Servs., Inc., 118 S.W.3d 479 \(Tex. App. 2003\)](#), the Texas Court of Appeals found specific jurisdiction lacking over a non-resident defendant—Paul Gustafson—under circumstances similar to those presented here. The plaintiff in *Gustafson*—Provider HealthNet Services, Inc. ("PHNS")—had "sued Gustafson for breach of a [*56] confidentiality agreement, common law misappropriation, misappropriation of trade secrets, and breach of fiduciary duty," *id. at 483*, all arising out of allegations "that Gustafson had, while employed by PHNS [from his residence in Michigan], provided PHNS's confidential information to [his former Michigan-based employer] as well as a PHNS competitor." *Id. at 481*. In arguing that specific jurisdiction over Gustafson was constitutional, "PHNS relie[d] on Gustafson's contacts with Texas by virtue of his employment with PHNS," including the relationship itself, two employment-related trips he made to Texas, payments he submitted and received from Texas, and communications he had with PHNS employees in Texas. *Id. at 483*.

The Texas Court of Appeals found these contacts insufficient to confer specific jurisdiction over PHNS's claims against Gustafson. In reaching this conclusion, the court noted initially "that the mere fact that Gustafson was employed by a company with its principal place of business in Texas is not sufficient to establish the requisite minimum contacts with Texas." *Id.* (citing [Rittenmeyer v. Grauer, 104 S.W.3d 725, 733 \(Tex. App. 2003\)](#); [Burger King, 471 U.S. at 478, 105 S.Ct. at 2174](#)). The court further explained that Gustafson's alleged contacts with Texas "relate[d] only superficially to his general employment relationship [*57] with PHNS," and "were necessarily created" by PHNS's own restructuring of its operations and employment arrangements. *Id. at 484*. The court similarly found Gustafson's two trips to Texas insignificant, reasoning that PHNS had failed to show or allege that Gustafson had "breached any duties to it or committed any torts during these meetings." *Id.* The court additionally rejected PHNS's contention that Gustafson created "'continuing obligations' with Texas"

through his employment relationship, because "Gustafson signed no employment agreement" and his confidentiality agreement with PHNS was "executed in Michigan, made no reference to the State of Texas and did not require any performance in this State." *Id.* Lastly, the court observed that while "a breach of the confidentiality agreement could cause an injury in Texas[,] . . . the mere fact that an injury is caused in the forum state is insufficient to establish minimum contacts." *Id.* (citing [City of Riverview, Michigan v. Am. Factors, Inc., 77 S.W.3d 855, 858 \(Tex. App. 2002\)](#)).

Drawing on *Gustafson's* reasoning, another case from this District—[Wheel-Source, Inc. v. Gullekson, No. 3:12-CV-1500-M, 2013 U.S. Dist. LEXIS 33540, 2013 WL 944430 \(N.D. Tex. Mar. 12, 2013\)](#) (Lynn, J.)—also found specific jurisdiction lacking over a non-resident defendant whose forum contacts and alleged misconduct mirror Johnston's. [*58] To illustrate, *Wheel-Source* involved a non-resident defendant who worked for the plaintiff, a Texas-based corporation, as a salesperson for seven years, during which time the defendant worked primarily from his home offices in Michigan, but engaged in various contacts with Texas pursuant to his agency relationship. This relationship ended when the defendant took a position with one of the plaintiff's competitors, after which the plaintiff apparently discovered the defendant's wrongful sharing of confidential information to third parties outside of Texas. The plaintiff, accordingly, filed suit in Texas against the defendant, asserting various claims arising from this alleged misconduct, including, *inter alia*, trade secret misappropriation, tortious interference, and breach of contract.

Addressing the plaintiff's claims in turn, the court in *Wheel-Source* found no specific jurisdiction over the defendant for similar reasons as discussed in *Gustafson*. In regards to its specific jurisdiction over the trade secret claim, the court reasoned that "[a]s was true in *Gustafson*, Defendants contacts with Texas relate only superficially to his general independent contractor relationship," and therefore, [*59] are merely "attenuated or fortuitous, as opposed to purposeful." [2013 U.S. Dist. LEXIS 33540, \[WL\] at *6](#). Moving next to the tortious interference claim, the court noted that the plaintiff had not alleged "any contracts it lost as a result of Defendant's alleged wrongful conduct, all of which appears to have occurred in Michigan." *Id.* Moreover, the court found that the fact that the defendant could foresee that his intentional acts would cause harm to the plaintiff in Texas was not sufficient to establish jurisdiction. *Id.* The court also dismissed the breach of

¹⁴The Court reaches this conclusion without addressing Johnston's objections to certain allegations made in Staneart's affidavit. See Johnston's & Short Splice's Reply Br. 7.

contract claim for lack of personal jurisdiction, finding that the contract at issue was performed "in Michigan, not Texas," and that the breach of contract claim centered on the defendant's "alleged dissemination of confidential information, all of which occurred in Michigan or states other than Texas." [2013 U.S. Dist. LEXIS 33540, \[WL\] at *7](#). In short, the plaintiff's relationship to Texas "rest[ed] on the mere fortuity that Wheel-Source is located in Texas," and therefore, the court concluded that jurisdiction was not appropriate. *Id.* (citing [Moncrief Oil Intern, Inc. v. OAO Gazprom, 481 F.3d 309, 313 \(5th Cir. 2007\)](#)). This holding accords with a number of other cases from courts in Texas finding the same under similar circumstances.¹⁵

In this case, the contacts on which Plaintiffs rely in attempting to show specific jurisdiction over Johnston are indistinguishable from those rejected as insufficient in [Gustafson, Wheel-Source](#), and related Texas cases. Like in those cases, nearly all of Johnston's forum contacts over the course of her agency relationship with Plaintiffs bear only a superficial relation to the misconduct alleged. Plaintiffs have not asserted, for example, that Johnston's numerous communications with TLI personnel and customers, her sales proposals for Texas customers, or her payments from Texas gave rise or relate to the misappropriation at issue. Likewise, Johnston's two trips [*61] to Texas, much like those taken by the defendants in [Gustafson](#) and [Wheel-Source](#), were merely work related and have nothing to do with the underlying suit. Additionally, Johnston's post-employment demand letters sent to Plaintiffs in Texas concern a dispute over unpaid commissions allegedly owed to Johnston, which is unrelated to Johnston's purported use of Plaintiffs' confidential information in this case.

Similarly, Plaintiffs also fail to demonstrate an adequate connection between Johnston's alleged misconduct and

¹⁵ See, e.g., [360 Mortgage Grp., LLC v. Stonegate Mortgage Corp., No. A-13-CA-942-SS, 2014 U.S. Dist. LEXIS 68567, 2014 WL 2092496, at *3-4 \(W.D. Tex. May 19, 2014\) \[*60\]](#) (no specific jurisdiction over trade secret claims brought against an individual "who worked exclusively in North Carolina," but had a number of contacts in Texas pursuant to his employment with the plaintiff, a company headquartered in Texas); [Rushmore Inv. Advisors, Inc. v. Frey, 231 S.W.3d 524, 529-30 \(Tex. App. 2007\)](#) (no specific jurisdiction over trade secret misappropriation, unfair competition, and breach of contract claims against non-resident defendant based on defendant's insufficient forum contacts during a "twenty-two month course of employment with a Texas firm").

this forum. Plaintiffs do not show, for instance, that Johnston's alleged misuse of their trade secrets took place in Texas, or that she helped secure new customers or business for Magnovo in Texas, or that her conduct in any way had an effect on Texas residents outside of Plaintiffs themselves. These in-state effects on Plaintiffs, moreover, are not sufficient on their own to establish jurisdiction over Johnston, just as they weren't sufficient in [Wheel-Source](#) or [Gustafson](#).¹⁶ And while Plaintiffs say that Johnston "likely contacts Texas residents in an effort to make sales on behalf of Magnovo," they base this assertion solely on Magnovo's activities—the fact that it "targets [*62] Texas residents through its Texas directed webpages." Pls.' App. Opp'n Johnston's & Short Splice's Mot. 8 (Ex. A, Stanearth Aff. ¶ 38). Such unilateral activities on the part of another party cannot be used to confer jurisdiction over Johnston. See [Walden, 134 S. Ct. at 1122](#).

Plaintiffs' reliance on Johnston's long-term agency relationship with TLI does not salvage their inadequate showing of relevant contacts purposefully directed at Texas. Unlike Defendant Jackson or the non-resident defendant in [Burger King](#), Johnston's forum contacts over the course of her relationship with TLI arose, not from Johnston's purposeful efforts to secure work from TLI in Texas, but from TLI's unilateral decision to internally restructure and directly hire its former subcontractors, including Johnston. Johnston, moreover, never signed an employment or independent contractor agreement governing her relationship with TLI, which she performed almost exclusively from Florida. Though at one point during her five year agency relationship, Johnston [*63] did sign a non-disclosure agreement with TLI before receiving TLI's 2013 corporate handbook, this discrete agreement—like those in [Gustafson](#) and [Wheel-Source](#)—was executed by Johnston in Florida, made no mention of Texas, and required no performance in Texas. Thus, like in those cases, the mere fortuity that Johnston had an employment relationship with TLI, a Texas company, and engaged in mostly remote contacts with Texas from her home in Florida pursuant to this relationship, is not enough for the Court to lawfully assert jurisdiction over Johnston here in Texas.

¹⁶ See also [Walden, 134 S. Ct. at 1123](#) (clarifying that under the effects test established by [Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L.Ed. 2d 804 \(1984\)](#) the Supreme Court "examined the various contacts the defendants had created with California (and not just with the plaintiff)").

In the end, Plaintiffs fail to show that the connection between Johnston, Texas, and this litigation extends beyond the mere fortuity that Plaintiffs happen to reside here. See [Walden, 134 S. Ct. at 1122](#) ("[T]he plaintiff cannot be the only link between the defendant and the forum [for personal jurisdiction to exist]"). Because of this, the Court concludes that Plaintiffs have failed to present a *prima facie* case of personal jurisdiction over Johnston, and therefore, that dismissal of the claims asserted against her under [Rule 12\(b\)\(2\)](#) is warranted.

4. Defendant Short Splice

Having found personal jurisdiction over Johnston lacking, the Court can quickly dispose of the [*64] jurisdictional arguments made in regards to Short Splice. Plaintiffs' primary contention here is that "the aforementioned actions of Johnston during the period of January 1, 2011 through July 2013, are directly attributable to Short Splice," and therefore, "Short Splice's contacts with Texas were sufficient to support the Court's exercise of personal jurisdiction in this case." Pls.' Br. Opp'n Johnston's & Short Splice's Mot. 20. But even assuming that all of Johnston's contacts during this time period may be imputed to Short Splice, Plaintiffs' efforts to show personal jurisdiction over Short Splice would still fall short, given the Court's above conclusion that Johnston's contacts are insufficient to establish personal jurisdiction over the same claims against her. Accordingly, the Court determines that Plaintiffs have also failed to present a *prima facie* case of personal jurisdiction over Short Splice, and that dismissal of the claims against Short Splice is, therefore, warranted under [Rule 12\(b\)\(2\)](#).

III.

TRANSFER OF VENUE

Having determined that it may lawfully assert jurisdiction over at least some of Plaintiffs' claims against Defendants Jackson and Magnovo, the Court turns next to Jackson's [*65] and Magnovo's request, in the alternative, for a transfer of venues to the judicial district in which they reside: the Southern District of Indiana. Defendants argue that such a transfer is warranted under [28 U.S.C. § 1404\(a\)](#), which codifies "the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system." [Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 580, 187 L. Ed. 2d 487 \(2013\)](#). This doctrine, and thus the [§ 1404\(a\)](#) analysis, requires courts to balance a number of

judicially-developed factors, including:

- (1) the relative ease of access to sources of proof;
- (2) the availability of compulsory process to secure the attendance of witnesses;
- (3) the cost of attendance for willing witnesses;
- (4) all other practical problems that make trial of a case easy, expeditious and inexpensive;
- (5) the administrative difficulties flowing from court congestion;
- (6) the local interest in having localized interests decided at home;
- (7) the familiarity of the forum with the law that will govern the case; and
- (8) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law.

[In re Radmax, Ltd., 720 F.3d 285, 288 \(5th Cir. 2013\)](#) (quoting [In re Volkswagen of Am., Inc., 545 F.3d 304, 311 \(5th Cir. 2008\)](#) (en banc)) (quotation marks and brackets omitted).

Importantly, courts must weigh these factors in a way that "reflect[s] the appropriate [*66] deference to which the plaintiff's choice of venue is entitled." [Volkswagen, 545 F.3d at 315](#). The party seeking a transfer, thus, bears the burden of establishing "that the transferee venue is clearly more convenient" when judged in light of the above factors. [Radmax, 720 F.3d at 288](#) (quoting [Volkswagen, 545 F.3d at 315](#)).

Here, Jackson and Magnovo have not satisfied the heavy burden they must carry to show that the Southern District of Indiana is a clearly more convenient venue than this District—the venue in which Plaintiffs chose to file suit and labored to establish personal jurisdiction. Of the few points raised by Defendants here, nearly all are typical of the circumstances faced by out of state litigants. For example, Defendants assert that "the majority of [their] evidence is located in Indiana, as well as several of [their] witnesses," and "the fact that Indiana is the place of residence of Jackson and the principal place of business of Magnovo makes trial of this case easier, more expeditious, and less inexpensive (sic)." Defs. Jackson's & Magnovo's Mot. 21-22. This, of course, is offset by the fact that Plaintiffs' witnesses and evidence are primarily in Texas, and that it would be easier and less expensive for them to try this case at home in Texas. [*67] Defendants also argue that Plaintiffs' request for injunctive relief makes it "more appropriate for an Indiana court to determine and regulate the future activities of [Defendants] located in Indiana." *Id.* at 22. They offer no explanation, however, as to why a federal court in Indiana would be more adept at deciding the issues in this case than a federal

court in Texas, and they even admit that the injunction requested "would apply on a national level, not merely in Texas" or Indiana. *Id.* Lastly, Defendants point out that "litigation is already pending in the United States District Court, Southern District of Indiana, between the parties." *Id.* But aside from asserting in conclusory fashion that both cases "involv[e] a substantial number of the same basic facts, witnesses, and parties," *id.*, Defendants do not explain why it would be any more efficient to send this seemingly separate case to Indiana for adjudication, simply because the parties are engaged in another legal dispute in that forum.

Ultimately, the record suggests that the Southern District of Indiana stands on equal footing with this venue in terms of convenience and fairness to the parties. In such circumstances, the Court must defer to [*68] Plaintiffs' choice of forum in filing suit in this venue. See [Volkswagen, 545 F.3d at 315](#). Therefore, the Court concludes that Jackson and Magnovo are not entitled to the relief sought in their motion to transfer pursuant to [28 U.S.C. § 1404\(a\)](#).

IV.

CONCLUSION

For the foregoing reasons, the Court concludes that it may assert personal jurisdiction over the trademark and anticybersquatting claims brought against Defendants Jackson and Magnovo, and the state law claims against Defendant Jackson. For these claims, the Court further determines that Defendants Jackson and Magnovo have not shown that a transfer of venues pursuant to [28 U.S.C. § 1404\(a\)](#) is warranted. For all other claims against Defendants Jackson and Magnovo, Plaintiffs

have failed to make out a *prima facie* case of personal jurisdiction. Likewise, the Court finds that Plaintiffs have failed to make out a *prima facie* case of personal jurisdiction with respect to any of their claims against Defendants Johnston and Short Splice.

Accordingly, the Court **GRANTS IN PART** Defendants Jackson's and Magnovo's Motion to Dismiss (doc.39), and hereby **DISMISSES WITHOUT PREJUDICE TO REFILE IN ANOTHER FORUM FOR LACK OF PERSONAL JURISDICTION** Plaintiffs' claim against Defendant Jackson for Federal Copyright Infringement [*69] (Am. Compl. ¶¶ 166-75), as well as Plaintiffs' claims against Defendant Magnovo for Federal Copyright Infringement (*id.* ¶¶ 166-75), Unfair Competition by Misappropriation (*id.* ¶¶ 176-83), Texas Theft Liability Act (*id.* ¶¶ 184-86), and Conversion and Misappropriation of Trade Secrets (*id.* ¶¶ 187-99). The Court **DENIES IN PART** Defendants Jackson's and Magnovo's Motion (doc. 39) in all other respects.

The Court also **GRANTS** Defendants Johnston's and Short Splice's Motion to Dismiss (doc. 41), and hereby **DISMISSES WITHOUT PREJUDICE TO REFILE IN ANOTHER FORUM FOR LACK OF PERSONAL JURISDICTION** all of Plaintiffs' claims against Defendants Johnston and Short Splice.

SO ORDERED.

Dated: July 24, 2015.

/s/ Jane J. Boyle

JANE J. BOYLE

UNITED STATES DISTRICT JUDGE

APPENDIX 9

Michael v. New Century Fin. Servs.

United States District Court for the Northern District of California, San Jose Division

March 30, 2015, Decided; March 30, 2015, Filed

Case No. 13-cv-03892-BLF

Reporter

2015 U.S. Dist. LEXIS 41030; 2015 WL 1404939

ALAZAR MICHAEL, Plaintiff, v. NEW CENTURY FINANCIAL SERVICES, et al., Defendants.

Prior History: [Michael v. New Century Fin. Servs., 65 F. Supp. 3d 797, 2014 U.S. Dist. LEXIS 117390 \(N.D. Cal., Aug. 20, 2014\)](#)

Counsel: [*1] For Alazar Michael, Plaintiff: William Eric Kennedy, LEAD ATTORNEY, Law Offices of William E. Kennedy, Santa Clara, CA; Tyler Hinz, Santa Cruz, CA.

For New Century Financial Services, Pressler and Pressler LLP, Defendants: Jeffrey A. Topor, LEAD ATTORNEY, Christopher M Spain, Liana Mayilyan, Simmonds and Narita LLP, San Francisco, CA.

Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

[Re: ECF 44]

In 2001, New Century Financial Services ("NCFS"), a New Jersey debt collector, obtained a default judgment against a debtor, Plaintiff Alazar Michael, in New Jersey state court. Over a decade later, NCFS, through its law firm Pressler and Pressler LLP (a New Jersey partnership), submitted two documents to the same New Jersey court to levy against Plaintiff's bank account in order to collect on that default judgment. The debt collector had information showing that Plaintiff lived in California at the time it submitted these levy documents.

The Court must determine whether Defendants' knowledge of Plaintiff's residence, and the resulting

removal of funds from Plaintiff's bank account effectuated through [*2] the levy, is sufficient for this Court to exercise specific personal jurisdiction over Defendants. The Court finds that it is not, and GRANTS Defendants' motion to dismiss for lack of personal jurisdiction.

I. BACKGROUND

A. Procedural History

Plaintiff filed his Complaint in this action on August 22, 2013, and amended as of right on September 25, 2013. Defendants moved to dismiss the amended complaint for lack of personal jurisdiction, which the Court granted. See ECF 40. The Court granted Plaintiff leave to amend to show that Defendants undertook actions expressly aimed at California. See *id.* at 14. Plaintiff amended his complaint and Defendants again moved to dismiss, contending that Plaintiff had not cured the deficiencies outlined in the Court's prior Order.¹ The Court determined that this motion was appropriate for adjudication without oral argument under [Civil Local Rule 7-1\(b\)](#).

B. Factual Background

The following factual allegations are taken from Plaintiff's SAC.

In 1998, Plaintiff allegedly incurred a debt as defined by the Fair Debt Collection [*3] Practices Act ("FDCPA"). SAC ¶ 9. In January 2001, Defendants instituted a civil action against Plaintiff to collect on this debt in New Jersey's Bergen County Superior Court. Plaintiff contends that he was never served with the summons

¹ Defendants also moved to dismiss Plaintiff's claims under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). Because the Court finds that it lacks personal jurisdiction over Defendants, it declines to reach these issues.

or complaint in this New Jersey action, though Defendants claim to have served him on January 19, 2001. In response, Plaintiff first states that he was living in the African nation of Eritrea, not New Jersey, at the time of the alleged service. Second, he states that the return of service described the person served as a "WM," or white male, but because Mr. Michael is of Eritrean descent, "has dark skin, and cannot reasonably be mistaken for a white male," he could not have been the person served. SAC ¶ 13. Defendants obtained a default judgment against Mr. Michael in February 2001.

In 2009, Mr. Michael moved from Eritrea to Chino Hills, California, to begin a graduate program. While in Chino Hills, he opened a bank account with Bank of America ("the BOA account"), and deposited funds into it. He then returned to Eritrea, and in 2010 attempted to pay for courses at the University of Phoenix through that BOA account. At this time, he learned that Defendants [*4] had a levy on his BOA account and had removed approximately \$2,900 from it, leaving Plaintiff unable to pay for his coursework. SAC ¶¶ 15-18. Mr. Michael claims he had "no knowledge of Defendants' action against him prior to this levy." SAC ¶ 19.

In July 2012, Mr. Michael moved from Eritrea to Hayward, California, and soon thereafter to San Jose, California, where he currently resides. In September 2012, he opened a JP Morgan Chase Bank Account ("the Chase Account"), and began depositing money into that account. In "early 2013," he received a letter from Chase stating that it had received a garnishment to enforce a judgment against him, amounting to over \$10,000. Chase informed Michael that it had placed a hold on his Chase Account. SAC ¶ 22. In March 2013, Chase paid an initial levy amount of \$327.03 to the officer of the Bergen County Court, which was withdrawn from Mr. Michael's Chase Account. Chase also charged him a legal processing fee of \$125, which left his account empty. SAC ¶ 24. Plaintiff alleges that Defendants took no effort to domesticate the New Jersey judgment in California, in violation of [California Code of Civil Procedure § 1913](#). SAC ¶ 26.

With regard to the 2013 levy, Plaintiff [*5] alleges that Defendants submitted two levy documents to the New Jersey court, and that at the time these documents were submitted to the Court, Defendants knew that Plaintiff lived in California. See, e.g., SAC Exh. 1. Plaintiff further alleges that Defendants had no knowledge he lived in Eritrea prior to issuing the levies. SAC ¶ 34.

II. LEGAL STANDARD

Plaintiff bears the burden of establishing that the Court has personal jurisdiction over Defendants. See, e.g., [Schwarzenegger v. Fred Martin Motor Co.](#), 374 F.3d 797, 800-01 (9th Cir. 2004). If a defendant moves to dismiss under [Rule 12\(b\)\(2\)](#) for lack of personal jurisdiction, a plaintiff must "come forward with facts, by affidavit or otherwise, supporting personal jurisdiction." [Scott v. Breeland](#), 792 F.2d 925, 927 (9th Cir. 1986). When, as here, the motion is based on written materials, rather than an evidentiary hearing, the plaintiff "need only make a prima facie showing of jurisdictional facts." [Schwarzenegger](#), 374 F.3d 797, 800. "Uncontroverted allegations in the complaint must be taken as true," [id.](#) at 800, though Plaintiff cannot "simply rest on the bare allegations of its complaint." [Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.](#), 551 F.2d 784, 787 (9th Cir. 1977). Conflicts between facts contained within the declarations or affidavits submitted by the parties are resolved in the plaintiff's favor for purposes of plaintiff's prima facie case. See, e.g., [Mattel, Inc. v. Greiner & Hausser GmbH](#), 354 F.3d 857, 861-62 (9th Cir. 2003).

Federal courts, in the absence [*6] of a specific statutory provision conferring jurisdiction, apply the personal jurisdiction laws of the state in which they sit. California's long-arm jurisdictional statute is "coextensive with federal due process requirements." [Panavision Int'l, LP v. Toeppen](#), 141 F.3d 1316, 1320 (9th Cir. 1998). To exercise jurisdiction over a non-resident defendant, the defendant must have "minimum contacts" with the forum state such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." [Int'l Shoe Co. v. Washington](#), 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

III. DISCUSSION

Defendants argue that Plaintiff has failed to show that the Court has general or specific jurisdiction over the Defendants, two New Jersey companies attempting to collect on a judgment rendered by a New Jersey court. Plaintiff does not argue that Defendants are subject to general jurisdiction in California, only specific jurisdiction.

Courts in the Ninth Circuit employ a three-prong test when determining whether a non-resident defendant can be subjected to specific personal jurisdiction in a forum:

- (1) The non-resident defendant must purposefully direct his activities or consummate some

transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of [*7] conducting activities in the forum, thereby invoking the benefits and protections of its laws;

(2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and

(3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

[Schwarzenegger, 374 F.3d 797, 802 \(9th Cir. 2004\).](#)

When a plaintiff's claims sound in tort, as do all of Plaintiff's claims here, the Court engages in a "purposeful direction" analysis to determine whether a defendant's conduct was directed at the forum state, even if the actions giving rise to the tort claims took place elsewhere. See, e.g., [id. at 802-03](#). With regard to both the first and second prongs of the specific jurisdiction test, the plaintiff bears the burden of proof. If he meets his burden, it then shifts to defendant to "set forth a compelling case that the exercise of jurisdiction would not be reasonable." See [CollegeSource, Inc. v. AcademyOne, Inc., 653 F.3d 1066, 1076 \(9th Cir. 2011\)](#).

A. Purposeful Direction

Purposeful direction is itself subject to another three-factor test. This test derives from the Supreme Court's decision in [Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 \(1984\)](#), which demands that the defendant "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be [*8] suffered in the forum state." [Schwarzenegger, 374 F.3d at 803](#) (citing [Dole Food Co. v. Watts, 303 F.3d 1104, 1111 \(9th Cir. 2002\)](#)). The Supreme Court has held that this inquiry must focus on "defendant's contacts with the forum state itself, not the defendant's contacts with persons who reside there." [Walden v. Fiore, 134 S. Ct. 1115, 1122, 188 L. Ed. 2d 12 \(2014\)](#) ("[T]he plaintiff cannot be the only link between the defendant and the forum."). The Supreme Court further held that "*Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum" for purposes of personal jurisdiction over a defendant. See [id. at 1125](#).

Plaintiff's jurisdictional allegations focus on two levy documents filed by Defendants with the New Jersey state court. See SAC Exhs. A, B. The first document, at

Exhibit A, was filed on January 22, 2013, on behalf of New Century Financial Services. It lists NCFS as the plaintiff and Mr. Michael as the defendant, includes Mr. Michael's Hayward, California address, and levies against Mr. Michael's Chase account. SAC Ex. A at 1. The levy is directed to a Chase post office box located in Columbus, Ohio. See *id.* The second document, at Exhibit B, was stamped with the seal of the Bergen County Superior Court, and includes NCFS and Mr. Michael as parties, as well as Mr. Michael's Hayward address, but the document is otherwise [*9] illegible.²

The Court considers whether the filing of these two levy documents with the New Jersey court constitutes Defendants "purposefully directing" activity toward California.

1. Intentional act

An "intentional act" means only that the defendant must act "with the intent to perform an actual, physical act in the real world." [Schwarzenegger at 806](#). Filing the levy documents was clearly an intentional act undertaken by Defendants. Cf. [Cybersitter, LLC v. People's Rep. of China, 805 F. Supp. 2d 958, 969 \(C.D. Cal. 2011\)](#).

2. Express Aiming

Plaintiff must show that the Defendants' tortious activity was "expressly aimed at the forum." [Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1111 \(9th Cir. 2002\)](#). The Court, in its prior dismissal order, found that Plaintiff was unable to prove that Defendants engaged in any conduct aimed [*10] at California because he had failed to make any showing that "Defendants even knew that Michael lived in California" at the time they engaged in the allegedly tortious conduct. See ECF 40 at 12. In response to this, Plaintiff has provided the Court with the levy documents filed by Defendants with the Bergen County court, which clearly show that Defendants were aware that Mr. Michael was a California resident at the

² Defendants encourage the Court to disregard this document in its entirety due to its illegibility. However, the Court agrees with Plaintiff that the document clearly shows Mr. Michael's Hayward address, includes New Century and Mr. Michael as parties, and includes the Bergen County court seal. The Court therefore considers this document only for those facts, because the remainder of the document is illegible. Cf., e.g., [Int'l Fire & Marine Ins. Co., Ltd. v. Silver Star Shipping Am., Inc., 951 F. Supp. 913, 920 \(C.D. Cal. 1997\)](#) (holding that the court can consider portions of documents that are difficult to read but not illegible).

time they levied funds from his bank account. See, e.g., SAC Exh. A.³

Defendants contend that this knowledge of Plaintiff's residence is still insufficient for the Court to exercise personal jurisdiction over them, citing the Supreme Court's recent decision in *Walden v. Fiore*. In *Walden*, a DEA agent named Walden, working at Atlanta's Hartsfield-Jackson International Airport, confiscated approximately \$97,000 in [*11] cash from two professional gamblers traveling through the airport en route from Puerto Rico to Nevada. The gamblers alleged that Walden filed a false affidavit to support the seizure, and filed a *Bivens* suit against him in Nevada. Walden moved to dismiss for lack of personal jurisdiction. On appeal, the Supreme Court unanimously found that the officer lacked sufficient contacts to be subjected to personal jurisdiction in Nevada, finding that "the relationship must arise out of contacts that the defendant *himself* creates with the forum State," and noting that "[w]e have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum state." [134 S. Ct. 1115, 1122, 188 L. Ed. 2d 12](#). The Supreme Court further held that the circuit court improperly "looked to [Walden's] knowledge of [the plaintiffs'] strong forum connections," rather than, as it should have, focusing on Walden's *own* contacts with the forum. [Id. at 1124](#).

Until recently, the Ninth Circuit had not clearly spoken as to how *Walden* should be read by district courts in relation to the circuit's prior personal jurisdiction jurisprudence. On March 19, 2015, however, the Ninth [*12] Circuit released a decision in a case factually similar to this one, *Picot v. Weston*, which provides such instruction. See [780 F.3d 1206, 2015 U.S. App. LEXIS 4437, 2015 WL 1259528 \(9th Cir. Mar. 19, 2015\)](#).

Plaintiff Picot, a California resident, brought suit against Defendant Weston, a Michigan resident, alleging a contract claim for declaratory judgment and a tort claim for tortious interference with contract. Picot and Weston had worked together to market an electrolyte which

could be used in hydrogen fuel cells. Picot and a third individual, Manos, then sold the technology to a company called HMR Hydrogen Master Rights without telling Weston. After being informed of the sale, Weston allegedly told Manos that he would "do everything in his power" to destroy Manos and Picot, and sent an email threatening to sue the two men if Weston was not paid a share of the sale's proceeds. As a result of these threats, "and other unspecified statements" Weston allegedly made to HMR's Ohio-based owner, Tracy Coats, HMR stopped making payments to Picot and Manos and the sale fell through. [2015 U.S. App. LEXIS 4437, \[WL\] at *5](#).

Under the express aiming prong, and relying heavily on the Supreme Court's holding in *Walden*, the court in *Picot* held that Weston's out-of-state actions which gave rise to Picot's tort claim [*13] "did not connect him with California in a way sufficient to support the assertion of personal jurisdiction over him." See [2015 U.S. App. LEXIS 4437, \[WL\] at *7](#). The court continued:

Weston's allegedly tortious conduct consists of making statements to Coats (an Ohio resident) that caused HMR (a Delaware corporation with offices in Ohio) to cease making payments into two trusts (in Wyoming and Australia). Weston did all this from his residence in Michigan, *without entering California, contacting any person in California, or otherwise reaching out to California*. In short, "none of [Weston's] challenged conduct had anything to do with [California] itself."

Id. (emphasis added).

The Ninth Circuit's holding in *Picot* is the latest in a series of cases from circuit courts interpreting *Walden* to find that knowledge of a plaintiff's residence in the forum is not enough to satisfy the express aiming prong of the *Calder* test. See, e.g., [Rockwood Select Asset Fund XI \(6\)-1, LLC v. Devine, Millimet & Branch, 750 F.3d 1178, 1180 \(10th Cir. 2014\)](#) ("*Walden* teaches that personal jurisdiction cannot be based on interaction with a plaintiff known to bear a strong connection to the forum state."); [Adv. Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc., 751 F.3d 796, 803 \(7th Cir. 2014\)](#) ("The district court also thought personal jurisdiction proper because Real Action knew that Advanced Tactical was [*14] an Indiana company and could foresee that its misleading emails and sales would harm Advanced Tactical in Indiana. *Walden*, however, shows the error of this approach."); [Fastpath, Inc. v. Arbela Techs. Corp., 760 F.3d 816, 823 \(8th Cir. 2014\)](#) (holding

³In his opposition, Plaintiff requested leave to conduct jurisdictional discovery *if* the Court found that the "documents were too speculative to indicate that Defendants knew that Plaintiff lived in California at the time of the levy." Opp., ECF 48 at 5. Because the Court finds the two documents sufficient to establish this fact, the Court DENIES Plaintiff's request.

that knowledge of a company's state of residence "cannot create minimum contacts [] because the plaintiff cannot be the only link between the defendant and the forum").

Applying these holdings—and the broader personal jurisdiction principals of *Walden*—to this case shows why Defendants cannot be subjected to personal jurisdiction in California. Both are New Jersey companies. They are alleged to have used deceptive means to collect Mr. Michael's debt when they did not serve him with the complaint and summons in the New Jersey action, and then obtained default judgment against him. See, e.g., SAC ¶ 39. These actions, too, occurred in New Jersey. In 2013, Defendants filed levy documents with the New Jersey Superior Court in Bergen County. Defendants' actions were expressly aimed at New Jersey, not California.

In his opposition, Plaintiff makes two arguments that merit the Court's attention. First, he contends that the law in this circuit holds that the "express aiming requirement is satisfied when 'the defendant [*15] is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant know to be a resident of the forum state.'" Opp. at 6 (citing [CollegeSource, 653 F.3d at 1077](#)). Plaintiff cites a number of other cases in support of this theory. See *id.* at 6-8. These cases, however, pre-date *Walden* and have been rendered unpersuasive following the Ninth Circuit's recent holding in *Picot*. A defendant who engages in out-of-state conduct that affects a resident of a forum state does not purposefully direct his conduct at the forum state simply by virtue of his knowledge that plaintiff lives there. Cf., e.g., [Walden at 1125](#) (finding that knowledge of a plaintiff's "strong forum connections," coupled with a "conclusion that [plaintiffs] suffered foreseeable harm in [the forum]," was insufficient for purposes of personal jurisdiction because it "impermissibly allow[ed] a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis").⁴

⁴ Similarly, Plaintiff's reliance on *Metropolitan Life Insurance Co. v. Neaves* is inapposite to the facts of this case. In *Neaves*, the defendant took action expressly aimed at California by sending a misleading letter into the forum state. [912 F.2d 1062 \(9th Cir. 1990\)](#). Plaintiff argues that the Ninth Circuit held in *Neaves* [*16] that the defendant would have been subject to personal jurisdiction in California "even if the [] letter had been directed to one of [plaintiff's] non-California offices." *Id.* at 1065. This, however, is a clear misstatement of the Ninth Circuit's holding and is wholly unsupported by the actual text of the opinion. The *Neaves* court held only that the

Second, Plaintiff argues that the fact that the levied funds were "previously held by Plaintiff in California and deposited in a bank in California" supports a finding of personal jurisdiction. See *id.* at 7. This argument, however, is unavailing following *Walden*. As the Court noted in its first dismissal order, determining the location of a bank account for jurisdictional purposes is a difficult question, given the ability of a person to access his or her funds from around the world. Plaintiff himself took advantage of this while he was living in Eritrea. SAC ¶ 17. Even if Plaintiff's [*17] bank account were "located" in California for jurisdictional purposes, the money was garnished from the account because of Defendants' activities in New Jersey and, to a lesser extent, Ohio. Like in *Picot*, "[n]one of [the] challenged conduct had anything to do with California itself." [2015 U.S. App. LEXIS 4437, 2015 WL 1259528, at *7](#). Critically, the Defendants did not "enter[] California, contact[] any person in California, or otherwise reach[] out to California." *Id.*

Walden states clearly that "the plaintiff cannot be the only link between the defendant and the forum." [Walden at 1122](#). Here, like in *Walden*, none of Defendants' conduct took place in California. Defendants are New Jersey companies. Plaintiff alleges improper conduct on their behalf with regard to a New Jersey debt collection action and levy documents filed with a New Jersey court. Mere knowledge that Plaintiff lived in California when these documents were filed is insufficient to show that Defendants had minimum contacts with the forum. "A forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." [Walden at 1123](#).

The Supreme Court in *Walden* admonished courts [*18] to avoid "attribut[ing] a plaintiff's forum connections to the defendant and mak[ing] those connections 'decisive' in the jurisdictional analysis." *Id.* at 1125. Here, Defendants' intentional conduct was directed at New Jersey. That the effects of that conduct were ultimately felt by a California plaintiff is insufficient for the Court to exercise personal jurisdiction over Defendants.⁵

sending of the letter to California was not "fortuitous" because the defendant purposefully directed the conduct at California. See *id.* at 1065. In this case, there is no evidence that Defendants sent any letters to Mr. Michael in California prior to filing of the levy documents.

⁵ Because the Court finds that Defendants' conduct fails to meet the "express aiming" prong, it need not consider the third prong of the purposeful direction inquiry, whether the

IV. ORDER

For the foregoing reasons, Plaintiff has not shown that Defendants purposefully directed conduct at California, and therefore cannot show that Defendants are properly subject to personal jurisdiction in California. Because the Court has already granted Plaintiff leave to amend as to personal jurisdiction, it finds that further amendment would be futile. See [Lopez v. Smith, 203 F.3d 1122, 1125 \(9th Cir. 2000\)](#). The Court therefore GRANTS Defendants' motion to dismiss for lack of personal jurisdiction, with prejudice.

IT IS SO ORDERED.

Dated: March 30, 2015

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

Defendants caused harm that was likely to be suffered in the forum state.

SCOTT SMITH

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APPENDIX 10

Poor Boy Prods. v. Fogerty

United States District Court for the District of Nevada

August 26, 2015, Decided; August 26, 2015, Filed

3:14-cv-00633-RCJ-VPC

Reporter

2015 U.S. Dist. LEXIS 113086; 2015 WL 5057221

POOR BOY PRODUCTIONS et al., Plaintiffs, vs. JOHN FOGERTY, Defendant.

Prior History: *Fogerty v. Poor Boy Prods.*, 124 F.3d 211, 1997 U.S. App. LEXIS 31428 (9th Cir. Cal., 1997)

Counsel: [*1] For Creedence Clearwater Revival, Stuart Cook, Douglas Clifford, Patricia Fogerty, an individual and the executrix of the Estate of Thomas Fogerty, Poor Boy Productions, Plaintiffs: Michael D Rounds, LEAD ATTORNEY, Matthew D Francis, Watson Rounds, PC, Reno, NV; Steven A. Caloiaro, Watson Rounds, Reno, NV.

For John Fogerty, Defendant: Richard L. Elmore, Robert C. Ryan, Tamara Reid, LEAD ATTORNEYS, Holland & Hart LLP, Reno, NV; Sarah E. Johnston, LEAD ATTORNEY, PRO HAC VICE, Barnes & Thornburg LLP, Los Angeles, CA.

Judges: ROBERT C. JONES, United States District Judge.

Opinion by: ROBERT C. JONES

Opinion

ORDER

This case arises out of a band member's alleged unlawful use of the trademarked name of the band, as well as his alleged violation of a settlement agreement concerning use of the mark. Pending before the Court is a Motion to Dismiss or Transfer (ECF No. 9). For the reasons given herein, the Court grants the motion in part and transfers the case to the U.S. District Court for the Central District of California.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff rock band Creedence Clearwater Revival

("CCR") exists in law as a partnership between Plaintiffs Douglas Clifford, Stuart Cook, Patricia Fogerty (the widow of deceased [*2] band member Tom Fogerty), and Defendant John Fogerty. (Compl. ¶¶ 5, 10, ECF No. 1). CCR owns U.S. Trademark Reg. No. 1222931 for "Creedence Clearwater Revival" (the "Mark"). (*Id.* ¶ 11).

In 1996, Defendant sued the other members of CCR and Plaintiff Poor Boy Productions, Inc. ("Poor Boy") in the U.S. District Court for the Central District of California seeking an injunction against their performance under the name "Creedence Clearwater Revisited." (*Id.* ¶ 12). The parties ultimately entered into an agreement (the "Settlement Agreement") that Defendant would withdraw his objection to the other band members' performances under the name "Creedence Clearwater Revisited," Poor Boy would pay Defendant royalties for the use of that name, and the other band members would not license any third party to perform under the names "Creedence," "Creedence Clearwater," or any derivative of those names without Defendant's prior written permission. (*Id.* ¶¶ 12-13).

On July 9, 2011, Defendant publicly condemned Poor Boy's, Clifford's, and Cook's use of the "Creedence Clearwater Revisited" name in an online article (the "Article") for the website Ultimateclassicrock.com. (*Id.* ¶ 14). Thereafter, Poor Boy's [*3] counsel sent Defendant's counsel a letter (along with royalty checks due at that time) demanding "cessation of Fogerty's malfeasance and breach of the Settlement Agreement." (*Id.* ¶ 15). The Article was still available online as of the date of the Complaint. (*Id.*). Defendant has also used the Mark without CCR's permission and has demanded all royalties owing from December 2011 to present. (*Id.* ¶¶ 16, 19).

Plaintiffs have sued Defendant in this Court for: (1) trademark infringement under *15 U.S.C. § 1114(a)*; (2) false advertising under *§ 1125(a)*; (3) common law unfair competition; (4) declaratory judgment as to Plaintiffs' non-breach of the Settlement Agreement; (5)

Defendant's breach of the Settlement Agreement; (6) Defendant's breach of the implied covenant of good faith and fair dealing as to the Settlement Agreement; (7) and breach of fiduciary duty. Defendant has asked the Court to dismiss for lack of personal jurisdiction over him in Nevada, or, in the alternative, to transfer the case to the U.S. District Court for the Central District of California under [28 U.S.C. § 1404\(a\)](#).

II. LEGAL STANDARDS

A defendant may move to dismiss for lack of personal jurisdiction. See [Fed. R. Civ. P. 12\(b\)\(2\)](#). Jurisdiction exists if: (1) provided for by law; and (2) the exercise [*4] of jurisdiction comports with due process. See [Greenspun v. Del E. Webb Corp.](#), [634 F.2d 1204, 1207 \(9th Cir. 1980\)](#). When no federal statute governs personal jurisdiction, a federal court applies the law of the forum state. See [Boschetto v. Hansing](#), [539 F.3d 1011, 1015 \(9th Cir. 2008\)](#). Where a state has a "long-arm" statute providing its courts jurisdiction to the fullest extent permitted by the *Due Process Clause of the Fourteenth Amendment*, as Nevada does, see [Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court](#), [122 Nev. 509, 134 P.3d 710, 712 \(Nev. 2006\)](#) (citing [Nev. Rev. Stat. § 14.065](#)), a court need only address federal due process standards, see [Boschetto](#), [539 F.3d at 1015](#). Technically, Nevada's long-arm statute restricts extra-territorial jurisdiction to the limits of both the U.S. and Nevada Constitutions. See [Nev. Rev. Stat. § 14.065\(1\)](#). But Nevada's *Due Process Clause* is textually identical to the *Due Process Clause of the Fourteenth Amendment* in relevant respects, compare [U.S. Const. amend. XIV, § 1](#), with [Nev. Const. art. 1, § 8\(5\)](#), and the Nevada Supreme Court reads the state clause as coextensive with the federal clause, see, e.g., [Wyman v. State](#), [125 Nev. 592, 217 P.3d 572, 578 \(Nev. 2009\)](#). Until the *Fourteenth Amendment* was adopted in 1868, no federal *due process clause* applied to the states. See [Barron v. City of Baltimore](#), [32 U.S. 243, 250-51, 8 L. Ed. 672 \(1833\)](#) (Marshall, C.J.). The Declaration of Rights comprising Article I of the Nevada Constitution, which was adopted in 1864, was included in order to impose certain restrictions on the State of Nevada that were already imposed against the federal government under the *Bill of Rights*, and the Nevada Supreme Court has not interpreted the protections of the Declaration of Rights to exceed the scope of their federal counterparts. Michael W. Bowers, *The Sagebrush State* 43-44 (3rd ed., [*5] Univ. Nev. Press 2006); Michael W. Bowers, *The Nevada State Constitution* 24 (1993). In summary, the exercise of personal jurisdiction in Nevada need only comport with the *Due Process Clause of the*

Fourteenth Amendment.

A. General Jurisdiction

There are two categories of personal jurisdiction: general jurisdiction and specific jurisdiction. In the mid-to-late-Twentieth Century, the federal courts developed a rule that general jurisdiction existed over a defendant in any state with which the defendant had "substantial" or "continuous and systematic" contacts such that the assertion of personal jurisdiction over him would be constitutionally fair even where the claims at issue were unrelated to those contacts. See [Tuazon v. R.J. Reynolds Tobacco Co.](#), [433 F.3d 1163, 1171 \(9th Cir. 2006\)](#) (citing [Helicopteros Nacionales de Colombia, S.A. v. Hall](#), [466 U.S. 408, 415, 104 S. Ct. 1868, 80 L. Ed. 2d 404 \(1984\)](#)). A state court has general jurisdiction over the state's own residents, for example. The Supreme Court recently clarified, however, that general jurisdiction exists only where the defendant is at "home" in the forum state. See [Daimler AG v. Bauman](#), [134 S. Ct. 746, 760-62, 187 L. Ed. 2d 624 \(2014\)](#). The Court noted that "continuous and systematic" contacts alone are not enough to create general jurisdiction without more. See *id.* The quoted phrase was in fact first used in the context of a specific jurisdiction analysis. See *id. at 761* (citing [Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement](#), [326 U.S. 310, 317, 66 S. Ct. 154, 90 L. Ed. 95 \(1945\)](#)). "Accordingly, the inquiry under *Goodyear* is not [*6] whether a foreign [defendant's] in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that [defendant's] 'affiliations with the State are so 'continuous and systematic' as to render [the defendant] essentially at home in the forum State.'" *Id.* (quoting [Goodyear Dunlop Tires Operations S.A. v. Brown](#), [131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 \(2011\)](#)).

B. Specific Jurisdiction

Even where there is no general jurisdiction over a defendant, specific jurisdiction exists when there are sufficient contacts with the forum state such that the assertion of personal jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" [Int'l Shoe Co.](#), [326 U.S. at 316](#) (quoting [Milliken v. Meyer](#), [311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 \(1940\)](#)). The standard has been restated using different verbiage. See [World-wide Volkswagen Corp. v. Woodson](#), [444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 \(1980\)](#) ("[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a

product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."); [Hanson v. Denckla](#), 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."). From these [*7] cases and others, the Court of Appeals has developed a three-part test for specific jurisdiction:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

[Boschetto](#), 539 F.3d at 1016 (quoting [Schwarzenegger v. Fred Martin Motor Co.](#), 374 F.3d 797, 802 (9th Cir. 2004)) (internal quotation marks omitted).

The plaintiff bears the burden on the first two prongs. If the plaintiff establishes both prongs one and two, the defendant must come forward with a "compelling case" that the exercise of jurisdiction would not be reasonable. But if the plaintiff fails at the first step, the jurisdictional inquiry ends and the case must be dismissed.

Id. (citations omitted).

The "purposeful direction" option of the first prong uses the "Calder-effects" test, under which "the defendant allegedly must have (1) committed an intentional act, (2) [*8] expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." [Brayton Purcell LLP v. Recordon & Recordon](#), 606 F.3d 1124, 1128 (9th Cir. 2010) (quoting [Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme](#), 433 F.3d 1199, 1206 (9th Cir. 2006) (en banc)). The tortious activity must be aimed at a forum state to create personal jurisdiction over a defendant in

that state; it is not enough that the activity occurs in another state but causes harm known or expected by the defendant to be felt by a resident of the forum state in the forum state. The second and third prongs of the *Calder*-effects test are conjunctive, not disjunctive. That is, a defendant must not only cause harm to a person who he knows will feel a "judicially sufficient amount of harm" in the forum state (the third prong), see [Yahoo! Inc.](#), 433 F.3d at 1207, the intentional activity must be directed to the forum state itself (the second prong). Activity is not "aimed at" a forum state merely because it is expected that its effects will be felt there, otherwise the third prong of the *Calder*-effects test would swallow the second. The prongs are distinct and conjunctive.

The Supreme Court has recently reaffirmed that "purposeful direction" or "express aiming" is not satisfied merely by a defendant committing an intentional tort against a plaintiff he knows is [*9] a resident of the forum state and that the effects of the act will be felt in that state. See [Walden v. Fiore](#), 134 S. Ct. 1115, 1124, 188 L. Ed. 2d 12 (2014) (reinstating Judge Reed's ruling, after reversal by the Court of Appeals, that there was no personal jurisdiction in Nevada over Georgia defendants who allegedly committed an intentional tort in Georgia against a person they knew was a Nevada resident where the tortious activity had no other connection to Nevada) ("[T]he relationship must arise out of contacts that the 'defendant himself' creates with the forum State." (quoting [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)) (emphasis in *Walden*)). In *Calder* itself, not only was it known that the effects of the libelous article would be felt in California (because the defendant knew the plaintiff resided there), but the article was also expressly aimed at California (because the defendant in fact circulated the article there). See [Calder v. Jones](#), 465 U.S. 783, 784, 789-90, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). That is, the effects of the libel did not merely find their way to the California plaintiff in a way the defendant should have anticipated after libeling her in another state; rather, the defendant actually libeled the plaintiff in California by causing the circulation of the article in that state. See *id.*

The third prong is a seven-factor balancing test, under [*10] which a court considers:

- (1) the extent of the defendant's purposeful interjection into the forum state's affairs;
- (2) the burden on the defendant of defending in the forum;
- (3) the extent of conflict with the sovereignty of the defendants' state;
- (4) the forum state's interest in

adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

[*Menken v. Emm*, 503 F.3d 1050, 1060 \(9th Cir. 2007\)](#) (quoting [*CE Distrib., LLC v. New Sensor Corp.*, 380 F.3d 1107, 1112 \(9th Cir. 2004\)](#)) (internal quotation marks omitted).

III. ANALYSIS

There appears to be no dispute that Defendant is a California resident and that there is therefore no general jurisdiction over him in Nevada. The parties dispute whether there is specific jurisdiction over him in Nevada as to the claims in this case. The Court finds that there is no specific jurisdiction over Defendant as to any claims over which the Court has original jurisdiction over the subject matter. Therefore, even assuming there were specific jurisdiction over Defendant as to one or more of the state law claims over which the Court has only supplemental jurisdiction over the subject matter—and that is doubtful—the [*11] Court is compelled to dismiss or transfer the case.

A. Personal Jurisdiction as to the Federal Claims

There is no specific jurisdiction over Defendant as to the federal claims under §§ 1114(a) and 1125(a). The nationwide service rule does not apply because the courts of California have general jurisdiction over Defendant. See *Fed. R. Civ. P. 4(k)(2)*. Plaintiffs therefore admit that there must be specific jurisdiction over Defendant based on his contacts with Nevada, not simply based on his contacts with the United States. But the only purposeful direction alleged in the response is that Defendant knew that Plaintiffs Clifford and Poor Boy were Nevada residents and that he purposely put the Mark on certain concert advertising and merchandise offered over the Internet. None of that is enough.

First, knowledge that a potential plaintiff is a resident of the forum is not enough. [*Walden*, 134 S. Ct. at 1124](#). The acts must be directed to the forum itself. The evidence adduced of concert advertising that included any variation of the Mark shows that it was directed variously to Argentina, California, and other unspecified venues in the United States. (Clifford Decl. ¶¶ 19, 21, ECF No. 13-1; Advertisements, ECF No. 13-4 to 13-5, 13-8; 13-11). No evidence is [*12] adduced of any materials containing the Mark having been used to

advertise any event in Nevada. Nor is any evidence adduced of the distribution in Nevada of any materials containing the Mark to advertise events in other venues. Plaintiffs' citation to [*Washington Shoe Co. v. A—Z Sporting Goods, Inc.*, 704 F.3d 668 \(9th Cir. 2012\)](#) is unavailing, because the holding there was based on the knowledge-of residency-and-impact theory since abrogated by *Walden*.

Second, there is no evidence of Nevada-specific design or targeting as to the merchandise generally available on the Internet. See [*J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791-92, 180 L. Ed. 2d 765 \(2011\)](#) (Breyer, J., concurring) (controlling opinion). And this is not an "exceptional case" where Defendant is "subject to the jurisdiction of the courts of the United States but not of any particular State." [*J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2789](#) (plurality opinion). Rather, "[D]efendant is a domestic domiciliary, [so] the courts of [his] home State are available and can exercise general jurisdiction." *Id.* Even before *Nicastro*, the Court of Appeals had ruled that in the Internet context the maintenance of a website or internet advertisement alone is not enough to subject a party to personal jurisdiction in the forum; rather, there must be "something more" to "indicate that the defendant purposefully (albeit electronically) [*13] directed his activity in a substantial way to the forum state." [*Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 \(9th Cir. 1998\)](#) (quoting [*Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 \(9th Cir. 1997\)](#)) ("We held the Arizona court could not exercise personal jurisdiction over Cybersell FL, because it had no contacts with Arizona other than maintaining a web page accessible to anyone over the Internet."); accord [*Boschetto*, 539 F.3d at 1020-22](#) (Rymer, J., concurring) ("I write separately to underscore my disagreement with Boschetto's argument that Hansing, as a seller on eBay, necessarily availed himself of the privilege of doing business in each state across the nation. I believe that a defendant does not establish minimum contacts nationwide by listing an item for sale on eBay; rather, he must do 'something more,' such as individually targeting residents of a particular state, to be haled into another jurisdiction. . . . As we have previously held, merely advertising over the Internet is not sufficient to confer jurisdiction throughout the United States, even though the advertisement or website at issue may be viewed nationwide").

B. Pendent Personal Jurisdiction

There is no original jurisdiction over the state law

claims, because Defendant is a member of Plaintiff CCR. A partnership has the citizenship of each of its members for the purposes [*14] of diversity, [Carden v. Arkoma Assocs.](#), 494 U.S. 185, 195-96, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990), so there is no diversity jurisdiction over the state law claims, see 28 U.S.C. § 1332(a); [Strawbridge v. Curtiss](#), 7 U.S. 267, 267-68, 2 L. Ed. 435 (1806). There is only potentially supplemental jurisdiction over those claims under § 1367.

The Court is compelled to find as a matter of discretion in the present case, if not as a matter of law, that pendent personal jurisdiction only emanates from claims over which a court has original subject matter jurisdiction. The Court will therefore not closely analyze whether there is personal jurisdiction over Defendant in Nevada as to the state law claims, although there likely is not. Although the Court of Appeals has not explicitly limited the doctrine of pendent personal jurisdiction to the fact pattern, its pendent personal jurisdiction cases all appear to be based on the existence of personal jurisdiction as to at least one claim over which the district court had original subject matter jurisdiction. See [Wash. Shoe Co.](#), 704 F.3d at 673 (personal jurisdiction as to one federal claim); [Fiore v. Walden](#), 688 F.3d 558, 586-87 (9th Cir. 2011) (same), *rev'd on other grounds*, [Walden](#), 134 S. Ct. 1115, 188 L. Ed. 2d 12; [CollegeSource, Inc. v. AcedemyOne, Inc.](#), 653 F.3d 1066, 1076 (9th Cir. 2011) (personal jurisdiction as to one state law claim over which there was diversity jurisdiction); [CE Distribution, LLC v. New Sensor Corp.](#), 380 F.3d 1107, 1111-13 (9th Cir. 2004) (same); [Action Embroidery Corp. v. Atl. Embroidery, Inc.](#), 368 F.3d 1174, 1180-81 (9th Cir. 2004) (personal jurisdiction as to federal claims) ("Pendent personal jurisdiction is typically found where one or more federal [*15] claims for which there is nationwide personal jurisdiction are combined in the same suit with one or more state or federal claims for which there is not nationwide personal jurisdiction. . . . [T]he actual exercise of personal pendent jurisdiction in a particular case is within the discretion of the district court."). And every reported case the Court has been able to find from the other courts of appeals to use the phrase "pendent personal jurisdiction" has applied the doctrine only to pendent claims where personal jurisdiction existed as to an original jurisdiction claim, typically based on a federal nationwide service of process statute or rule, but sometimes based on ordinary service under state law in a diversity case.

The Court finds that applying the doctrine of pendent personal jurisdiction "backwards" would not be a

reasonable application of the doctrine. Judge Jackson of the District of Colorado recently articulated the Court's concerns:

One question the Court grappled with a bit in ruling on this motion is whether the Court could (or should) keep the action given that the state law claims likely give rise to specific jurisdiction over the defendant. Could they in turn provide "pendent [*16] personal jurisdiction" with respect to the federal claims? The problem is that the Court has only been asked to assert supplemental jurisdiction over the state law claims, not original jurisdiction. Thus, the Court would be using claims over which it has no original jurisdiction to establish personal jurisdiction with respect to claims as to which the Court has original jurisdiction but no personal jurisdiction.

A Tenth Circuit decision, [United States v. Botefuhr](#), 309 F.3d 1263 (10th Cir. 2002), while not directly on point, is quite helpful in thinking about this issue. There, the Tenth Circuit was presented with the question of whether a district court abused its discretion in maintaining a cause of action over which it had only asserted pendent personal jurisdiction after the claim over it which it asserted specific personal jurisdiction had been voluntarily dismissed by the parties. "Pendent personal jurisdiction, like its better known cousin, supplemental subject matter jurisdiction, exists when a court possesses personal jurisdiction over a defendant for one claim, lacks an independent basis for personal jurisdiction over the defendant for another claim that arises out of the same nucleus of operative fact, and then, because it possesses [*17] personal jurisdiction over the first claim, asserts personal jurisdiction over the second claim." [Id. at 1272](#) (citations omitted). This first claim is considered the "anchor claim." See [id. at 1274](#). "In essence, once a district court has personal jurisdiction over a defendant for [the anchor] claim, it may 'piggyback' onto that claim other claims over which it lacks independent personal jurisdiction, provided that all the claims arise from the same facts as the claim over which it has proper personal jurisdiction." [Id. at 1272](#).

The choice of whether to exercise pendent personal jurisdiction over a claim is left to the discretion of the court. [Id. at 1273](#). However, complications arise where the Court loses the anchor claim. By way of analogy, the *Botefuhr* court explains that when a

district court dismisses federal claims and thereby leaves only supplemental state claims, courts most commonly dismiss the supplemental claims. See *id. at 1273-74*. Using this analogy, the Tenth Circuit panel found that the district court abused its discretion when it kept a pendent claim after the parties voluntarily dismissed the anchor claim as "there was no claim before the district court for which it could be said [the defendants] had 'minimum [*18] contacts' with [the forum State]." *Id. at 1274*.

The problem that arises here is that the state law and federal claims are mutually dependent. Without the state law claims, there would be no personal jurisdiction over the defendant. And without the federal claims, there would be no subject matter jurisdiction over the state law claims. Technically, I suppose I could find that the actions are so interconnected that each type of claim, and thus each type of jurisdiction, holds the other up, a tension bar of sorts. However, I'm not persuaded. The exercise of pendent personal jurisdiction is discretionary. In a case such as this, where neither set of claims could survive on its own, it feels fundamentally unfair to rely on each set of independently deficient claims to subject the defendant to jurisdiction in Colorado.

More importantly, it seems logically inapt to look past the claims over which this Court asserts original jurisdiction in order to determine whether it can maintain those claims. Independently analyzing the federal claims, the Court must dismiss this action for lack of personal jurisdiction. In turn, the supplemental state law claims must likewise be dismissed.

Leachman Cattle of Colo., LLC v. Am. Simmental Ass'n, 66 F. Supp. 3d 1327, 2014 WL 4458893, at *8-9 (D. Colo. 2014).

The "reverse" application [*19] of the pendent jurisdiction rule would mean that a federal district court has both subject matter jurisdiction and personal jurisdiction as to all claims arising out of the same set of operative facts so long as the court has original subject matter jurisdiction over one of the claims and personal jurisdiction over the defendant as to any of the other claims. Although the Court has subject matter jurisdiction over the federal claims in this case, exercising jurisdiction over Defendant purely because there is personal jurisdiction over him as to

supplemental claims over which the Court does not have original jurisdiction would be an unreasonably broad reading of § 1367 flying in the face of the presumption against federal jurisdiction. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). That is, in addition to the fairness concerns under the *Due Process Clause*, "reverse" application of the doctrine of pendent personal jurisdiction would permit a federal court in cases like the present one to exercise jurisdiction over federal claims based purely on the presence of state law claims. As to the "traditional" application of the pendent personal jurisdiction doctrine, where there is personal jurisdiction as to an original-jurisdiction claim, the intent of [*20] Congress to broaden the scope of the assertion of personal jurisdiction (within its constitutional limits) to supplemental claims can be reasonably inferred from § 1367. No such intent can be inferred from the statute as to "reverse" application of the doctrine.

Insofar as the doctrine is a matter of federal common law not dependent on any interpretation of § 1367, the purposes behind the doctrine are judicial economy, convenience, and fairness to the parties. See *Action Embroidery Corp.*, 368 F.3d at 1181. In a case such as the present one, where the court's subject matter jurisdiction over the only claims giving rise to personal jurisdiction is not original but supplemental, the Court finds that fairness to the nonresident Defendant counsels dismissal or transfer of the case. The interests of judicial economy and convenience could be argued to favor application of pendent personal jurisdiction here, because the copyright claim may not be brought in state court, see 28 U.S.C. §1338(a), meaning Plaintiffs would have to maintain two lawsuits, one in federal court in California and one in state court in Nevada, potentially with inconsistent resolutions of common questions of fact, if they insisted on maintaining the state law claims in Nevada. But that can [*21] easily be avoided by transfer of the entire case to a forum where there is both subject matter and personal jurisdiction over Defendant as to the federal claims, as well as both supplemental subject matter jurisdiction and not only "traditional" pendent jurisdiction but actual personal jurisdiction over the state law claims. A transfer therefore furthers the interests of fairness and judicial economy, only at the expense of the convenience of two of the five Plaintiffs, who reside in Nevada. For the remaining Plaintiffs, who are citizens of California, Arizona, and Texas, however, the Los Angeles venue will actually be slightly more convenient to attend. Overall, therefore, the result is in the interest of the convenience of the parties, as well.

C. Venue

The Court's decision is bolstered by the apparent lack of venue in this District. Although Defendant asks in the alternative to dismissal for a transfer under 28 U.S.C. § 1404(a), the Court finds that § 1406(a) applies. Where venue is lacking, a court must dismiss or transfer under § 1406(a).¹ This is the case whether or not there is personal jurisdiction over the Defendant. Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962). First, it is not disputed that Defendant does not reside in this District. See 28 U.S.C. § 1391(b)(1). Second, as noted, [*22] *supra*, neither the allegations nor the evidence adduced indicate that a substantial part of the events or omissions giving rise to any of the claims occurred in Nevada. See *id.* § 1391(b)(2). The only allegations of Defendant's acts in Nevada are that he performed in Las Vegas in October 2014, (see Compl. ¶ 2), but he is not alleged to have used the Mark in connection with that performance, Defendant's manager attests that he did not, (see Robert Fogerty Decl. ¶ 8, ECF No. 10), and Plaintiffs have provided no contrary evidence in rebuttal. The only allegations or evidence of Defendant having used the Mark concern promotional materials for his performances in California, abroad, and in unspecified U.S. locations, as well as in advertisements on the Internet for various merchandise, (see Compl. ¶ 16 & Ex. D; Clifford Decl. ¶¶ 19, 21; Advertisements, ECF No. 13-4 to 13-5, 13-8; 13-11), without any "special [Nevada]-related design, advertising, advice, marketing, or anything else." See J. McIntyre Mach., Ltd., 131 S. Ct. at 2791-92.² Third, there is another district in which the case could have been brought, see *id.* § 1391(b)(3), because Defendant resides in the Central District of California, which fact

provides both personal jurisdiction in California, [*23] see Daimler AG, 134 S. Ct. at 760-62, and venue in the U.S. District Court for the Central District of California, see 28 U.S.C. § 1391(b)(1).

CONCLUSION

IT IS HEREBY ORDERED that the Motion to Dismiss or Transfer (ECF No. 9) is GRANTED IN PART, and the case is TRANSFERRED to the U.S. District Court for the Central District of California under 28 U.S.C. § 1406(b).

IT IS SO ORDERED.

Dated this 26th day of August, 2015.

/s/ Robert C. Jones

ROBERT C. JONES

United States District [*24] Judge

¹ The difference between § 1404(a) and § 1406(a) transfers matters because it affects the choice of law analysis as to the state law claims. See Muldoon v. Tropitone Furniture Co., 1 F.3d 964, 966-67 (9th Cir. 1993).

² *Nicastro* was a personal jurisdiction case, but if some state-specific targeting is required to show "purposeful direction" as to personal jurisdiction even where it is suspected that a product is likely to end up in a given state, it is difficult to see how a plaintiff can show in the absence of state-specific targeting that an event actually "occurred" in the state under § 1391(b)(2). Much more probably, the Supreme Court would consider internet advertisements to have "occurred" in the state where the offending party sits when he posts them, or perhaps where his servers are located, and there is no allegation or evidence adduced in this case that any of these places was Nevada.

End of Document

APPENDIX 11



Cited

As of: September 8, 2016 1:36 PM EDT

[Presby Patent Trust v. Infiltrator Sys.](#)

United States District Court for the District of New Hampshire

June 3, 2015, Decided; June 4, 2015, Filed

Civil No. 14-cv-542-JL

Reporter

2015 U.S. Dist. LEXIS 71562; 2015 DNH 111; 2015 WL 3506517

Presby Patent Trust v. Infiltrator Systems, Inc.

Case Summary

Overview

HOLDINGS: [1]-Exercising specific personal jurisdiction over an alleged infringer of a patent, even though the infringer marketed and sold products in the forum state, since the infringer did not market or sell the allegedly infringing product in the forum state and the alleged infringement thus did not arise from or relate to the infringer's activities in the forum state; [2]-Exercising general personal jurisdiction over the infringer was also not warranted even though the infringer had continuous and systematic contacts in the forum state through sales and marketing, since both the infringer's place of incorporation and principal place of business were in another state, and the infringer's activities in the forum state were not differentiated from the infringer's activities in any other state.

Outcome

Motion to dismiss granted.

Counsel: [*1] For Presby Patent Trust, Plaintiff: David W. Rayment, Cleveland Waters & Bass PA, Concord, NH USA; Stephen Finch, Finch & Maloney, PLLC, Manchester, NH USA; William B. Pribis, Cleveland Waters & Bass PA, Concord, NH USA.

For Infiltrator Systems, Inc., Defendant: Peter S. Cowan, Sheehan Phinney Bass & Green PA (Manchester), Manchester, NH USA; Robert Ashbrook, PRO HAC VICE, Dechert LLP, Philadelphia, PA USA.

Judges: Joseph N. Laplante, United States District Judge.

Opinion by: Joseph N. Laplante

Opinion

MEMORANDUM ORDER

This case involves personal jurisdiction in the area of patent infringement, and specifically whether this court has either general or personal jurisdiction over defendant Infiltrator Systems, Inc. The plaintiff in this action, Presby Patent Trust, alleges that Infiltrator directly and indirectly infringes one or more claims of U.S. Patent No. 8,815,094. The '094 patent issued on August 26, 2014, and claims a method of processing effluent, such as in a septic system. Presby alleges that Infiltrator directly infringes the '094 patent by making, using, importing, selling, and/or offering to sell Infiltrator's Advanced Treatment Leachfield ("ATL") in-ground septic system, and indirectly infringes the '094 patent by inducing others to do so and by contributing [*2] to the infringement of the '094 patent by others. This court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 (federal question) and 1338(a) (patents).

Infiltrator, which is incorporated and has its principal place of business in Connecticut, moves to dismiss for lack of personal jurisdiction and improper venue. See Fed. R. Civ. P.12(b)(2), (3). After oral argument, the court grants the defendant's motion to dismiss. Infiltrator's contacts with New Hampshire are insufficient for this court to exercise personal jurisdiction over it in this action.

I. Applicable Legal Standard

"Personal jurisdiction implicates the power of a court over a defendant [B]oth its source and its outer limits are defined exclusively by the Constitution," namely, the due process clause of the Fourteenth Amendment. Foster-Miller, Inc. v. Babcock & Wilcox Can., 46 F.3d 138, 143-44 (1st Cir. 1995) (citing Ins.

Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)); *U.S. Const. Am. XIV*. Whether a district court has personal jurisdiction over a defendant is a two-step inquiry: first, the long-arm statute of the forum state must provide for jurisdiction over the defendant and second, if it does, the court's exercise of that jurisdiction must comport with due process.¹ *Grober v. Mako Prods. Inc.*, 686 F.3d 1335, 1345 (Fed. Cir. 2012). Where, as here, the applicable long-arm statute and federal due process limitations are coextensive, "the state limitation collapses into the due process requirement" and the two [*3] inquiries "coalesce into one." *Trintec Indus., Inc. v. Pedre Promotional Prods., Inc.*, 395 F.3d 1275, 1279 (Fed. Cir. 2005); see also *Phillips Exeter Acad. v. Howard Phillips Fund*, 196 F.3d 284, 287 (1st Cir. 1999) ("New Hampshire's long-arm statute reaches to the full extent that the Constitution allows.").

Due process requires that a defendant must have sufficient "minimum contacts" with the forum in question "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (internal quotations omitted). Consistent with the requirements of due process, a court may exercise one of two categories of personal jurisdiction: general and specific. General jurisdiction exists when "the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Daimler AG v. Bauman*, 134 S. Ct. 746, 751, 187 L. Ed. 2d 624 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011)). Specific jurisdiction, on the other hand, "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear*, 131 S. Ct. at 2851 (internal quotations omitted). Infiltrator argues that [*4] this court may exercise neither specific nor general jurisdiction in this case.

Presby bears the burden of showing that Infiltrator has sufficient "minimum contacts" with New Hampshire to satisfy the requirements of due process. Where, as

¹ As the parties expressly agreed at oral argument, because personal jurisdiction in a patent case is "intimately involved with the substance of patent law," the law of the Federal Circuit governs this inquiry. *Grober*, 686 F.3d at 1345 (Fed. Cir. 2012) (internal quotations omitted).

here, "the district court's disposition of the personal jurisdictional question is based on affidavits and other written materials in the absence of an evidentiary hearing, a plaintiff need only to make a prima facie showing that defendants are subject to personal jurisdiction." *Elecs. for Imaging, Inc. v. Coyle*, 340 F.3d 1344, 1349 (Fed. Cir. 2003). The plaintiff is not limited to its allegations in the complaint and may make this showing through affidavits attached to its opposition.² In determining whether a plaintiff has made a prima facie showing of personal jurisdiction, the court "accept[s] the uncontroverted allegations in the plaintiff's complaint as true and resolve[s] any factual conflicts in the affidavits in the plaintiff's favor." *Id.*

II. Background

The relevant facts, construed in the light most favorable to Presby, are as follows. Infiltrator makes and sells septic systems, including the ATL system that Presby accuses of infringing the '094 patent. Though incorporated and with its principal place of business in Connecticut--where its president maintains an office--Infiltrator is present in New Hampshire. It sells septic systems in New Hampshire through its New Hampshire-based sales representative, resellers, and distributors; obtains approvals for its septic systems to be installed in New Hampshire through the New Hampshire Department of Environmental Services; provides New Hampshire-specific installation instructions to its customers; exhibits its products at trade shows in New Hampshire; hosts educational seminars about its septic systems in New Hampshire; and is an "affiliate member" of a New Hampshire-based trade association.

Despite [*6] Infiltrator's several contacts with the state, at oral argument, Presby conceded that Infiltrator had neither marketed nor sold the accused ATL System in New Hampshire at the time Presby filed its complaint,

² A court considering a motion to dismiss on personal jurisdiction grounds may properly consider documents attached to an opposition, even if they contain hearsay, so long as that evidence "bears circumstantial indicia of reliability." *Akro Corp. v. Luker*, 45 F.3d 1541, 1546-47 (Fed. Cir. 1995); see also *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1562 (Fed. Cir. 1994). At oral argument, counsel for Infiltrator confirmed [*5] that it does not dispute the accuracy of the exhibits attached to Presby's opposition for purposes of this motion and argues only that those exhibits should not be considered because they contain hearsay. Because these documents appear to be reliable, the court sees no reason to disregard them.

and that Infiltrator only sells non-infringing systems in New Hampshire at this time. Nor has Infiltrator appointed an agent for service of process in New Hampshire.

III. Analysis

A. Specific Jurisdiction

Whether a district court has specific jurisdiction over a defendant in a patent case "entails a three-part test: (1) whether the defendant purposefully directs activities at the forum's residents; (2) whether the claim arises out of or relates to those activities; and (3) whether assertion of personal jurisdiction is reasonable and fair." [AFTG-TG, LLC v. Nuvoton Tech. Corp.](#), 689 F.3d 1358, 1361 (Fed. Cir. 2012) (citing [Nuance Commc'ns, Inc. v. Abbyy Software House](#), 626 F.3d 1222, 1231 (Fed. Cir. 2010)). Because Presby has not shown that the claims it asserts in this action "arise[] out of or relate[] to" activities that Infiltrator purposefully directs to New Hampshire, the court does not have specific jurisdiction over Infiltrator.

The parties conceded at oral argument, and the court agrees, that Infiltrator satisfies the first part of the test. Among other activities, as described *supra*, Infiltrator employs a sales representative in [*7] New Hampshire and sells septic systems into the state (both directly and through distributors). There is no question that Infiltrator purposefully directs these activities at residents of New Hampshire. The operative question for specific jurisdiction in this case, then, is the second part of the test--whether Presby's claim "arises out of or relates to" those activities. It does not.

Presby's cause of action is the alleged direct and indirect infringement of its patent. For this court to have specific jurisdiction over Infiltrator, Presby would have to allege that Infiltrator directly or indirectly infringed its patent in New Hampshire.³ [HollyAnne Corp. v. TFT](#),

³ At oral argument, the parties agreed that [Avocent Huntsville Corp. v. Aten Intern. Co.](#), 552 F.3d 1324 (Fed. Cir. 2008) controls on the question specific jurisdiction. There, the Federal Circuit explained that, in an ordinary patent infringement suit, "for purposes of specific jurisdiction, the jurisdictional inquiry is relatively easily discerned from the nature and extent of the commercialization of the accused products or services by the defendant in the [*9] forum." *Id.* at 1332. Commercialization in this context is coextensive with the activities that constitute infringement under [35 U.S.C. § 271\(a\)](#). See *id.* Because Presby concedes that Infiltrator has

[Inc.](#), 199 F.3d 1304, 1308 & n.4 (Fed. Cir. 1999) (affirming dismissal for lack of personal jurisdiction where plaintiff conceded that defendant did not sell or offer to sell accused products in the forum). A party directly infringes a patent when it makes, uses, offers to sell or sells in the United States, or imports into the United States, any patented invention, without authorization from the patentee. [35 U.S.C. § 271\(a\)](#). A party indirectly infringes a patent when it induces another to infringe or contributes to the infringement by another. [35 U.S.C. § 271\(b\), \(c\)](#). Presby has not connected either of these claims to any conduct by Infiltrator in New [*8] Hampshire. Specifically, Presby does not allege--in its complaint or its opposition to Infiltrator's motion to dismiss--that Infiltrator makes, sells, uses, or offers for sale its accused ATL system in New Hampshire, or that Infiltrator induces or contributes to the infringement by others in New Hampshire. In fact, Presby concedes that the ATL system is neither sold nor marketed in New Hampshire. In the absence of those allegations, this court cannot exercise specific jurisdiction over Infiltrator on Presby's claims for patent infringement. See [Grober](#), 686 F.3d at 1346-47 (affirming order dismissing defendants who did not engage in alleged infringing activity in the forum state); [F & G Research, Inc. v. Paten Wireless Tech., Inc.](#), No. 2007-1206, 2007 U.S. App. LEXIS 24246, 2007 WL 2992480, at *3 (Fed. Cir. Oct. 15, 2007) (affirming dismissal for lack of personal jurisdiction where plaintiff did not allege that defendant sold infringing products in the forum in question).

Presby argues that the disjunctive nature of the standard--that its claims must "arise from or relate to" Infiltrator's activity--allows the court to find specific jurisdiction because Presby's claims generally "relate to" Infiltrator's septic system business. Infiltrator would not research and develop new, allegedly infringing products to meet the needs of its customers in other states, Presby contends, if it did not engage in a regular (and non-infringing) septic system business in New Hampshire. While some courts, including the Court of Appeals for the First Circuit, have suggested that the disjunctive language of the "arises from or relates to" standard may "portend[] added flexibility and signal[] a relaxation of the applicable standard," [Ticketmaster-New York, Inc. v. Alioto](#), 26 F.3d 201, 206 (1st Cir. 1994), the Supreme Court has recently reiterated that it must be the defendant's "suit-related conduct" that "create[s] a substantial connection with the forum state,"

not engaged in any of those activities in New Hampshire, the outcome here is the same.

Walden v. Fiore, 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12 (2014).⁴ The suit-related conduct in a patent [*10] case is the alleged infringing activity, which must occur in the forum state for specific jurisdiction to exist. See HollyAnne Corp., 199 F.3d at 1308. Presby has only alleged the most attenuated connection between Infiltrator's sale of non-infringing products, its research and development efforts, and the potential for infringing activities in New Hampshire. This is not enough to satisfy due process and establish specific jurisdiction. Therefore, this court lacks specific jurisdiction over Infiltrator.⁵

B. General Jurisdiction

Having determined that it cannot exercise specific jurisdiction over Infiltrator, the court considers whether it can exercise general jurisdiction. For this court to do so, Infiltrator must have contacts with New Hampshire that are "so 'continuous and systematic' as to render [it] essentially at home in" New Hampshire. Daimler, 134 S. Ct. at 749 (quoting Goodyear, 131 S. Ct. at 2851). Though the parties dispute whether Daimler applies to a situation where, as here, the parties are both located in the United States and the plaintiff is located in the forum,⁶ the court agrees with Infiltrator that Daimler

controls here and that, under Daimler, the court cannot exercise general jurisdiction over Infiltrator on the facts alleged by Presby.

Prior to Daimler, courts found general jurisdiction over a defendant where the defendant had "continuous and systematic general business contacts" with the forum state. AFTG-TG, 689 F.3d at 1360 (internal quotations omitted). This is, essentially, the test that Presby asks the court to apply here.⁷ However, the Supreme Court in Daimler rejected this approach as "unacceptably grasping." Daimler, 134 S. Ct. at 760.

In Daimler, the Supreme Court addressed the question of whether the United States District Court for the Northern District of California could exercise general jurisdiction over DaimlerChrysler Aktiengesellschaft ("Daimler"), a German corporation, for claims related to human rights abuses committed by Daimler's Argentinian subsidiary during Argentina's "Dirty War" between 1976 and 1983. Daimler, 134 S. Ct. 750. The plaintiffs, all Argentinian residents, argued that California could exercise general jurisdiction over Daimler because its subsidiary, Mercedes-Benz USA, LLC ("MBUSA"), a Delaware corporation with a principal place of business in New Jersey, maintained several corporate facilities there, and its California sales constituted 2.4% of Daimler's worldwide sales and over 10% of its sales in the United States. Id. at 751-52. After concluding that a subsidiary like MBUSA could not be

⁴It is worth noting that neither the Court of Appeals nor the Supreme Court restricted its holding to a construction of "arising from" but not "relating to." The Supreme Court instead focused on the "relationship among the defendant, the forum, and the litigation." Walden, 134 S. Ct. at 1126. The Court of Appeals similarly concluded that "[w]e know to a certainty only that the [relatedness] requirement focuses on the nexus between the defendant's contacts and the plaintiff's cause of action." Ticketmaster-New York, 26 F.3d at 206.

⁵Because the court concludes that Presby has not satisfied the second part of the three-part test, it need not address the third--whether assertion of personal jurisdiction in this action would be reasonable and fair to the defendant--which corresponds with [*11] the "fair play and substantial justice" prong of the International Shoe analysis. See Grober, 686 F.3d at 1346.

⁶Presby attempts to distinguish Daimler on the grounds that, unlike the plaintiff in Daimler, Presby is a resident of the forum state and, as the patent-holder, it would be injured in New Hampshire if Infiltrator were allowed to continue marketing and selling its ATL systems (presumably, in other states). This argument runs afoul of the Supreme Court's decision in Walden, issued shortly after Daimler. There, the [*12] Court reaffirmed that the inquiry for general jurisdiction is whether the defendant--not the plaintiff--has the necessary "minimum

contacts" with the forum to satisfy due process. Walden, 134 S. Ct. at 1122 ("We have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State. . . . Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.'" (quoting Rush v. Savchuk, 444 U.S. 320, 332, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980))).

⁷At oral argument, Presby's counsel argued that Barriere v. Juluca, No. 12-23510, 2014 U.S. Dist. LEXIS 21500, 2014 WL 652831 (S.D. Fla. Feb. 19, 2014), supports its contention that, even under Daimler, a defendant's "continuous and systematic" contacts with the forum are sufficient to establish general jurisdiction. There, the District Court for the Southern District [*13] of Florida found that it could exercise general jurisdiction over an Anguillan corporation with its principal place of business in Anguilla on a claim that arose in Anguilla because the defendant had "such minimum contacts with Florida to be considered 'at home'" there. 2014 U.S. Dist. LEXIS 21500, [WL] at *8. For the reasons discussed below, the court is not persuaded.

considered an agent [*14] for jurisdictional purposes, the Court explained that, even if MBUSA were "at home" in California and even if its contacts with the forum were imputable to Daimler, "there would still be no basis to subject Daimler to general jurisdiction in California," because Daimler's contacts with the state were insufficient. [Id. at 760.](#)

Under Daimler, then, it is no longer enough for the defendant to have "continuous and systematic" contacts with the forum state. See [Otsuka Pharm. Co. v. Mylan Inc., No. 14-4508, 2015 U.S. Dist. LEXIS 35679, 2015 WL 1305764, at *5 \(D.N.J. Mar. 23, 2015\)](#) (acknowledging Daimler as causing a shift in the general jurisdiction standard); see also Tanya J. Monestier, [Where Is Home Depot at Home? Daimler v. Bauman and the End of Doing Business Jurisdiction](#), [66 Hastings L.J. 233, 265-66 \(2014\)](#) (discussing same). Those contacts must be of such a degree that they essentially render the defendant "at home" in the forum state. [Daimler, 134 S. Ct. at 761.](#) "[T]he paradigm forum for the exercise of general jurisdiction" for a corporation, the Supreme Court explained, is its "place of incorporation and principal place of business." [Daimler, 134 S. Ct. at 760](#) (quoting [Goodyear, 131 S. Ct. at 2851](#)). This promotes predictability, allowing corporations to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit" while, at the same time, affording plaintiffs [*15] "recourse to at least one clear and certain forum in which a defendant corporation may be sued on any and all claims." [Id. at 762 n.20.](#)

The Supreme Court left open the possibility that "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State," offering [Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146 \(1952\)](#), as an example of such an exceptional case. [Daimler, 134 S. Ct. at 761 n.19.](#) In Perkins, a corporation organized and with its principal place of business in the Philippines was forced to effectively relocate to Ohio when Japan occupied the Philippines during World War II. [342 U.S. at 447-48.](#) The Supreme Court held that Ohio courts could exercise general jurisdiction over that defendant because, it later noted, "Ohio was the corporation's principal, if temporary, place of business." [Daimler, 134 S. Ct. at 756.](#)

Thus, [Daimler](#) cannot be read so narrowly, as Infiltrator suggests, as to restrict general jurisdiction over a

defendant only to the forum where it is incorporated or has its principal place of business. But neither is its holding so broad as to support general jurisdiction over a defendant doing business in the forum state without some special circumstance that ties the defendant more [*16] particularly to the forum state. Rather, for a court to exercise general jurisdiction over the defendant in a forum that is not the defendant's place of incorporation or principal place of business, Daimler requires at the very least that the defendant have systematic and continuous contacts with the forum that sets the forum apart from the other states where defendant may conduct business--contacts that render the forum in some manner equivalent to a principal place of business. See, e.g., [Fed. Home Loan Bank of Boston v. Ally Financial, Inc., No. 11-10952, 2014 U.S. Dist. LEXIS 140975, 2013 U.S. Dist. LEXIS 141682, 2014 WL 4964506, at *2 \(D. Mass. Sept. 30, 2014\)](#) (finding no general jurisdiction under Daimler where defendant's contacts with forum were no more significant than with any other state); [Bulwer v. Mass. Coll. of Pharmacy & Health Sciences, No. 13-521, 2014 U.S. Dist. LEXIS 106365, 2014 WL 3818689, at *5 \(D.N.H. Aug. 4, 2014\)](#) (McCafferty, J.) (same). See also Monestier, [66 Hastings L.J. at 266](#) ("Courts must evaluate 'at home' using a comparative approach, that is, by assessing a corporation's contacts with the forum in relation to its contacts with other forums. 'At home' is seen as being a unique place akin to the corporation's state of incorporation or its principal place of business.").

Presby suggests that the test for general jurisdiction set forth in Daimler only applies in cases wherein both plaintiffs and defendants are foreign to, and the cause of action accrues outside of, the United States. This [*17] reading is also unsupportably narrow. The Supreme Court has explicitly defined a "foreign corporation" in the personal jurisdiction context to be one foreign to the state in which jurisdiction is invoked--not foreign to the United States. See [Goodyear, 131 S. Ct. at 2851 \(2011\)](#) ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State.") (emphasis added) (internal quotation marks omitted).

Applying Daimler to the facts of this case, the court concludes that it cannot exercise general jurisdiction over Infiltrator. As an initial matter, Infiltrator is incorporated and has its principal place of business in Connecticut, rendering that state "the paradigm forum

for the exercise of general jurisdiction" over Infiltrator. See [Daimler, 134 S. Ct. at 760](#). The inquiry, then, is whether Presby has made a prima facie showing that this is an exceptional case. [Id. at 761, n.19](#). It has not.

The parties do not dispute that Infiltrator has several and continuous contacts with the state of New Hampshire. It employs a sales representative here. It markets and sells septic [*18] systems here. In connection with those activities, it attends trade shows, demonstrates its products, seeks approvals for its products, instructs users how to install its products, and has joined a trade organization, all in New Hampshire. But none of these activities essentially render New Hampshire a surrogate for Infiltrator's principal place of business. Nor has Presby differentiated Infiltrator's activities here from its activities in Connecticut or any other state. In fact, these activities do not appear to surpass the level of activity that the Supreme Court rejected as insufficient to confer on California general jurisdiction over MBUSA. See [Daimler, 134 S. Ct. at 761-72](#); see also [Loyalty Conversion Sys. Corp. v. American Airlines, Inc., No. 2:13-CV-655, 66 F. Supp. 3d 795, 2014 U.S. Dist. LEXIS 122190, 2014 WL 4352544, at *5 \(E.D. Tex. Sept. 2, 2014\)](#) (Delaware corporation with headquarters in Hawaii not subject to general jurisdiction in Texas, where it maintained one employee and made sales to Texas residents). For the same reason, then, this court must find that it lacks general jurisdiction over Infiltrator in this case.

C. Jurisdictional Discovery

Although Presby did not raise or press this request at oral argument, it has requested the opportunity to conduct discovery into whether Infiltrator's [*19] activities confer specific jurisdiction over it on this court.⁸ It is true that "a diligent plaintiff who sues an out-of-state corporation and who makes out a colorable case for the existence of in personam jurisdiction may well be entitled to a modicum of jurisdictional discovery if the corporation interposes a jurisdictional defense."⁹

⁸ Presby has not requested discovery into the court's general jurisdiction over Infiltrator.

⁹ Jurisdictional discovery is not an issue unique to patent law, and therefore is governed by the law of the First Circuit. [Autogenomics, Inc. v. Oxford Gene Tech. Ltd., 566 F.3d 1012, 1021 \(Fed. Cir. 2009\)](#). However, Federal Circuit law governs whether the requested discovery is relevant to the case. [Commissariat a L'Energie Atomique v. Chi Mei Optoelectronics Corp., 395 F.3d 1315, 1323 \(Fed. Cir. 2005\)](#).

[Negrón-Torres v. Verizon Commc'ns, Inc., 478 F.3d 19, 27 \(1st Cir. 2007\)](#) (quotation marks omitted). But Presby has not made a colorable case for personal jurisdiction over Infiltrator. In fact, as discussed *supra*, by conceding that Infiltrator did not sell or market its accused ATL systems in New Hampshire at the time Presby filed its complaint, Presby has conceded that this court does not have specific jurisdiction over Infiltrator on these claims. No amount of jurisdictional discovery can change that. See [United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 626 \(1st Cir. 2001\)](#) (request for jurisdictional discovery was properly denied where plaintiff's "relatedness showing was unconvincing").

Even if Presby [*20] had not made that concession, none of the information that Presby requests is likely to substantiate Presby's claim of specific personal jurisdiction. Specifically, Presby asks for the opportunity to investigate Infiltrator's plans and preparations to market and sell its ATL system in New Hampshire in the future (including pursuit of regulatory approvals) and Infiltrator's "activities in marketing and selling the ATL system nationwide." Opp. to Mot. to Dismiss (document no. 10) at 13-14; Sur-reply (document no. 14) at 5. [Invoking Momenta Pharms., Inc. v. Amphastar Pharms., Inc., 841 F. Supp. 2d 514, 520-22 \(D. Mass. 2012\)](#), Presby argues that jurisdictional discovery into Infiltrator's plans to market its ATL system in New Hampshire is appropriate because "[a]n infringing company's plan to sell an infringing product in a forum state can be the basis for a finding of specific personal jurisdiction." Opp. to Mot. to Dismiss (document no. 10) at 13. But, as Presby admitted at oral argument, in *Momenta*, the plaintiff sought discovery into the defendant's offers to sell the accused products in the forum state--behavior that amounts to infringement under [35 U.S.C. § 271](#). A company's intention to sell a product, without an actual offer, does not constitute infringement, and cannot support a court's finding of [*21] specific jurisdiction. Nor can Infiltrator's plans to sell the ATL system in the future support specific jurisdiction. The relevant inquiry is whether the alleged infringing activity had occurred at the time the complaint was filed. See [Spectronics Corp. v. H.B. Fuller Co., 940 F.2d 631, 635 \(Fed. Cir. 1995\)](#), abrogated on other grounds by [Liquid Dynamics Corp. v. Vaughan Co., Inc., 355 F.3d 1361, 1370 \(Fed. Cir. 2004\)](#) ("[I]n personam and subject matter jurisdictional facts must be pleaded, and proved when challenged, and . . . later events may not create jurisdiction where none existed at the time of filing." (citing [Mollan v. Torrance, 22 U.S. 537, 6 L. Ed. 154 \(1824\)](#))). Here, as discussed *supra*, Presby admits that it had not.

Similarly, Infiltrator's sales of the accused system outside of New Hampshire cannot confer personal jurisdiction over Infiltrator in New Hampshire. Presby suggests that Infiltrator's updated website, which includes information about the accused system, amounts to an effort to promote that system nationwide-including to residents of New Hampshire. But a passive website through which anyone who has Internet access can obtain information about a product does not provide a basis for personal jurisdiction. [GTE New Media Servs. Inc. v. BellSouth Corp.](#), 199 F.3d 1343, 1350, 339 U.S. App. D.C. 332 (Fed. Cir. 2000); cf. [Gorman v. Ameritrade Holding Corp.](#), 293 F.3d 506, 513 n.5, 352 U.S. App. D.C. 229 (Fed. Cir. 2002) (a website through which customers in the forum state engage in transactions may confer personal jurisdiction where "essentially passive" websites do not). Presby's [*22] request for discovery into Infiltrator's nationwide marketing and sale of the ATL system is thus unlikely to result in evidence that would allow this court to exercise specific jurisdiction. See [Crocker v. Hilton Int'l Barb., Ltd.](#), 976 F.2d 797, 801 (1st Cir. 1992) (affirming denial of jurisdictional discovery where appellants sought information, irrelevant to forum contacts, on solicitation of business and the provision of goods or services outside of the forum). And where, as here, the plaintiff has not shown that "it can supplement its jurisdictional allegations through discovery," [GTE](#), 199 F.3d at 1351-52, jurisdictional discovery is not appropriate.

IV. Conclusion

For the reasons set forth above, Presby's request for jurisdictional discovery is DENIED and Infiltrator's motion to dismiss the complaint for lack of personal jurisdiction and improper venue¹⁰ is GRANTED.¹¹ The clerk shall enter judgment accordingly and close the case.

SO ORDERED.

/s/ Joseph N. Laplante

Joseph N. Laplante

United States District Judge

Dated: June 3, 2015

¹⁰ Document no. 8.

¹¹ Because the court concludes that it cannot exercise personal jurisdiction over Infiltrator in this action, the court need not address whether venue in this district is proper.

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APPENDIX 12

Priority Env'tl. Solutions, Inc. v. Stevens Co.

United States District Court for the Eastern District of Wisconsin

December 18, 2015, Decided; December 18, 2015, Filed

Case No. 15-CV-871-JPS

Reporter

2015 U.S. Dist. LEXIS 170230

PRIORITY ENVIRONMENTAL SOLUTIONS, INC.,
Plaintiff, v. THE STEVENS COMPANY LIMITED,
Defendants.

Counsel: [*1] For Priority Environmental Solutions Inc,
Plaintiff: Eric L Maassen, LEAD ATTORNEY, Aaron R
Wegrzyn, Foley & Lardner LLP, Milwaukee, WI.

For The Stevens Company Limited, Defendant: Laura A
Brenner, Scott W Hansen, James N Law, Reinhart
Boerner Van Deuren SC, Milwaukee, WI.

Judges: J.P. Stadtmueller, United States District Judge.

Opinion by: J.P. Stadtmueller

Opinion

ORDER

This action, originally filed in the Waukesha County Circuit Court on June 25, 2015, was removed to this court on July 20, 2015, by the defendant, The Stevens Company Limited ("Stevens"). (Docket #1) On August 20, 2015, Stevens filed a motion to dismiss the complaint for lack of personal jurisdiction. (Docket #7). On September 1, 2015, the plaintiff, Priority Environmental Solutions, Inc. ("PES"), filed a motion for discovery limited to jurisdiction and to extend time to respond to Stevens's motion to dismiss. (Docket #15). On September 18, 2015, PES filed a stipulation regarding jurisdictional discovery (Docket #24) along with a motion to withdraw its previous motion for discovery (Docket #23).

On November 4, 2015, PES filed its response to the motion to dismiss, (Docket #31), and on November 18, 2015, Stevens filed its reply brief (Docket #35). The [*2] matter is now fully briefed and ready for disposition. As discussed more thoroughly below, the Court finds that Stevens is not subject to personal jurisdiction in

Wisconsin and, thus, the Court will grant Stevens's motion to dismiss.

1. FACTUAL BACKGROUND¹

PES is a Wisconsin corporation based in Pewaukee. (Compl. ¶ 1). Stevens is a Canadian corporation with its headquarters located in Brampton, Ontario. (Declaration of Brian Godwin. ¶ 4, Docket #9 ("Godwin Decl.")). PES manufactures sanitation products used in the medical community and Stevens is a distributor of medical supplies and equipment. (Compl. 10; (J. Stevens Dep. at 11)).²

Stevens does not maintain a place of business in Wisconsin and does not sell, promote, or demonstrate goods or services to customers or other persons in Wisconsin. [*3] (Godwin Decl. ¶ 4). Stevens does not lease or own any real or personal property located in Wisconsin. (Godwin Decl. ¶ 5). Stevens does not maintain a Wisconsin telephone number, mailing address, bank account, or taxpayer identification number. (Godwin Decl. ¶ 6).

A third party, the Canadian Department of National Defense ("Canadian DND"), introduced PES to Stevens on July 13, 2013, through an email. Jacqueline Doucette, a customer service supervisor at Canadian DND, sent an email inquiry to Laurie Marquis of Stevens and to Linda Wise of Cardinal Health Canada, another Canadian product distributor. (Laurie Marquis

¹The Court notes that at the motion to dismiss stage, the Court "take[s] as true all well-pleaded facts alleged in the complaint and resolve[s] any factual disputes in the [record] in favor of the plaintiff." [Tamburo v. Dworkin, 601 F.3d 693, 700 \(7th Cir. 2010\)](#).

²Stevens's corporate designee, Jeffrey Peter Stevens, testified on October 16, 2015, pursuant to [Fed. R. Civ. P. 30\(b\)\(6\)](#). (Wegrzyn Decl., Ex. A). For simplicity, the Court will refer to this deposition as simply the "J. Stevens Dep."

Declaration ¶ 7, Docket #10 ("Marquis Decl.")). Ms. Doucette explained that the Canadian DND was interested in a PES manufactured medical drape product and asked whether Stevens or Cardinal Health would be interested in working with PES to resell a smaller amount of PES's drapes to the Canadian DND. (Marquis Decl. ¶ 4). Ms. Doucette copied Elizabeth Kemp of PES on the email. (Marquis Decl. ¶ 3). Neither Ms. Marquis nor anyone else at Stevens responded to Ms. Doucette's inquiry. (Marquis Decl. ¶ 5).

PES initiated contact directly with Stevens on January 22, 2014, approximately [*4] six months after the email introduction. Ms. Kemp called Ms. Marquis regarding the possibility of Stevens becoming a distributor for PES's medical drape product, called the MedMat, in Canada. (Marquis Decl. ¶ 6). Ms. Kemp requested a follow-up phone call with Ms. Marquis's boss, Brian Godwin. (Marquis Decl. ¶ 6). That same day, Ms. Marquis followed up on the conversation in an email to Ms. Kemp, and stated that she was "looking forward to doing business with [her] in the near future." (Kemp Decl., Ex. B).

On February 5, 2014, Ms. Kemp emailed Stevens a draft version of a document entitled "Mutual Confidentiality and Non-Disclosure Agreement" ("NDA").³ (Wegrzyn Decl., Exs. D & E). On February 11, 2014, Mr. Godwin emailed Ms. Kemp to note he would return an executed version of the NDA that day. (Wegrzyn Decl., Ex. F). Later that day, Mr. Godwin sent Ms. Kemp an executed version of the NDA (Wegrzyn Decl., Ex. E). The NDA explicitly stated that Wisconsin law governed the agreement. (Wegrzyn Decl., Ex. E).

On February 22, 2014, Ms. Marquis and Mr. Godwin had a telephone conference with Ms. Kemp regarding their potential distributor relationship. (Marquis Decl. ¶ 7). During the call, Ms. Kemp explained that the Canadian DND only wanted to purchase small quantities of the Medmat, because the Canadian DND used approximately only 400 units per year and that the product had a limited three-year shelf life. (Marquis Decl. ¶ 8).

On February 19, 2014, Ms. Kemp emailed Mr. Godwin

³ It is unclear what, if any, communications took place between PES and Stevens from the January 5, 2014 email until February 5, 2014. PES states "[a]s the discussions between the two sides continued..." [*5] (Pl's Opp. at 5), however, neither party provides any facts as to specific details of these communications.

and Ms. Marquis a draft agreement entitled "Priority Environmental Solutions, Inc. Reseller Agreement" ("Reseller Agreement"). (Wegrzyn Decl., Ex. J). On February 21, 2014, Mr. Godwin responded that he received the agreement and would get back to Ms. Kemp the following Monday. (Wegrzyn Decl., Ex. K at 2). Stevens made revisions to the draft agreement regarding insurance (J. Stevens Dep. at 100), and on March 10, 2014, Mr. Godwin executed the Reseller Agreement on behalf of Stevens.⁴ (Godwin Decl., Ex. A).

The Reseller Agreement called for a twelve-month term and contemplated an additional twelve-month term subject to an agreement by the parties of a mandatory minimum sales level. (Compl., Ex. 1, Docket #1-1). The mandatory minimum sales portion of the agreement, however, was left blank. (Compl., Ex. 1, Docket #1-1). Section 16.1 of the Reseller Agreement provided that it was to be governed by Wisconsin law. (Compl., Ex. 1, Docket #1-1). At the time Stevens executed the Reseller Agreement, it knew that PES was a Wisconsin company and believed that PES would be shipping its products from Wisconsin. (J. Stevens Dep. at 49). Notably, the Reseller Agreement, however, did not include any specific information as to the location from which PES would ship its products. (See Compl., Ex. 1).

The Reseller Agreement provided that Stevens was required to place an initial stocking order within ninety days. (Compl., Ex. 1). On April 9, 2014, Stevens assured PES that its initial stocking order would be placed the following day. (Kemp. Decl., Ex. C). Stevens's purchasing department informed Mr. Godwin that it required a proforma invoice from PES before Stevens could issue any advance payment. (Godwin Decl. ¶ 12). [*7]

On May 20, 2014, Ms. Kemp sent Mr. Godwin a proforma invoice that stated "FOB China and Distributor is responsible for shipment costs." (Godwin Decl., Ex. B). This was the first time that Stevens learned that PES's products were to be manufactured and shipped from China. (Godwin Decl. ¶ 13). This detail was essentially the breaking point of Stevens's and PES's relationship, and on September 23, 2014, Mr. Godwin emailed Ms. Kemp that the FOB China was a "game ender" for Stevens and that they "were not the right company for [PES] right now." (Kemp. Decl., Ex. E).

⁴ It appears that Mr. Godwin did not provide PES with a copy of the Reseller Agreement until March 25, 2014. (Wegrzyn Decl., Ex. [*6] M).

PES alleges that as a direct result of Stevens's breach of the Reseller Agreement, PES has lost the opportunity to make substantial sales of its products to the Canadian DND and other customers, and that it has suffered significant reputational damage with prospective customers. (Compl. ¶¶ 23-24).

2. LEGAL STANDARD

[Rule 12\(b\)\(2\)](#) provides for dismissal where a court lacks personal jurisdiction over a party. [Fed. R. Civ. P. 12\(b\)\(2\)](#). "The plaintiff bears the burden of establishing personal jurisdiction when the defendant challenges it." See [N. Grain Mktg., LLC v. Greving](#), 743 F.3d 487, 491 (7th Cir. 2014). On a motion challenging personal jurisdiction, the Court may "receive and weigh" affidavits and other evidence outside the pleadings. [*8] See [Purdue Research Found. v. Sanofi—Synthelabo, S.A.](#), 338 F.3d 773, 782 (7th Cir. 2003). If the Court does not hold an evidentiary hearing to resolve factual disputes, as is the case here, the plaintiff "need only make out a prima facie case of personal jurisdiction." See [N. Grain](#), 743 F.3d at 491. On a motion pursuant to [Rule 12\(b\)\(2\)](#), the Court will "resolve factual disputes in the plaintiff's favor." *Id.* The Court, however, also "accept[s] as true any facts contained in the defendant's affidavits that remain unrefuted by the plaintiff." [GCIU—Employer Ret. Fund v. Goldfarb Corp.](#), 565 F.3d 1018, 1020 n.1 (7th Cir. 2009).

Personal jurisdiction refers to a court's "power to bring a person into its adjudicative process." BLACK'S LAW DICTIONARY 930 (9th ed. 2009). "A district court sitting in diversity has personal jurisdiction over a nonresident defendant only if a court of the state in which it sits would have jurisdiction." [Purdue](#), 338 F.3d at 779 (citing [Hyatt Int'l Corp. v. Coco](#), 302 F.3d 707, 713 (7th Cir. 2002)). This is technically a two-part analysis: the Court must determine whether Wisconsin's state courts would have jurisdiction under the state's long-arm statute, [Wis. Stat. § 801.05](#), and whether personal jurisdiction would comport with principles of due process. See [Purdue](#), 338 F.3d at 779. But Wisconsin's long-arm statute is liberally construed in favor of conferring jurisdiction to the maximum extent allowable under principles of due process. See, e.g., [Kopke v. A. Hartrodt S.R.L.](#), 2001 WI 99, ¶ 10, 245 Wis. 2d 396, 629 N.W.2d 662; [Fabio v. Diversified Consultants, Inc.](#), No. 13-CV-524, 2014 U.S. Dist. LEXIS 24669, 2014 WL 713104 at *2 (W.D. Wis. Feb. 25, 2014). As such, [*9] the Court can easily collapse the personal jurisdiction issue into one question: whether personal jurisdiction over Stevens comports with principles of due process.

The federal constitutional limits of a court's personal jurisdiction in a diversity case are found in the *Fourteenth Amendment's* due-process clause, see [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 464, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985), which "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations,'" *Id.* at 471-72 (quoting [Int'l Shoe Co. v. Wash., Office of Unemployment Comp. & Placement](#), 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). A forum state's courts may not exercise personal jurisdiction over a nonconsenting, out-of-state defendant unless the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" [Int'l Shoe](#), 326 U.S. at 316 (quoting [Milliken v. Meyer](#), 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)).

There are two types of personal jurisdiction: general and specific. See [Helicopteros Nacionales de Colombia v. Hall](#), 466 U.S. 408, 414-16, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984); see also [Hyatt Int'l](#), 302 F.3d at 713. Recently, the Supreme Court held that general jurisdiction requires "'affiliations with the State [that] are so 'continuous and systematic' as to render [the defendant] essentially at home in the forum State,'" [Daimler AG v. Bauman](#), 134 S.Ct. 746, 754, 187 L. Ed. 2d 624 (2014) (quoting [Goodyear Dunlop Tires Operations, S.A. v. Brown](#), 564 U.S. 915, 131 S.Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011)). If such contacts exist, "the court may exercise personal jurisdiction over the defendant even in cases that [*10] do not arise out of and are not related to the defendant's forum contacts." [Hyatt Int'l](#), 302 F.3d at 713. Specific jurisdiction, on the other hand, is more limited and exists for controversies that "arise out of" or "relate to" a defendant's forum contacts. *Id.* PES contends that the Court has both general and specific jurisdiction over Stevens. The Court addresses both jurisdictional theories below.⁵

⁵ It is worthy to note that the complexity of personal jurisdiction is intensely fact driven, thus, the Court's analysis will differ from case to case. As a liberty protection enshrined in the *Fourteenth Amendment*, a finding of personal jurisdiction over a defendant should not turn on a "gotcha" moment of a deposition. As such, an attorney's tongue twisting questions, such as "How many contacts constitutes continuous contact," (Docket #36-2 at 12), provide little, if anything, to inform the Court's analysis. This is certainly not a question that any

3. DISCUSSION

Stevens's motion to dismiss argues that it is not subject to either general or specific personal jurisdiction in Wisconsin. (Def's Opening Br. at 5-6, Docket #12). In contrast, PES argues that Stevens's contacts with Wisconsin are sufficient to support either general or specific personal jurisdiction. (Pl's Opp. at 10). The Court will discuss each type of personal jurisdiction separately, and, as detailed below, the Court finds that Stevens's contacts with Wisconsin are insufficient to support either general or specific personal jurisdiction over Stevens.

3.1 General Personal Jurisdiction

General jurisdiction does not depend on any connection between the underlying claim and the forum. [Abelesz v. OTP Bank](#), 692 F.3d 638, 654 (7th Cir. 2012). "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State." [Id.](#) (quoting [Goodyear 131 S. Ct. at 2851](#)). Where a court has general jurisdiction over a defendant, that defendant may be called into that court "to answer for any alleged wrong, committed in any place, no matter how unrelated to the defendant's contacts [*12] with the forum." [uBID, Inc. v. GoDaddy Grp., Inc.](#), 623 F.3d 421, 426 (7th Cir. 2010).

Exercising general personal jurisdiction over a defendant can result in severe consequences, and for that reason courts have held that the constitutional requirement for general jurisdiction is "considerably more stringent" than that required for personal jurisdiction. [Abelesz](#), 692 F.3d at 654 (quoting [Purdue](#), 338 F.3d at 787). "[T]he paradigm forum for the exercise of general jurisdiction is the individual's domicile." [Daimler AG](#), 134 S. Ct. at 760 (quoting [Goodyear](#), 131 S. Ct. at 2853-54). Although courts have clarified that general jurisdiction can be appropriate in more forums than a person's domicile alone, however, that will only be in the exceptional case. See [Daimler AG](#), 134 S. Ct. at 761, n.19.

deponent should be able to answer as it calls for a legal conclusion. And, indeed, the answer to, "How many contacts constitutes continuous contact?," is akin to the well-known Tootsie Pop question, in that the "world may never know." See Scientific Endeavors, Tootsie.com, <http://www.tootsie.com/howmanylick-experiments> (last visited December [*11] 15, 2015).

PES argues that Stevens is subject to general personal jurisdiction in Wisconsin because Stevens has regularly purchased significant amounts of medical equipment from multiple Wisconsin-based manufactures. (Pl's Opp. at 19). PES points to 529 separate purchase agreements that Stevens made with Wisconsin-based companies found during the limited jurisdiction discovery period of three years. The total amounts that Stevens paid Wisconsin-based manufacturers since 2012 exceeds \$500,000.00. PES relies on [Shepard Investments International LTD v. Verizon Communications, Inc.](#), 373 F. Supp. 2d 853 (E.D. Wis. 2005), for the proposition that "a non-resident can conduct sufficient businesses to justify general jurisdiction without maintaining [*13] a business location in a state or acting through an in-state agent." [Id. at 863](#). PES concludes that "Stevens voluntarily chooses to do regular business in Wisconsin and should reasonably be expected to defend itself in Wisconsin court." (Pl's Opp. at 20). The Court disagrees.

The Court finds that this is nowhere near the "exceptional case," and that Stevens, a Canadian company organized under the laws of Ontario, was not "at home" in Wisconsin to justify general personal jurisdiction. Stevens's purchase agreements with third party Wisconsin companies is insufficient to justify the Court's exercise of general jurisdiction. PES's reliance on case law decided prior to the Supreme Court's guiding language in [Goodyear](#) and [Daimler AG](#) and ensuing Seventh Circuit precedent is unpersuasive to the Court's analysis here. More importantly, [Shepard Investment](#) is factually distinguishable from this case in two significant respects: (1) the [Shepard Investment](#) defendant's number of contacts with the forum state, business relationships with over 140 Wisconsin banks, and 15,000 Wisconsin shareholders who received numerous mailings from the defendant each year, was substantially more than Steven's contacts with three Wisconsin-based [*14] companies in this case; and (2) the [Shepard Investment](#) defendant engaged in substantial lobbying activities in Wisconsin that reinforced the court's decision for general jurisdiction, which is also not present in this case. See [Shepard Invest.](#), 373 F. Supp. 2d at 863.

Stevens's purchases from a few third-party vendors located in Wisconsin for resale in Canada do not rise to the level of being so extensive that Stevens is "at home" in Wisconsin. To hold otherwise, and allow Stevens to be haled into Wisconsin courts for *any* litigation, arising out of *any* transaction, *anywhere* in the world, would be simply unfair. See [Purdue](#), 338 F.3d at 787. As such,

the Court finds that Stevens is not subject to general personal jurisdiction in Wisconsin. The Court now turns to discuss PES's remaining option, specific personal jurisdiction.

3.2 Specific Jurisdiction

To support an exercise of specific personal jurisdiction, the defendant's contacts with the forum state must "directly relate to the challenged conduct or transaction." [Tamburo v. Dworkin](#), 601 F.3d 693, 701, 710 (7th Cir. 2010) (citing [GCIU—Emp'r Ret. Fund](#), 565 F.3d at 1024). "Specific personal jurisdiction is appropriate where (1) the defendant has purposefully directed his activities at the forum state or purposefully availed himself of the privilege of conducting [*15] business in that state, and (2) the alleged injury arises out of the defendant's forum-related activities." *Id.* (citing [Burger King](#), 471 U.S. at 472). The exercise of specific jurisdiction must also comport with traditional notions of fair play and substantial justice. *Id.* (citing [Int'l Shoe](#), 326 U.S. at 316).

The defendant's conduct and connection with the forum state must be substantial enough to make it reasonable for the defendant to anticipate that he could be hailed into court there. [Burger King](#), 471 U.S. at 474. This purposeful-availing requirement ensures that a defendant's amenability to jurisdiction is not based on "random, fortuitous, or attenuated contacts," *id.* at 475 (internal quotation marks omitted), but on contacts that demonstrate a real relationship with the state with respect to the transaction at issue, see [Purdue](#), 338 F.3d at 780.

In looking to contacts for purposes of specific jurisdiction,

The relevant contacts are those that center on the relations among the defendant, the forum, and the litigation. Crucially, not just any contacts will do: "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." The "mere fact that [defendant's] conduct affected plaintiffs with connections [*16] to the forum State does not suffice to authorize jurisdiction." Furthermore, the relation between the defendant and the forum "must arise out of contacts that the 'defendant himself' creates with the forum...." Contacts between the plaintiff or other third parties and the forum do not satisfy this requirement.

[Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.](#), 751 F.3d 796, 801 (7th Cir. 2014), as corrected (May 12, 2014) (quoting [Walden v. Fiore](#), ___ U.S. ___, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014); citing [Int'l Shoe](#), 326 U.S. at 310; [Keeton v. Hustler Mag., Inc.](#), 465 U.S. 770, 775, 104 S. Ct. 1473, 79 L. Ed. 2d 790; [Burger King](#), 471 U.S. at 475.

With respect to contract disputes, "contracting with an out-of-state party alone cannot establish automatically sufficient minimum contacts in the other party's home forum." [Purdue](#), 338 F.3d at 781 (citing [Burger King](#), 471 U.S. at 478). Instead, we conduct a context-sensitive analysis of the contract, examining "prior negotiations, contemplated future consequences, the terms of the contract, and the parties' course of actual dealing with each other." *Id.* (citing [Burger King](#), 471 U.S. at 479). So long as a commercial defendant's efforts are purposefully directed toward residents of the forum state, the fact that the defendant has not physically entered it does not defeat personal jurisdiction there. [Burger King](#), 471 U.S. at 476. Although even a single act can support the exercise of personal jurisdictions, the Supreme Court has held that personal jurisdiction may exist only so long as the act has a "substantial connection" with the [*17] forum state. See [Burger King](#), 471 U.S. at 475 n.18.

PES argues that the facts of this case demonstrate a "multitude of actions by Stevens directed at Wisconsin" that allow the Court to exercise specific jurisdiction. (PI's Opp. at 10). As PES describes them, Stevens's contacts directed at Wisconsin include: (1) Stevens sending the first written communications between the parties; (2) Stevens sent both executed versions of the NDA and the Reseller Agreement to PES in Wisconsin, which expressly selected Wisconsin as the governing law; and (3) Stevens knew that PES was located in Wisconsin and expected that the products would be shipped from Wisconsin. (PI's Opp. at 10-11).

Not surprisingly, given the factual-specific nature of personal jurisdiction analysis, both parties were able to cite cases supporting their arguments. Yet, having balanced the factors for and against a finding of specific personal jurisdiction, the Court finds that PES has not met its burden of showing that Stevens purposefully availed itself of the privilege of doing business in Wisconsin such that Stevens should have foreseen being hailed into court here. While the Court could, of course, go on at length describing each and every factual similarity and difference of every case cited by the parties, [*18] indeed they are numerous, the Court

finds this exercise would not be particularly helpful to its analysis. Instead, the Court finds it more useful to look to recent Seventh Circuit case law describing the boundaries of when specific personal jurisdiction exists and when it does not, and then applying those limits to the facts of this case.

Recently, the Seventh Circuit in *Northern Grain*, outlined the boundaries of specific personal jurisdiction in a contract case. [743 F.3d at 494](#). There, the court distinguished [Lakeside Bridge & Steel Co. v. Mountain State Construction Company](#), [597 F.2d 596 \(7th Cir. 1979\)](#), a case finding no personal jurisdiction over the defendant, with [Madison Consulting Group v. South Carolina](#), [752 F.2d 1193 \(7th Cir. 1985\)](#), where the court did find personal jurisdiction. The *Northern Grain* court discussed cases distinguishing and criticizing the *Lakeside* decision, however, the court also emphasized that *Lakeside* is still good law. [Northern Grain](#), [743 F.3d at 494](#). Notably, the *Northern Grain* court described *Lakeside* "as marking something of a borderline for a no-jurisdiction" and that "when a defendant's contacts with the forum state have been as—if not more—limited than those of the defendant in *Lakeside*, this court has denied personal jurisdiction." (quoting [Madison Consulting](#), [752 F.2d 1193 at 1200](#)).

In *Lakeside*, the court found that Wisconsin lacked personal jurisdiction over a West Virginia-based defendant who [*19] ordered "structural assemblies" from the Wisconsin-based plaintiff without ever having set foot in Wisconsin. [597 F.2d at 598](#). The court recognized that although the performance of the contract would take place primarily within the forum state, the contract negotiations and acceptance took place via mail, and "the contacts with Wisconsin...consist[ed] solely of the unilateral activity of" the Wisconsin-based plaintiff; no other circumstances indicated that the West Virginia company purposefully availed itself of the privilege of conducting activities within Wisconsin. [Id. at 603](#) (internal quotation marks omitted).

In *Northern Grain*, the court found no personal jurisdiction in Illinois over a Wisconsin defendant where the plaintiff "wasn't actively marketing his grain to [the forum state's] companies; he just happened to get acquainted with [the plaintiff] at the seed-corn trade meeting in Illinois." [743 F.3d at 496](#). When looking at the parties' contract and the actual course of dealings, the court found that the defendants' task—to grow and deliver grain outside of the forum state—were distinct tasks and did not create "continuing obligations," unlike

other contract cases such as the franchise contract in *Burger King* or the insurance contracts [*20] in *Insurance Health*. See [id. at 495](#) (citing [Burger King](#), [471 U.S. at 480](#) and [Travelers Health Ass'n](#), [339 U.S. at 648](#)). The court also found significant the fact that all preliminary negotiations took place remotely, over the phone, when the defendant was not located in the forum state. *Id.* Finally, and perhaps most notably, the *Northern Grain* court found no personal jurisdiction even when the defendant had contracted with the plaintiff "from time to time" during a period of approximately nine years while knowing the plaintiff was based in the forum state, Illinois. [Id. at 496](#).

Here, the Court finds Stevens's contacts with Wisconsin to be even more limited than those of the defendants in both *Lakeside* and *Northern Grain*, and thus, the Court does not find specific personal jurisdiction. Similar to the defendant in *Northern Grain*, Stevens has never actively marketed, advertised, or sold its products in Wisconsin; Stevens just happened to become acquainted with PES when a third party, the Canadian DND, introduced the companies to each other and then PES initially reached out to Stevens to begin a business relationship.⁶ The parties had no prior relationship and Stevens never physically entered Wisconsin for any reason in relation to the contracts at issue. The case against [*21] personal jurisdiction is stronger in this case as opposed to the *Northern Grain* defendant who physically traveled to the forum state, Illinois, and made contact with the plaintiff at a seed-corn trade meeting in Illinois. See [N. Grain](#), [743 F.3d at 496](#). These factors weigh against a finding that Stevens purposefully directed its activities towards Wisconsin.

Nor do Stevens's negotiations and actual course of dealings with PES dictate a finding of personal jurisdiction. In looking at the negotiations that took place between the parties prior into entering the NDA and Reseller Agreement, the phrase, "the proof is in the pudding," comes to mind. Indeed, the parties negotiations were so limited and undeveloped that neither party ever discussed [*22] the location from

⁶ PES emphasizes the fact that Stevens sent the first "written communication" between the parties. (PI's Opp. at 10). However, PES points to no case law or other argument as to why the Court should find the first *written* communication to be more significant than the telephone conversation where PES initiated contact with Stevens. The Court is not persuaded that the mode of communication should matter at all to its analysis, and instead focuses on the fact that PES first reached out to Stevens.

where PES would ship its products—a seemingly important factor which ultimately led to Stevens's alleged breach of the agreement. (See Kemp. Decl., Ex. E) (noting that FOB China was a "game ender" for Stevens). The negotiations lasted only approximately two months—from the January 22, 2014, initial PES telephone call until March 25, 2014, when Stevens delivered the executed Reseller Agreement to PES. During that time period, Stevens sent PES approximately only five, relatively short, emails, and the parties made a small number of phone calls to each other (the exact number of phone calls is unclear based on the record). During all negotiations, Stevens was located in Canada and not in Wisconsin, which also weighs against personal jurisdictions. See *N. Grain*, 743 F.3d at 495 (distinguishing cases where parties discussed contracts over the telephone from cases where meetings leading to contract formation were held in the forum state). Given these facts, the Court finds that the parties' negotiations and actual course of dealings were limited and do not support a finding of personal jurisdiction.

Finally, Stevens's contacts with PES were significantly less than the nine-year business relationship [*23] between the parties in *Northern Grain*—whereas here the Reseller Agreement involved a term of only one year and Stevens allegedly breached the agreement even prior to the exchange of any goods.⁷ See *N. Grain*, 743 F.3d at 496.

Although the court recognizes that the NDA and the Reseller Agreement between the parties both stated that Wisconsin law governed the agreements, this factor, though certainly persuasive to PES's position, is only one among many animating the Court's analysis, and is insufficient to carry the day for PES in this case. See *Burger King*, 471 U.S. at 482 (noting that a choice-of-law provision in a contract, standing alone, is insufficient to confer jurisdiction). In looking at the totality of the circumstances, Stevens had significantly [*24] less contacts with Wisconsin than the defendants in *Northern Grain* and *Lakeside*, and thus,

⁷The Court recognizes that the Reseller Agreement allowed for a renewal of the purchase agreement provided that Stevens met a certain sales volume, however, this portion of the contract was specifically left blank. (See Compl., Ex. 1, Docket #1-1). Of course, almost any contract *could* be renewed, but that is not the question before the Court. Based on the facts presented in this case, the Court views the dealings between the parties as a twelve-month agreement with only the potential for a renewal.

the case against personal jurisdiction is even stronger here.

For these reasons, the Court concludes that Stevens has not established the requisite minimum contacts with Wisconsin to be hailed into court here, and thus, PES has failed to meet its burden in establishing a prima facie case of specific personal jurisdiction. Because the Court finds that PES has not established that Stevens had the necessary minimum contacts to establish personal jurisdiction, the Court need not determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *Burger King*, 471 U.S. at 476.

4. CONCLUSION

As discussed above, the Court finds that it does not have either general personal jurisdiction or specific personal jurisdiction over Stevens in Wisconsin. As such, the Court will grant Stevens's motion to dismiss and will dismiss this action in its entirety for lack of personal jurisdiction.

Accordingly,

IT IS ORDERED that Stevens's motion to dismiss the complaint (Docket #7) be and the same is hereby **GRANTED** and this action be and the same is hereby **DISMISSED for lack of personal jurisdiction**;

IT IS [*25] FURTHER ORDERED that Stevens's motions to restrict document (Docket #34) be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED that PES's motion to restrict document (Docket #30) be and the same is hereby **GRANTED**; and

IT IS FURTHER ORDERED that PES's motion for discovery limited to jurisdiction (Docket #15) and motion to withdraw motion for discovery limited to jurisdiction (Docket #23) be and the same are hereby **DENIED as moot**.

The Clerk of the Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 18th day of December, 2015.

BY THE COURT:

/s/ J.P. Stadtmueller

J.P. Stadtmueller
U.S. District Judge

IT IS FURTHER ORDERED AND ADJUDGED that this action be and the same is hereby **DISMISSED for lack of personal jurisdiction.**

JUDGMENT

December 18, 2015

Decision by Court. This action came on for consideration before the Court and a decision has been rendered.

Date

APPROVED:

IT IS ORDERED AND ADJUDGED that Defendant's motion to dismiss the complaint (Docket #7) be and the same is hereby **GRANTED**; and

/s/ J.P. Stadtmueller

J.P. Stadtmueller

U.S. District Judge

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APPENDIX 13



Cited

As of: September 8, 2016 1:49 PM EDT

Ridemind, LLC v. S. China Ins. Co.

United States District Court for the Western District of Washington

June 9, 2014, Decided; June 9, 2014, Filed

Case No. C14-489RSL

Reporter

2014 U.S. Dist. LEXIS 78314; 2014 WL 2573310

RIDEMIND, LLC, Plaintiff, v. SOUTH CHINA INSURANCE CO., LTD., Defendant.

Counsel: [*1] For Ridemind LLC, a Washington Corporation doing business as Transition Bikes, Plaintiff: James Paul Murphy, LEAD ATTORNEY, MURPHY ARMSTRONG & FELTON, SEATTLE, WA; Scott Haworth, LEAD ATTORNEY, PRO HAC VICE, HAWORTH COLEMAN & GERSTMAN, LLC, NEW YORK, NY.

For South China Insurance Co Ltd, a foreign corporation, Defendant: Charles E Haddick, Jr., LEAD ATTORNEY, PRO HAC VICE, DICKIE, MCCAMEY & CHILCOTE, PC, CAMP HILL, PA; Charles C Huber, Gretchen J. Hoog, LEAD ATTORNEYS, LANE POWELL PC, SEATTLE, WA.

Judges: Robert S. Lasnik, United States District Judge.

Opinion by: Robert S. Lasnik

Opinion

ORDER DENYING MOTION TO DISMISS

This matter comes before the Court on defendant's "Motion to Dismiss for Lack of Personal Jurisdiction," dkt. # 7. Defendant South China Insurance Co., Ltd. ("South China") alleges that the Court should dismiss the complaint because this Court lacks personal jurisdiction over the claims in the complaint. For the reasons set forth below, the Court DENIES South China's motion.¹

I. BACKGROUND

Plaintiff Ridemind, LLC, doing business as "Transition

Bikes" ("Transition"), is a Washington corporation [*2] that sells bicycles. See Decl. of Charles C. Huber ("Huber Decl.") (Dkt. # 8), Ex. A; Compl. (Dkt. # 5) ¶¶ 1.1, 3.2. In August 2012, Bennett Winslow Mauzé filed a complaint against Transition in Whatcom County Superior Court, alleging products liability claims relating to the injuries he suffered while riding a bike he purchased from Transition. Huber Decl. (Dkt. # 8), Ex. A ¶¶ 3.1-3.31. Transition denies liability, but contends that the frame of the bicycle was manufactured and sold by Astro Engineering Co., Ltd. ("Astro"), a Taiwanese company that has factories in Taiwan and Vietnam. *Id.*, Ex. B at 2-3, Ex. C. To the extent there is any liability, Transition claims the cause of the injuries was Astro's negligent manufacture and design of the frame. Compl. (Dkt. # 5) ¶ 3.10.

In May 2013, Transition filed a complaint against South China Insurance, Co., Ltd. ("South China"). Compl. (Dkt. # 5). South China is a Taiwanese insurance company located in Taiwan, that issued a products liability insurance policy to Astro for the period of May 1, 2011-May 1, 2012. Huber Decl. (Dkt. # 8), Ex. B at 2, 3; Decl. of Scott Haworth ("Haworth Decl.") (Dkt. # 22), Ex. H. The policy included a vendor's [*3] endorsement, dated May 12, 2011, that identifies Transition as an additional insured vendor under the policy. Haworth Decl. (Dkt. # 8), Ex. H. In its complaint against South China, Transition asserts a breach of contract claim and alleges violations of Washington's Insurance Fair Conduct Act ("IFCA") and Washington's Consumer Protection Act ("CPA") arising out of South China's alleged refusal to defend and/or indemnify Transition in the lawsuit filed by Mr. Mauzé. Compl. (Dkt. # 5) ¶¶ 5.1-7.4. In addition to seeking monetary relief, Transition seeks a declaration that South China is obligated to defend and indemnify Transition for costs incurred in defending against Mr. Mauzé's claims. *Id.* ¶¶ 4.1-4.3. South China timely removed the case to this Court on

¹This matter can be decided on the papers submitted. The parties' requests for oral argument are, therefore, DENIED.

April 3, 2014,² notice of removal (Dkt. # 1), and now seeks dismissal for lack of personal jurisdiction.

II. DISCUSSION

Plaintiff has the burden of making a prima facie showing of personal jurisdiction. See, e.g., [Bourassa v. Desrochers](#), 938 F.2d 1056, 1057 (9th Cir. 1991) [*4] (internal citation omitted). On a motion to dismiss for lack of personal jurisdiction, the Court must assume that the allegations in the complaint are true unless contravened. See, e.g., [Dole Food Co., Inc. v. Watts](#), 303 F.3d 1104, 1108 (9th Cir. 2002). The Court resolves all disputed facts in Transition's favor. [Wash. Shoe Co. v. A-Z Sporting Goods Inc.](#), 704 F.3d 668, 672 (9th Cir. 2012).

The exercise of jurisdiction must comport with the state's long arm statute, and with the constitutional requirement of due process. See [Omeluk v. Langsten Slip & Batbyggeri](#), 52 F.3d 267, 269 (9th Cir. 1995) (internal citation omitted). "Because the Washington long arm statute reaches as far as the *Due Process Clause*, all we need to analyze is whether the exercise of jurisdiction would comply with due process." *Id.* (internal citations omitted). For a forum state to have personal jurisdiction over an out-of-state defendant, that defendant must "have certain minimum contacts with the forum state, such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" [Int'l Shoe Co. v. Washington](#), 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (quoting [Milliken v. Meyer](#), 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)). [*5] The due process requirements ensure that individuals have "fair warning that a particular activity may subject [them] to jurisdiction of a foreign sovereign." [Shaffer v. Heitner](#), 433 U.S. 186, 218, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

Where, as in this case, general jurisdiction is undisputedly lacking, a court may nevertheless exercise "limited" or "specific" personal jurisdiction depending upon "the nature and quality of the defendant's contacts in relation to the cause of action." [Data Disc, Inc. v. Sys. Tech. Assocs., Inc.](#), 557 F.2d 1280, 1287 (9th Cir. 1977). The Ninth Circuit utilizes a three-part test to

analyze specific jurisdiction:

(1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

(2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and

(3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

[Schwarzenegger v. Fred Martin Motor Co.](#), 374 F.3d 797, 802 (9th Cir. 2004) [*6] (quoting [Lake v. Lake](#), 817 F.2d 1416, 1421 (9th Cir. 1987)). Transition bears the burden of establishing the first two prongs. [CollegeSource, Inc. v. AcademyOne, Inc.](#), 653 F.3d 1066, 1076 (9th Cir. 2011). In considering the first two prongs, "[a] strong showing on one axis will permit a lesser showing on the other." [Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme](#), 433 F.3d 1199, 1210 (9th Cir. 2006). In other words, a single contact with a forum state may support jurisdiction if the cause of action arises out of that particular intentional contact. *Id.* If Transition meets this burden, the burden shifts to South China "to set forth a 'compelling case' that the exercise of jurisdiction would not be reasonable." [CollegeSource, Inc.](#), 653 F.3d at 1076 (quoting [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 476-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

The first prong of the specific jurisdiction test refers to both purposeful direction and purposeful availment. [Schwarzenegger](#), 374 F.3d at 802. Although these two ideas are "often clustered together under a shared umbrella, [they] 'are, in fact, two distinct concepts.'" [Brayton Purcell LLP v. Recordon & Recordon](#), 606 F.3d 1124, 1128 (9th Cir. 2010) (quoting [*7] [Pebble Beach Co. v. Caddy](#), 453 F.3d 1151, 1155 (9th Cir. 2006)). "A purposeful availment analysis is most often used in suits sounding in contract. A purposeful direction analysis, on the other hand, is most often used in suits sounding in tort." *Id.* (internal quotation marks omitted). Here, Transition has asserted claims sounding in contract and tort. The Court, therefore, first considers whether it has personal jurisdiction over Transition's breach of contract claim.

²Although Transition filed the complaint in state court in May 2013, South China was not served with a copy of the summons and complaint in this matter until March 4, 2014. See Notice of Removal (Dkt. # 1) at 1.

A. Contract Claim

Purposeful availment "requires that the defendant has performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state." [Doe v. Unocal Corp.](#), 248 F.3d 915, 924 (9th Cir 2001). By taking action, such as executing or performing a contract in a forum state, a defendant invokes the benefits and protections of that state's laws. [Schwarzenegger](#), 374 F.3d at 802. In exchange, "a defendant must — as a quid pro quo — submit to the burdens of litigation in that forum." *Id.* (internal quotation marks and citation omitted). However, contracting with an out-of-state defendant does not automatically establish sufficient contacts to support personal jurisdiction. [Unocal](#), 248 F.3d at 924. [*8] The relationship between the forum and the course of negotiations, the terms of the contract, and its anticipated future consequences must be considered. [Burger King Corp.](#), 471 U.S. at 479.

Transition argues that South China purposefully availed itself of the benefits of this state by issuing a Certificate of Liability Insurance to Transition, a Washington resident. Response (Dkt. # 21) at 8-9. South China disputes Transition's claim that the certificate constitutes a contract between the parties. Reply (Dkt. # 23) at 3-4. As noted above, however, the existence of a contract between the parties is not dispositive of the minimum contacts inquiry. [Unocal](#), 248 F.3d at 924. Regardless of whether the certificate is an enforceable contract, it clearly identifies Transition as an additional insured and provides that Transition's principal place of business is in Washington. Haworth Decl. (Dkt. # 8), Ex. H. Based on this representation, South China was created a continuing obligation to a forum resident. See [Burger King](#), 471 U.S. at 475 ("[W]here the defendant deliberately has engaged in significant activities within a State, or has created continuing obligations between himself and residents [*9] 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.") (internal quotation marks and citations omitted).

The facts of this case are similar to those in [Hirsch v. Blue Cross, Blue Shield](#), 800 F.2d 1474 (9th Cir. 1986). In [Hirsch](#), Blue Cross, a Missouri corporation authorized to conduct business in Kansas, contracted with Southwest Freight Lines, Hirsch's former employer, to provide group health insurance for Southwest's

employees. [800 F.2d at 1476](#). At the time Blue Cross entered the contract, Southwest had employees who lived outside of Kansas and Missouri, but none of the employees lived in California. *Id.* After the contract was signed, Southwest added Hirsch, a California resident, to the group policy. *Id. at 1476-77*. Hirsch received a Blue Cross membership card that listed his California address on its face. After Blue Cross refused to pay certain medical expenses, Hirsch filed a complaint against Blue Cross alleging breach of contract and [*10] bad faith. *Id. at 1477*. The Ninth Circuit found that Blue Cross, "by voluntarily and knowingly obligating itself to provide health care coverage to Southwest's California employees, . . . purposefully availed itself of the benefits and protections of that forum." *Id. at 1480*.

The same is true here. Even though South China is not physically located in Washington and does not have any physical contacts with the state, South China willingly included a vendor's endorsement in its policy with Astro and the vendor's endorsement specifically identified Transition and Transition's location in Washington. As was the case in [Hirsch](#), it may be true that at the time South China issued the policy to Astro it may not have foreseen that the vendor's endorsement would have effects in Washington. However, once South China, through its agent V&C Risk Services Taiwan Ltd.,³ issued the Certificate of Liability Insurance to a Washington corporation, South China could foresee that its actions would have an effect in Washington. See *id. at 1479*. Furthermore, because the cause of action arises out of that single intentional act, the Court finds that Transition has established a prima facie case of personal [*11] jurisdiction. See [Yahoo! Inc.](#), 433 F.3d at 1210.

Because Transition has made a prima facie showing that the exercise of personal jurisdiction is constitutional, the burden shifts to South China to present a "compelling case" that it would be unreasonable. In determining whether the exercise of jurisdiction comports with "fair play and substantial justice," the Court considers the following seven factors:

³ The fact that the certificate was produced by South China's agent rather than South China does not alter the Court's finding that South China purposefully created an ongoing obligation to a Washington resident. See e.g., [Daimler AG v. Bauman](#), U.S. , 134 S.Ct. 746, 759 n.13 (Jan. 14, 187 L. Ed. 2d 624, 2014) ("[A] corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there.").

(1) the extent of the defendants' purposeful injection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of the conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the [*12] forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

CollegeSource, Inc., 653 F.3d at 1079. No one factor is dispositive; the Court must balance all of them. Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1132 (9th Cir. 2003). South China addresses only the second and fourth factors. With respect to the second factor, South China states generally that it does not maintain an office in Washington, does not have any reason to travel to Washington, and that it would be required to spend significant financial resources for travel purposes if forced to defend itself here. First, South China provides no evidence to support this argument even though it bears the burden on this issue. Nothing in the record shows that South China will face a significant burden if required to litigate in Washington. Second, the Ninth Circuit has noted that "modern advances in communications and transportation have significantly reduced the burden of litigating in another country." Id. at 1132-33. Thus, to the extent that this factor weighs in favor of South China, it does so only slightly.

As for the forum state's interest [*13] in adjudicating the dispute, Washington has a strong interest in protecting its citizens from injuries inflicted by out-of-state actors who provide insurance coverage to Washington residents. See RCW 4.28.185(1)(d). Although South China contends that it did not contract with Transition, the certificate identifying Transition as an additional insured vendor appears to provide certain insurance coverage to Transition. Haworth Decl. (Dkt. # 8), Ex. H. Thus, this factor weighs in favor of exercising personal jurisdiction.

With respect to the other factors not addressed by the parties, the first factor weighs in favor of Transition. As outlined above, South China knowingly created a continuing obligation to a Washington resident. The certificate expressly identified Transition as an additional insured and it was clear that Transition was located in Washington. This constitutes purposeful injection. As for the third factor, the Court is not aware of any conflict with a foreign state's interest in adjudicating

the matter. This factor, therefore, weighs in favor of Transition. See Menken v. Emm, 503 F.3d 1050, 1060 (9th Cir. 2007) (finding that where there is no conflict between two states [*14] regarding sovereignty this factor favors the plaintiff). The fifth factor is primarily concerned with the location of witnesses and evidence. Id. Because witnesses are located in Washington and Taiwan, neither location seems to have a clear efficiency advantage. The convenience and effectiveness of relief for plaintiff comprise the sixth factor. Transition is a Washington resident that seeks relief for injuries allegedly arising out of litigation in a Washington state court. This factor, therefore, favors Transition. Finally, the seventh factor, whether another reasonable forum exists, is only considered if the forum state is shown to be unreasonable. CollegeSource, Inc., 653 F.3d at 1080.

Balancing the relevant factors, the Court concludes that South China has failed to establish a "compelling case" that the exercise of jurisdiction would be unreasonable. Because Transition has satisfied the first two prongs of the specific jurisdiction test and the balance of factors weighs in favor of personal jurisdiction, the exercise of specific personal jurisdiction over South China is appropriate.

B. Pendent Personal Jurisdiction

Having established personal jurisdiction over South China with respect [*15] to Transition's contract claim, the Court must also determine whether it has jurisdiction with respect to Transition's IFCA and CPA claims. In the Ninth Circuit, "a court may assert pendent personal jurisdiction over a defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction." Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1181 (9th Cir. 2004). Whether to exercise jurisdiction is within the discretion of the district court. Id. Transition's IFCA and CPA claims arise from the same nucleus of operative facts: South China's alleged refusal to defend and/or indemnify Transition against Mr. Mauzé's products liability claims. Compl. (Dkt. # 5) ¶¶ 5.1-7.4. Accordingly, the Court finds that the exercise of pendent personal jurisdiction over Transition's IFCA and CPA claims is appropriate here.

III. CONCLUSION

For all of the foregoing reasons, South China's motion to

dismiss (Dkt. # 7) is DENIED.

Robert S. Lasnik

DATED this 9th day of June, 2014.

United States District Judge

/s/ Robert S. Lasnik

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APPENDIX 14



Cited

As of: September 8, 2016 1:33 PM EDT

Sutcliffe v. Honeywell Int'l, Inc.

United States District Court for the District of Arizona

March 30, 2015, Decided; March 30, 2015, Filed

No. CV-13-01029-PHX-PGR

Reporter

2015 U.S. Dist. LEXIS 40382

Cameron Sutcliffe, et al., Plaintiffs, vs. Honeywell International, Inc., et al., Defendants.

Counsel: [*1] For Cameron Sutcliffe, Brock Gorrell, Galina Gorokhovskaia, in her personal capacity and on behalf of all beneficiaries of Iaroslav Gorokhovski, deceased, Iaroslav Gorokhovski, Plaintiffs: Stephen M Hopkins, LEAD ATTORNEY, Hopkins Law Offices PLC, Phoenix, AZ.

For Honeywell International Incorporated, a foreign corporation, Defendant: Aaron Stephen Welling, LEAD ATTORNEY, Perkins Coie LLP - Phoenix, AZ, Phoenix, AZ; Vernon L Woolston, LEAD ATTORNEY, Perkins Coie LLP, Seattle, WA.

For Airbus Military SL, a foreign corporation, EADS Construccions Aeronauticas S.A., a foreign corporation, Defendants: David J Weiner, LEAD ATTORNEY, Arnold & Porter LLP - Washington, DC, Washington, DC; Mark G Worischek, Shanks Leonhardt, LEAD ATTORNEYS, Sanders & Parks PC, Phoenix, AZ; Thad T Dameris, LEAD ATTORNEY, Arnold & Porter LLP - Houston, TX, Houston, TX.

Judges: Paul G. Rosenblatt, United States District Judge.

Opinion by: Paul G. Rosenblatt

Opinion

WO

ORDER

Pending before the Court is Defendants Airbus Military, S.L.'s and EADS Construcciones Aeronauticas S.A.'s Motion to Dismiss the Second Amended Complaint for Lack of Personal Jurisdiction Pursuant to [Fed.R.Civ.P. 12\(b\)\(2\)](#) (Doc. 38). Having considered the parties'

memoranda in light of the relevant [*2] record, the Court finds the motion should be granted pursuant to [Fed.R.Civ.P. 12\(b\)\(2\)](#) because the Court lacks personal jurisdiction over either Airbus Military, S.L. or EADS Construcciones Aeronáuticas S.A.¹

Background

This action arises from the crash of a CASA C212-CC40, a twin engine aircraft ("the Aircraft"), in Saskatoon, Saskatchewan, Canada on April 1, 2011. On the day of the crash, the Aircraft, owned by non-party Fugro Aviation Canada Ltd., was being used to conduct an aerial geophysical survey near Saskatoon. On board the Aircraft were two pilots, Cameron [*3] Sutcliffe and Brock Gorrell, and an equipment operator, Iaroslav Gorokhovski. Approximately three hours into the flight, the Aircraft's right engine failed and the pilots attempted to return to the Saskatoon airport but could not do so because the Aircraft's left engine failed about fourteen minutes later while the Aircraft was on its final approach to the airport and the Aircraft ended up crashing into a noise abatement wall next to a street in Saskatoon. Both pilots were injured in the crash, and Gorokhovski was killed. The Second Amended Complaint ("SAC"), filed by plaintiffs Sutcliffe and Gorell

¹ Although the moving defendants, without the joinder of the plaintiffs, have requested oral argument, the Court concludes that oral argument would not significantly aid the decisional process.

The Court notes that it has intentionally not discussed every argument raised by the parties and that those arguments not discussed were considered by the Court to be unnecessary to its resolution of the pending motion.

The Court further notes that it is exercising its discretion to resolve the personal jurisdiction issue prior to resolving the pending issue of whether it has subject matter jurisdiction over this action based on diversity of citizenship. See [Ruhrgas AG v. Marathon Oil](#), 526 U.S. 574, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999).

and Galina Gorokhovskaia, in her personal capacity and on behalf of Gorokhovski's beneficiaries, alleges a separate claim of negligence against each of three groups of defendants: Honeywell International, Inc., alleged to be the successor to Garrett, the company that designed, manufactured and distributed the Aircraft's TPE331 turboprop engines; EADS Construcciones Aeronáuticas, S.A. ("EADS CASA") and Airbus Military S.L. ("Airbus Military"), both alleged to be the manufacturer of the C212 aircraft, with Airbus Military alleged to be the successor to EADS CASA; and Shimadzu Corporation [*4] and Shimadzu Precision Instruments, Inc., alleged to be suppliers of components used in the Aircraft's engines.²

More specifically, Count Three of the SAC alleges that EADS CASA and Airbus Military, without distinguishing between them, "failed to meet the duties [of care to pilots and passengers in CASA C-212 aircraft] required of them as the designer, manufacturer, type certificate holder, and distributor of the Aircraft" (¶ 49), and that their acts of negligence did or could include the following (¶ 50):

- A. Failing to conduct adequate test[ing] to ensure the Aircraft could be safely operated with one engine inoperative;
- B. Designing a fuel system which was incapable of supplying the collector tank with sufficient fuel when the Aircraft was flown banked in the operating engine;
- C. Failing to include screens on the ejector pumps;
- D. Specifying inspection techniques and intervals that were unable to detect foreign objects in ejector pumps and fuel tanks;
- E. Failing to have an effective system in place to identify and report engine failures caused by low fuel levels in collector tanks, including failures identified in service difficulty, [*5] incident and accident reports, warranty claims, and communications with engine and fuel pump manufacturers, operators, repair stations, pilots, mechanics, transportation safe[ty] boards, and military and civil aviation authorities;
- F. Failing to apply state of the art ergonomics and human factors principles in the design of the

cockpit, including the annunciator panel;

- G. Designing the annunciator panel with lights grouped by system rather than engine;
- H. Specifying inadequate emergency procedures to engine failures;
- I. Failing to warn that single engine operations could lead to fuel starvation of the operating engine; and
- J. Failing to warn of the risks of debris injection by ejector pumps.

The SAC alleges that the named plaintiffs, Sutcliffe, Gorrell and Galina Gorokhovskaia, are all residents of Canada, as was decedent Gorokhovski, and that his beneficiaries are also residents of Canada with the exception of his parents who are alleged to be citizens of the United States residing in Georgia. None of the plaintiffs are alleged to have any connection with Arizona. Defendant Honeywell is alleged to be an Arizona corporation with its principal place of business in Arizona, and defendants EADS CASA [*6] and Airbus Military are alleged to be Spanish corporations with their principal places of business in Madrid, Spain. Personal Jurisdiction-Related Evidence³

The defendants have supported their motion with two declarations from Pedro Blanco, EADS CASA's head of legal affairs.⁴ The plaintiffs, whose SAC contains no personal jurisdiction allegations, have supported their opposition to the motion with the declaration of Jamie Thornback, a Canadian attorney associated with the plaintiffs who specializes in aviation accidents, and various website documents submitted by Thornback.

There is no dispute that both engines [*7] that were in the Aircraft at the time of the crash in April 2011 had been originally purchased by Construcciones

³ The plaintiffs contend at least twice in their response that the defendants' motion to dismiss, which has been brought pursuant to [Rule 12\(b\)\(2\)](#), must be treated as a motion for summary judgment pursuant to [Fed.R.Civ.P. 12\(d\)](#) because evidentiary matters outside of the pleadings have been presented to the Court. This contention is baseless because [Rule 12\(d\)](#), by its very terms, mandates such a conversion only as to motions brought pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#) and [12\(c\)](#).

⁴ The Court notes that it has not relied on any disputed evidence set forth in Blanco's supplemental declaration filed with the defendants' reply brief.

² Both Shimadzu defendants were previously dismissed from this action.

Aeronáuticas SA ("CASA"), a predecessor to EADS CASA, from co-defendant Honeywell's predecessor in Arizona in 1980 (left engine) and 1981 (right engine). There is also no dispute that the crash-related engines were not the engines that had been originally installed on the Aircraft by CASA at the time of its manufacture in 1980; the right engine was installed in the Aircraft in January 2005 by a non-party and the left engine was installed in August 2010 by a non-party.

A. EADS CASA's evidence

According to the evidence submitted on behalf of EADS CASA by its declarant Blanco, CASA was renamed EADS CASA in 1999 when it became a subsidiary of the European Aeronautic Defense and Space Company ("EADS"); EADS CASA became a subsidiary of EADS N.V. in April 2009, which was renamed Airbus Group N.V. in June 2014. EADS CASA designs, manufactures, assembles and sells certain aircraft, including the C-212 and its variants. The Aircraft was delivered in 1981 to American Casa Distributor, Inc., a California company that is independent from EADS CASA, and thereafter EADS CASA did not determine [*8] or play any role in who purchased or used the Aircraft. The Aircraft was extensively modified by its owner in 1989 and received a Canadian type limited certificate; EADS CASA was not involved in those modifications.

Blanco also declares that the C-212 aircraft and all of its variants were designed, manufactured, assembled, tested, distributed, and sold in Spain, and decisions about the issuance of warnings, operational procedures, and emergency procedures to customers and operators were and are made in Spain. He also states that none of the specific acts of negligence alleged against EADS CASA in Count Three of the SAC were committed in Arizona by it or any corporate affiliate or predecessor.

Blanco further declares that EADS CASA has not made any direct sales to Arizona customers in the previous ten years, and that it and its predecessors make a limited number of purchases from Arizona companies. He also states that EADS CASA North America, which was previously owned as a subsidiary of EADS CASA, had sales of approximately \$47,881 to customers in Arizona between July 2008 and October 2011, and that EADS CASA North America is now a subsidiary of Airbus Group, Inc., which is a corporation [*9] wholly owned by Airbus Group, N.V.

Blanco also declares that in the past ten years EADS CASA has not maintained any offices, employees, or representatives, including sales personnel, in Arizona;

that it has not had any subsidiaries or affiliates with offices, employees or agents in Arizona; that it has not advertised any aircraft, parts, equipment, or services in Arizona or to any customer whose principal place of business is in Arizona; that it has not owned any property or maintained any bank accounts in Arizona; that it has not sued or previously been sued in Arizona; and it has not been registered to do business in Arizona.

B. Airbus Military's evidence

According to the evidence submitted by declarant Blanco on behalf of Airbus Military, the company was founded in 2002 for the sole purpose of designing, manufacturing, assembling and selling a single aircraft, the A400M, and the company has never played any role in the design, manufacture, assembly, sale, or after-sale support of the CASA C-212-CC40 aircraft, its engines, or any of its components.

Blanco also declares that Airbus Military has never maintained any offices, employees, or representatives, including sales personnel, in [*10] Arizona; that it has never had any subsidiaries or affiliates with offices, employees or agents in Arizona; that it has never sold aircraft, parts, or equipment to, or provided any services to any customer in Arizona; that it has never advertised any aircraft or parts, equipment or services in Arizona or to any customer whose principal place of business is in Arizona; that it has never owned any property, maintained any bank accounts, or paid any taxes in Arizona; that it has never sued or previously been sued in Arizona; and that it has never been registered to do business in Arizona. Blanco further declares that Airbus Military has never had any offices, employees, property or representatives in the United States.

C. The plaintiffs' evidence

The plaintiffs, through its declarant Jamie Thornback, has submitted research information that Thornback obtained from several websites, including Airbus-related websites and Honeywell's website. Thornback states in his declaration that he has investigated and litigated other accidents involving TPE331 engines, and that he conducted research regarding the Aircraft's crash and potentially responsible parties both before and after this action was [*11] filed. Based on his research, Thornback states that 477 C212 aircraft were manufactured between 1971 and 2013, which means that Airbus Military/EADS CASA and their predecessors have purchased at least 954 TPE331-10 engines from Garrett/Honeywell; he also states that 13,000 TPE331 engines have shipped from Honeywell's Arizona facility since 1961, which means that Airbus Military/EADS

CASA have purchased at least 7% of the TPE331 engines manufactured by Honeywell. He further states that in 2009 the general procurement activities of Airbus, Airbus Military Astrium, EADS, EADS Defense & Security and Eurocopter were merged into a single department, the EADS General Procurement share service, which is hosted by Airbus; that Airbus has purchased materials from several Arizona companies, that Airbus contributed \$165 million in Arizona in 2009, working with sixteen suppliers, and that Honeywell has a longstanding relationship with Airbus and has been a part of every aircraft Airbus has developed.

Discussion

EADS CASA and Airbus Military ("the defendants") have moved to dismiss the negligence claim alleged against them pursuant to [Fed.R.Civ.P. 12\(b\)\(2\)](#) for lack of personal jurisdiction; they argue that the Court has [*12] neither general nor specific personal jurisdiction over them. The burden of proof is on the plaintiffs to show that personal jurisdiction is appropriate, and they need to make that showing as to both of the defendants. [Walden v. Fiore, 134 S.Ct. 1115, 1123, 188 L. Ed. 2d 12 \(2014\)](#). Since the Court is only considering the parties' pleadings and their submitted written materials, the plaintiffs need only make a prima facie showing of jurisdictional facts to defeat the motion to dismiss, [Martinez v. Aero Caribbean, 764 F.3d 1062, 1066 \(9th Cir.2014\)](#), i.e., they need only demonstrate facts that if true would support jurisdiction over the defendants. [Ballard v. Savage, 65 F.3d 1495, 1498 \(9th Cir.1995\)](#).

Where, as here, there is no applicable federal statute governing personal jurisdiction, the Court applies the law of the state in which it sits. [Martinez, at 1066](#). Arizona's long-arm statute provides that an Arizona court may exercise personal jurisdiction over a nonresident defendant to the maximum extent permitted under the Due Process Clause of the United States Constitution. [Ariz.R.Civ.P. 4.2\(a\); A. Uberti and C. v. Leonardo, 181 Ariz. 565, 892 P.2d 1354, 1358 \(Ariz.1995\)](#). The Constitution permits courts to exercise personal jurisdiction over nonresident defendants if there are at least "minimum contacts" with the forum such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." [International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 \(1945\)](#) (internal quotation marks omitted). The "'minimum contacts' inquiry principally [*13] protects the liberty of the nonresident defendant, not the interests of the plaintiff." [Walden v. Fiore, 134 S.Ct. at 1125 n.9](#).

A. General Jurisdiction

The plaintiffs argue in part that the Court possesses general personal jurisdiction over the defendants. General jurisdiction allows a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world. [Martinez v. Aero Caribbean, 764 F.3d at 1066](#). The Supreme Court has made it clear that general jurisdiction "requires affiliations so continuous and systematic as to render the foreign corporation essentially at home in the forum State, i.e., comparable to a domestic enterprise in that State." [Daimler AG v. Bauman, 134 S.Ct. 746, 758 n.11, 187 L. Ed. 2d 624 \(2014\)](#) (internal quotation marks, brackets, and citation omitted). This standard is a "demanding" one, [Martinez, at 1070](#), and the paradigm for a for general jurisdiction over a corporation are its place of incorporation and its principal place of business, [Daimler, at 760](#), and only in an "exceptional case" will general jurisdiction be available anywhere else. [Id. at 761 n.19; Martinez, at 1070](#). It is undisputed that Arizona is neither the place of incorporation nor the primary place of business of either EADS CASA or Airbus Military.

The Court, reviewing the evidence of record in the light most favorable to the plaintiffs, concludes [*14] that the plaintiffs have failed to establish a prima facie showing of general jurisdiction over either EADS CASA or Airbus Military because their factual showing is insufficient as a matter of law to render these defendants "essentially at home" in Arizona.

The plaintiffs' argument that the "numerous contacts" between the defendants and Arizona are sufficient to establish general jurisdiction is simply untenable. First, the plaintiffs' theory of general jurisdiction is not based solely on the Arizona-related contacts of the defendants, but rather on the aggregate in-state activities of unspecified Airbus-connected entities affiliated or related to them. This single enterprise contention, whether it be grounded in an agency or alter ego theory, and it's not clear whether the plaintiffs are invoking one or both theories, is insufficient to establish general personal jurisdiction. As to the former, the Supreme Court essentially rejected an agency theory of general jurisdiction in [Daimler](#): "The Ninth Circuit's agency theory appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep even the sprawling [*15] view we rejected in [Goodyear \[Dunlop Tires Operations, S.A. v. Brown, 131 S.Ct. 2846, 180 L. Ed. 2d 796 \(2011\)\]](#)". As to the latter, the plaintiffs have not made any showing sufficient to

establish that either defendant is the alter ego of some other unspecified Airbus-related entity with Arizona contacts. Under Arizona law, corporate status is not to be lightly disregarded, [Chapman v. Field, 124 Ariz. 100, 602 P.2d 481, 483 \(Ariz.1979\)](#), and alter ego status is not demonstrated absent proof of both (1) unity of control and (2) that the observance of corporate form would sanction a fraud or promote injustice. [Gatecliff v. Great Republic Life Ins. Co., 170 Ariz. 34, 821 P.2d 725, 728 \(Ariz. 1991\)](#). The Court agrees with the defendants that the isolated examples of cooperation among Airbus-related entities that the plaintiffs identify from declarant Thornback's internet research do not amount to any evidence of the injustice or fraud requirement necessary to pierce the corporate veil.

Secondly, and more importantly, general personal jurisdiction would not exist here even if all of the Arizona-based contacts by any Airbus-related entity mentioned by the plaintiffs are attributed to the defendants. For purposes of this motion, the Court accepts that purchases of aerospace-related products from Arizona companies by Airbus-related entities are systematic, continuous, and substantial. But those procurement activities [*16] alone are insufficient because the proper inquiry is not, as the plaintiffs seem to suggest, whether a defendant's contacts in the aggregate in the forum state are extensive. The Supreme Court has now made it clear that since a corporation is normally at home for purposes of general personal jurisdiction only at its place of incorporation and its principal place of business, an argument that a foreign corporation is subject to general jurisdiction in any state in which it conducts a systematic, continuous and substantial course of business is "unacceptably grasping." [Daimler AG v. Bauman, 134 S.Ct. at 761](#). This is so because the inquiry into general jurisdiction is not solely focused on the magnitude of the foreign defendant's in-state contacts, but on "an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States." [Id. at 762](#). See also, [Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418, 104 S. Ct. 1868, 80 L. Ed. 2d 404 \(1984\)](#) ("[W]e hold that mere purchases even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over [*17] a nonresident corporation in a cause of action not related to those purchase transactions.")

The plaintiffs have simply not made the requisite showing that this is an exceptional case permitting general personal jurisdiction over defendants incorporated and headquartered in Spain and the Court concludes that subjecting the defendants to general jurisdiction in Arizona is incompatible with due process. See [Helicopteros, at 417-18](#) (Supreme Court concluded that a Colombian corporation that owned a helicopter that crashed in Peru killing a U.S. citizen was not subject to general personal jurisdiction in a wrongful death action brought in Texas. In so deciding, the Supreme Court noted that the defendant had no place of business in Texas and had never been licensed to do business there. It further noted that the defendant's contacts with Texas, which included that its CEO had gone to Texas to negotiate a contract for transportation services with the plaintiffs' employers, it had deposited checks drawn on a Texas bank, it had made significant purchases from Bell Helicopter in Texas, and had sent its personnel to Texas for training at Bell's facilities there, were insufficient to satisfy due process requirements. [*18]) See also, [Martinez v. Aero Caribbean, 764 F.3d at 1070](#) (Ninth Circuit concluded that a foreign aircraft manufacturer sued for wrongful death in California over an airplane crash in Cuba was not subject to general personal jurisdiction in California. In so determining, the court noted that this was not an exceptional case permitting general personal jurisdiction because the defendant was organized and had its principal place of business in France, it had no offices, staff or other physical presence in California, it was not licensed to do business in California, and its California contacts were minor compared to its worldwide activities. While the defendant did have numerous contacts with California, including that it had contracts worth between \$225 and \$450 million to sell airplanes to a California corporation, it had contracts with eleven California component suppliers, it had sent company representatives to California to attend industry conferences, promote its products, and meet with its suppliers, its aircraft were being used in California, and it had advertised in trade publications with distribution in California, these contacts were insufficient to make the defendant at home in California.)

B. Specific Jurisdiction

The [*19] plaintiffs also argue that the Court has specific jurisdiction over the defendants, basically because the engines that were on the Aircraft at the time of the crash were purchased by EADS CASA's corporate predecessor in Arizona. The inquiry into whether a forum state may assert specific jurisdiction over a nonresident defendant focuses on the relationship

among the defendant, the forum, and the litigation. [Walden v. Fiore, 134 S.Ct. at 1121](#). A three-part is used to determine whether a defendant has sufficient contacts with the forum state to be subjected to specific personal jurisdiction: (1) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or a forum resident, or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the nonresident defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.*, it must be reasonable. [Picot v. Weston, 780 F.3d 1206, 2015 U.S. App. LEXIS 4437, 2015 WL 1259528, at *3 \(9th Cir. March 19, 2015\)](#). All three factors must exist for personal jurisdiction to apply. [Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 \(9th Cir.1995\)](#). The plaintiffs have the [*20] burden of proving the first two prongs, and if they do so, the burden shifts to the defendants to set forth a compelling case that the exercise of jurisdiction would not be reasonable. [Picot, 2015 U.S. App. LEXIS 4437, \[WL\] at *4](#).

(1) Purposeful Availment

The first prong of the test is analyzed under either a purposeful availment standard or a purposeful direction standard, which are two distinct concepts. [Washington Shoe Co. v. A-Z Sporting Goods Inc., 704 F.3d 668, 672 \(9th Cir. 2012\)](#). While the Ninth Circuit generally applies a "purposeful direction" or "effects" test for claims sounding in tort, *id.*, it has, at least in some cases, limited the use of that test to claims involving intentional torts. See [Holland America Line Inc. v. Wärtsilä North America, Inc., 485 F.3d 450, 460 \(9th Cir.2007\)](#) ("[I]t is well established that the *Calder* [purposeful direction] test applies only to intentional torts, not to the breach of contract and negligence claims[.]"); accord, [Marlyn Nutraceuticals v. Improvita Health Products, 663 F.Supp.2d 841, 850 \(D.Ariz. 2009\)](#) (Court applied the purposeful availment test to a negligent misrepresentation claim). Since the sole claim against the defendants is a negligence claim, a non-intentional tort, the Court will apply the purposeful availment standard.⁵

⁵ The Court notes that if the purposeful direction standard were to be applied here, the Court would conclude that no specific personal jurisdiction exists because the plaintiffs failed to meet their burden as to [*21] the first prong. This is because one element of that standard is that the defendants caused harm

This standard focuses on whether a nonresident defendant's conduct and connection with the forum are such that it should reasonably anticipate being haled into court there. [World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 \(1980\)](#). It is based on the presumption that it is reasonable to require a defendant to be subject to the burden of litigating in a state in which it conducts business and benefits from its activities in that state. [Brainerd v. Governors of the University of Alberta, 873 F.2d 1257, 1259 \(9th Cir.1989\)](#). This requirement is met if the contacts proximately result from actions by the defendant itself that create a substantial connection with the forum, such as where the defendant has deliberately engaged in significant activities within the forum or has created continuing obligations between itself and forum residents. [Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-76, 105 S. Ct. 2174, 85 L. Ed. 2d 528 \(1985\)](#). But the defendant may not be haled into a jurisdiction as a result of the defendant's random, fortuitous, or attenuated contacts with the forum. *Id.* at 474.

The plaintiffs argue in part [*22] that EADS CASA purposely availed itself of the rights and privileges of Arizona law via its purchase of the Aircraft's engines in Arizona from Honeywell.⁶ The Court, viewing the evidence in a light most favorable to the plaintiffs, concludes that the plaintiffs have met this prong because they have sufficiently established that the defendants have deliberately engaged in commercial activities within Arizona that cannot be said to be merely attenuated.

(2) Arising Out Of

In order for the defendants' purposeful activities in Arizona to support specific jurisdiction, the plaintiffs' claims against them must arise out of those activities. The Ninth Circuit relies on a "but for" test to determine whether a particular claim arises out of forum-related activities. [Ballard v. Savage, 65 F.3d at 1500](#). The question presented here is whether but for the

that they knew would be likely to be suffered in the forum state, [Washington Shoe Co., 704 F.3d at 673](#), and the plaintiffs, who have not alleged that they have any connection at all with Arizona, clearly have not alleged that they suffered any harm in Arizona.

⁶ Although the Court recognizes that the Arizona-related contacts at issue are those of EADS CASA or of its corporate predecessor CASA, the Court treats the defendants as being a single entity for purposes of the specific jurisdiction analysis given the plaintiffs' allegation and evidence that Airbus Military is the successor to EADS CASA.

defendants' contacts with Arizona would the [*23] plaintiffs' claims against them have arisen. *Id.* The plaintiffs' contention is that "'but for' EADS CASA's purchase of engines from Honeywell there would be no action against EADS CASA in Arizona."

The Court is unpersuaded that this factor has been met because it concludes that the "arising out of" issue cannot be reduced to the simplistic and sweeping approach taken by the plaintiffs given the facts of record. The causation element requires a more direct relationship between the relevant forum contact, the mere purchase of the engines, and the actual negligence claim brought against the moving defendants in the SAC. As the defendants correctly point out, the plaintiffs do not allege that the purchase of the engines in Arizona constituted a negligent act on the defendants' part, nor do they allege that any of the specific acts of negligence raised against the defendants in ¶ 50 of Count Three of the SAC, *i.e.*, the design of the C-212 aircraft's fuel system, the design of its cockpit and instrument panel, the testing of the aircraft, the specification of inspection techniques for the aircraft, and decisions about whether and what warnings to issue, occurred in Arizona. While the design [*24] and/or manufacture of the engines themselves underlies the plaintiffs' negligence claim against Honeywell, and their negligence claim against the former Shimadzu defendants, it does not appear to directly underlie their negligence claim against the moving defendants.

(3) Reasonableness

But even if the first two prongs of the specific jurisdiction test are met, the assertion of personal jurisdiction against the defendants is unreasonable if it does not comport with fair play and substantial justice. The Court must consider and balance seven factors in determining the reasonableness of its exercise of personal jurisdiction, none of which are dispositive in itself. [Terracom v. Valley National Bank, 49 F.3d 555, 561 \(9th Cir.1995\)](#).

The first reasonableness factor is the extent of the defendants' purposeful interjection into Arizona. Notwithstanding the Court's conclusion that the plaintiffs have satisfied the purposeful availment prong, this factor tilts at least somewhat in the defendants' favor given that the defendants' relevant connections with Arizona are sparse. See [Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482, 1488 \(9th Cir.1993\)](#) (Ninth Circuit noted that since the foreign defendants' contacts with the forum were attenuated, this first factor weighed in their favor, but that it did not weigh heavily in

their [*25] favor given the court's assumption that those contacts were sufficient to meet the purposeful availment prong.)

The second factor is the burden on the defendants of defending this action in Arizona. This factor favors the defendants because they are Spanish businesses headquartered in Spain with no physical presence in Arizona, and there is no evidence of record that any of the specific allegations of negligence against them took place anywhere other than in Spain. "The Supreme Court has recognized that defending a lawsuit in a foreign country can impose a substantial burden on a nonresident alien. 'The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.'" [Core-Vent, at 1488](#) (quoting [Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 114, 107 S. Ct. 1026, 94 L. Ed. 2d 92 \(1987\)](#)); see also, [Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1125-26 \(9th Cir.2002\)](#) (Ninth Circuit, in assessing this second factor, noted that the burden on the foreign defendant to defend a suit in California "appears great, given that it is incorporated in India, owns no property in the forum, and has no employees or persons authorized to act on its behalf there. Moreover, its potential witnesses and evidence are [*26] likely half a world away.")

The third factor is the extent to which the exercise of jurisdiction would conflict with the sovereignty of the defendants' state. This factor favors the defendants. The Ninth Circuit has recognized that where the nonresident defendant "is from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction." [Glencore Grain Rotterdam, at 1126](#).

The fourth factor is the forum state's interest in adjudicating the dispute. This factor weighs in the defendants' favor because Arizona's interest in this action, at least as to the negligence claim against these defendants, is at best very slight for the following reasons: none of the plaintiffs are Arizona residents and none of them were harmed in Arizona; while the Aircraft's engines were purchased from an Arizona company, those purchases occurred in 1980 and 1981, over 30 years prior to the crash of the Aircraft; the specific allegations of negligence raised against these defendants occurred outside of Arizona; the Aircraft was not built or sold in Arizona, and there is no evidence that it was ever operated in Arizona. See [Asahi Metal](#)

[Industry Co., 480 U.S. at 114](#) ("Because the plaintiff is [*27] not a California resident, California's legitimate interests in the dispute have considerably diminished.")

The fifth factor considers what forum is the most efficient judicial resolution of the controversy, which is evaluated by looking at where the witnesses and the evidence are likely to be located. [Terracom v. Valley National Bank, 49 F.3d at 561](#). This is essentially a neutral factor here because witnesses and evidence will likely be located in Arizona, Canada, and Spain.

The sixth factor is the importance of the forum to the plaintiffs' interest in convenient and effective relief. Notwithstanding the plaintiffs' statement that they filed suit in Arizona for a variety of reasons, including their enhanced ability to obtain discovery in this forum, particularly against Honeywell, this factor is essentially insignificant in this case given that Arizona is neither the plaintiffs' place of residence nor the location of the crash. See [Core-Vent Corp., 11 F.3d at 1490](#) (Ninth Circuit noted that "neither the Supreme Court nor our court has given much weight to inconvenience to the plaintiff" and that "a mere preference" on the plaintiff's part for its chosen forum does not affect the balancing.)

The seventh factor is the existence of an alternative forum. This factor [*28] weighs in the defendants' favor because the plaintiffs, who bear the burden of proving the unavailability of an alternative forum, *id.*, have not sufficiently established that they would be precluded from effectively litigating their negligence claim against these defendants in Canada or Spain.

In summary, the Court, having balanced all of the reasonableness-related factors, concludes that the moving defendants have presented a sufficiently compelling argument that the exercise of personal jurisdiction over them by this Court would be improper because it would offend the traditional notions of fair play and substantial justice.

C. Jurisdictional Discovery

The plaintiffs request that if the Court fails to summarily deny the defendants' motion that they be afforded the opportunity to conduct formal jurisdictional discovery related to the internal relationships among the various Airbus-related entities and those entities' contacts with Arizona. They state that such discovery will show, for

example, that the defendants' purchases of Honeywell's products are systematic, continuous, and substantial.

The Court agrees with the defendants that no such discovery is warranted here because, based on [*29] the sufficiently developed record already presented by the parties, the requested discovery would not reveal facts sufficient to constitute a basis for either general or specific personal jurisdiction. See [Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1160 \(9th Cir.2006\)](#) ("[W]here a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants, the Court need not permit even limited discovery[.]"); [Martinez v. Aero Caribbean, 764 F.3d at 1070](#) (Ninth Circuit concluded that it is not an abuse of discretion to refuse to grant jurisdictional discovery when it is clear that additional discovery would not demonstrate facts sufficient to constitute a basis for personal jurisdiction.); [Boschetto v. Hansing, 539 F.3d 1011, 1020 \(9th Cir. 2008\)](#) (Ninth Circuit noted that the denial of jurisdictional discovery is not an abuse of discretion when the plaintiffs' request is based only on their belief that discovery will enable them to demonstrate sufficient forum business contacts to establish the court's personal jurisdiction.) Therefore,

IT IS ORDERED that Defendant Shimadzu Corporation's Motion to Amend Caption (Doc. 40) is granted to the extent that the caption of this action is amended to reflect that the sole remaining named defendant is Honeywell International, Inc. [*30]

IT IS FURTHER ORDERED that Defendant Airbus Military, S.L.'s and EADS Construcciones Aeronauticas S.A.'s Motion to Dismiss the Second Amended Complaint for Lack of Personal Jurisdiction Pursuant to [Fed.R.Civ.P. 12\(b\)\(2\)](#) (Doc. 38) is granted to the extent that the Second Amended Complaint (Doc. 12) is dismissed as to defendants Airbus Military, S.L. and EADS Construcciones Aeronáuticas S.A. pursuant to [Fed.R.Civ.P. 12\(b\)\(2\)](#) for lack of personal jurisdiction.

DATED this 30th day of March, 2015.

/s/ Paul G. Rosenblatt

Paul G. Rosenblatt

United States District Judge

APPENDIX 15



Theunissen v. Matthews

United States Court of Appeals for the Sixth Circuit

April 5, 1993, Filed

No. 92-1271

Reporter

1993 U.S. App. LEXIS 7843

Herman and Ann Theunissen, Plaintiffs-Appellants v. Sid Matthews, d/b/a Matthews Lumber Transfer, Defendant-Appellant

Notice: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Subsequent History: Reported as Table Case at: 992 F.2d 1217, 1993 U.S. App. LEXIS 19984.

Prior History: United States District Court for the Southern District of Michigan. District No. 89-73346. Cohn, District Judge.

Case Summary

Procedural Posture

Appellant truck driver and his wife sought review of a judgment of the United States District Court for the Southern District of Michigan, which granted the motion of appellee lumberyard owner to dismiss the complaint filed by the truck driver and his wife for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2). The complaint was filed against the lumberyard owner arising from an injury to the truck driver in a foreign lumber yard.

Overview

The truck driver drove to pick up the lumber and his hand was crushed in a forklift-type machine during the loading of lumber by one of the lumberyard owner's employees. The truck driver contended that the district

court erred in finding insufficient contacts between the lumberyard owner and the state of Michigan to establish personal jurisdiction over the lumberyard owner. On appeal, the court affirmed the district court's decision. The court held that the truck driver did not meet the requirements of the long-arm statute, Mich. Comp. Laws Ann. § 600.705, by proving that his personal injury claim arose out of the lumberyard owner's transaction of business in Michigan or from a contract for services or materials to be furnished in the state. The court held that the record supported the district court's findings that the lumberyard owner did not contract with the trucking company and that it sold the lumber directly to the customer. The court stated that because personal jurisdiction was not established under § 600.705, it was unnecessary to decide the constitutional issue of whether jurisdiction should be denied on due process grounds.

Outcome

The court affirmed the district court's judgment dismissing the action for lack of personal jurisdiction over the lumberyard owner.

Judges: BEFORE: NELSON and BATCHELDER, Circuit Judges, and CONTIE, Senior Circuit Judge

Opinion by: PER CURIAM

Opinion

PER CURIAM. Herman Theunissen drove a truck for Direct Transit Lines, located in Grand Rapids, Michigan. On March 10, 1988, Theunissen picked up a load of lumber from the lumber yard owned by Sid Matthews in Windsor, Canada. One of Matthews's employees loaded the lumber onto Theunissen's truck using a forklift-type machine called a "hi-lo." During the loading, Theunissen's hand was caught in the hi-lo and crushed, causing permanent damage. He and his wife filed suit against Matthews in State court; the case was removed

to the Eastern District of Michigan as a diversity action.

The District Court granted Matthews's motion to dismiss for lack of personal jurisdiction [*2] under [Fed. R. Civ. P. 12\(b\)\(2\)](#). However, this court sent the matter back to the District Court, having agreed with Theunissen that the record did not adequately support the District Court's conclusion that the plaintiff had proven insufficient contacts between Matthews and the State of Michigan to reach the defendant via long-arm jurisdiction. See [Theunissen v. Matthews, 935 F.2d 1454 \(6th Cir. 1991\)](#). After conducting a hearing and making additional findings of facts, the District Court again arrived at the same conclusion. Theunissen appeals the dismissal; we affirm.

State "long-arm" statutes grant State courts limited personal jurisdiction over nonresident defendants, in general to allow resident plaintiffs to sue foreign persons or corporations whose out-of-state activities have visited harm upon them. However, the Federal Constitution's Due Process Clause limits the power of States to extend their jurisdictional reach in this manner. [Asahi Metal Industry Co. Ltd. v. Superior Court of California, Solano County, 480 U.S. 102, 108 \(1987\)](#). The court may exercise personal jurisdiction over a nonresident only where "the [*3] defendant purposefully established 'minimum contacts' in the forum State." *Id.* (quoting [Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 \(1985\)](#)). The plaintiff must therefore show both that the defendant's alleged bad conduct fits the requisite conditions for exercise of long-arm jurisdiction under State law and that sufficient contacts exist between the defendant and the State to exercise personal jurisdiction without violating the Due Process Clause.

Since this case was removed on the basis of diversity, the District Court properly applied the law of Michigan, the forum State, to the question of personal jurisdiction. [Theunissen, 935 F.2d at 1459](#) (citing [Welsh v. Gibbs, 631 F.2d 436 \(6th Cir. 1980\)](#), *cert. denied, 450 U.S. 981 (1981)*). Theunissen contends that limited personal jurisdiction extends to Matthews under [Mich. Comp. Laws Ann. § 600.705\(1\)](#) and (5) (West 1981).¹ He

alleges that on several occasions, and on the occasion of his injury, Matthews had contracted with Direct Transit Lines to haul lumber from his yard to a recipient in Michigan; he [*4] points to several Direct Transit shipments from Matthews Lumber Transfer to Michigan which were billed directly to Matthews and evidently paid by him.

Matthews admits paying the invoices, but argues that he did not "contract" with Direct Transit. Typically, Matthews testified, a Canadian lumber company or wholesaler sold lumber directly [*5] to a customer, in this case Weyerhaeuser; the lumber company or wholesaler would then directly hire both Direct Transit and Matthews, and Matthews's only role was to unload the lumber from incoming trains and load it onto trucks in the proper quantities. Only when Matthews made a mistake, for example sending the wrong amount of lumber on a truck, would Direct Transit send him a bill for any extra shipments necessary to cure the error.

These conflicting accounts originally appeared in affidavits the parties submitted to the District Court in conjunction with Matthews's first motion to dismiss. We remanded for additional findings of fact because Theunissen's affidavits made out a prima facie showing of proper long-arm jurisdiction under [§ 600.705\(1\)](#), and Matthews's affidavits alone did not suffice to rebut this showing. [Theunissen, 935 F.2d at 1464](#). We noted, however, that if on remand Matthews substantiated his story, he would most likely prevail. *Id.*

After conducting an evidentiary hearing on the matter, the District Court concluded that "no . . . course of business dealings [between Matthews and Direct Transit Lines] can be found from the evidence." [*6] The District Court found that Matthews had not ever hired Direct Transit but that the invoices had in fact resulted from shipping errors. Thus, the court found that Theunissen's injury did not occur in the course of a Direct Transit haul ordered by Matthews. On the basis of these facts, the court concluded, quoting [Theunissen,](#)

representative arising out of an act which creates any of the following relationships:

(1) The transaction of any business within the state.

* * *

(5) Entering into a contract for services to be rendered or for materials to be furnished in the state by the defendant.

[Mich. Comp. Laws Ann. § 600.705](#).

¹ This section provides that

the existence of any of the following relationships between an individual or his agent and the state shall constitute a sufficient basis of jurisdiction to enable a court of record of this state to exercise limited personal jurisdiction over the individual and to enable the court to render personal judgments against the individual or his

that "sufficient contacts [did not] exist to sustain jurisdiction" and again dismissed the case.

In reviewing the District Court's determination as to whether personal jurisdiction exists, we review findings of fact for clear error and conclusions of law *de novo*. [Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 678 \(1st Cir. 1992\)](#). Clearly erroneous findings of fact are those which leave "the reviewing court on the entire evidence . . . with the definite and firm conviction that a mistake has been committed." [Loudermill v. Cleveland Board of Education, 844 F.2d 304, 308 \(6th Cir.\), cert. denied, 488 U.S. 946 \(1988\)](#). The testimony offered at the hearing on the whole confirmed Matthews's original description of his business dealings and essentially undermined Theunissen's [*7] allegations. The record now fully supports the conclusions of the District Court, and we hold that the District Court's findings of fact are not clearly erroneous.

As for the District Court's legal conclusions, we note that the court held that it had no personal jurisdiction over Matthews because the facts showed insufficient contacts between Matthews and the State of Michigan.

We hold, however, that the facts appearing in the record do not show Matthews to fall within the statutory ambit of the Michigan long-arm statute as alleged by the plaintiffs. For this reason, we decline to pass judgment on the existence of minimum contacts. One of the "fundamental and longstanding principles of judicial restraint" obliges us not to deny jurisdiction based on Due Process concerns where we can dispose of this case on alternate statutory grounds without reaching constitutional issues. [Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 445 \(1988\)](#). Mr. Theunissen has not proven that his claim arose out of the "transaction of any business" in Michigan by Matthews, [Mich. Comp. Laws § 600.705\(1\)](#), or out of a "contract for services to be rendered [*8] or for materials to be furnished in the state" by Matthews. [Mich. Comp. Laws § 600.705\(5\)](#). We therefore hold that the Michigan long-arm statute would not reach the defendant even if the constitutional concerns were to prove nonexistent.

For the reasons given, the District Court's dismissal of this action for lack of personal jurisdiction over the defendant is **AFFIRMED**.

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