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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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NAM CHUONG HUYNH and LIN R. BUI, husband and wife, and JO-  
HANNAH 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,

Respondent/Cross-Appellant

AKER BIOMARINE ANTARCTIC II AS, a Norwegian corporation,

Respondent/Cross-Appellant,

and MAREL SEATTLE, INC., a Washington State corporation,

Defendant.

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**REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT  
AKER BIOMARINE ANTARCTIC AS**

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APPEAL FROM THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR KING COUNTY  
NO. 14-2-31832-4 SEA

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## I. INTRODUCTION

“‘Specific’ or ‘case-linked’ jurisdiction depends on an affiliation between the forum and the underlying controversy (i.e., an activity or occurrence that takes place in the forum State and is therefore subject to the State’s regulation).” *Walden v. Fiore*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1115, 1121 n.6 (2014) (citation and internal quotation marks omitted). For Washington courts to exercise specific personal jurisdiction over AKAS II, its’ “suit-related conduct” must create a “substantial connection” with Washington. *Id.* at 1121.

The “underlying controversy” is whether AKAS II’s negligence caused an injury Huynh allegedly sustained while aboard a Norwegian-flagged fishing vessel located in the territorial waters of Uruguay, thousands of miles from Washington. CP 1-4. AKAS II’s “suit-related conduct” consists of alleged acts and omissions which Huynh alleges created an unsafe condition aboard the vessel, and AKAS II’s alleged failure to warn Huynh of that condition. CP 3. None of these alleged acts and omissions took place in Washington. *Id.* Absent a connection between the suit-related conduct and Washington, Huynh nevertheless makes the novel argument that specific jurisdiction is available due to what he characterizes as AKAS II’s “wide-reaching forum contacts,” as well as the “earlier, significant business activities” of its’ parent corporation. App. Reply Br. p. 7.

The “contacts” relied upon by Huynh are irrelevant to the exercise of specific personal jurisdiction because they are not “suit-related.”

Instead, these contacts are more akin to, yet fall far short of, those required for general personal jurisdiction, “which permits a court to assert jurisdiction over a defendant based on a forum connection unrelated to the underlying suit.” *Walden*, 134 S. Ct. at 1121 n.6. AKAS II does not dispute that during its brief existence it purchased some goods and services from Washington vendors, nor that its parent company, AKAS, did the same. These transactions, however, are not the conduct that is challenged in this action, and therefore cannot support the exercise of specific personal jurisdiction.<sup>1</sup> *Id* at 1121-22.

## II. RESPONSE TO HUYNH’S COUNTERSTATEMENT OF THE CASE

Huynh’s counterstatement of facts, *see* App. Reply Br. p. 2-6, and other factual allegations in the body of the Reply, cite to materials that were either not admitted or not offered in the evidentiary hearing, and should therefore not be considered on appeal.<sup>2</sup>

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<sup>1</sup> Nor, as explained in prior briefing, are these contacts sufficient to support the exercise of general jurisdiction. *See* AKAS’ Answering Brief and Opening Brief on Cross Appeal at 10–14.

<sup>2</sup> The improper citations include:

- P.3 ¶ 4, citing to Exhibit 49. Exhibit 49 was not admitted. *See* CP 986. In addition, Huynh withdrew the exhibit following the hearing. CP 1027.
- P.3 ¶ 6, citing to CP 418-19. These documents were not offered or admitted at the evidentiary hearing. *See* CP 983-990.
- P.4 ¶ 17 & pp. 17, 19, citing to CP 123. This document was not offered or admitted at the evidentiary hearing. *See* CP 983-990.
- P.27, citing to CP 439-447. These documents were not offered or admitted at the evidentiary hearing. *See* CP 983-990.
- P.28, citing to CP 532-555. These documents were not offered or admitted at the evidentiary hearing. *See* CP 983-990.

As explained in AKAS’ pending Motion to Strike, no party has assigned error to the trial court made in’s findings or fact, or to any of the court’s evidentiary rulings. In his Reply,

Huynh also improperly urges this Court to adopt reasoning articulated by the United States District Court for the Western District of Washington in an order issued in a prior iteration of this case. App. Reply Br. p.23 n.14. Huynh elected to voluntarily dismiss that proceeding pursuant to Fed. R. Civ. P. 41(a)(1), the effect of which “is to render the proceedings a nullity and leave the parties as if the action had never been brought.” *Beckman v. Wilcox*, 96 Wn. App. 355, 359, 979 P.2d 890, 892 (1999) (quoting *Bonneville Assoc., Ltd. Partnership v. Barram*, 165 F.3d 1360, 1364 (Fed.Cir.1999)). AKAS argued against consideration of that order below and moved to strike. RP (6/26/2015) 11:17-13:24; RP (8/17/2015) 24:12-26:13; *see also* CP 664-65; 673, n.6; 731:17 – 733:7; 1204-06. The trial court clarified that it did not consider the federal order in reaching its decision on jurisdiction over AKAS and AKAS II. CP 1217. When Huynh voluntarily dismissed the prior federal action, he rendered the order issued in that case a nullity, as if it had never existed. *See Beckman*, 96 Wn. App. at 359, 979 P.2d at 892; *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492, 200 P.3d 683, 688 (2009) (“A voluntary dismissal leaves the parties as if the action had never been brought.”).<sup>3</sup> The order from the prior federal action cannot be used against

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Huynh nevertheless urges this Court to weigh the evidence differently than the trial court, and further urges this Court to reach different conclusions than the trial court regarding witness credibility. In an effort to advance these goals, Huynh has cited to materials that were either: (1) denied admission at the evidentiary hearing, (2) not offered, or (3) withdrawn. For the reasons set forth in AKAS’ Motion to Strike, these improper fact citations should be stricken, or, in the alternative, they should be corrected, if they can be.

<sup>3</sup> Moreover, because the case was dismissed, AKAS is unable to seek appellate review of

AKAS or AKAS II in this appeal.

### III. ARGUMENT

#### A. **Huynh Has Waived any Assignment of Error Regarding the Trial Court's Decision that General Jurisdiction Is Unavailable over AKAS or AKAS II.**

Huynh has contended that the facts establish general jurisdiction over both AKAS and AKAS II. App. Br. p. 25 n.17; App. Reply Br. p. 9 n.4. Yet, he has twice stated that “the Court need not address” the question of whether general jurisdiction is available. *See id.* Huynh has offered no authority or argument in support of general jurisdiction, electing not to respond to AKAS' detailed analysis of general jurisdiction. *See generally* App. Reply Br. It is well established that “[a]n assignment of error not supported by argument or authority is deemed waived.” *Diehl v. Mason Cty.*, 94 Wn. App. 645, 651, 972 P.2d 543, 546 (1999). Huynh has failed to support his contention that the trial court erred in failing to find general jurisdiction, and therefore, to the extent that he has assigned error to this issue, he has waived review.

#### B. **In *Walden*, the Supreme Court Articulated New, Previously Unrecognized Standards for Specific Personal Jurisdiction**

##### 1. ***Walden* Is Controlling Authority on the Issue of The Minimum Contacts Necessary to Support the Exercise of Specific Personal Jurisdiction.**

Huynh suggests that *Walden* has no effect on the analysis of specific personal jurisdiction. App. Reply Br. 11-12. This is implausible.

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that order. It would be contrary to precedent and inequitable to bind AKAS to that order now.

Huynh's theory is predicated upon the mistaken assumption that in *Walden*, the United States Supreme Court utilized its absolute discretion to grant or deny certiorari simply to correct the Ninth Circuit's misapplication of law. This is not how the Court utilizes its discretion: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, Rules of the United States Supreme Court.

The only reasonable assumption is that the Court accepted *Walden* for review because it believed that the case presented an appropriate vehicle for resolving important questions of federal law relating to specific personal jurisdiction. *See id.* (setting forth criteria that support the granting of certiorari). It makes no sense to assume, as Huynh apparently does, that the Court intended for its decision in *Walden* to be limited in application to that specific case, construed as nothing more than a narrowly tailored remedy for a single individual who disagreed with a lower court's decision on where a straightforward tort claim could be tried.

As Justice Thomas explained on behalf of a unanimous Court, "This case addresses the 'minimum contacts' necessary to create specific jurisdiction." *Walden*, 134 S. at 1121. The holding of *Walden* is therefore unquestionably controlling authority on the question of whether AKAS II has sufficient minimum contacts to create specific jurisdiction in Washington.

**2. The Supreme Court’s Use of “Suit-Related Conduct” and “Challenged Conduct” in *Walden* Represents a New Focusing of the Due Process Analysis for Specific Personal Jurisdiction.**

Huynh mistakenly contends that *Walden* “created no new principle or test,” for specific jurisdiction. App. Reply Br. p. 7. *Walden* in fact re-frames the specific jurisdiction analysis using terminology absent from all prior rulings on the topic. The Court has not previously used the terms “suit-related conduct” or “challenged conduct” in its personal jurisdiction jurisprudence.<sup>4</sup> Justice Thomas’ unanimous opinion cites no prior authority in support of its pronouncement that “[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.” *Walden*, 134 S. Ct. at 1121. While it draws on “[w]ell established principles of personal jurisdiction,” *id.* at 1126, the guidance that courts must focus on the defendant’s suit-related conduct and whether that conduct created a substantial relationship with the forum, is new.

The requirement for “minimum contacts” has been in place for more than 70 years, since *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Walden* does not alter that requirement. *Walden* does, however, instruct the lower courts on how to determine whether such minimum contacts exist in specific jurisdiction cases.

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<sup>4</sup> In her dissent to *Daimler AG v. Bauman*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 746, 772 n.10 (2014), Justice Sotomayor noted that “specific jurisdiction focuses on the relationship between a defendant’s challenged conduct and the forum State.” Extensive research has not revealed prior use of these terms in an opinion on personal jurisdiction.

This is evident from the structure of the opinion itself. Part II.B.1 reviews and analyzes the requirement of minimum contacts, emphasizing that due process requires that the “defendant’s suit-related conduct must create a substantial connection with the forum State,” and highlighting two key points. “First, the relationship must arise out of contacts that the defendant *himself* creates with the forum State.” *Walden*, 134 S. Ct. at 1122 (citation and internal quotation marks omitted, emphasis in original). “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.” *Id.* The principles set forth in this part of the opinion have universal application to all types of causes of action.

In Part II.B.2, the Court narrows the focus of its analysis, turning to principles that apply specifically in the context of intentional torts. *Id.* at 1123 (“These same principles apply when international torts are involved.”). And in Part II.B.3, the Court applies these principles to the facts of *Walden*.

Relevant to this appeal is the discussion and analysis in Part II.B.1, which applies to specific jurisdiction in all types of causes of action; this section sets forth the most recent pronouncement from the Court on what due process requires for the exercise of specific personal jurisdiction. It establishes the “proper lens” through which a defendant’s conduct should be analyzed when evaluating specific personal jurisdiction. *See id.* at 1124 (“In short, when viewed through the proper lens—whether the *defendant’s* actions connect him to the *forum*—petitioner formed no

jurisdictionally relevant contacts with Nevada.”) (emphasis in original).

Huynh disregards *Walden*, and instead urges this Court to view AKAS II’s contacts using principles which *Walden* specifically rejects. Huynh focuses on foreseeability of harm (App. Reply Br. p. 6-7), volume of forum contacts (*id.* p.7), unrelated actions of agents and principals (*id.*), and a host of other factors that have no connection to AKAS II’s suit-related conduct, i.e., the conduct Huynh has challenged in his lawsuit.

This is the approach the trial court erroneously applied. The trial court did not tether its analysis to the challenged conduct—AKAS II’s allegedly negligent acts—and consequently failed to examine whether AKAS II’s suit-related conduct created the “substantial connection” to Washington that *Walden* teaches is required in order to satisfy due process. Instead, the trial court looked to whether AKAS II had interactions with persons or entities who resided in Washington. *See* CP 1146-47. Specifically, the trial court found that as a result of AKAS II’s contract with Marel Seattle, AKAS II “knew that [Marel] Seattle would be providing its workers to travel abroad to refit the *F/V Antarctic Sea*,” and as a result, AKAS II “knew . . . that Washington-based residents were likely to be among the mix.” CP 1146. This is precisely the sort of analysis which *Walden* holds is improper. *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.”).<sup>5</sup>

**C. The Trial Court Failed to Focus its Jurisdictional Inquiry on the Suit-Related, or Challenged, Conduct, Resulting in a Misapplication of the Jurisdictional Tests.**

The trial court found that the first of the *Shute/Tyee* factors (“The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state . . . .” CP 1143) was satisfied because “AKAS II purposefully sought out [Marel] Seattle, engaged it in a contract, and continued to pay that contract for work done in Washington.” CP 1145. The trial court further found that the second of the *Shute/Tyee* factors (“the cause of action must arise from, or be connected with, such act or transaction”) was satisfied because “there is a causal nexus between Mr. Huynh’s injury in Uruguay and AKAS II’s contract with [Marel] Seattle, its knowledge that Washington residents would travel to Uruguay, and the funds it expended to send Washington residents there.” CP 1147.

The trial court’s analysis is erroneous because it binds AKAS II to specific jurisdiction in Washington to account here for conduct that occurred, if at all, thousands of miles away in another hemisphere and that

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<sup>5</sup> The Eastern District of Michigan recently described *Walden* as “clarifying the more exacting requirements for case-specific jurisdiction...” *Gutman v. Allegro Resorts Mktg. Corp.*, 15-12732, 2015 WL 8608941, at \*5 (E.D. Mich. Dec. 14, 2015). The same court wrote: “[W]here *Conley* [a case from another district] implies that a mere ‘but-for’ relationship between contacts and claims will suffice to support an exercise of specific personal jurisdiction, it collides with later published decisions of our supervising appellate court...as well as the Supreme Court’s recent clear pronouncement in *Walden*, that any exercise of limited personal jurisdiction must be premised on a *substantial* connection between the alleged in-forum activities and the injuries for which a plaintiff seeks to recover.” *Id.*

was not directed at Washington. In other words, it fails to focus on AKAS II's challenged conduct—i.e., its alleged negligence on board the ANTARCTIC SEA in Uruguay. The trial court instead focused on the contract between AKAS II and Marel Seattle—the performance of which is not the subject of any of plaintiffs' claims against AKAS II (or AKAS, for that matter). As explained more fully below, the trial court's flawed analysis resulted in reversible error.

**1. The “Suit-Related” or “Challenged” Conduct Consists of AKAS II's Acts and Omissions aboard the ANTARCTIC SEA in Uruguay.**

AKAS discussed “suit-related” and “challenged” conduct at length in prior briefing. Resp. Br. pp. 22-26. In response, Huynh argues that AKAS' interpretation of suit-related or challenged conduct is too narrow,<sup>6</sup> but fails to articulate any meaningful alternative interpretation of the scope of these terms. App. Reply Br. pp. 13-15. Instead, Huynh argues that in *Walden* the Court highlighted the defendant's lack of activity in the forum state, from which Huynh reaches the unsupported conclusion that “[n]one of those act/contacts were needed for the intentional tort, but could have supported jurisdiction.” App. Reply Br. p. 14. *Walden* does not indicate

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<sup>6</sup> Huynh specifically suggests that AKAS believes *Walden* limits the jurisdictional inquiry to only those facts which comprise the elements of the cause of action. This is not what AKAS believes. There are certain causes of action for which such a restriction would be problematic. Indeed, *Walden* expressly leaves open the possibility of alternate tests in the context of torts committed via the Internet. *Walden*, 134 S. Ct. at 1125 n.9. It is also possible that certain types of product liability claims could require alternate tests. In a case such as this one, however, where ordinary negligence is at issue, there does not appear to be any reason to look beyond the acts and omissions challenged as wrongful in determining the scope of the challenged conduct.

that such contacts could have supported jurisdiction. *See Walden*, 134 S. Ct. at 1124-25. Nor does *Walden* indicate that such contacts should be considered suit-related or challenged conduct. *See id.* Instead, the opinion merely notes the absence of such contacts. *See id.* Huynh’s theory is not supported by the opinion.

Although the United States Supreme Court has not previously used the term “challenged conduct” in the context of personal jurisdiction, the term has long been utilized by the federal courts in other contexts, including, for example, subject matter jurisdiction, standing, mootness, the discretionary function exception, and preemption. Review of these cases is instructive in determining the scope of “challenged conduct.” The term consistently refers to the conduct which the plaintiff contends was wrongful; i.e., the acts and omissions alleged in the complaint. *See, e.g., Monzon v. United States*, 253 F.3d 567, 572 (11th Cir. 2001) (“We conclude that the challenged conduct in this case—the United States’ failure to warn Plaintiff’s wife of the danger of rip currents in the surf—is the type of conduct that the discretionary function exception was designed to protect.”); *Moore v. United States*, 817 F. Supp. 2d 1136, 1150 (N.D. Cal. 2011) (evaluating discretionary function exception and determining that for the exception to apply, “[t]he government must show that the challenged conduct—here the failure to provide a safe reefer room—involved some judgment....”). Moreover, subsequent to *Walden*, the lower courts have uniformly reached the same conclusion: the challenged conduct is that which is the focus of the complaint. *See Resp.*

Opening/Resp. Br. at pp. 23–26 & nn. 18-19.

Here, the challenged conduct consists of the acts and omissions of AKAS II as alleged in paragraph 4.1 of the Complaint. CP 3. Unless these acts and omissions create a “substantial connection with the forum state,” the exercise of jurisdiction is not consistent with due process. *See Walden*, 134 S. Ct. at 1122-23.

**2. AKAS II’s Suit-Related Conduct Did Not Create a Connection to Washington, Let Alone the “Substantial” Connection Due Process Requires.**

There is no connection (let alone a “substantial connection”) between AKAS II and Washington that was created by AKAS II’s suit-related conduct, as required by *Walden*. All of the alleged acts and omissions occurred far outside of Washington. CP 2-3. Huynh has not proved that AKAS II’s alleged injury-causing conduct occurred in or was directed to Washington. He has not proved and cannot prove that Huynh’s injuries suffered in Uruguay were a foreseeable consequence of AKAS II hiring Marel Seattle to perform work on the ANTARCTIC SEA. Seen through the “proper lens,” *id.* at 1124, AKAS II hiring Marel Seattle is not a relevant “but for” cause because it is completely unrelated to AKAS II’s suit-related conduct, i.e., its alleged negligence. There is nothing about hiring Marel Seattle, or about that company’s decision to send Huynh to Uruguay, that ordained (or even set in motion events that ensured) Huynh would be injured in Uruguay. Others were sent by Marel Seattle to work on projects in Uruguay without injury—including Huynh himself. *See, e.g.*, RP (8/17/15) at 84:19-23. If AKAS II’s errors or

omissions injured Huynh, those errors or omissions occurred in Uruguay while Huynh was there. Missing from the trial court's order, though, is any analysis of how AKAS II's suit-related conduct in Uruguay created the required substantial connection with Washington. *See Walden*, 134 S.Ct. at 1121. The only connection between the challenged conduct and this state is that Huynh, the alleged victim of that conduct, is a Washington resident, which is insufficient as a matter of law. *Id.* at 1122. AKAS II's suit-related conduct therefore created no connection whatsoever with Washington, let alone the "substantial" connection due process requires. *Walden*, 134 S.Ct. at 1121.<sup>7</sup>

**a) The Purposeful Direction Test Is Applicable, Appropriate, and Should Have Been Applied Below.**

Huynh contends that the purposeful availment test applies, and that the purposeful direction test is "incompatible with negligence claims." Reply Br. p. 10. Huynh is incorrect.

Case law reveals numerous examples of courts applying the purposeful direction test to negligence-based causes of action—including recent decisions of this Court. For example, in analyzing specific jurisdiction over negligent misrepresentation claims in *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, this Court explained that "[t]he purposeful availment analysis in the tort context permits the

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<sup>7</sup> Moreover, "the fact that a contract envisions one party discharging his obligations in the forum state cannot, standing alone, justify the exercise of jurisdiction over another party to the contract." *Picot v. Weston*, 780 F.3d 1206, 1213 (9th Cir. 2015).

exercise of jurisdiction when the claimant makes a prima facie showing that an out-of-state party's intentional actions were expressly aimed at the forum state and caused harm in the forum state.” 175 Wn. App. 840, 891, 309 P.3d 555, 580 (2013), *aff'd*, 180 Wn.2d 954, 331 P.3d 29 (2014). Although this Court did not use the term “purposeful direction,”<sup>8</sup> the elements described and considered, (1) an intentional act, (2) express aiming, and (3) harm caused in the forum state, are the same as those evaluated under the purposeful direction test. The Court then applied this test to the facts related to the negligent misrepresentation claim. *Id.*

This Court is by no means alone in applying the purposeful direction test to negligence-based causes of action. *See, e.g., Concord Servicing Corp. v. JPMorgan Chase Bank, N.A.*, CV 12-0438-PHX-JAT, 2012 WL 2913282, at \*2 (D. Ariz. July 16, 2012) (“Here, Plaintiff's claim against Whitney is for negligence, so the Court will apply the purposeful direction standard.”); *Penny Newman Grain Co. v. Midwest Paint Servs., Inc.*, CV-F-06-1021 OWWDLB, 2007 WL 4531700, at \*3 (E.D. Cal. Dec. 18, 2007) (“[B]ecause Midwest's claims against Norberg are based on negligence, the purposeful direction analysis is appropriate.”); *China Energy Corp. v. Hill*, 3:13-CV-00562-MMD, 2014 WL 4633784,

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<sup>8</sup> The Court does, however, use the term “purposeful availment” at the outset of its analysis of the first factor of the *Tyee/Shute* due process inquiry. *Id.* at 890-91, 309 P.3d at 580 As explained in AKAS’ prior briefing, courts “often use the phrase ‘purposeful availment in shorthand fashion, to include both purposeful availment and purposeful direction, . . . but availment and direction are, in fact, two distinct concepts.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). AKAS presumes this Court was doing the same in *FutureSelect*.

at \*5 (D. Nev. Sept. 15, 2014) (“The Court considers the Sammons’ negligence and breach of fiduciary duties claims through a purposeful direction analysis.”); *Catibayan v. SyCip Gorres Velayo & Co.*, 3:13-CV-00273-HU, 2013 WL 5536868, at \*5 (D. Or. Oct. 7, 2013) ( holding “[i]n this case, the Court concludes that the purposeful direction analysis should be applied because the present suit sounds in tort” in action “alleging claims for breach of fiduciary duty, negligence and fraud”), *aff’d*, 609 Fed. Appx. 428 (9th Cir. 2015).<sup>9</sup> AKAS concedes that there are also out-of-jurisdiction cases holding that the purposeful availment test—rather than purposeful direction—should be applied to negligence cases. There is nothing in those cases, however, that requires this Court to depart from precedent and apply a different test to negligence causes of action than it has applied in the past.

Huynh suggests that the purposeful direction test cannot be applied because “in negligence actions, a defendant does not perform intentionally injurious or tortious acts.” Reply Br. p. 10. Huynh misapprehends the nature of the “intentional act” required by this test. The term “intentional

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<sup>9</sup> AKAS recognizes that some of the cases cited involve intentional torts as well as negligence-based causes of action. This does not mean that the application of the purposeful direction test is somehow different in cases involving “mixed” causes of action, because jurisdiction is analyzed on a claim-by-claim basis, allowing for the application of either the “direction” or “availment” test depending on the nature of each specific claim. Indeed, as Huynh himself points out, *Picot v. Weston*, 780 F.3d 1206, 1212 (9th Cir. 2015) provides an excellent example of this principle: the Ninth Circuit applied the purposeful availment test to a contract claim, and then applied the purposeful direction test to a tort claim asserted against the same defendant. App. Reply. Br. p. 22.

act” has a “specialized meaning in the context of the *Calder* effects test.” *Wash. Shoe Co. v. A–Z Sporting Goods Inc.*, 704 F.3d 668, 673 (9th Cir. 2012) (quotation and citation omitted). The “intentional act” element refers 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.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 806 (9th Cir. 2004). Thus, it is entirely possible for a defendant to perform an “intentional act” in a negligence cause of action. Indeed, this Court found such intentional acts occurred in the context of the negligent misrepresentation cause of action in *FutureSelect*. 175 Wn. App. at 891. Here, the operative pleading alleges that the vessel ANTARCTIC SEA was unsafe “as the result of the actions of defendants’ agents,” “defendants and their agents failed to properly inspect the ship’s equipment,” and defendants “failed to warn” Huynh of this alleged unsafe condition, all of which took place while the vessel was located in Montevideo, Uruguay. CP 2-3 ¶¶ 3.3-3.4, 4.1. Just like the actions undertaken by the defendant in *FutureSelect*, the alleged actions and omissions of AKAS and AKAS II were “intentional,” in the sense of the purposeful direction test (actual physical acts in the real world), despite the fact that they are alleged to have been performed negligently.

In sum, the purposeful direction test, contrary to Huynh’s argument, can be (and is) applied to negligence causes of action. Moreover, this Court has recently applied that test to a negligence-based cause of action. The purposeful direction test should have been applied

below. Doing so would have properly focused the jurisdictional inquiry on AKAS II's challenged conduct, rather than forum contacts unrelated to that conduct.

**b) The Purposeful Direction Test Is Not Satisfied.**

The purposeful direction test is not satisfied because AKAS II's acts were not "expressly aimed" at Washington.

"The express aiming analysis depends, to a significant degree, on the specific type of tort or other wrongful conduct at issue." *Schwarzenegger*, 374 F.3d at 807. "When the alleged conduct involves an intentional tort, for example, the analysis is relatively straightforward." *C.S. v. Corp. of the Catholic Bishop of Yakima*, 13-CV-3051-TOR, 2013 WL 5373144, at \*4 (E.D. Wash. Sept. 25, 2013). "In these cases, the defendant's actions '[were] performed for the very purpose of having their consequences felt in the forum state.'" *Id.* (quoting *Schwarzenegger*, 374 F.3d at 807) (alteration in original).

"In cases of alleged negligence, by contrast, the express aiming requirement is more difficult to satisfy." *Id.* "Allegations of "untargeted negligence" are not enough to satisfy this element." *Hefferon v. Henry Perez, DDS, P.C.*, CIV 11-1541-PHX-MHB, 2011 WL 5974562, at \*3 (D. Ariz. Nov. 29, 2011). *Hefferon* involved allegations of negligent dental treatment. *See id.* at \*1. The bulk of the treatment occurred outside of the forum, in California, although some minor treatment involving the adjustment of a retainer took place in Arizona, the forum state. *Id.* The *Hefferon* court reasoned that "even if the out-of-state dental treatment

qualifies as an ‘intentional act’ that caused harm that Defendants ‘knew’ was likely to be suffered in [the forum state],” the express aiming requirement was not satisfied, because the plaintiff’s claims “rest on allegations of mere negligence.” *Id.* Only that conduct which occurred in Arizona—the adjustment of the retainer—was found to possibly constitute purposeful direction.<sup>10</sup> *Id.* at \*3-4.

Similarly, all of AKAS II’s alleged negligence took place on the vessel while located in Uruguay. CP 3 ¶¶ 3.3-3.4, 4.1. None of these actions were “expressly aimed” at Washington. Rather, they were aimed—if such untargeted negligence can be aimed at all—toward the Southern Ocean off of Antarctica, where the ANTARCTIC SEA harvests krill, or Uruguay, where the vessel typically docks for maintenance. *See* CP 944 ¶ 15; 1138. In sum, AKAS II’s suit-related conduct was not directed at Washington and did not create a substantial relationship between AKAS II and Washington.

**c) Huynh’s Alleged Injury Does Not “Arise Out Of” AKAS II’s Contacts with Washington.**

In response to AKAS’ arguments regarding the “arising out of” prong,” Huynh urges the Court to yet again ignore *Walden*. *See* App. Reply Br. p. 22. Even applying the “arising out of” test rather than

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<sup>10</sup> The *Hefferon* court found that adjustment of the retainer was not a “but for” cause of the negligence cause of action, because “[t]he adjustment to the retainer appears merely incidental to the out-of-state diagnosis and treatment, and is not the basis for the claims alleged in this lawsuit.” *Hefferon*, 2011 WL 5974562, at \*4. Although *Hefferon* pre-dates *Walden*, it nonetheless provides a good example of a jurisdictional inquiry that is properly focused in the connection between the challenged conduct and the forum state.

“purposeful direction,” AKAS II is not subject to jurisdiction in Washington.

Huynh acknowledges that there is some conduct which can occur in the chain of events leading up to an injury that is “too attenuated” to support jurisdiction even under a “but for” standard for relatedness. App. Reply Br. p. 24 (discussing *Sutcliffe* and reasoning that “[t]he fact that the Spanish defendant purchased engines in Arizona that killed and injured an aircrew in Canada was too attenuated”). It is precisely that sort of attenuation that is at play here.

Even if the “but for” test was not abrogated or modified by *Walden*, the test is not satisfied here. AKAS II’s contracting with Huynh’s employer is not alleged to have caused Huynh’s injuries. What is alleged to have caused his injuries is negligence that purportedly occurred entirely aboard ANTARCTIC SEA, in Uruguay. This same alleged negligence (i.e., the “suit-related conduct”) did not in any way depend upon a contract with Marel Seattle, or a decision by Marel Seattle to send Huynh to the vessel.

If AKAS II’s contract with Marel Seattle can be a “but for” cause of Huynh’s injuries, then the same contract should logically also give rise to the injuries sustained by anyone else injured by an allegedly unsafe condition aboard the ANTARCTIC SEA. Examination of this hypothetical, however, reveals the attenuated nature of the connection between the contract and Huynh’s negligence cause of action. Consider, for example, a scenario in which a Uruguayan shipyard worker was

injured aboard the vessel in the exact same manner as Huynh, by the very same conduct challenged in Huynh’s Complaint. If the Uruguayan shipyard worker wanted to maintain a lawsuit in Washington, even if he or she were to establish that the purposeful availment prong was somehow satisfied, the worker would need to show that the injuries would not have occurred “but for” AKAS II’s contract with Marel Seattle. The contract, however, has no connection whatsoever with the mechanism of injury or the alleged acts and omissions which proximately caused the injury. Even if the contract had never been entered into, AKAS II’s alleged acts and omissions would still have harmed the Uruguayan shipyard worker. This hypothetical demonstrates that the jurisdictional relevance of the contract between AKAS II and Marel Seattle is extremely limited: at most it created the possibility that a Washington resident sent by Marel Seattle to Uruguay would be affected by AKAS II’s conduct in Uruguay. This is exactly the kind of plaintiff-driven analysis which *Walden* rejects: “mere injury to a forum resident is not a sufficient connection to the forum.” 134 S. Ct. at 1125.<sup>11</sup>

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<sup>11</sup> Furthermore, focus on AKAS II’s activities in Washington that are not suit-related resulted in the trial court improperly substituting “but for” causality for “proximate” causality. “[W]here individuals purposefully derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise *proximately* from such activities...” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473–74, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528 (1985)(internal quotes and citation omitted, emphasis added). The object of the contract between AKAS II and Marel Seattle did not include harming Marel Seattle workers – that occurred *despite* the contract, not because of it.

**3. Jurisdiction over AKAS II Is Unreasonable in Light of the Attenuated Nature of the Connection between AKAS II's Forum Contacts and Huynh's Cause of Action.**

Huynh contends that “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,” and suggests that this is an improper approach to the reasonableness inquiry, App. Reply Br. p.28 n.17. Huynh is mistaken.

In opting for the “but for” approach to relatedness, the Washington Supreme Court balanced the potential over-breadth of the test with a “reasonableness” inquiry that would protect non-resident defendants from claims that were “too attenuated.” *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 770, 783 P.2d 78, 81 (1989) (citing *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1445 (9th Cir. 1988), *opinion withdrawn*, 872 F.2d 930 (9th Cir. 1989)). Specifically, the Washington Supreme Court cited to the Ninth Circuit’s justification of the “but for” test. *See id.* Addressing concerns about the “but for” test, the Ninth Circuit stated that “[a] restrictive reading of the ‘arising out of’ requirement is not necessary in order to protect potential defendants from unreasonable assertions of jurisdiction,” because “[t]he third prong of the *Data Disc* test [i.e., the reasonableness inquiry] provides that protection.” *Shute*, 863 F.2d at 1445. Thus, AKAS II’s arguments relating to the reasonableness inquiry are exactly what the Washington Supreme Court had in mind when it adopted the “but for” test. *See Shute*, 113 Wn.2d at 770, 783 P.2d at 81.

The factors which Huynh discusses in his arguments relating to the reasonableness inquiry have little to do with the connection between

AKAS II's challenged conduct and his cause of action. Indeed, these factors would be present in nearly any personal injury case in which a foreign corporation is alleged to be at fault. *See* App. Reply Br. p. 26-29 (noting that Huynh resides in Washington and therefore persons who have witnessed his the extent of his alleged damages tend to be located in Washington as well; noting that a foreign corporation that has conducted business in the United States is generally familiar with United States legal principles; noting that Washington has a worker's compensation scheme).

Moreover, Huynh overstates the significance of these factors. For example, Huynh suggests that it is likely the Washington Department of Labor and Industries "would never recover" if this litigation did not proceed in Washington, which is a basis for what Huynh contends is the State's "strong interest" in this case. The Department, however, has not made any effort whatsoever to oppose the dismissal of AKAS or AKAS II from this action or participate in the instant appeal. Moreover, Huynh's concerns regarding the recovery of proceeds from a possible foreign judgment are misplaced: the Legislature has given the Department broad powers to recover these funds from Huynh—and his counsel—should he fail to comply with the various statutory provisions relating to the distribution of such proceeds. RCW 51.24.060(6)-(7) (providing for "a lien upon the title to and interest in all real and personal property of the injured worker" and also authorizing the issuance of an "order and notice to withhold and deliver property" to any firm believed to have in its possession property subject to the aforementioned lien.). Thus, if Huynh

pursues his claims against AKAS in Norway, the State's interest in his recovery is unaffected.

Huynh's arguments regarding foreign law are similarly unavailing. Despite Huynh's lack of knowledge of foreign law, *see* App. Reply Br. p. 28, if this action proceeds here in Washington, the trial court will almost certainly apply Norwegian law to the substantive claims against AKAS II.<sup>12</sup> The trier of fact would then have to determine whether AKAS II's alleged acts and omissions in Uruguay aboard a Norwegian-flagged vessel were consistent with the standard of care required by the Norwegian Maritime Code.

In sum, the equities militate toward dismissal due to the attenuated connection between Huynh's cause of action and AKAS II's contacts with

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<sup>12</sup> In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), the Supreme Court identified seven factors "which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim": (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance of the injured party; (4) the allegiance of the defendant shipowner; (5) the place of contract; (6) the inaccessibility of a foreign forum; and (7) the law of the forum." *Trans-Tec Asia v. M/V HARMONY CONTAINER*, 518 F.3d 1120, 1124 (9th Cir. 2008). An eighth factor, the shipowner's base of operations, was added in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970).

Here, the alleged wrongful act occurred in Uruguay, the vessel is Norwegian-flagged, the injured parties are Washington residents, the shipowners/operators are Norwegian, there is no contract between plaintiffs and defendants, foreign law experts retained by defendants have concluded that both Uruguay and Norway are available fora, the law of the forum is Washington and/or United States federal law, and defendants' base of operations are either Uruguay or Norway.

Thus, the only *Lauritzen* factor weighing in favor of the application of United States law is the allegiance of the plaintiffs. "[T]he allegiance of a plaintiff, even when recruited in the United States, does not mandate the application of United States law in a maritime suit when all the other factors indicate the application of foreign law." *Fogleman v. ARAMCO (Arabian Am. Oil Co.)*, 920 F.2d 278, 284 (5th Cir. 1991); *see also Bilyk v. Vessel Nair*, 754 F.2d 1541 (9th Cir. 1985) (finding U.S. Jones Act and general maritime law did not apply to claims of U.S. citizen for injuries sustained on Mexican vessel in Mexican waters). Accordingly, Norwegian law will govern Huynh's claims.

Washington. When it adopted the “but for” test, the Washington Supreme Court did so because it believed the over-inclusive nature of the test would be tempered by the reasonableness inquiry, which would prevent the exercise of specific personal jurisdiction when the connection between the defendant’s forum related activities and the plaintiff’s cause of action was “too attenuated.” *Shute*, 113 Wn.2d at 770, 783 P.2d at 81. This appeal presents the very sort of attenuated connection which concerned the *Shute* court, and therefore dismissal is appropriate. *See id.*

**D. The “But For” Test Must Be Applied in a Manner Consistent with *Walden*.**

It is opening brief, AKAS contended that the trial court erred by relying on dicta in *Theunissen v. Matthews*, 935 F.2d 1454 (6th Cir. 1991). In response, Huynh, contends that *Theunissen* is persuasive, and urges this Court to follow *Theunissen* as well. Huynh, however, neglects to advise the Court that the Sixth Circuit subsequently abandoned the “but for” test, joining the overwhelming majority of jurisdictions that have found the test incompatible with the requirements of due process. *Beydoun v. Wataniya Restaurants Holding, Q.S.C.*, 768 F.3d 499 (6th Cir. 2014).

As the Sixth Circuit recently explained in *Beydoun*, “more than mere but-for causation is required to support a finding of personal jurisdiction.” *Id.* at 507. The Sixth Circuit reasoned, as have other Circuits, that “[b]ut-for causation cannot be the sole measure of relatedness because it is vastly over inclusive . . . .” *Id.* (quoting *O’Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 322 (3d. Cir. 2007)). “The problem is that it

has no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain.” *Id.* (quoting *Sandy Lane Hotel*, 496 F.3d at 322 (internal quotation marks omitted). The dicta in *Theunissen* that Huynh urges upon this Court would today not be followed in the very jurisdiction that originally authored it.

Although *Walden* does not expressly provide that the “but for” test is abrogated, the test cannot survive unless it can be applied in a manner consistent with *Walden’s* requirement that the “defendant’s suit-related conduct must create a substantial connection with the forum State.” *Walden*, 134 S. Ct. at 1121. If the “but for” test can be satisfied with nothing more than a purchase of goods or services from a Washington vendor at some remote point in the causative chain, then the test fails to comport with due process. *See id.*

### III. CONCLUSION

For the forgoing reasons, the trial court’s Order on Motion to Dismiss should be reversed, and AKAS II should be dismissed for lack of personal jurisdiction.

Respectfully submitted this 31st day of October, 2016.

NICOLL BLACK & FEIG



By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I certify that on the 31st day of October, 2016, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

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<i>Department of Labor &amp; Industries</i> Re: L&I Claim No. Y118595 Michael D. Patjens Third Party Section Department of L&I PO Box 44288 Olympia, WA 98504 Patj235@lni.wa.gov	<input type="checkbox"/> MESSENGER <input type="checkbox"/> VIA FACSIMILE <input type="checkbox"/> VIA U.S. MAIL <input checked="" type="checkbox"/> VIA E-MAIL

I declare under penalty of perjury that the foregoing is true and correct, and that this certificate was executed on October 31, 2016 at Seattle, Washington.




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Katherine Smith Jacobs

FILED  
October 31, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 74241-8-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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NAM CHUONG HUYNH and LIN R. BUI, husband and wife, and JO-  
HANNAH 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

and MAREL SEATTLE, INC., a Washington State corporation,

*Defendant*

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**APPENDIX TO REPLY BRIEF OF RESPONDENT/CROSS-  
APPELLANT AKER BIOMARINE ANTARCTIC AS**

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APPEAL FROM THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR KING COUNTY  
NO. 14-2-31832-4 SEA

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**APPENDIX A –  
UNPUBLISHED OPINIONS**

<i>Catibayan v. SyCip Gorres Velayo &amp; Co.</i> , 3:13-CV-00273-HU, 2013 WL 5536868, at *5 (D. Or. Oct. 7, 2013)	A1-A7
<i>China Energy Corp. v. Hill</i> , 3:13-CV-00562-MMD, 2014 WL 4633784, at *5 (D. Nev. Sept. 15, 2014)	A8-A13
<i>Concord Servicing Corp. v. JPMorgan Chase Bank, N.A.</i> , CV 12-0438-PHX-JAT, 2012 WL 2913282, at *2 (D. Ariz. July 16, 2012)	A14-A17
<i>C.S. v. Corp. of the Catholic Bishop of Yakima</i> , 13-CV-3051-TOR, 2013 WL 5373144, at *4 (E.D. Wash. Sept. 25, 2013)	A18-A27
<i>Gutman v. Allegro Resorts Mktg. Corp.</i> , 15-12732, 2015 WL 8608941, at *5 (E.D. Mich. Dec. 14, 2015)	A28-A33
<i>Hefferon v. Henry Perez, DDS, P.C.</i> , CIV 11-1541-PHX-MHB, 2011 WL 5974562, at *3 (D. Ariz. Nov. 29, 2011)	A34-A38
<i>Penny Newman Grain Co. v. Midwest Paint Servs., Inc.</i> , CV-F-06-1020 OWW/DLB, 2007 WL 4531700, at *3 (E.D. Cal. Dec. 18, 2007)	A39-A51

**CERTIFICATE OF SERVICE**

I certify that on the 31st day of October, 2016 I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

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<p>Philip A. Talmadge  Talmadge/Fitzpatrick/Tribe  2775 Harbor Avenue SW  Third Floor, Suite C  Seattle, WA 98126  Email: <a href="mailto:Phil@tal-fitzlaw.com">Phil@tal-fitzlaw.com</a></p>	<input type="checkbox"/> VIA MESSENGER <input type="checkbox"/> VIA FACSIMILE <input type="checkbox"/> VIA U.S. MAIL <input checked="" type="checkbox"/> VIA E-MAIL/ECF
<p><i>Guardian ad Litem</i>  Jo-Hanna Read  600 North 36<sup>th</sup> Street, #306  Seattle, WA 98103  Email: <a href="mailto:jolawyer@read-law.com">jolawyer@read-law.com</a></p>	<input type="checkbox"/> VIA MESSENGER <input type="checkbox"/> VIA FACSIMILE <input type="checkbox"/> VIA U.S. MAIL <input checked="" type="checkbox"/> VIA E-MAIL
<p><i>Attorneys for Defendant Marel  Seattle, Inc.</i>  Jennifer K. Sheffield  Erin M. Wilson  Lane Powell PC  1420 Fifth Avenue, Suite 4200  Seattle, WA 98111  Email: <a href="mailto:SheffieldJ@lanepowell.com">SheffieldJ@lanepowell.com</a>  <a href="mailto:WilsonEm@lanepowell.com">WilsonEm@lanepowell.com</a></p>	<input type="checkbox"/> VIA MESSENGER <input type="checkbox"/> VIA FACSIMILE <input type="checkbox"/> VIA U.S. MAIL <input checked="" type="checkbox"/> VIA E-MAIL

<p>William J. Cremer  Joshua D. Yeager  Cremer, Spina, Shaughnessy, Jansen  &amp; Siegert, LLC  1 North Franklin, 10<sup>th</sup> Floor  Chicago, IL 60606  Email: <u>WCremer@CremerSpina.com</u>  <u>JYeager@CremerSpina.com</u></p>	<p><input type="checkbox"/> MESSENGER  <input type="checkbox"/> VIA FACSIMILE  <input type="checkbox"/> VIA U.S. MAIL  <input checked="" type="checkbox"/> VIA E-MAIL</p>
<p><i>Department of Labor &amp; Industries</i>  Re: L&amp;I Claim No. Y118595  Michael D. Patjens  Third Party Section  Department of L&amp;I  PO Box 44288  Olympia, WA 98504  Patj235@lniwa.gov</p>	<p><input type="checkbox"/> MESSENGER  <input type="checkbox"/> VIA FACSIMILE  <input type="checkbox"/> VIA U.S. MAIL  <input checked="" type="checkbox"/> VIA E-MAIL</p>

I declare under penalty of perjury that the foregoing is true and correct, and that this certificate was executed on October 31, 2016 at Seattle, Washington.




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Katherine Smith Jacobs

2013 WL 5536868

Only the Westlaw citation is currently available.  
United States District Court,  
D. Oregon.

Cesar Y. CATIBAYAN, a U.S. Citizen, Plaintiff,

v.

SYCIP GORRES VELAYO & CO. (SGV), a.k.a. SGV/Ernst &  
Young (SGV/Ey), a Philippine Accounting firm, Defendant.

No. 3:13-cv-00273-HU.

|  
Oct. 7, 2013.

**Attorneys and Law Firms**

Cesar Y. Catibayan, Vancouver, WA, Pro Se Plaintiff.

Douglas E. Goe, Orrick, Herrington & Sutcliffe LLP, Portland, OR, Daniel J. Dunne, Jr., Orrick, Herrington & Sutcliffe LLP, Seattle, WA, for Defendant.

**ORDER**

HERNANDEZ, District Judge:

\*1 Magistrate Judge Dennis J. Hubel issued a Findings and Recommendation (dkt.# 49) on August 14, 2013, recommending that Defendant's motion to dismiss (dkt.# 11) be granted and Plaintiff's action be dismissed for lack of general and specific jurisdiction. Plaintiff filed timely objections to the Magistrate Judge's Findings and Recommendation. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1) and rule 72(b) of the Federal Rules of Civil Procedure.

When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, as here, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir.2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.2003) (en banc). I have carefully considered Plaintiff's objections and conclude that his objections do not provide a basis to modify the Findings and Recommendation. I have also reviewed the pertinent portions of the record *de novo* and find no error in the Magistrate Judge's Findings and Recommendation.

**CONCLUSION**

The Court ADOPTS the Magistrate Judge's Findings and Recommendation (dkt. # 49). Accordingly, Defendant's motion to dismiss (dkt.# 11) is granted, and this action is dismissed with prejudice.

IT IS SO ORDERED.

## FINDINGS AND RECOMMENDATION

HUBEL, United States Magistrate Judge:

Defendant SyCip Gorres Velayo & Co. (“Defendant”) moves to dismiss this action on the grounds that: (1) this Court lacks personal jurisdiction over Defendant; (2) the doctrine of *forum non conveniens* precludes going forward in the District of Oregon; and (3) Plaintiff Cesar Catibayan’s (“Plaintiff”) complaint fails to state a claim upon which relief can be granted. For the reasons that follow, Defendant’s motion (Docket No. 11) to dismiss should be granted on the grounds that Plaintiff has established neither general, nor specific jurisdiction over Defendant in Oregon.

### I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a former resident of Oregon who currently resides in Vancouver, Washington. Defendant “is a professional accounting firm organized and existing under the laws of the Philippines as a general professional partnership, with its principal office located [in] ... Makati City, Philippines.” (Alcantara Decl. ¶ 3.) Defendant “provides accounting and auditing services to clients throughout the Philippines.” (Alcantara Decl. ¶ 3.) Defendant “is not licensed to perform professional services in Oregon or in any other state in the United States, nor does it perform professional services in the United States.” (Alcantara Decl. ¶ 4.) Defendant “has no employees or offices located within the United States.” (Alcantara Decl. ¶ 4.)

Both parties agree that this action concerns an audit report Defendant issued in January 1997 in connection with a business dispute that had been commenced in a Philippines-based court (hereinafter the “Regional Trial Court or “RTC”) in May 1995. That proceeding was initiated by Fischer Engineering and Maintenance Company (“FEMCO”), a Delaware corporation co-owned by Plaintiff and Donald Fischer (“Fischer”). FEMCO had a license to perform construction work in the Philippines and, up until May 1995, FEMCO maintained its principal place of business in Portland, Oregon.<sup>1</sup>

\*2 FEMCO sued its “Filipino General Manager and Chief Operating Officer,” Isaias Bongar (“Bongar”), who is a citizen of the Philippines, in the RTC for breach of contract. (Alcantara Decl. Ex. C at 4, 9; Pl.’s P. & A. [Docket 32–2] at 1.) About two years earlier, in October 1993, FEMCO hired Bongar to oversee its operations in the Philippines, despite the fact that Bongar had previously allegedly breached two agreements to purchase the company. (Alcantara Decl. Ex. C at 8–9.) In late February 1994, Bongar apparently got his hands on “pre-endorsed blank” FEMCO stock certificates and proceeded to “illegally [take] over ... the entire FEMCO organization in the Philippines and claimed the American company as his own to the exclusion of the two American owners Fis[c]her and [Plaintiff].” (Alcantara Decl. Ex. C at 9; Pl.’s P. & A. [Docket 32–1] at 2.) As Plaintiff explains, “Bongar got hold of the stock certificates in February 1994, ... shut down the FEMCO office in Manila City and moved everything i.e., office furniture, equipment, etc., including all the personnel to his compound in Las Pinas, Rizal, Metro Manila.” (Pl.’s P. & A. [Docket 32–1] at 2.)

By way of an engagement letter dated February 12, 1996, the RTC, with the approval of FEMCO and Bongar,

hired [Defendant] as an independent auditor who pursuant to the directive of the RTC ... were tasked to inspect the books and records of ... FEMCO; verify the payments of Bongar for his purchase of 100 common shares of stock belonging to FEMCO’s shareholders; and ascertain the sources of the funds used by Bongar in claiming his alleged payments to FEMCO for said purchase.

(Alcantara Decl. Ex. C [Docket No. 14–1] at 10; Pl.’s P. & A. [Docket No. 32–4] at 1.) Defendant submitted its audit report on January 22, 1997, and was paid a fee in the amount of \$10,000—“which was equally shared between FEMCO

and Bongar (with the stipulation that the losing party [would] reimburse the winning party for its share of the audit fee).” (Alcantara Decl. Ex. C at 10.) Ultimately, FEMCO was the losing party in the RTC.

Not satisfied with Defendant's audit report and the RTC's rulings (which Plaintiff has appealed successfully in the ongoing case in the Philippines against Bongar), Plaintiff mounted attacks against Defendant in various administrative and judicial fora around the world. Plaintiff filed his complaint in the present action on February 15, 2013, alleging, inter alia, causes of action for negligence, breach of fiduciary duty, and fraud. It is Plaintiff's belief that Defendant submitted “a highly erroneous and fraudulent audit report,” despite its “knowledge and possession of documentary evidence [ ] that materially affected and contradicted [its] audit findings.” (Compl. at 1.) Plaintiff's complaint was served on Defendant in Makati City, Philippines, on February 26, 2013. (Proof Serv. [Docket No. 5] at 1–3.) Defendant's motion followed on March 19, 2013.

## II. LEGAL STANDARD

\*3 Where, as here, “the existence of personal jurisdiction is challenged and the defendant appears specially to contest its presence in the jurisdiction, the plaintiff has the burden to come forward with some evidence to establish jurisdiction.” *DRW-LLC v. Golden Harvest Holdings, Inc.*, No. 3:12-CV-01009-BR, 2013 WL 1296075, at \*2 (D.Or. Mar. 28, 2013) (citation omitted). “The court may consider evidence presented in affidavits to assist it in its determination and may order discovery on the jurisdictional issues.” *Id.*

When the “court rule[s] on the issue relying only on affidavits [and/or] discovery materials without holding an evidentiary hearing,” which is the case here, “dismissal is appropriate only if the plaintiff has not made a prima facie showing of personal jurisdiction.” *Dist. Council No. 16 of Int'l Union of Painters & Allied Trades, Glaziers, Architectural Metal & Glass Workers, Local 1621 v. B & B Glass, Inc.*, 510 F.3d 851, 855 (9th Cir.2007) (citation omitted). Indeed, as the Ninth Circuit more recently explained:

Absent an evidentiary hearing this court only inquires into whether the plaintiff's pleadings and affidavits make a prima facie showing of personal jurisdiction. Uncontroverted allegations in the plaintiff's complaint must be taken as true. Conflicts between the parties over statements contained in affidavits must be resolved in the plaintiff's favor.

*Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir.2008) (citation and internal quotation marks omitted; brackets deleted).

“To determine whether there is personal jurisdiction over a non-resident defendant in a diversity case, a federal court must look to the law of the forum state.” *W. Helicopters, Inc. v. Rogerson Aircraft Corp.*, 715 F.Supp. 1486, 1489 (D.Or.1989) (citing *Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1246 (9th Cir.1984)). Oregon's long-arm statute is co-extensive with federal standards, so this court may exercise personal jurisdiction if doing so comports with federal constitutional due process. *Gray & Co. v. Firstenberg Mach. Co.*, 913 F.2d 758, 760 (9th Cir.1990). Due process requires that a defendant 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. State of Wash.*, 326 U.S. 310, 316 (1945). The pertinent determination for the court is whether the “defendant's conduct and connection with the forum [s]tate are such that he should reasonably anticipate being haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

## III. DISCUSSION

There are two types of personal jurisdiction: general and specific. If general jurisdiction is inapplicable, the court must then determine whether specific jurisdiction exists. *In re Tuli*, 172 F.3d 707, 713 n. 5 (9th Cir.1999). The Court will proceed first to the general jurisdiction analysis.

#### A. General Jurisdiction

\*4 For general jurisdiction to exist, “the defendant must engage in continuous and systematic general business contacts ... that approximate physical presence in the forum state.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir.2004) (internal quotation marks and citations omitted). The Ninth Circuit has set a high standard for general jurisdiction, *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1169 (9th Cir.2006), because such a finding “permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world.” *Schwarzenegger*, 374 F.3d at 801. Factors to be taken into consideration include whether the non-resident defendant “makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there.” *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir.2000), *overruled on other grounds by Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir.2006) (en banc).

In this case, it is abundantly clear that Defendant's affiliations with Oregon are not “so ‘continuous and systematic’ as to render them essentially at home in th[is] ... [s]tate.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011). Many examples can be given, but one suffices to illustrate this point. In *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218 (9th Cir.2011), it was argued that Brand, an Ohio corporation that operated an interactive website called celebrity-gossip.net, was subject to general jurisdiction in California. *Id.* at 1222. Brand and its website had several specific ties to California, including (1) Brand made money from third-party advertisements for jobs, hotels, and vacations in California; (2) the website featured a “Ticket Center,” which enabled third-party vendors to sell tickets to events in California; (3) Brand had several agreements with California businesses; (4) a California Internet advertising agency solicited buyers and placed advertisements on the website; (5) a California wireless phone service provider designed and hosted on its servers a version of the website that was accessible to cell phone users; (6) a California firm designed the website and performed site maintenance; and (7) Brand entered a “link-sharing” agreement with a California-based national news site, according to which each site agreed to promote the other's top stories. *Id.* The Ninth Circuit held that Brand's contacts fell “well short of the requisite showing for general jurisdiction” and “reiterate[d] that Brand ha[d] no offices or staff in California, [was] not registered to do business in the state, ha[d] no registered agent for service of process, and pa[id] no state taxes.” *Id.* at 1225.

The level of activity rejected in *Mavrix* as insufficient to make out a case for general jurisdiction is greater than that which exists on the record before this Court. As in *Mavrix*, the Court emphasizes that Defendant “is not licensed to perform professional services in Oregon or in any other state in the United States,” (Alcantara Decl. ¶ 4), and it “has no employees or offices located within the United States.” (Alcantara Decl. ¶ 4.) Plaintiff does not dispute these facts, nor does he allege that Defendant has a registered agent for service of process in Oregon or pays state taxes. *See Levine v. Entrust Group, Inc.*, No. C 12-03959 WHA, 2013 WL 1320498, at \*2 (N.D.Cal. Apr. 1, 2013) (making similar observations in concluding that a defendant was not subject to general jurisdiction in California). Indeed, the only apparent contact with Oregon is the fortuitous hiring of Defendant by the RTC in the Philippines in conjunction with litigation in that court where one of the parties to the litigation at that time had an Oregon office. Accordingly, Defendant's contacts with Oregon do not justify the exercise of general jurisdiction.

#### B. Specific Jurisdiction

\*5 The Ninth Circuit applies a tripartite analysis to determine whether the exercise of specific jurisdiction over a non-resident is appropriate:

- (1) [t]he non-resident defendant must purposefully direct his activities or consummate some transaction with the forum [state] or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum [state], thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the [non-resident] 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 at 802 (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir.1987)). “The plaintiff bears the burden of satisfying the first two prongs of the test. If the plaintiff fails to satisfy *either* of these prongs, personal jurisdiction is not established in the forum state.” *Schwarzenegger*, 374 F.3d at 802 (emphasis added).

The first prong of the specific jurisdiction test refers to both purposeful direction and purposeful availment. A purposeful availment analysis is most often used in suits sounding in contract, while a purposeful direction analysis is used in suits sounding in tort. *Schwarzenegger*, 374 F.3d at 802. In this case, the Court concludes that the purposeful direction analysis should be applied because the present suit sounds in tort. (Compl. at 1) (alleging claims for breach of fiduciary duty, negligence and fraud); *Ufrvaksina v. Olden Group, LLC*, No. 10-6297-AA, 2011 WL 5244697, at \*7 (D.Or. Oct. 30, 2011) (fraud is a tort claim); *Regatta Bay Ltd. v. United States*, 506 F. App'x 617, 618 (9th Cir.2013) (breach of fiduciary duty is a tort claim); *Skanning v. Sorensen*, No. 09-00364, 2009 WL 5449149, at \*5 (D.Haw. Dec. 10, 2009) (negligence is a tort claim).

The three-part *Calder* effects test, taken from the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984), is used by the Ninth Circuit to evaluate purposeful direction. *Schwarzenegger*, 374 F.3d at 803. Under this test, “the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Yahoo! Inc.*, 433 F.3d at 1206 (internal quotation marks omitted).

### 1. Intentional Act

The Ninth Circuit “construe[s] ‘intent’ in the context of the ‘intentional act’ test as referring 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.” *Schwarzenegger*, 374 F.3d at 806. The “intentional act” element is easily satisfied here. Defendant committed an intentional act when it produced the audit report. *Cf. Bancroft*, 223 F.3d at 1088 (sending a letter was an intentional act).

### 2. Express Aiming

\*6 The Ninth Circuit has held that *Calder* does not stand for the “broad proposition” that “a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction,” *Bancroft*, 223 F.3d at 1087; there must be “something more.” *Id.* That “something more” is “express aiming” at the forum state, which “encompasses wrongful conduct individually targeting a known forum resident.” *Washington Shoe Co. v. A-Z Sporting Goods, Inc.*, 704 F.3d 668, 675 (9th Cir.2012) (quoting *Bancroft*, 223 F.3d at 1087)).

The dispute underlying this litigation commenced when FEMCO (a Delaware corporation licensed to perform work in the Philippines) brought an action for breach of contract against Bongar (a citizen of the Philippines that worked as a manager for FEMCO) in a Philippines-based court (the RTC) on May 17, 1995. (Pl.'s P. & A. [Docket 32-2] at 1.) Also in May 1995, while Plaintiff was residing in Maryland, it was decided that FEMCO would no longer maintain its principal place of business in Portland, Oregon. (Fischer Aff. [Docket No. 30-3] ¶¶ 3, 33, 37.) Sometime shortly thereafter, FEMCO's co-owners, Plaintiff and Fischer, mutually decided that Plaintiff and his family should move back to Portland, Oregon, where it would be easier for Plaintiff “to travel to and from Manila at any time while the court

hearings [before the RTC] were scheduled almost on a month basis [beginning in] August 1995.” (Fischer Aff. ¶ 34; Alcantara Decl. Ex. C at 9.)<sup>2</sup>

Several months later, by way of an engagement letter dated February 12, 1996, the RTC, with the approval of FEMCO and Bongar,

hired [Defendant] as an independent auditor who pursuant to the directive of the RTC ... were tasked to inspect the books and records of ... FEMCO; verify the payments of Bongar for his purchase of 100 common shares of stock belonging to FEMCO's shareholders; and ascertain the sources of the funds used by Bongar in claiming his alleged payments to FEMCO for said purchase.

(Alcantara Decl. Ex. C [Docket No. 14–1] at 10; Pl.'s P. & A. [Docket No. 32–4] at 1.) Defendant submitted its audit report on January 22, 1997, and was paid a fee in the amount of \$10,000—“which was equally shared between FEMCO and Bongar (with the stipulation that the losing party [would] reimburse the winning party for its share of the audit fee).” (Alcantara Decl. Ex. C at 10.)

With this background in mind, the Court turns to Plaintiff's voluminous opposition papers. Taken together, Plaintiff has filed over 400 pages worth of single-spaced briefing, affidavits, exhibits and annexes in response to Defendant's motion to dismiss.<sup>3</sup> Plaintiff addresses the *Calder* effects test at page 9 of his sixth opposition to Defendant's motion to dismiss, where he argues that Defendant “engaged in a course of conduct that was designed to harm American investors ... and to cause in the forum, USA.” (Pl.'s P. & A. [Docket No. 29–1] at 9; Compl. at 15.) Plaintiff also claims that Bongar's conduct, which was “abetted and supported by [Defendant]'s false audit report,” caused FEMCO to close “its operations in Portland, Oregon.” (Pl.'s P. & A. at 10.)

\*7 All of this may be true, but there is no record evidence to support the conclusion that Defendant was individually targeting a known Oregon resident, as opposed to a resident of the United States. Indeed, Defendant was hired by the RTC in February 1996, several months after FEMCO decided to no longer maintain its principal place of business in Oregon. And Plaintiff does not allege that Defendant knew he had moved from Maryland to Oregon during the time period of February 1996 (when Defendant was hired by the RTC) through January 1997 (when Defendant issued its audit report). This would seem to negate any possibility that Defendant's “conduct and connection with the forum [s]tate are such that [it] should [have] reasonably anticipate[d] being haled into court [ ] here.” *World-Wide Volkswagen*, 444 U.S. at 297.

Plaintiff seeks to convince this Court otherwise by pointing out that (1) from 1985 to early 2002, Defendant was a member firm of Andersen Worldwide Societe Cooperative, which was also known as Arthur Andersen Worldwide Organization (“AAW”); (2) Defendant is a member of Ernst & Young Global (“EYG”); and (3) Plaintiff received emails from Defendant in March and April 2000 in response to his inquiries regarding proceedings in the RTC. This is of little import because (1) Plaintiff was living in Vancouver, Washington at the time the emails were received, (Fischer Aff. ¶ 36), (2) Defendant remained a separate and autonomous legal entity during its time as a member firm of AAW and EYG, (Alcantara Supp. Decl. ¶¶ 5–6; Phillips Decl. Ex. A at 3), and (3) AAW and EYG are coordinating bodies that do not manage, control or govern the conduct or affairs of any of their member firms, (Alcantara Supp. Decl. ¶¶ 5–6; Phillips Decl. Ex. A at 3). *See Goh v. Baldor Elec. Co.*, No. 3:98–MC–064–T, 1999 WL 20943, at \*3 (N.D.Tex. Jan. 13, 1999) (“Other than shared membership in the common association of Ernst & Young International, Ernst & Young LLP, Ernst & Young Singapore, and Ernst & Young Thailand are separate entities.”); *see also Nasser v. Andersen Worldwide Societe Co-op.*, 2003 WL 22179008, at \*1 n. 1 (S.D.N.Y. Sept. 23, 2003) (explaining that AAW “was created to coordinate the professional practices of the separate national practice entities that were affiliates of Arthur Andersen & Co. Each national practice was to be kept separate, autonomous, and [AAW] did not earn net income, nor did it engage in professional practice.”)

In summary, the Court concludes that Defendant's conduct was not expressly aimed at a known Oregon resident. See *Schwarzenegger*, 374 F.3d at 805 (explaining that even “[t]he mere fact that [the defendant] can ‘foresee’ that the [challenged conduct] will ... have an effect in [the forum state] is not sufficient for an assertion of [specific] jurisdiction.” (quoting *Calder*, 365 U.S. at 789)). Because Plaintiff failed to sustain his burden with respect to the second part of the *Calder* effects test, the Court need not reach the third part of the test. *Schwarzenegger*, 374 F.3d at 807 n. 1. Nor does it need to address the remaining two prongs of the three-part specific jurisdiction analysis. See *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir.2006) (“[Plaintiff’s] arguments fail under the first prong. Accordingly, we need not address [the remaining two prongs].”)

#### IV. CONCLUSION

\*8 For the reasons stated, Defendant's motion (Docket No. 11) to dismiss should be granted on the grounds that Plaintiff has established neither general, nor specific jurisdiction over Defendant in Oregon.<sup>4</sup>

#### V. SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due **September 3, 2013**. If no objections are filed, then the Findings and Recommendation will go under advisement on that date. If objections are filed, then a response is due **September 20, 2013**. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

#### All Citations

Not Reported in F.Supp.2d, 2013 WL 5536868

#### Footnotes

- 1 FEMCO's "registration in the [state of] Oregon ... has been under inactive status" since March 1991. (Fischer Aff. ¶ 3; Phillips Supp. Decl. Ex. A at 2.)
- 2 Plaintiff moved from Oregon to Laurel, Maryland in 1988. (Pl.'s P. & A. [Docket 30-3] at 9.)
- 3 The Court acknowledges that, "[w]ithout prior Court approval, memoranda ... may not exceed 11,000 words, or in the alternative, 35 pages." LR 7-2(b)(1). Nevertheless, the Court declines Defendant's request to "disregard the portion of the briefing that exceeds the permissible limits," (Def.'s Reply at 1), because (1) some of the additional material was helpful, (2) Plaintiff is appearing pro se, and (3) the Court believes Plaintiff's lack of compliance was a good-faith mistake.
- 4 While this decision was pending, Plaintiff inquired about submitting documents indicating the results from an appeal in the Philippine court system that he alleges has been successful. Having already filed several responses to Defendant's motion to dismiss, and there being no likelihood an appeal of the action in the Philippines will change any of the facts for jurisdictional purposes, no further documents may be filed on this issue.

2014 WL 4633784

Only the Westlaw citation is currently available.  
United States District Court,  
D. Nevada.

CHINA ENERGY CORPORATION, Plaintiff,

v.

Alan HILL, et al., Defendants,

Elena Sammons and Michael Sammons, Third-Party Plaintiffs,

v.

Cede & Co., The Depository Trust Company, and COR Clearing, Third-Party Defendants.

No. 3:13-cv-00562-MMD-VPC.

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Signed Sept. 15, 2014.

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**ORDER**

(Defs.' Motion to Dismiss And/Or Strike—dkt. no. 152)

MIRANDA M. DU, District Judge.

**I. SUMMARY**

\*1 Before the Court is a Motion to Dismiss And/Or Strike (dkt. no. 152) filed by ThirdParty Defendants Cede & Co. (“Cede”) and The Depository Trust Company (“DTC”) (together, “DTC Defendants”). The Court has also reviewed the opposition filed by ThirdParty Plaintiffs Elena and Michael Sammons (“the Sammons”) (dkt. no. 172) and DTC Defendants' reply (dkt.nos.171, 200). For the following reasons, the motion is granted.

**II. BACKGROUND**

In an order issued on June 13, 2014, the Court addressed a similar Motion to Dismiss and/or To Strike filed by Third-Party Defendant COR Clearing, LLC (“COR”). (Dkt. no. 226.) COR’s motion focused on Fed.R.Civ.P. 14(a), whereas the present motion takes issue with this Court’s jurisdiction and the sufficiency of the Sammons’ pleadings, along with Rule 14. (See dkt. no. 161.) The order denying COR’s motion (“COR Order”) erroneously noted that COR was the only Third-Party Defendant to move to dismiss or strike the Sammons’ First Amended Third Party Complaint. (Dkt. no. 226 at 2.) On June 18, 2014, the Court granted, in part, the Sammons’ Motion to Correct the COR Order, recognizing that DTC and Cede had filed the present motion in February 2014. (Dkt. no. 230.)

This motion arises out of a complaint filed by Plaintiff China Energy Corporation (“CEC”) in the First Judicial District Court of the State of Nevada in and for the County of Carson City. (Dkt. no. 128–1 at 1.) CEC seeks a declaration that certain shareholders—including the Sammons—did not properly dissent to a stock split. (*Id.* at 4–7.) CEC alleges that the Sammons “failed to timely deposit [their] stockholder’s certificates,” (*id.* ¶¶ 33–34), and that their “purported demand was expressed” in the wrong currency. (*Id.* ¶ 35.) Because of these errors, CEC asks the Court to declare that “[n]o defendant is entitled to payment for his or her shares.” (*Id.* at 7.) Alternatively, CEC requests a “fair value determination” that before the stock split, CEC’s stock was worth \$0.14 per share. (*Id.* at 6–7.)

After removing CEC’s action, the Sammons filed a Third-Party Complaint against Cede, DTC, and COR (together, “Third-Party Defendants”), pursuant to Rule 14. (Dkt. no. 128.) Proceeding pro se, the Sammons allege that the Third-Party Defendants vitiated their ability to dissent to CEC’s stock split. (*Id.* ¶¶ 19, 25, 28, 32–36, 40–41.) The Sammons allege that in so doing, the Third-Party Defendants breached a contract, their fiduciary duties, and were negligent. (*Id.* ¶ 41.) If, as CEC requests, this Court declares that the Sammons failed to dissent to CEC’s stock split, the Sammons request a declaratory judgment specifying that, but for the Third-Party Defendants’ errors, the Sammons would have properly dissented to CEC’s stock split.<sup>1</sup> (*Id.* at 12.)

DTC is a securities depository and clearing agency. (*Id.* ¶¶ 5–6; dkt. no. 152–1, Ex. 1 ¶ 7.) DTC is incorporated in New York as a limited purpose trust company; its primary place of business is New York City, New York. (Dkt. no. 152–1, Ex. 1 ¶ 7.) Securities deposited with DTC are registered to Cede, DTC’s nominee. (*Id.* ¶ 9.) Cede is a partnership under New York law, and its principal place of business is New York City, New York. (*Id.* ¶ 7; dkt. no. 128 ¶ 4.)

\*2 Before CEC’s stock split, the Sammons allege that they asked Cede, the shareholder of record for their CEC shares, to provide a letter consenting to their dissent pursuant to NRS § 92A.400(2). (Dkt. no. 128 ¶¶ 17–18.) DTC allegedly refused to provide this written consent, instead indicating that it would charge \$400 to perfect the Sammons’ dissenters’ rights. (*Id.* ¶¶ 19, 40.) The Sammons contend that Cede mailed a dissenters’ rights letter to CEC in Nevada, asserting appraisal rights for Elena Sammons’ shares. (*Id.* ¶ 25.) Because the letter misstated the number of shares at issue and Elena Sammons’ address, Cede allegedly withdrew the letter and submitted a corrected copy to CEC. (*Id.* ¶¶ 25, 28.) Additionally, the Sammons allege that the Third-Party Defendants caused Quicksilver Stock Transfer, LLC (“Quicksilver”), CEC’s Nevadabased stock transfer agent, to print an unnecessary stock certificate for their shares. (*Id.* ¶¶ 23, 31–35; see dkt. no. 200 at 42.) The stock certificate was untimely delivered to CEC. (Dkt. no. 128 ¶¶ 34–35.)

DTC Defendants argue that the Third-Party Complaint should be dismissed for three reasons. (Dkt. no. 152 at 3.) First, they assert that the Court lacks personal jurisdiction. Second, they contend that the Sammons’ impleader was improper under Rule 14. Third, they argue that the Sammons fail to state essential elements of their claims. The Court finds that the personal jurisdiction argument is dispositive.

### III. LEGAL STANDARD

Courts must liberally construe complaints filed by pro se litigants. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). Like other plaintiffs, pro se third-party plaintiffs bear the burden of establishing the district court’s personal jurisdiction. See *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir.2004). Where, as here, the defendant’s motion

is based on written materials rather than an evidentiary hearing, “the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss.” *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir.2010) (internal quotation marks omitted). The plaintiff cannot “‘simply rest on the bare allegations of its complaint,’ [but] uncontroverted allegations in the complaint must be taken as true.” *Schwarzenegger*, 374 F.3d at 800 (citation omitted) (quoting *Amba Mktg. Sys., Inc. v. Jobar Int’l, Inc.*, 551 F.2d 784, 787 (9th Cir.1977)). The court “may not assume the truth of allegations in a pleading which are contradicted by affidavit,” *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1284 (9th Cir.1977), but it may resolve factual disputes in the plaintiff’s favor, *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir.2006).

#### IV. DISCUSSION

A two-part analysis governs whether a court retains personal jurisdiction over a nonresident defendant. “First, the exercise of jurisdiction must satisfy the requirements of the applicable state long-arm statute.” *Chan v. Soc’y Expeditions*, 39 F.3d 1398, 1404 (9th Cir.1994). Because “Nevada’s long-arm statute, NRS § 14.065, reaches the limits of due process set by the United States Constitution,” the Court moves to the second part of the analysis. *Baker v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 999 P.2d 1020, 1023 (Nev.2000). “Second, the exercise of jurisdiction must comport with federal due process.” *Chan*, 39 F.3d at 1404–05. “Due process requires that nonresident defendants have certain minimum contacts with the forum state so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.” *Id.* at 1405 (citing *Int’l Shoe v. Washington*, 326 U.S. 310, 316 (1945)). Courts analyze this constitutional question with reference to two forms of jurisdiction: general and specific jurisdiction. The Sammons contend that only specific jurisdiction covers DTC Defendants. (*See* dkt. no. 172 at 5.)

\*3 Specific jurisdiction exists where “[a] nonresident defendant’s discrete, isolated contacts with the forum support jurisdiction on a cause of action arising directly out of its forum contacts.” *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1075 (9th Cir.2011). Courts use a three-prong test to determine whether specific jurisdiction exists over a particular cause of action:

- (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.

*Id.* at 1076 (quoting *Schwarzenegger*, 374 F.3d at 802)). The party asserting jurisdiction bears the burden of satisfying the first two prongs. *Id.* If it does so, the burden shifts to the party challenging jurisdiction to set forth a “‘compelling case’ that the exercise of jurisdiction would not be reasonable.” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985)).

The Court concludes that the Sammons cannot demonstrate the first prong required to establish specific jurisdiction. The Court therefore will not address the remaining two prongs.

“The first prong of the specific jurisdiction test refers to both purposeful availment and purposeful direction.” *Id.* In contract cases, a court asks whether a defendant “purposefully avails itself of the privilege of conducting activities or consummates a transaction in the forum.” *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir.2006) (en banc) (quoting *Schwarzenegger*, 374 F.3d at 802) (internal quotation marks and alterations omitted). In tort cases, the court asks whether a defendant “purposefully directs” its activities at the forum state and applies an “effects” test that looks to where the defendant’s actions were felt, rather than where they occurred. *Id.* (quoting *Schwarzenegger*, 374 F.3d at 803).

Here, the Sammons seek a declaratory judgment that DTC Defendants failed to follow Nevada's dissenters' rights laws, NRS § 92A.440, by sending defective and untimely documents to CEC. The Sammons assert that DTC Defendants were negligent, breached a contract, and breached their fiduciary duties in failing to comply with NRS § 92A.440. (Dkt. no. 128 ¶ 41.) Because the Sammons allege both contract and tort claims, the Court examines DTC Defendants' alleged contacts with Nevada under both the purposeful availment and purposeful direction frameworks. *See Yahoo! Inc.*, 433 F.3d at 1206 (discussing tests in the context of a First Amendment claim).

#### A. Purposeful Availment

\*4 Purposeful availment occurs when a defendant “deliberately has engaged in significant activities within a state, or has created continuing obligations between himself and residents of the forum.” *Burger King Corp.*, 471 U.S. at 475–76 (citations and internal quotation marks omitted). A single act associated with a forum state may be sufficient, “[s]o long as it creates a ‘substantial connection’ with the forum.” *Id.* at 475 n. 18 (internal quotation marks omitted). Activities constituting purposeful availment may include “executing or performing a contract” in a forum state. *Schwarzenegger*, 374 F.3d at 802. In holding that personal jurisdiction existed over a franchisee in the franchisor's home state, the Court in *Burger King* examined the parties' “prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing.” *Burger King Corp.*, 471 U.S. at 479. Here, even when liberally construed, neither the Third-Party Complaint nor the Sammons' opposition shows that DTC Defendants “purposefully avail[ed] [themselves] of the privilege of conducting activities within [Nevada].” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

The Sammons allege that DTC Defendants were contractually bound to carry out certain activities in Nevada. (Dkt. no. 172 at 9.) The contract at issue allegedly arose from a \$400 payment DTC charged to process the Sammons' dissent letter. (*See id.*, Exh. B.) The Sammons assert that they were either parties to the contract, or were third party beneficiaries. (*Id.*, Exh. A ¶ 6; dkt. no. 128 ¶ 40.) By charging the fee, the Sammons contend that DTC Defendants agreed to perfect their rights as dissenters, a process defined by NRS § 92A.440 as the (1) timely delivery of a dissenters' rights letter, and (2) the timely delivery of stock certificates. (Dkt. no. 172 at 9); *see* NRS § 92A.440(1). Thus, the Sammons argue, because DTC Defendants executed a contract that required performance in Nevada, they purposefully availed themselves of the forum.

Assuming the \$400 fee created a contractual obligation to perfect the Sammons' dissenters' rights,<sup>2</sup> the Sammons have not demonstrated that their contract with DTC Defendants had a “substantial connection with [Nevada].” *Burger King Corp.*, 471 U.S. at 479 (*quoting McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). First, the alleged contractual obligations do not involve any residents of the forum state. The Sammons are residents of Texas, not Nevada (dkt. no. 128 ¶¶ 2, 9), and DTC Defendants' principal place of business is New York. (Dkt. no. 128 ¶¶ 4, 6; dkt. no. 152–1, Exh. 1 ¶¶ 7, 9.) Second, in terms of the activities involved, no negotiations occurred in or revolved around Nevada, and no written agreement suggests that the parties contemplated any consequences that might occur in Nevada. The Sammons Affidavit notes, however, that the Sammons paid the \$400 fee to perfect their rights under Nevada law, indicating that Nevada appeared in the parties' course of dealing. (Dkt. no. 172, Exh. A ¶ 5.) But it is not clear what effect, if any, Nevada had on the course of dealing. Presumably, the parties would have reached the same agreement—where, for a \$400 fee, DTC Defendants would assume responsibility for perfecting the Sammons' dissenters' rights—if CEC were domiciled in a different state.

\*5 Furthermore, in performing their contractual obligation, DTC Defendants had only five points of contact with Nevada. (*See* dkt. no. 128 ¶¶ 23, 25, 28, 31–35.) As described by the Sammons, these contacts are: (1) a package Quicksilver mailed to Cede, which contained a transmittal letter for consenting shareholders, a dissenters' rights notice, and a form demand letter; (2) a dissenters' rights letter on behalf of Elena Sammons; (3) a withdrawal of that dissenters' rights letter; (4) an amended dissenters' rights letter; and (5) correspondence to order a stock certificate.<sup>3</sup> (*Id.*) These few contacts are attenuated—rather than suggesting a substantial connection to Nevada, they reflect a single transaction carried out for remote shareholders. *See Burger King Corp.*, 471 U.S. at 466–68 (finding purposeful availment through

extensive communications with the forum state, including months-long negotiations); *Gray & Co. v. Firstenberg Mach. Co., Inc.*, 913 F.2d 758, 760–61 (9th Cir.1990) (finding no purposeful availment where contacts with forum state consisted of phone calls and an oral purchase agreement). Moreover, no evidence indicates that DTC Defendants' business benefitted from contact with Nevada. Instead, the exhibits show that DTC Defendants would recoup the same fee regardless of where they agreed to send dissenters' materials. (Dkt. no. 172, Exh. B); see *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 840 (nonresident company purposefully availed itself of the state where a contract was performed because it benefitted from coal deliveries there). Accordingly, the Sammons have not made a prima facie showing of purposeful availment.

### B. Purposeful Direction

The Court considers the Sammons' negligence and breach of fiduciary duties claims through a purposeful direction analysis. To determine whether DTC purposefully directed its actions to Nevada, the Court employs the “effects” test, which requires that “the defendant allegedly [must] have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Yahoo! Inc.*, 433 F.3d at 1206 (alteration in original) (quoting *Schwarzenegger*, 374 F.3d at 803) (internal quotation marks omitted).

Although the Sammons satisfy the first two elements of the “effects” test, they have not alleged any harm occurring in the forum state. See *id.* at 1207 (clarifying that the test may be satisfied so long as a “jurisdictionally sufficient amount of harm is suffered in the forum state”). First, by alleging that DTC Defendants prepared and sent dissenters' rights materials to CEC in Nevada, the Sammons describe an intentional act. See *Schwarzenegger*, 374 F.3d at 806 (defining an intentional act as an “external manifestation of [an] actor's will” and “an intent to perform an actual, physical act in the real world”). Second, these acts were expressly aimed at Nevada, where CEC's activity regarding the stock split occurred. Third, however, the harm arising from these acts—the Sammons' failure to perfect their dissenters' rights—occurred in Texas, not Nevada. See *Yahoo!*, 433 F.3d at 1210–11. Indeed, the Sammons have not alleged that CEC or any other Nevada-based entity was harmed by their failure to perfect their dissenters' rights. Because they accordingly cannot satisfy the “effects” test, the Sammons have not made a prima facie showing of purposeful direction.

## V. CONCLUSION

\*6 The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion or reconsideration as they do not affect the outcome of the Motion.

It is ordered that DTC Defendants' Motion to Dismiss And/Or Strike (dkt. no. 152) is granted.

### All Citations

Not Reported in F.Supp.3d, 2014 WL 4633784

### Footnotes

- 1 The Sammons also seek costs and other awards, as appropriate. (Dkt. no. 128 at 12.)
- 2 DTC Defendants stress that the Sammons improperly alleged these contractual obligations for the first time in their opposition to the present motion. (See dkt. no. 200 at 7.) Liberally construed, the Third-Party Complaint alleges a contract through which the DTC Defendants agreed to perfect their dissenters' rights. (Dkt. no. 128 ¶ 40.) The Court therefore assumes that the contract exists for this analysis.
- 3 A declaration submitted with DTC Defendants' motion (“Rex Declaration”) contradicts the allegation that DTC Defendants sent dissenters' rights letters to Nevada. (Dkt. no. 200, Decl. of Colette Rex.) The Rex Declaration indicates that COR—not DTC or Cede—mailed two dissenters' rights letters and a withdrawal letter to CEC in Nevada. (*Id.* ¶ ¶ 9, 13.) The Rex

**China Energy Corp. v. Hill, Not Reported in F.Supp.3d (2014)**

Declaration includes shipping labels for each letter. (*Id.*, Exhs.D, G.) The Sammons, however, included with their opposition an affidavit from Michael Sammons (“Sammons Affidavit”) pursuant to Rule 56(d). (Dkt. no. 172, Exh. A.) The Sammons Affidavit states that Cede delivered two dissenters' rights letters to CEC in Nevada. (*Id.* ¶¶ 7–8.) Because the Court may consider affidavits in deciding a Rule 12(b)(2) motion, *see Data Disc, Inc.*, 557 F.2d at 1284–85, and because the Court must liberally construe pro se filings, the Court construes the Sammons Affidavit as supporting the Sammons' opposition to the Rule 12(b)(2) motion to dismiss. So construed, the Sammons Affidavit contradicts the Rex Declaration. Because the Court resolves factual disputes in the plaintiff's favor, the Court assumes that DTC Defendants engaged in correspondence with CEC in Nevada. *See Pebble Beach Co.*, 453 F.3d at 1154.

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United States District Court,  
D. Arizona.

CONCORD SERVICING CORPORATION, Plaintiff,

v.

JPMORGAN CHASE BANK, N.A.; Whitney National Bank; Standard Chartered Bank, Defendants.

No. CV 12-0438-PHX-JAT.

|  
July 16, 2012.

#### Attorneys and Law Firms

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#### ORDER

JAMES A. TEILBORG, District Judge.

\*1 Pending before the Court is Defendant Whitney National Bank's ("Whitney") Motion to Dismiss. (Doc. 28). The Court now rules on the Motion.

#### I. BACKGROUND

Plaintiff is an Arizona corporation. (Doc. 1-1 at 2). Whitney is a regional banking institution based in Louisiana. (Doc. 24 at 2). Plaintiff alleges that between 2009 and 2011, Victor Aguilar fraudulently indorsed 221 checks ("Checks") that had been intended for the customers of Plaintiff's clients. (Doc. 1-1 at 3-6). Plaintiff further alleges that Whitney accepted some portion of the Checks for processing. *Id.* at 6. Plaintiff argues that accepting the Checks for processing, and presenting them to Defendant JPMorgan Chase Bank for payment, was negligent. *Id.* at 9.

Whitney now moves to dismiss Plaintiff's claim against it, arguing that this Court lacks personal jurisdiction over Whitney. (Doc. 28 at 1-2).

#### II. LEGAL STANDARD

##### A. BURDEN OF PROOF

When a defendant moves prior to trial to dismiss a complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2), the district court determines the method of resolving the jurisdictional issue. *Data Disc, Inc. v. Sys. Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir.1977). If the parties have submitted only written materials, the plaintiff "must make only a prima facie showing of jurisdictional facts through the submitted materials in order to avoid a defendant's motion to dismiss." *Id.*

## B. PERSONAL JURISDICTION

In the absence of a federal statute governing the existence of personal jurisdiction, a federal court applies the personal jurisdiction law of the state in which the court sits. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir.2004); *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 559 (9th Cir.1995). 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); *Uberti v. Leonardo*, 181 Ariz. 565, 892 P.2d 1354, 1358 (Ariz.1995).

The Due Process Clause requires that a nonresident defendant have certain minimum contacts with the forum state such that the exercise of personal 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) (internal quotation omitted). Due process protects a defendant'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." *Omeluk v. Langsten Slip & Batbyggeri*, 52 F.3d 267, 270–71 (9th Cir.1995) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)).<sup>1</sup>

Personal jurisdiction may be either general or specific. See *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414–15 nn. 8–9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) (citations omitted). General jurisdiction exists when a defendant has "continuous and systematic" contacts with the forum state. *Id.* at 415 (quoting *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437, 445, 72 S.Ct. 413, 96 L.Ed. 485 (1952)); see also *Data Disc*, 577 F.2d at 1287. A state may exercise specific jurisdiction over a defendant lacking continuous and systematic contacts if the controversy is related to or arises out of the defendant's contacts with a forum state. See *Helicopteros Nacionales*, 466 U.S. at 414 (internal quotation omitted). In evaluating whether an exercise of specific jurisdiction is proper, courts focus on the "relationship among the defendant, the forum, and the litigation." *Id.* (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977)). The inquiry evaluates the "nature and quality of the defendant's contacts in relation to the cause of action." *Data Disc*, 577 F.2d at 1287.

\*2 The Ninth Circuit applies a three-prong test to determine whether a defendant's contacts with the forum state are sufficient enough that an exercise of personal jurisdiction comports with due process. See *Schwarzenegger*, 374 F.3d at 802.

(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.

*Id.* (citing *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir.1987)); see also *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir.2000). The plaintiff bears the burden of satisfying the first two prongs of this test, *Schwarzenegger*, 374 F.3d at 802, and is "obligated to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction." *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir.1986) (quoting *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir.1977)). Once the plaintiff has made this showing, "the burden then shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Schwarzenegger*, 374 F.3d at 802 (citing *Burger King*, 471 U.S. at 476–78).

The first prong of the three-part specific jurisdiction test requires the plaintiff to establish either that the defendant purposefully availed himself of the privilege of conducting activities within the forum state or that he purposefully directed his activities toward the forum state. *Id.* Availment and direction are distinct concepts, with availment being the

standard for suits based in contract and direction the standard for suits based in tort. *Id.* Here, Plaintiff's claim against Whitney is for negligence, so the Court will apply the purposeful direction standard.

The second prong of the Ninth Circuit's test for specific jurisdiction, whether the claim arises out of or relates to the defendant's forum-related activities, is a "but for" test. *Doe v. Unocal Corp.*, 248 F.3d 915, 924 (9th Cir.2001); *see also Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir.1995). The claim arises out of the defendant's forum-related activities if, but for the contacts between the defendant and the forum state, the cause of action would not have arisen. *Id.* at 924.

Once a plaintiff has shown that the first two prongs of the test are satisfied, a court presumes that the exercise of personal jurisdiction is reasonable. *Ballard*, 65 F.3d at 1500 (citing *Sher v. Johnson*, 911 F.2d 1357, 1364 (9th Cir.1990)). The burden then shifts to the defendant to show a compelling case that the exercise of jurisdiction would be unreasonable. *Id.*; *Schwarzenegger*, 374 F.3d at 802 (citing *Burger King*, 471 U.S. at 476-78).

### III. DISCUSSION

#### A. SPECIFIC JURISDICTION

\*3 Plaintiff asserts that Whitney's actions in processing the Checks give this Court specific jurisdiction over Whitney. Applying the first part of the Ninth Circuit test for specific jurisdiction, Plaintiff does not meet its burden of demonstrating that Whitney purposely directed its actions toward Arizona. The three-part *Calder* effects test, taken from the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), is used to evaluate purposeful direction. Under this test, "the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir.2006).

To satisfy the first requirement of the effects test, it is enough that a defendant performed "an actual, physical act in the real world." *Schwarzenegger*, 374 F.3d at 806. The defendant need not have intended "to accomplish a result or consequence of that act." *Id.* Here, Whitney's acceptance and presentment of the Checks to Defendant Chase constitutes an intentional act. Thus, the first prong of the *Calder* test is satisfied.

"The second part of the *Calder*-effects test requires that the defendant's conduct be expressly aimed at the forum." *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1129 (9th Cir.2010). As a general principle, express aiming requires more than " 'untargeted negligence' that merely happened to cause harm to [a plaintiff]." *Schwarzenegger*, 374 F.3d at 807 (quoting *Calder*, 465 U.S. at 789). The "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.'" *Menken v. Emm*, 503 F.3d 1050, 1059 (9th Cir.2007) (quoting *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir.2002)); *see also Bancroft*, 223 F.3d at 1087 (concluding that " 'express aiming' encompasses wrongful conduct individually targeting a known forum resident").

Here, Plaintiff fails to show that Whitney's alleged wrongdoing was expressly aimed at Plaintiff. Whitney's alleged negligence arose in the normal course of banking. (Doc. 28 at 4). Plaintiff does not allege that Whitney's allegedly wrongful conduct individually targeted Plaintiff or that Whitney was even aware that Plaintiff was an Arizona resident when it processed the Checks. Moreover, Courts generally have rejected the idea that a nonresident bank's processing of a check connected to the forum state gives rise to specific jurisdiction. *See Resolution Trust Corp. v. First of Am. Bank*, 796 F.Supp. 1333, 1337 n. 3 (C.D.Cal.1992) (collecting cases). Plaintiff thus has failed to make a prima facie showing of purposeful direction, the first prong of the three-part test for specific personal jurisdiction. This Court therefore need not proceed to the remaining two prongs. Plaintiff has not shown that Defendants have sufficient minimum contacts with Arizona such that this Court's exercise of specific personal jurisdiction would comport with Defendants' due process rights.

### B. GENERAL JURISDICTION

\*4 Plaintiff also asserts that this Court may have general jurisdiction over Whitney. Plaintiff argues that it be allowed to conduct jurisdictional discovery in order to show that Whitney has continuous and systematic contacts with Arizona in the form of depositors or borrowers. The Third Circuit Court of Appeals, as Plaintiff argues, has confirmed general jurisdiction over an out-of-state bank based partly on the presence of depositors and outstanding loans within the forum state. *See Provident Nat'l Bank v. California Fed. Sav. & Loan*, 819 F.2d 434 (3d Cir.1987) (cited in *Ballard*, 65 F.3d at 1499). There, however, the out-of-state bank maintained a zero balance account with a bank within the forum. *Id.* at 438. That account involved daily communication and transactions between the banks, and was "a continuous and central part of [the out-of-state bank's] business." *Id.*

Here, Whitney has affirmed that it had no such relationship with an Arizona bank, nor any offices or direct operations in Arizona. (Doc. 28-2). Plaintiff merely alleges that a portion of Whitney's activities is traceable to Arizona. Perhaps general jurisdiction would exist if that portion were sufficiently large. *See Lakin v. Prudential Sec.*, 348 F.3d 704 (8th Cir.2003) (Jurisdictional discovery allowed where a ten million dollar loan portfolio in the state implied multi-year lending relationships with "hundreds, if not thousands of [forum] residents"). But there is no evidence of any business between Whitney and Arizona. Plaintiff essentially requests the Court allow it to conduct a fishing expedition in the hope of discovering some fact upon which general jurisdiction might be based. Without some foundation for this request, the Court will not grant it. *See Terracom*, 49 F.3d at 562 ("Where 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 defendants, the Court need not permit even limited discovery.") (quoting *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254, 259 (M.D.N.C.1988)).

### IV. CONCLUSION

The Court thus finds that it has neither specific nor general personal jurisdiction over Whitney. The Court also finds that Plaintiff has failed to articulate a sufficient basis for allowing jurisdictional discovery.

Accordingly,

**IT IS ORDERED** granting Whitney's Motion to Dismiss. (Doc. 28).

### All Citations

Not Reported in F.Supp.2d, 2012 WL 2913282

### Footnotes

- 1 A defendant may also choose to waive his due process rights and consent to personal jurisdiction. *See Burger King*, 471 U.S. at 472 n. 14.

2013 WL 5373144

Only the Westlaw citation is currently available.

United States District Court,

E.D. Washington.

C.S., Plaintiff,

v.

The CORPORATION OF THE CATHOLIC BISHOP OF YAKIMA, et al., Defendants.

No. 13-CV-3051-TOR.

|

Sept. 25, 2013.

**Attorneys and Law Firms**

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**ORDER ON DEFENDANTS' MOTIONS TO DISMISS**

THOMAS O. RICE, District Judge.

\*1 BEFORE THE COURT are the following motions: (1) Defendant Corporation of the Catholic Bishop of Yakima's Motion to Dismiss for Failure to State a Claim (ECF No. 2); (2) Defendant Diocese of Beaumont's Motion to Dismiss for Failure to State a Claim (ECF No. 6); (3) Defendant Diocese of Beaumont's Motion to Dismiss for Lack of Personal Jurisdiction (ECF No. 7); and (4) Defendant Diocese of Beaumont's Motion to Strike the Affidavit of Thomas P. Doyle (ECF No. 19). These matters were heard with oral argument on September 24, 2013, in Yakima, Washington. Vito de la Cruz and Bryan G. Smith appeared on behalf of the Plaintiff. Theron A. Buck and Thomas D. Frey appeared on behalf of Defendant Corporation of the Catholic Bishop of Yakima. Gregory J. Arpin and Randal G. Cashiola (telephonically) appeared on behalf of Defendant Diocese of Beaumont. The Court has reviewed the briefing and the record and files herein, and is fully informed.

**BACKGROUND**

Plaintiff has sued the Corporation of the Catholic Bishop of Yakima ("Yakima Diocese") and the Diocese of Beaumont ("Beaumont Diocese") for negligently failing to prevent him from being sexually abused as a minor by a priest named Father Ernest Dale Calhoun ("Father Calhoun"). Both Defendants have moved to dismiss the complaint for, *inter alia*, failure to plead sufficient facts to support an inference that the statute of limitations on Plaintiff's claims has been tolled under RCW 4.16.340. The Beaumont Diocese also seeks dismissal of Plaintiff's claims for lack of personal jurisdiction.

**FACTS**

The following facts are drawn from Plaintiff's complaint and are accepted as true for purposes of the instant motion only. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Plaintiff was sexually abused

by Father Calhoun on multiple occasions from approximately 1977 to 1982. Pl.'s Compl., ECF No. 1, at ¶ 3.2. The abuse began when Plaintiff was approximately 12 years old and continued until Plaintiff reached the age of 17. Pl.'s Compl., ECF No. 1, at ¶ 3.3. On at least one occasion, a church leader named Monsignor Ecker witnessed Father Calhoun “escorting” Plaintiff to the church rectory immediately prior to an instance of abuse. Pl.'s Compl., ECF No. 1, at ¶ 3.5.

Prior to joining the Yakima Diocese, Father Calhoun was affiliated with the Beaumont Diocese in Beaumont Texas. Pl.'s Compl., ECF No. 1, at ¶ 3.11. During his time in Beaumont, Father Calhoun was accused of engaging in “inappropriate sexual conduct with seminarians.” Pl.'s Compl., ECF No. 1, at ¶ 3.7. As a result of these accusations, Father Calhoun was ordered to undergo a psychological evaluation. Pl.'s Compl., ECF No. 1, at ¶ 3.8. The psychologist who performed the evaluation concluded that Father Calhoun posed a risk of engaging in inappropriate sexual conduct and recommended that he not be ordained as a priest. Pl.'s Compl., ECF No. 1, at ¶ 3.10. Despite this recommendation, the Beaumont Diocese ordained Father Calhoun as a priest in 1968. Pl.'s Compl., ECF No. 1, at ¶ 3.10.

\*2 After a brief period of service as a chaplain in the United States Navy (1974–1976), Father Calhoun sought employment with the Yakima Diocese. Pl.'s Compl., ECF No. 1, at ¶ 3.14. Upon receiving his application, the Yakima Diocese requested an evaluation of Father Calhoun's fitness to serve as a priest from the Beaumont Diocese. Pl.'s Compl., ECF No. 1, at ¶ 3.16. The Beaumont Diocese responded that while Father Calhoun had “experienced problems” during his tenure there, he would likely be successful in the Yakima Diocese. Pl.'s Compl., ECF No. 1, at ¶ 3.17. The Beaumont Diocese did not, however, “disclose in writing ... that Father Calhoun had been accused of inappropriate sexual conduct with minors in seminary and/or while employed by the Diocese of Beaumont, and that a psychological evaluation had concluded that Father Calhoun posed a risk of engaging in inappropriate sexual conduct.” Pl.'s Compl., ECF No. 1, at ¶ 3.18. The Yakima Diocese “incardinated” Father Calhoun and maintained authority, control and supervision over him. Pl.'s Compl., ECF No. 1, at ¶¶ 3.19 and 3.23.

## DISCUSSION

### A. Personal Jurisdiction Over the Beaumont Diocese

A motion to dismiss for lack of personal jurisdiction is governed by Federal Rule of Civil Procedure 12(b)(2). In opposing such a motion, the plaintiff bears the burden of establishing that jurisdiction is proper. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir.2008). When the motion is “based on written materials rather than an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss.” *Id.* (citing *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir.2010)). To satisfy this standard, a plaintiff “need only demonstrate facts that[,] if true[,] would support jurisdiction over the defendant.” *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir.2003) (quotation and citation omitted). In determining whether a plaintiff has made the requisite showing, a court must accept all uncontroverted allegations in the complaint as true and resolve any factual disputes in the Plaintiff's favor. *Id.*

The term personal jurisdiction refers to a court's power to render a valid and enforceable judgment against a particular defendant. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). The exercise of this power is limited by the Due Process Clause of the Fourteenth Amendment. In general, due process requires that a non-resident defendant have sufficient “minimum contacts” with the forum state such that requiring the defendant to defend in that forum would comport with 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).

Personal jurisdiction over a non-resident defendant may take one of two forms: general jurisdiction or specific jurisdiction. *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 233 F.3d 1082, 1086 (9th Cir.2000). General jurisdiction may be exercised over a defendant who has established “substantial” or “continuous and systematic” contacts with the forum, regardless of whether the cause of action arose from those contacts. *Id.* Specific jurisdiction, by contrast, may

only be exercised when the plaintiff's cause of action arises from the defendant's specific contacts with the forum. *Id.* In either case, the critical inquiry is whether the defendant's contacts with the forum are sufficiently extensive to warrant the exercise of personal jurisdiction. *Id.*

\*3 Plaintiff concedes that he is unable to establish general jurisdiction over the Beaumont Diocese. ECF No. 11 at 7. Thus, the Court will proceed directly to the specific jurisdiction analysis. The following three-part test controls:

- (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.

*Mavrix Photo*, 647 F.3d at 1228–29 (9th Cir.2011) (emphasis in original) (quotation and citations omitted). The plaintiff bears the burden of establishing that the first two prongs have been satisfied. *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1076 (9th Cir.2011). If the plaintiff is successful, the burden shifts to the defendant “to set forth a ‘compelling case’ that the exercise of jurisdiction would not be reasonable.” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)).

For the reasons discussed below, the Court concludes that (1) Plaintiff has failed to demonstrate that the Beaumont Diocese “purposefully directed” its activities toward the State of Washington; and (2) in the alternative, the Beaumont Diocese has made a “compelling case” that the exercise of specific jurisdiction would be unreasonable on the facts of this case.

#### 1. Purposeful Direction (*Calder Effects Test*)

The first prong of the specific jurisdiction test may be satisfied by either “purposeful direction” of the defendant's activities toward the forum state or “purposeful availment” of the forum state's laws. *Yahoo! Inc. v. La Ligue Contre La Racisme et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir.2006) (en banc). These are “two distinct concepts,” and courts applying them must be careful to apply the correct test based upon the type of claim(s) being asserted. *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 743 (9th Cir.2013). “In tort cases, [courts in the Ninth Circuit] typically inquire whether a defendant ‘purposefully directs his activities’ at the forum state[.]” *Yahoo! Inc.*, 433 F.3d at 1206. In deciding whether purposeful direction occurred, courts apply 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.” *Id.* This test, which is derived from the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), “requires that the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Mavrix Photo*, 647 F.3d at 1228 (quotation and citation omitted).

##### i. Intentional Act

\*4 The term “intentional act” has a “specialized meaning in the context of the *Calder* effects test.” *Wash. Shoe Co. v. A–Z Sporting Goods Inc.*, 704 F.3d 668, 673 (9th Cir.2012) (quotation and citation omitted). For purposes of this test, “an intentional act is an external manifestation of the actor's intent to perform an actual, physical act in the real world, not including any of its actual or intended results.” *Id.*

The Beaumont Diocese engaged in an intentional act when it sent a letter of recommendation to the Yakima Diocese on Father Calhoun's behalf. This was an “actual, physical act in the real world.” *Id.* The fact that the Beaumont Diocese may not have intended the alleged results of that act is irrelevant. *Id.* This prong of the *Calder* effects test is satisfied.

ii. Express Aiming

The “express aiming” prong 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.” *Wash. Shoe*, 704 F.3d at 675 (quotation and citation omitted); *see also Bancroft & Masters*, 223 F.3d at 1087 (“‘[E]xpress aiming’ encompasses wrongful conduct individually targeting a known forum resident.”). The nature of the express aiming analysis “depends, to a significant degree, on the specific type of tort or other wrongful conduct at issue.” *Schwarzenegger v. Fred Martin Motor Co.*, 347 F.3d 797, 807 (9th Cir.2004). When the alleged conduct involves an *intentional* tort, for example, the analysis is relatively straightforward. In these cases, the defendant’s actions “[were] performed for the very purpose of having their consequences felt in the forum state.” *Id.* Because such conduct implicates the forum state’s “special interest in exercising jurisdiction over those who commit intentional torts” against its residents, the exercise of personal jurisdiction is usually supported. *Id.* at 675–76 (citing *Licciardello v. Lovelady*, 544 F.3d 1280, 1286 (11th Cir.2008)).

In cases of alleged *negligence*, by contrast, the express aiming requirement is more difficult to satisfy. *See Calder*, 465 U.S. at 789 (distinguishing “untargeted negligence” from “express aiming”); *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1112 (same).<sup>1</sup> The dispositive question in such cases is whether the defendant “individually targeted” a resident of the forum state or whether it was “merely foreseeable that there [would] be an impact on individuals in the forum.” *Fiore v. Walden*, 688 F.3d 558, 581 (9th Cir.2012). Mere foreseeability of injury in the forum state is insufficient to satisfy the express aiming requirement; the plaintiff must demonstrate that the defendant made a conscious and deliberate effort to engage a resident of the forum. *See id.* at 577; *Wash. Shoe*, 704 F.3d at 677 (“[W]here a defendant *knows*—as opposed to being able to foresee—that an intentional act will impact another state, the ‘expressly aimed’ requirement is satisfied.”) (emphasis in original).

\*5 Plaintiff has failed to satisfy the express aiming requirement. First, Plaintiff cannot demonstrate that he was “individually targeted” by the Beaumont Diocese’s letter of recommendation. To whatever extent the Beaumont Diocese “knew or should have known” that its alleged misrepresentations about Father Calhoun would harm Washington residents, *see* ECF No. 11 at 9–13, there is no indication (or even an allegation) that *Plaintiff* was specifically targeted. At best, Plaintiff has established that the Beaumont Diocese should have anticipated that persons in his position might have been harmed. Such mere foreseeability of generalized harm, however, is insufficient to satisfy the express aiming requirement. *Fiore*, 688 F.3d at 581. Because the Beaumont Diocese did not “individually target[ ] a known forum resident,” Plaintiff cannot satisfy the express aiming prong of the *Calder* effects test. *Bancroft & Masters*, 223 F.3d at 1087. This absence of express aiming is fatal to Plaintiff’s ability to establish personal jurisdiction over the Beaumont Diocese. In the interest of developing a complete record, however, the Court will proceed with the remainder of the personal jurisdiction analysis.

iii. Foreseeability of Harm

The third prong of the *Calder* effects test “asks whether the intentional acts caused harm that the defendant knows is likely to be suffered in the forum state.” *In re W. States*, 715 F.3d at 744. The relevant inquiry is whether “the defendant’s intentional act ha[d] ‘foreseeable effects’ in the forum.” *Fiore*, 688 F.3d at 581.

Plaintiff has satisfied the foreseeability prong. Although a close question, the Beaumont Diocese could arguably have foreseen that failing to disclose Father Calhoun’s alleged propensity for “inappropriate sexual conduct” would result in harm to Washington residents. For purposes of this prong, it matters not whether the Beaumont Diocese could have foreseen harm to Plaintiff personally.

2. Claims Arising From Forum-Specific Contacts

The second prong of the specific jurisdiction analysis focuses on whether the plaintiff's claims arise out of the defendant's forum-related activities. Courts in the Ninth Circuit apply a "but for" test to determine whether this requirement has been satisfied. *In re W. States*, 715 F.3d at 742. "Under the 'but for' test, a lawsuit arises out of a defendant's contacts with the forum state if a direct nexus exists between those contacts and the cause of action." *Id.* (quotation omitted).

The Court finds that the "but for" test has been satisfied. Contrary to the Beaumont Diocese's assertions, Plaintiff need not establish that he would not have been *injured* "but for" its alleged negligence. *See* ECF No. 7 at 14. Instead, Plaintiff must merely demonstrate that his claims—irrespective of their underlying merit—would not have arisen but for the Beaumont Diocese's contacts with Washington. *In re W. States*, 715 F.3d at 742. That requirement is easily satisfied here, as Plaintiff's causes of action all arise from the Beaumont Diocese's communications with the Yakima Diocese about Father Calhoun.

### 3. Reasonableness Considerations

\*6 As noted above, because Plaintiff has failed to demonstrate purposeful direction of the Beaumont Diocese's activities toward Washington, personal jurisdiction is lacking. Nevertheless, assuming for the sake of argument that Plaintiff could establish purposeful direction, the Court concludes that the exercise of personal jurisdiction over this Defendant would offend traditional notions of fair play and substantial justice.

Once a plaintiff satisfies the first two prongs of the specific jurisdiction analysis, the burden shifts to the defendant to make a "compelling case" that the exercise of personal jurisdiction would be unreasonable—*i.e.*, that requiring the defendant to litigate in the forum would offend traditional notions of fair play and substantial justice. *In re W. States*, 715 F.3d at 745 (citing *Burger King*, 471 U.S. at 476–77). There are seven factors relevant to a court's reasonableness inquiry:

- (1) the extent of the defendant's 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 forum to the plaintiff's interest in convenient and effective relief; and
- (7) the existence of an alternative forum.

*Dole Food*, 303 at 1114. The Court will address each of these factors in turn.

#### i. Extent of Purposeful Injection

The extent of the Beaumont Diocese's purposeful injection into the State of Washington's affairs was *de minimis*. The Beaumont Diocese's *only* alleged contact with Washington was a letter mailed to the Yakima Diocese addressing Father Calhoun's fitness to serve as a priest. Notably, this letter was sent in response to a formal request for information *by the Yakima Diocese*; the Beaumont Diocese did not initiate the contact. *Doyle Aff.*, ECF No. 12, at ¶ 25. Moreover, according to Plaintiff, the Beaumont Diocese was "*required* by Church law and practice" to respond to the Yakima Diocese's inquiry. ECF No. 11 at 4 (emphasis added). A single obligatory letter of recommendation simply cannot support a finding of "purposeful injection" into the State of Washington's affairs.

Further, it bears noting that the Beaumont Diocese's endorsement of Father Calhoun was far from glowing. *See Doyle Decl.*, ECF No. 12, at ¶¶ 26–27. Plaintiff himself describes the letter as a "qualified and suspicious reference," *see* ECF No. 11 at 11, and this description appears to be supported by the excerpts of the letter in Mr. Doyle's affidavit. Thus, even assuming that the Beaumont Diocese omitted important facts about Father Calhoun's fitness to serve as a priest, the information which it *did* convey effectively put the Yakima Diocese "on notice" that Father Calhoun was not an ideal candidate. This circumstance also cuts against a finding that the Beaumont Diocese purposefully injected itself into Washington's affairs.

\*7 Plaintiff suggests that the purposeful injection factor should weigh in his favor because “the Beaumont Diocese retained personal authority and jurisdiction over Calhoun” during his first two years of probationary employment with the Yakima Diocese. ECF No. 11 at 14. There is no dispute that Father Calhoun remained “incardinated” with the Beaumont Diocese during his two-year term of “*ad experimentum*” employment with the Yakima Diocese, and that, as a result, Father Calhoun remained under the official authority of the Bishop of the Beaumont Diocese during that time. Jamail Decl., ECF No. 8, at ¶ 7; Doyle Decl., ECF No. 12, at ¶ 36. Nevertheless, the record reveals that the Bishop of the Beaumont Diocese exercised no *actual* authority over Father Calhoun's actions once he accepted employment with the Yakima Diocese. Indeed, Plaintiff's own expert states that the Bishop of the Beaumont Diocese “did not have the right to directly control Calhoun's ministerial activities in Yakima because these activities involved serving the people of the Diocese of Yakima and not the Diocese of Beaumont.” Doyle Aff., ECF No. 12, at ¶ 36.

This explanation is corroborated by Monsignor Jamail of the Beaumont Diocese, who states as follows:

- Priests may leave the Diocese of Beaumont from time to time, and for various personal reasons, but in doing so, they are under the control and supervision of the Bishop of the Diocese where they serve;
- Once the Bishop [of a “receiving diocese”] accepts a priest *ad experimentum*, that Bishop assumes responsibility over the priest, including all compensation of the priest, in relation to the pastoral care of the Catholic population in the receiving Diocese. The Bishop of the receiving Diocese determines in his sole discretion whether and when to accept the priest into the Diocese permanently, and so determines in his sole discretion the duration of the *ad experimentum* [period];
- During the incardination process, including the period of *ad experimentum*, the Bishop of the sending Diocese has no right of direct control over the activities of the priest. During the *ad experimentum* period, the priest remains attached to the sending Diocese, but is exclusively serving the Bishop of the receiving Diocese.

Jamail Decl., ECF No. 8, at ¶¶ 12, 22. In sum, it is undisputed that, for all practical purposes, Father Calhoun was under the exclusive authority and control of the Yakima Diocese from the moment he arrived in 1976. The fact that the Bishop of the Beaumont Diocese retained nominal or token authority over Father Calhoun during his two years of *ad experimentum* employment does not warrant a finding of purposeful injection into Washington's affairs.

#### ii. Burden on Defendant

The burden on the Beaumont Diocese of defending in Washington is high. The Beaumont Diocese is a non-profit association which operates exclusively in nine counties in the State of Texas. Jamail Decl., ECF No. 8 at ¶ 4, 7. It has never done business in Washington, and it has never offered its services to Washington residents. Jamail Decl., ECF No. 8 at ¶ 11. In short, the Beaumont Diocese has virtually no connections to the State of Washington. Requiring it to defend here would pose a significant burden financial burden. This factor also weighs strongly in the Beaumont Diocese's favor.

#### iii. Conflicts in Sovereignty

\*8 This factor is neutral. Neither party has identified a potential conflict in sovereignty between Washington and Texas.

#### iv. Forum State's Interest

Washington has a significant interest in adjudicating cases involving sexual abuse of Washington children. *See C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wash.2d 699, 712, 985 P.2d 262 (1999) (noting that the Washington Legislature enacted RCW 4.16.340 “to provide a broad avenue of redress for victims of childhood sexual abuse”). This factor weighs generally in Plaintiff's favor, despite the fact that Plaintiff no longer resides in Washington. *See* Pl.'s Compl., ECF No. 1, at ¶ 1.1 (Plaintiff is a resident of Washington County, Oregon).

v. Efficient Resolution of Controversy

Litigating in a single forum, as opposed to two different forums, would provide the most efficient judicial resolution of this controversy. This factor weighs in Plaintiff's favor.

vi. Convenient & Effective Relief

Plaintiff clearly has an interest in obtaining convenient and effective relief in the Eastern District of Washington. However, this interest is diminished to some degree by the fact that he currently resides near Portland, Oregon. The Court takes judicial notice that the distance between Portland and Yakima is approximately 180 miles. While this distance does not render the Eastern District of Washington a particularly *inconvenient* forum, the fact that Plaintiff has sought relief outside his "home" forum renders this factor less significant. It also bears noting that this factor is typically afforded less weight in the first instance by courts in the Ninth Circuit. *See Dole Food*, 303 F.3d at 1116 ("[I]n this circuit, the plaintiff's convenience is not of paramount importance."). This factor weighs slightly in Plaintiff's favor.

vii. Existence of an Alternative Forum

This factor weighs strongly in the Beaumont Diocese's favor, as the Eastern District of Texas remains available to Plaintiff as an alternative forum.

On balance, the above factors weigh squarely in the Beaumont Diocese's favor. The fact the Beaumont Diocese's only contact with Washington was a single letter of recommendation submitted in response to a formal request for information by the Yakima Diocese is a particularly compelling circumstance. Even if Plaintiff could establish that this letter was "purposefully directed" to Washington, the Court concludes that requiring the Beaumont Diocese to defend in Washington based upon this *de minimis* contact would offend traditional notions of fair play and substantial justice. Plaintiff's claims against the Beaumont Diocese are dismissed for lack of personal jurisdiction on this alternative basis as well.

4. Request for Jurisdictional Discovery

At oral argument, Plaintiff moved for leave to take limited jurisdictional discovery on the issue of whether the Beaumont Diocese purposefully directed its activities toward Washington. Leave to take jurisdictional discovery should be permitted when "pertinent facts bearing on the question of jurisdiction are in dispute." *Am. W. Airlines, Inc. v. GPA Grp., Ltd.*, 877 F.2d 793, 801 (9th Cir.1989) (citing *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430-31 n. 24 (9th Cir.1977)). When a court finds that discovery "would not demonstrate facts sufficient to constitute a basis for jurisdiction," however, leave to take jurisdictional discovery is properly denied. *Wells Fargo*, 556 F.2d at 430 n. 24; *see also St. Clair v. City of Chico*, 880 F.2d 199, 202 (9th Cir.1989) ("Where, as here, the extra-pleading material demonstrates that the controlling questions of fact are undisputed, additional discovery would be useless.").

\*9 As noted above, it is undisputed that the Bishop of the Beaumont Diocese exercised no actual authority or control over Father Calhoun during his period of *ad experimentum* employment with the Yakima Diocese. According to Plaintiff's own expert, the Bishop of the Beaumont Diocese "did not have the right to directly control Calhoun's ministerial activities in Yakima because these activities involved serving the people of the Diocese of Yakima and not the Diocese of Beaumont." *Doyle Aff.*, ECF No. 12, at ¶ 36. Thus, contrary to Plaintiff's assertions, the controlling issue of fact for purposes of the purposeful direction analysis is undisputed: although the Beaumont Diocese may have retained *symbolic* authority over Father Calhoun, it retained no *actual* authority over his actions during his period of probationary employment. As a matter of undisputed fact, the Beaumont Diocese did not engage in purposeful direction of its activities toward Washington by allowing Father Calhoun to transfer to the Yakima Diocese. No additional discovery on this issue is warranted.

### B. Motion to Strike

The Beaumont Diocese has moved to strike the affidavit of Thomas P. Doyle (ECF No. 12) on the grounds that Mr. Doyle's statements are speculative and not supported by personal knowledge. ECF No. 19. Having reviewed the affidavit, the Court finds the statements therein admissible for the limited purpose for which they were submitted—to respond to the Beaumont Diocese's assertions regarding the absence of personal jurisdiction. Accordingly, the motion is denied. The Court has fully considered this evidence in reaching the ruling above.

### C. Failure to State a Claim

A motion to dismiss for failure to state a claim “tests the legal sufficiency” of the plaintiff's claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001). To withstand dismissal, a complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). “Naked assertion[s],” “labels and conclusions,” or “formulaic recitation[s] of the elements of a cause of action will not do.” *Id.* at 555, 557. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). While a plaintiff need not establish a probability of success on the merits, he or she must demonstrate “more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

A complaint must also contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). This standard “does not require detailed factual allegations, but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). In assessing whether Rule 8(a)(2) has been satisfied, a court must first identify the elements of the plaintiff's claim(s) and then determine whether those elements could be proven on the facts pled. The court should generally draw all reasonable inferences in the plaintiff's favor, see *Sheppard v. David Evans and Assocs.*, 694 F.3d 1045, 1051 (9th Cir.2012), but it need not accept “naked assertions devoid of further factual enhancement.” *Iqbal*, 556 U.S. at 678 (internal quotations and citation omitted).

\*10 In ruling upon a motion to dismiss, a court must accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the party opposing the motion. *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.2001). The court may disregard allegations that are contradicted by matters properly subject to judicial notice or by exhibit. *Id.* The court may also disregard conclusory allegations and arguments which are not supported by reasonable deductions and inferences. *Id.*

The Ninth Circuit has repeatedly instructed district courts to “grant leave to amend even if no request to amend the pleading was made, unless ... the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir.2000). The standard for granting leave to amend is generous—the court “should freely give leave when justice so requires.” Fed.R.Civ.P. 15(a)(2). In determining whether leave to amend is appropriate, a court must consider the following five factors: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint. *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir.2011).

The Yakima Diocese has moved to dismiss the Complaint for failure to plead sufficient facts to support Plaintiff's invocation of Washington's “savings statute,” RCW 4.16.340, for claims involving allegations of childhood sexual abuse. Specifically, the Yakima Diocese contends that Plaintiff “fails to assert any facts that would establish a feasible claim that he has only recently discovered the nature of his damages; instead he simply quotes the savings language from the statute.” ECF No. 2 at 2. Given that the Complaint “merely parrots the statutory language and adds *no actual facts* demonstrating recent discovery of harm,” the Yakima Diocese argues, Plaintiff's negligence claims must be dismissed. ECF No. 15 at 4 (emphasis in original).

In Washington, negligence claims are subject to a three-year statute of limitations. RCW 4.16.080(2); *Hill v. Withers*, 55 Wash.2d 462, 464, 348 P.2d 218 (1960). By statute, this limitations period can be tolled for negligence claims involving allegations of childhood sexual abuse under certain circumstances:

All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods:

- (a) Within three years of the act alleged to have caused the injury or condition;
- (b) Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or
- (c) Within three years of the time the victim discovered that the act caused the injury for which the claim is brought.

RCW 4.16.340(1). Under this statutory scheme, “the limitations period only begins to run on the date of the injury-causing act or the date the victim discovers the nexus between that act and the claimed injury, whichever is later.” *Oostra v. Holstine*, 86 Wash.App. 536, 542, 937 P.2d 195 (1997).

\*11 Plaintiff has alleged that he was abused on various occasions from 1977 until 1982. Pl.’s Compl., ECF No. 1, at ¶ 3.2. Because the most recent allegation of abuse occurred over thirty years ago, Plaintiff’s claims are time-barred unless the statute of limitations has been tolled. Despite this obvious barrier to relief, the Complaint contains only two allegations relevant to tolling under RCW 4.16.340:

Plaintiff has not yet discovered, nor should he reasonably have discovered, all of the damages caused by the abuse alleged herein. Pl.’s Compl., ECF No. 1, at ¶ 3.28.

Plaintiff’s claims have not expired under the Statute of Limitations because not more than three years have elapsed since becoming aware of the damages caused by the abuse. Pl.’s Compl., ECF No. 1, at ¶ 5.17.

These allegations fail to raise Plaintiff’s right to relief above the speculative level. Contrary to Plaintiff’s assertions, a mechanical recitation of the language of RCW 4.16.340(1)(b), *without supporting factual content*, is wholly insufficient to trigger the statute’s protections. The law on this point is now well-settled. *See Twombly*, 550 U.S. at 555 (“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions [.]”) (citations omitted); *Iqbal*, 556 U.S. at 678 (“A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertions’ devoid of ‘further factual enhancement.’”) (quoting *Twombly*, 550 U.S. at 557). Plainly stated, Plaintiff cannot simply copy-and-paste the language of the savings statute into his Complaint. While this type of boilerplate recitation arguably satisfies the more lenient pleading standard embodied in Washington Superior Court Civil Rule 12(b)(6), *see McCurry v. Chevy Chase Bank, FSB*, 169 Wash.2d 96, 101–03, 233 P.3d 861 (2010), it is patently deficient under Federal Rule of Civil Procedure 12(b)(6). To avoid dismissal in this Court, Plaintiff must go one step further: he must plead specific, real-world facts which, when accepted as true, would support an inference that he has discovered damages related to the alleged abuse within the past three years.

The Court is mindful that RCW 4.16.340 must be construed broadly in favor of victims of childhood sexual abuse. *See C.J.C.*, 138 Wash.2d at 712, 985 P.2d 262 (noting that, in enacting RCW 4.16.340, the Washington Legislature “specifically provided for a broad and generous application of the discovery rule to civil action for injuries caused by childhood sexual abuse.”). Nevertheless, Plaintiff has failed to plead a single *fact* from which the Court might construe the statute in his favor. He has not alleged, for example, that his memory of the alleged abuse had been repressed until a specific date within the past three years; that he had been unable to connect the alleged abuse to a known injury until a specific date within the past three years; or that he did not discover the full scope of the injuries caused by the alleged abuse until a specific date within the past three years. *See C.J.C.*, 138 Wash.2d at 712–13, 985 P.2d 262. Nor has he

taken the next step of stating the circumstances under which any such recent discovery actually occurred. Unless and until Plaintiff corrects these deficiencies, his Complaint fails to state a viable claim.

\*12 Because the deficiencies identified above could potentially be cured by pleading additional factual content, leave to amend is appropriate. *Lopez*, 203 F.3d at 1130. Plaintiff's claims against the Yakima Diocese are therefore dismissed with leave to amend within **fourteen (14) days** of the date of this Order.

#### D. Defendant Yakima Diocese's Remaining Challenges

The Yakima Diocese has raised a number of additional challenges to the legal sufficiency of Plaintiff's claims. Given that Plaintiff's entire complaint is being dismissed with leave to amend, the Court deems it inappropriate to rule on these challenges at this time. In the event that Plaintiff amends his complaint, the Yakima Diocese may renew its additional challenges at that time. At its option, the Yakima Diocese may submit any renewed challenges for consideration on the existing briefing. In responding to any such renewed challenges, Plaintiff may likewise rely on his existing briefing. Alternatively, the parties are welcome to re-brief the relevant issues entirely.

#### IT IS HEREBY ORDERED:

1. Defendant Diocese of Beaumont's Motion to Strike the Affidavit of Thomas P. Doyle (ECF No. 19) is **DENIED**.
  2. Defendant Diocese of Beaumont's Motion to Dismiss for Lack of Personal Jurisdiction (ECF No. 7) is **GRANTED**. Plaintiff's claims against the Diocese of Beaumont are **DISMISSED** without prejudice. The District Court Executive is directed to **TERMINATE** this Defendant (erroneously named as the Roman Catholic Diocese of Beaumont).
  3. Defendant Diocese of Beaumont's Motion to Dismiss for Failure to State a Claim (ECF No. 6) is **DENIED as moot**.
  4. Defendant Corporation of the Catholic Bishop of Yakima's Motion to Dismiss for Failure to State a Claim (ECF No. 2) is **GRANTED**. Plaintiff's claims against this Defendant are **DISMISSED** without prejudice. Plaintiff is granted leave to file an Amended Complaint within **fourteen (14) days** of the date of this Order.
- The District Court Executive is hereby directed to enter this Order and provide copies to counsel.

#### All Citations

Not Reported in F.Supp.2d, 2013 WL 5373144

#### Footnotes

- 1 Indeed, there is reason to question whether negligence claims are properly analyzed under *Calder* in the first instance. See *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 454, 460 (9th Cir.2007) (declining to apply *Calder* effects test to claims for negligent design and negligent manufacture of an allegedly defective engine part). Given that Plaintiff's theory of personal jurisdiction over the Beaumont Diocese clearly involves "express aiming" of negligent acts toward the State of Washington, however, the Court will proceed with the *Calder* analysis. See ECF No. 11 at 9 ("The Diocese of Beaumont purposefully directed acts aimed at Washington State causing harm that it knew or should have known was likely to be suffered.").

2015 WL 8608941

Only the Westlaw citation is currently available.  
United States District Court,  
E.D. Michigan, Southern Division.

Karen Gutman and Howard Gutman, Plaintiffs,

v.

Allegro Resorts Marketing Corporation and Occidental Hoteles Management, S.L., Defendants.

Case Number 15-12732

|  
Signed 12/14/2015

**Attorneys and Law Firms**

Mark Kelley Schwartz, Driggers, Schultz & Herbst, P.C., Troy, MI, for Plaintiffs.

Anthony J. Calati, Rutledge, Manion, Rabaut, Terry & Thomas PC, Detroit, MI, Joshua D. Yeager, Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago, IL, for Defendants.

**OPINION AND ORDER GRANTING MOTION TO  
DISMISS AND DISMISSING CASE WITHOUT PREJUDICE**

DAVID M. LAWSON, United States District Judge

\*1 While on vacation at the Grand XCaret Resort in Mexico, plaintiff Karen Gutman tripped on some uneven pavement, fell, and broke her ankle. The resort is owned by a Spanish corporation, and its marketing is handled by its wholly owned subsidiary, which is a Florida corporation. Ms. Gutman and her husband sued them both in this Michigan federal court, alleging that the resort premises were negligently maintained, and the defendants are therefore responsible for her damages. Defendant Allegro Resorts Marketing Corporation, the Florida company (and the only defendant served at this point) has moved to dismiss, arguing that this Court has no personal jurisdiction over it. The plaintiffs make no effort to suggest that the Court has general personal jurisdiction over the defendants. But they do insist that defendant Occidental Hoteles Management S.L., (the Spanish company that owns the resort) and Allegro are *alter egos* of each other, and Allegro's Internet marketing activity in Michigan gives the Court specific personal jurisdiction to adjudicate the trip-and-fall claim against these defendants. After reviewing the briefs and records and hearing oral argument on the motion, the Court is unable to conclude that Ms. Gutman's negligence cause of action arose from the defendant's activities in Michigan. Haling the defendants into this Court, therefore, would violate their rights under the Due Process Clause. The motion to dismiss must be granted.

I.

The underlying facts, as relevant to the disposition of the present motion, are essentially undisputed by the parties. The plaintiffs allege that Karen Gutman was injured while a guest at the defendants' Occidental Grand XCaret Hotel and Resort near Playa Riviera, Mexico, on February 1, 2014. According to the complaint, at around 8:30 p.m., Gutman walked out of the resort's restaurant after dinner, "mistepped over an un-or poorly-marked three-to-four-inch change in elevation," fell, and broke her ankle. Her injury required surgery and installation of stabilizing hardware. Gutman

contends that she suffers from impaired mobility and continuing pain, and her husband alleges that as a result of her injuries he has been deprived of the enjoyment of his wife's companionship.

The defendant admits that Allegro Resorts Marketing Corporation is a Florida corporation with its principal place of business in Florida. Allegro concedes that its business is "limited solely to advertising, marketing and otherwise soliciting business in the United States on behalf of 'Occidental' branded hotels and resorts, all of which are located outside of the United States." Allegro contends that it did not have any contact with the plaintiffs relating to their stay at the Occidental property in Mexico, and that Allegro itself does not own or control that property. However, Allegro does not appear to contest seriously any of the basic factual conclusions reached by the district court in another case against Allegro and Occidental, where the court found that "that Allegro and the Occidental Defendants are the same companies for personal jurisdiction purposes." *Conley v. MLT, Inc.*, No. 11-11205, 2012 WL 1893509, at \*4 (E.D. Mich. May 23, 2012). The *Conley* court cited the *alter ego* factors discussed in *Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362-63 (6th Cir. 2008), and *Seasword v. Hilti, Inc.*, 449 Mich. 542, 548 n.10, 537 N.W.2d 221, 224 n.10 (1995), and found that Allegro and Occidental shared common ownership, governing boards, and control, and that despite separate corporate identities, Allegro essentially served as Occidental's marketing department.

\*2 According to the complaint, Occidental Hoteles Management, S.L. is a Spanish corporation with its principal place of business in Madrid. Allegro does not appear to contest the allegations that Occidental owns the hotel property in Mexico where the Gutmans took their February 2014 vacation, or that Allegro is a wholly owned subsidiary of Occidental. However, at oral argument, Allegro's attorney stated that the actual property may be owned by a Mexican entity, which itself is under Occidental's corporate umbrella.

The *Conley* court found that Allegro maintains a fully interactive website through which customers and travel agents make reservations and book stays at Occidental's resorts, and that the defendants have made contracts with Michigan residents by means of the website. *Conley*, 2012 WL 1893509, at \*7. Allegro points out, however, that the plaintiffs do not allege in their complaint, and they do not suggest in their briefing, any particular facts regarding how they booked or conducted their trip to Mexico or their stay at Occidental's hotel. Nor do the plaintiffs assert that they used that website to book their stay at the hotel. They do contend that Allegro markets Occidental properties to Michigan residents through various means, including contacts with Michigan travel agents. But they do not offer any specific facts to explain how and when, if at all, they were exposed to any of Allegro's marketing efforts.

For its part, Allegro affirmatively asserts that the plaintiffs did not book their hotel stay through Occidental's website. Allegro further asserts that it never sent any materials to the plaintiffs in Michigan, does not maintain any place of business or contacts in the state, does not sell any goods or services here, and "does not derive substantial revenue within Michigan."

The plaintiffs filed their complaint on August 4, 2015, raising state law claims for premises liability (count I), negligence (count II), and loss of consortium (count III). Allegro filed its motion to dismiss for lack of personal jurisdiction on August 25, 2015. Nothing filed on the docket suggests that defendant Occidental Hoteles Management, S.L. has been served yet, and it has not appeared in the case.

## II.

When personal jurisdiction is challenged in a motion filed under Federal Rule of Civil Procedure 12(b)(2), the plaintiff bears the burden of establishing the Court's authority to proceed against the defendant. *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1168 (6th Cir. 1988); *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 929 (6th Cir. 1974)). When the motion is supported by properly documented factual assertions, the plaintiff "may not stand on his pleadings but

must, by affidavit or otherwise, set forth specific facts showing that the court has [personal] jurisdiction.” *Ibid.* The Court may opt to decide the motion based only on the affidavits, allow discovery of the jurisdictional facts, or, if factual disputes need resolving, hold an evidentiary hearing. *Ibid.* If a factual contest requires resort to the third option, the plaintiff must satisfy the preponderance of evidence standard of proof. Otherwise, the plaintiff need only present a *prima facie* case for personal jurisdiction, and the Court views the submissions in the light most favorable to the plaintiff. *Id.* at 1458-59.

In a case where subject matter jurisdiction is based on diversity of citizenship, federal courts look to state law to determine personal jurisdiction. *See* Fed. R. Civ. P. 4(k)(1); *Miller v. AXA Winterthur Ins. Co.*, 694 F.3d 675, 678 (6th Cir. 2012). If a Michigan court would have jurisdiction over a defendant, so would a federal district court sitting in this state. *Daimler AG v. Bauman*, —U.S.—, 134 S. Ct. 746, 753 (2014) (explaining that “[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons”). Michigan law recognizes two bases for personal jurisdiction over corporations: general, Mich. Comp. Laws § 600.711, and specific (called “limited personal jurisdiction” in state law parlance), Mich. Comp. Laws § 600.715. Michigan’s so-called Long Arm Statute defines the scope of its limited personal jurisdiction. But “[t]he Due Process Clause of the Fourteenth Amendment constrains a State’s authority to bind a nonresident defendant to a judgment of its courts.” *Walden v. Fiore*, —U.S.—, 134 S. Ct. 1115, 1121 (2014). Michigan interprets its Long Arm Statute to allow personal jurisdiction to extend to the limits imposed by the federal constitution. *Michigan Coalition of Radioactive Material Users, Inc. v. Riepentrog*, 954 F.2d 1174, 1176 (6th Cir. 1992).

\*3 General jurisdiction allows a plaintiff to sue a defendant “on any and all claims against it, wherever in the world the claims may arise.” *Daimler*, 134 S. Ct. at 751. The plaintiffs do not suggest such judicial authority exists in this case. “‘Specific’ or ‘case-linked’ 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 1122 n.6 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, —U.S.—, 131 S. Ct. 2846, 2851 (2011)).

“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.” *Id.* at 1121. “Thus, in order to determine whether the [Court is] authorized to exercise jurisdiction over [the defendant], we ask whether the exercise of jurisdiction ‘comports with the limits imposed by federal due process’ on the [forum state].” *Ibid.* (quoting *Daimler*, 134 S. Ct. at 753). “Although a nonresident’s physical presence within the territorial jurisdiction of the court is not required, the nonresident generally must have ‘certain minimum contacts such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Ibid.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (alterations omitted). The Sixth Circuit historically has applied three criteria to guide the minimum contacts analysis, which it enunciated in *Southern Machine Company, Inc. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968):

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant’s activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

*Southern Machine*, 401 F.3d at 381.

#### A. Purposeful Availment

The Sixth Circuit “views the purposeful availment prong of the *Southern Machine* test as ‘essential’ to a finding of personal jurisdiction.” *Intera Corp. v. Henderson*, 428 F.3d 605, 616 (6th Cir. 2005) (citing *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 722 (6th Cir. 2000)). “Purposeful availment” occurs when “the defendant’s contacts with the forum state ‘proximately result from actions by the defendant himself that create a “substantial connection” with the forum State.’

" *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 889 (6th Cir. 2002) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

Physical presence within the state is not required to create such a connection. *Southern Machine*, 401 F.3d at 382. The Supreme Court has "consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Burger King Corp.*, 471 U.S. at 476. The defendant's maintenance of its fully interactive website, which allows Michigan residents to enter into booking contracts with the defendants, easily satisfies this requirement. See *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264 (6th Cir. 1996). The facts discussed by the *Conley* court fortify this conclusion: "from 2007 to 2010, 155 guests with Michigan addresses booked hotel or resort reservations through Defendants' website....Defendants entered into contracts with Michigan residents using their website." *Conley*, 2012 WL 1893509, at \*7. Allegro does not dispute these facts. And it follows logically that Allegro should have had "reason to foresee being 'haled before' a Michigan court." *Audi AG & Volkswagon of Am., Inc. v. D'Amato*, 341 F. Supp. 2d 734, 742 (E.D. Mich. 2004) (citing *Sports Auth. Michigan, Inc. v. Justballs, Inc.*, 97 F. Supp. 2d 806, 811 (E.D. Mich. 2000)).

#### B. Cause of Action Arising From Local Activities

\*4 It is this second requirement that causes the plaintiffs to stumble here. The plaintiffs argue without elaboration that the defendants' marketing activities in Michigan are somehow "intertwined" with the defective premises in Mexico. That connection, however, is not self-evident. And the Sixth Circuit has emphasized that "[i]t is not enough that there be some connection between the in-state activity and the cause of action — that connection must be *substantial*," and "[t]he defendant's contacts with the forum state must relate to the operative facts and nature of the controversy." *Community Trust Bancorp, Inc. v. Community Trust Financial Corp.*, 692 F.3d 469, 472-73 (6th Cir. 2012).

One might posit that without the marketing efforts, the plaintiffs may not have learned of the defendants' resort and would not have booked their trip to Mexico there. And absent the booking, the accident would not have occurred. However, the Sixth Circuit explained recently in *Beydoun v. Wataniya Restaurants Holding, Q.S.C.*, 768 F.3d 499 (6th Cir. 2014), that the type of mere "but-for" association relied upon by the plaintiffs is not sufficient to support the exercise of limited personal jurisdiction. That explanation is worth repeating here in detail:

Here, plaintiffs argue that "but for Jordan's outreach to...Beydoun on behalf of Wataniya, Beydoun would not have been in a position to have been injured by Wataniya....Thus, Beydoun's cause of action arises out of Wataniya's connections to Michigan." Essentially, plaintiffs argue that their causes of action arose from Wataniya's initial contact with Michigan because but for the initial contact with Michigan, Beydoun would never have moved to Qatar, and if Beydoun had never moved to Qatar, he could not have been wrongfully blamed for Wataniya's financial losses and wrongfully detained for them.

We disagree because more than mere but-for causation is required to support a finding of personal jurisdiction. To the contrary, the plaintiff's cause of action must be proximately caused by the defendant's contacts with the forum state. Indeed, the Supreme Court has emphasized that only consequences that *proximately* result from a party's contacts with a forum state will give rise to jurisdiction. *Burger King*, 471 U.S. at 474. As our sister circuits have noted:

[A]lthough the analysis may begin with but-for causation, it cannot end there. The animating principle behind the relatedness requirement is the notion of a tacit *quid pro quo* that makes litigation in the forum reasonably foreseeable. But-for causation cannot be the sole measure of relatedness because it is vastly overinclusive in its calculation of a defendant's reciprocal obligations. The problem is that it has no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain. If but-for causation sufficed, then defendants' jurisdictional obligations would bear no meaningful relationship to the scope of the "benefits and protection" received from the forum. As a result, the relatedness inquiry cannot stop at but-for causation.

*Beydoun*, 768 F.3d at 507-08 (quoting *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 322 (3d Cir. 2007)) (other citations, quotations, and footnotes omitted).

Certainly, there are cases in which interactive advertising itself can satisfy this element of the *Southern Machine* test. For instance, in *Neogen Corp. v. Neo Gen Screening, Inc.*, the defendant's advertising or internet marketing operations directly gave rise to the harm alleged through the use of infringing trademarks on a website and other materials made available to Michigan consumers who also were exposed to the plaintiff's competing brand, causing the court to concede the "possib[ility] that NGs's activities in Michigan have caused economic injury to Neogen," and thereby satisfying the "arising from" requirement." 282 F.3d at 892. Of course, that did not happen here. The asserted basis of liability in this case is premises liability, which by definition infers that the claim arose where the "premises" are located. The claim did not — could not — arise from the defendants' advertising contacts in Michigan.

\*5 That point was made well a few years ago by the Eleventh Circuit, which concluded on similar facts that there is no substantial or proximate factual relationship between advertising of vacation accommodations and an alleged on-site personal injury that occurs at the defendant's remote hotel property, where none of the allegedly negligent acts occurred within the forum state:

The Frasers' injuries were not a sufficiently foreseeable consequence of their hotel's business relationship with J&B Tours to satisfy the constitutional relatedness requirement. A negligence action for personal injuries sustained while vacationing in another country does not "arise from" the simple act of making a reservation. A finding that such a tenuous relationship somehow satisfied the relatedness requirement would not only contravene the fairness principles that permeate the jurisdictional due process analysis, but would also interpret the requirement so broadly as to render it virtually meaningless.

*Fraser v. Smith*, 594 F.3d 842, 851 (11th Cir. 2010); see also *Walden*, 134 S. Ct. 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." (quoting *Burger King*, 471 U.S. at 475)); *Kinder v. City of Myrtle Beach*, No. 11-712, 2015 WL 1439136, at \*4 (S.D. Ohio Mar. 27, 2015) ("[E]ven if there was purposeful availment through advertising or solicitation in Ohio, an alleged slip-and-fall by Plaintiff on a property owned by the City in the State of South Carolina does not arise out of or have any substantial connection to such activity in Ohio. Therefore, the Defendant would not have reasonably anticipated being haled into court in Ohio.") (citing *World-Wide Volkswagen*, 444 U.S. at 297); *Dillard v. Gen. Acid Proofing, Inc.*, No. 12-13813, 2013 WL 1563213, at \*9 (E.D. Mich. Apr. 15, 2013) ("The facts giving rise to Plaintiff's negligence claim against Prince Resorts do not arise from Prince Resorts's contacts with this state. The alleged negligence occurred in Hawaii. Plaintiff's negligence claim did not arise from any marketing efforts in Michigan.").

At oral argument, the plaintiffs made reference to a "single enterprise" theory, which was mentioned briefly by the Supreme Court in *Goodyear Dunlop Tires Operations, S.A. v. Brown*. See 131 S. Ct. at 2857. The plaintiffs appear to argue that Allegro's marketing and advertising activity fall within the corporate sphere of Occidental's worldwide activities, which includes reaching into Michigan to solicit customers to come to its resorts. That argument was made in *Goodyear* — belatedly — to advance the concept of *general* personal jurisdiction, a theory that is not in play in this case. More importantly, however, the argument fails here because there is nothing in the record that would make Michigan "home" to either Allegro or Occidental, and the plaintiffs still must connect the advertising activity to the tortious conduct to prevail on their case-specific personal jurisdiction theory, which they have failed to do.

A word or two is required about *Conley v. MLT, Inc.*, in which another judge in this district held in a remote personal injury lawsuit against these same defendants that the "arising from" element was satisfied because "Plaintiffs chose to vacation at the Occidental resort...based upon Defendants' direct advertising efforts in Michigan," reasoning that their

son “would not have been injured but for Plaintiffs’ contract with Defendants to stay at Defendants’ resort.” 2012 WL 1893509, at \*8. That case, of course, is not binding authority. And there are reasons not to follow it. For one, the court relied primarily on *Theunissen v. Matthews*, 935 F.2d at 1464, for its conclusion. However, *Theunissen* involved readily distinguishable facts, where the plaintiff was involved in the performance of a contract for carriage of goods from a remote state into Michigan, and where his injuries occurred as a result of the defendant’s employee’s negligence at the point of pick-up. The defendant had arranged for the physical transportation of goods into the forum state, and the plaintiff was injured in the course of performing that carriage. For another, the *Conley* court did not have the benefit of the Supreme Court’s subsequent decisions clarifying the more exacting requirements for case-specific jurisdiction, such as *Walden v. Fiore*. Finally, where *Conley* implies that a mere “but-for” relationship between contacts and claims will suffice to support an exercise of specific personal jurisdiction, it collides with later published decisions of our supervising appellate court, e.g., *Beydoun*, 768 F.3d at 507-08, as well as the Supreme Court’s recent clear pronouncement in *Walden*, that any exercise of limited personal jurisdiction must be premised on a *substantial* connection between the alleged in-forum activities and the injuries for which a plaintiff seeks to recover.

\*6 Because the plaintiff is relying on the *alter ego* identity between Allegro and Occidental Hoteles to pursue its case in this district against that premises owner, personal jurisdiction over the latter must fail as well, since it is based on the Internet conduct of the former. Although Occidental Hoteles has not been served with process yet, the Court can see no basis for maintaining the case against it in this forum. No supporting facts appear in the complaint. That does not leave the plaintiff without a remedy, as it appears that general personal jurisdiction likely exists in Florida over Allegro and, by extension, its *alter ego*. The case here, however, must be dismissed for want of personal jurisdiction.

### III.

The plaintiff has not established a *prima facie* case for limited personal jurisdiction over the defendants that can satisfy the Due Process Clause.

Accordingly, it is **ORDERED** that the motion to dismiss by defendant Allegro Resorts Marketing Corporation [dkt. #9] is **GRANTED**.

It is further **ORDERED** that the complaint is **DISMISSED** against all defendants **WITHOUT PREJUDICE**.

#### All Citations

Not Reported in F.Supp.3d, 2015 WL 8608941

2011 WL 5974562

Only the Westlaw citation is currently available.  
United States District Court,  
D. Arizona.

Gerard HEFFERON, Plaintiff,

v.

HENRY PEREZ, DDS, P.C., a California professional corporation, et al., Defendants.

No. CIV 11-1541-PHX-MHB.

|  
Nov. 29, 2011.

**Attorneys and Law Firms**

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Frederick M. Cummings, Kerry A. Hodges, Jennings Strouss & Salmon P.L.C.—Phoenix—Washington St., Phoenix, AZ, for Defendants.

**ORDER**

MICHELLE H. BURNS, United States Magistrate Judge.

\*1 Pending before the Court is Defendants' Motion to Dismiss for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2) (Doc. 7). After considering the arguments raised by the parties in their briefing, the Court now issues the following ruling.<sup>1</sup>

**BACKGROUND**

This is a dental malpractice action asserted by Plaintiff Gerard Hefferon against Defendants Henry Perez, DDS and entity, Henry Perez, DDS, P.C. Hefferon originally filed his Complaint in the Maricopa County Superior Court on June 1, 2011, alleging negligence and unjust enrichment. Specifically, Hefferon alleges that Perez was negligent in performing dental treatment on him, which has resulted in injuries and damages. The matter was subsequently removed to this Court on August 5, 2011.

Perez is a California resident who is licensed to practice dentistry in California. He has been in private practice for more than 28 years, all in California, and operates his practice—through Perez P.C., a California professional corporation with its only place of business in California—out of a single office located in Oxnard, California.

Perez met Hefferon in mid-2007 at a dental health conference in San Diego, California. At the conference, Hefferon apparently expressed dissatisfaction with the dental treatment he was receiving in Arizona, and one of the speakers at the conference suggested that he have Perez look at his case. Several months later, Hefferon flew to Perez's office in California to discuss treatment.

Over the next year-and-a-half, Perez provided dental treatment to Hefferon in his California office on at least ten occasions. During that time, Perez also made follow-up telephone calls to Hefferon from California to Arizona concerning Hefferon's diagnosis and treatment.

At one point during the year-and-a-half of treatment, Perez flew to Arizona to visit Hefferon's chiropractic offices. During the visit, Hefferon removed his retainer, and Perez made an adjustment to the retainer to alleviate Hefferon's discomfort until his next scheduled appointment in California. According to Hefferon, Perez spent "at least thirty" minutes adjusting the retainer.

Prior to filing an answer, Defendants filed the instant Motion to Dismiss for lack of personal jurisdiction on August 12, 2011. Hefferon filed a Response on September 19, 2011, and Defendants filed their Reply on October 3, 2011.

### STANDARD OF REVIEW

To establish personal jurisdiction, the plaintiff must show that: (1) the forum state's long arm statute confers jurisdiction over the non-resident defendant and (2) the exercise of jurisdiction comports with the principles of due process. *See Omeluk v. Langsten Slip & Batbyggeri AIS*, 52 F.3d 267, 269 (9th Cir.1995). Arizona's long arm statute confers jurisdiction to the maximum extent allowed by the Due Process Clause of the United States Constitution. *See Ariz.R.Civ.P. 4.2(a); Doe v. Am. Nat'l Red Cross*, 112 F.3d 1048, 1050 (9th Cir.1997). Therefore, the issue before the Court is whether the exercise of jurisdiction over Defendants accords with due process. *See Omeluk*, 52 F.3d at 269.

\*2 The Due Process Clause requires that a nonresident defendant have "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) (citations omitted). There are two types of personal jurisdiction: general and specific. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445, 72 S.Ct. 413, 96 L.Ed. 485 (1952). General jurisdiction exists where a non-resident defendant engages in substantial, continuous or systematic activities within the forum. *See id.* When a court has general jurisdiction over a defendant, the defendant may be haled into that court for any claim, even one that does not arise from the defendant's contacts with that jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). However, when a defendant's contact with the forum does not rise to the level required for general jurisdiction, a court may have specific jurisdiction over a claim when the claim arises from the defendant's activities within that forum. *See Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir.1990), *rev'd on other grounds*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

Where an evidentiary hearing is not held, dismissal for lack of personal jurisdiction is appropriate only if the plaintiff has not made a *prima facie* showing of personal jurisdiction. *See Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 300 (9th Cir.1986). "[U]ncontroverted 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 for purposes of deciding whether a prima facie case for personal jurisdiction exists.'" *Am. Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir.1996) (quoting *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir.1989)). However, a court may not assume the truth of allegations in a pleading that are contradicted by affidavit. *See Data Disc, Inc. v. Systems Tech. Assoc.*, 557 F.2d 1280, 1284 (9th Cir.1977). If the plaintiff is able to meet its *prima facie* burden, the movant can nevertheless continue to challenge personal jurisdiction either at a pretrial evidentiary hearing or at trial itself. *See Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1064 n. 1 (9th Cir.1990).

### DISCUSSION

In their pleadings, the parties agree that this Court does not have general jurisdiction over Defendants. Thus, the dispute before the Court is whether the Court has specific jurisdiction over Defendants.

The Ninth Circuit applies a three-part test to determine if the exercise of specific jurisdiction over a non-resident defendant is appropriate. First, the defendant must purposefully direct his activities towards the forum or its residents, or he must purposefully avail “himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.” *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir.2008). Second, “the claim must be one which arises out of or relates to the defendant's forum-related activities.” *Id.* Finally, the exercise of jurisdiction must be reasonable. *See id.* The plaintiff must prove the first two prongs, in which case the defendant must come forward with compelling evidence that the exercise of jurisdiction would be unreasonable. *See id.* “If any of the three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law.” *Omeluk*, 52 F.3d at 270.

#### A. Purposeful Availment or Direction

\*3 “The purposeful availment requirement ensures that a nonresident defendant will not be haled into court based upon ‘random, fortuitous or attenuated’ contacts with the forum state.” *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir.1998) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)). The phrase “purposeful availment” includes both purposeful availment and purposeful direction, which are distinct concepts. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir.2004). While a purposeful availment analysis is used in suits sounding in contract, a purposeful direction analysis is used in suits sounding in tort. *See id.* Here, the underlying action is characterized as a tort. Purposeful direction is therefore the proper analytical framework in this case.

The Ninth Circuit “evaluates purposeful direction using the three-part ‘Calder-effects’ test, taken from the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984).” *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir.2010). “Under this test, ‘the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.’ ” *Id.* (quoting *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir.2006) (en banc)).

Defendants do not dispute that when Perez flew to Arizona and made an adjustment to Hefferon's retainer to alleviate discomfort—such activity was purposefully directed at Arizona and, therefore, meets the first prong of the specific jurisdiction test. Defendants, however, dispute that the dental treatment and telephone calls performed in California satisfy the “purposeful direction” prong claiming that said conduct fails to meet the *Calder-effects* test. The Court agrees.

Express aiming, the second element of the test, “depends, to a significant degree, on the specific type of tort or other wrongful conduct at issue.” *Schwarzenegger*, 374 F.3d at 807. Allegations of “untargeted negligence” are not enough to satisfy this element. *See id.* at 806–07. Thus, even if the out-of-state dental treatment qualifies as an “intentional act” that caused harm that Defendants “knew” was likely to be suffered in Arizona, Hefferon cannot establish that such treatment was expressly aimed at Arizona because his claims rest on allegations of mere negligence. Therefore, there is no basis for finding that Defendants purposefully directed any out-of-state activity at Arizona, whether through the treatment itself or the telephone calls that were incidental to that treatment.

This conclusion is supported by the decisions of numerous courts, including the Ninth Circuit, which hold that rendering medical or dental services in one state does not subject the provider of those services to personal jurisdiction in the patient's state, even when the doctor or dentist knows that the patient is a resident of another state and, thus, that the consequences of their services will be felt in that state. *See, e.g., Wright v. Yackley*, 459 F.2d 287, 289–90 (9th Cir.1972) (affirming dismissal of a medical-malpractice action for lack of personal jurisdiction where the defendant provided the allegedly negligent medical services outside the forum state, and stating: “[T]he idea that tortious rendition of such services is a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt is wholly inconsistent with the public interest in having services of this sort generally available.”); *Jackson v. Shepard*, 609

F.Supp. 205, 207 (D.Ariz.1985) (dismissing medical-malpractice action for lack of personal jurisdiction where the alleged injury-causing event occurred in California); *Jackson v. Wileman*, 468 F.Supp. 822, 825 (W.D.Ky.1979) (holding that Kentucky resident who traveled to Ohio for dental services could not maintain action in Kentucky, since the jurisdictional focus is on the place where the services were rendered rather than where the consequences of such services would be felt).

\*4 This principle holds true even when the out-of-state doctor or dentist makes telephone calls to the forum state that are incidental to the out-of-state services. *See, e.g., Wright*, 459 F.2d at 288–90 (affirming dismissal of a medical-malpractice action for lack of personal jurisdiction where the defendant, a South Dakota doctor, mailed to the plaintiff, an Idaho resident, copies of prescriptions stemming from the defendant's treatment of plaintiff in South Dakota); *Kennedy v. Ziesmann*, 526 F.Supp. 1328, 1330 (E.D. Ky. (holding that telephone calls incidental to medical treatment that the plaintiff received outside the forum were insufficient to establish personal jurisdiction); *Prince v. Urban*, 49 Cal.App.4th 1056, 57 Cal.Rptr.2d 181, 182 (“[W]here, as here, the out-of-state doctor's contact with the forum state consists of nothing more than telephonic follow up on services rendered in the doctor's own state, it is unreasonable for the patient's home state to exercise personal jurisdiction over the physician.”).

In sum, the only possible activity that satisfies the “purposeful direction” prong of the specific-jurisdiction test is Perez's adjustment to Hefferon's retainer.

#### B. Arises Out Of

The Ninth Circuit utilizes “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.” *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir.1995). That is, a claim arises out of a forum-related activity only if the claim would not exist but for the forum-related activity. *See id.; Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1088 (9th Cir.2000) (“[T]he contacts constituting purposeful [direction] must be the ones that give rise to the current suit.”).

On this record, the Court finds that the claims arise from the diagnosis and treatment that Hefferon received in California. Specifically, the record reflects that Perez initially evaluated Hefferon in California; Perez recommended a treatment plan in California; Perez delivered and fitted the retainer device in California; and Perez continued to treat Hefferon in California—even after Perez's alleged 30–minute adjustment to the retainer in Arizona. Any suggestion that Hefferon's claims would not exist but for the retainer adjustment in Arizona misses the mark. The adjustment to the retainer appears merely incidental to the out-of-state diagnosis and treatment, and is not the basis for the claims alleged in this lawsuit. And, Hefferon's contention that specific personal jurisdiction is established whenever in-state conduct is “directly related” to the out-of-state conduct out of which the claims arise is unpersuasive. As previously noted, the jurisdictional inquiry requires the Court to identify the conduct that was “purposefully directed” at the forum state (in this case, the retainer adjustment in Arizona), and then to determine whether the dispute arises out of that particular conduct. *See Bancroft & Masters*, 223 F.3d at 1088 (“[T]he contacts constituting purposeful [direction] must be the ones that give rise to the current suit.”). It is the relationship between the “purposefully directed” conduct and the claim that matters, not the relationship between the “purposefully directed” conduct and other conduct. Accordingly, Hefferon has failed to establish that his claims arise out of any forum-related activity and, thus, this Court lacks specific jurisdiction.

#### C. Reasonableness

\*5 Even if Hefferon was able to establish that his claims arise out of the only forum-related activity in this case, personal jurisdiction would still not be proper, as the exercise of such jurisdiction would be unreasonable. In determining whether the exercise of personal jurisdiction is reasonable, courts consider and balance seven factors, none of which are alone dispositive: (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 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 forum to the plaintiff's interest in obtaining convenient and effective relief; and (7) the existence of an alternative

forum. See *Harris Rutsky & Co. Ins. Serv., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1132 (9th Cir.2003) (citing *Burger King Corp.*, 471 U.S. at 476-77).

As previously stated, Defendants only in-state conduct was the adjustment of Hefferon's retainer, which, according to Hefferon, lasted about 30 minutes. Arizona undoubtedly has little interest in adjudicating disputes with so little connection to this state. Any negligent act that can be alleged took place in California in association with the diagnosis and treatment of Hefferon. The fact that Hefferon's alleged injuries were suffered in Arizona is irrelevant. As set forth by the Ninth Circuit in *Wright*, 459 F.2d at 289-90:

In the case of personal services[,] focus must be on the place where the services are rendered, since this is the place of the receiver's (here the patient's) need. The need is personal and the services rendered are in response to the dimensions of that personal need. They are directed to no place but to the needy person herself. It is in the very nature of such services that their consequences will be felt wherever the person may choose to go. However, the idea that tortious rendition of such services is a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt is wholly inconsistent with the public interest in having services of this sort generally available. Medical services in particular should not be proscribed by the doctor's concerns as to where the patient may carry the consequences of his treatment and in what distant lands he may be called upon to defend it. The traveling public would be ill served were the treatment of local doctors confined to so much aspirin as would get the patient into the next state. The scope of medical treatment should be defined by the patient's needs, as diagnosed by the doctor, rather than by geography.

Thus, Hefferon's claims do not arise out of the in-state retainer adjustment. But even if they did, under these circumstances, it would be unreasonable to subject Defendants to the personal jurisdiction of the courts of this state.

#### CONCLUSION

\*6 Hefferon has not met his burden of showing that this dispute arises out of Perez's in-state adjustment to his retainer, the only conduct that was "purposefully directed" at Arizona. Accordingly, the Court will grant Defendants' Motion to Dismiss.

**IT IS ORDERED** that Defendants' Motion to Dismiss for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2) (Doc. 7) is **GRANTED**.

DATED this 28th day of November, 2011.

#### All Citations

Not Reported in F.Supp.2d, 2011 WL 5974562

#### Footnotes

- 1 The parties request for oral argument will be denied because the parties have fully briefed the issues and oral argument will not aid in the Court's decision. See *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir.1998); *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corp.*, 933 F.2d 724, 729 (9th Cir.1991).

2007 WL 4531700

Only the Westlaw citation is currently available.  
United States District Court,  
E.D. California.

PENNY NEWMAN GRAIN COMPANY, Plaintiff,  
v.  
MIDWEST PAINT SERVICES, INC., et al., Defendant.

No. CV-F-06-1020 OWW/DLB.

|  
Dec. 18, 2007.

**Attorneys and Law Firms**

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MEMORANDUM DECISION GRANTING THIRD-PARTY DEFENDANT NORBERG  
PAINTS, INC.'S MOTION TO DISMISS MIDWEST PAINT SERVICES, INC.'S AMENDED  
THIRD PARTY COMPLAINT PURSUANT TO FED. R.CIV.P. 12(b)(2) (Doc. 33)

OLIVER W. WANGER, District Judge.

\*1 Plaintiff Penny Newman Grain Co., Inc. (Penny Newman) has filed a First Amended Complaint for Breach of Contract, Negligence and Breach of Express Warranty (FAC). Named as defendants are Midwest Paint Service, Inc. (Midwest), ICI Paints (ICI), and Does 1-100. The FAC alleges that Penny Newman and Midwest entered into a Painting Contract in June 2003 under which Midwest agreed to provide the labor, supplies, insurance, equipment and tools necessary to prepare, patch and paint a storage facility consisting of concrete silos in Stockton, California (the Stockton Facility) for the sum of \$336,500; that Midwest began the process of preparing and repainting the Stockton Facility in August 2003; that Midwest finished working on the Stockton Facility in January 2004; that Midwest negligently prepared the surface of the Stockton Facility and painted and/or selected a paint wholly unsuitable for the Stockton Facility; and that, as a result of Midwest's conduct, large sections of the paint failed to adhere, resulting in blistering, flaking and stripping of the paint from the surface of the Stockton Facility.

Midwest has filed an Amended Third Party Complaint (TPC) against Norberg Paint Services, Inc. (Norberg), alleging claims for negligent misrepresentation and indemnity and contribution. The TPC alleges that Norberg is liable to Midwest for the liability that Midwest may owe to Penny Newman because of negligent misrepresentations, contribution, equitable indemnity, and apportionment of fault. Based on information and belief, the TPC alleges that Norberg is a South Dakota corporation, with its principal place of business in Sioux Falls, South Dakota; that Norberg is a paint products retailer who sells, among other products, Devoe paint products including Devoe Hydrosealer and Devoe Hi-Build Acrylic paint; that Norberg has sold paint and paint products to Midwest which Norberg knew would be used in locations outside of South Dakota in the usual course of its business; and that Norberg either regularly shipped or arranged for shipping of paint products to be used outside South Dakota. (TPC, ¶ 6). The TPC further alleges that Midwest contracted with Penny Newman to paint the grain storage facility in Stockton, California; that Midwest consulted with Norberg about the proper type of paint for painting the grain storage facility before it undertook

any work; and that this consultation included requests for information as to the proper preparation products and/or procedures, and paint for painting the grain storage facility. (TPC ¶ 7). Midwest further alleges that Norberg represented to it that Devoe Hydrosealer and Devoe Hi Build Acrylic would be adequate to prepare and paint the grain storage facility; that Norberg's representations "were done with the intent of causing effects in the California [sic], and/or not done with the intention of causing effects in California, but could reasonable [sic] have been expected to do so"; that Midwest consulted with Norberg when the paint on the grain storage facility began to fail, after which Norberg made representations to Midwest that the products it had sold to Midwest were adequate and that the preparation of the job being done by Midwest was adequate. (TPC ¶ 8). The TPC alleges that Norberg had a duty to communicate accurate information concerning the preparation and adequacy for use of the paint products it sold to Midwest; that Norberg's representations were made without any reasonable basis for believing them to be true and with the intent to induce Midwest's reliance; that Norberg's representations to Midwest conveyed in Midwest's proposal to Penny Newman induced Penny Newman to accept Midwest's proposal; that Midwest was unaware of the falsity of Norberg's representations; and that Norberg's misrepresentations proximately caused damage to Midwest.

\*2 Norberg moves to dismiss the TPC pursuant to Rule 12(b)(2), Federal Rules of Civil Procedure, for lack of *in personam* jurisdiction.

#### A. GOVERNING STANDARDS.

Where a defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is appropriate. *Dole Foods Co., Inc. v. Watts*, 303 F.3d 1104, 1108 (9th Cir.2002). If the motion is based on written materials rather than an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts. *Id.* In such cases, the court "only inquire[s] into whether [the plaintiff's] pleadings and affidavits make a prima facie showing of personal jurisdiction." *Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 128 (9th Cir.1995). Although the plaintiff cannot "simply rest on the bare allegations of its complaint," ..., uncontroverted allegations in the complaint must be taken as true." *Dole Foods Co., Inc., id.* "Conflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor." *Id.*

Personal jurisdiction exists if permitted by California's long-arm statute and federal due process. Pursuant to Cal.Code of Civ. P. § 410.10, California's long-arm statute reaches as far as the Due Process Clause permits. *See Panavision Int'l, L.P. v. Toepfen*, 141 F.3d 1316, 1320 (9th Cir.1998). For a court to exercise personal jurisdiction over a non-resident defendant, that defendant must have at least "minimum contacts" with the forum state 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).

Two categories of jurisdiction exist: general or specific jurisdiction. *See Lake v. Lake*, 817 F.2d 1416, 1420-21 (9th Cir.1987). Midwest concedes that general jurisdiction does not exist. At issue in this motion is specific jurisdiction.

A court may exercise specific jurisdiction when the following requirements are met:

- (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 privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one that 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 Foods, supra*, 303 F.3d at 1104. The plaintiff bears the burden of satisfying the first two prongs of this test. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir.1990). If the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the forum state. If the plaintiff succeeds in satisfying both of the first two prongs, the burden then

shifts to the defendant to “present a compelling case that the exercise of jurisdiction would not be reasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-478, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Courts examine the defendant's contacts with the forum at the time of the events underlying the dispute. See *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir.1987).

\*3 As explained in *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir.2004):

We often use the phrase ‘purposeful availment,’ in shorthand fashion, to include both purposeful availment and purposeful direction ..., but availment and direction are, in fact, two distinct concepts. 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.

Here, because Midwest's claims against Norberg are based on negligence, the purposeful direction analysis is appropriate.

In *Dole Foods Co. supra*, 303 F.3d at 1111, the Ninth Circuit stated:

Under our precedents, the purposeful direction ... requirement is analyzed in intentional tort cases under the ‘effects’ test derived from *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 ... (1984). In *Calder*, the Supreme Court determined that California courts could exercise jurisdiction over an editor and a reporter who caused a defamatory article about a California resident to be published in Florida and circulated in California, on the ground that the tortious conduct was ‘expressly aimed’ at the forum state in which the harm occurred ... As we have previously recognized, *Calder* stands for the proposition that purposeful availment is satisfied even by a defendant ‘whose only “contact” with the forum state is the “purposeful direction” of a foreign act having an effect in the forum state.’ ... Based on these interpretations of *Calder*, the ‘effects’ test requires that the defendant allegedly have (1) committed an intentional act; (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state ....

“The second prong of the specific jurisdiction test (litigation must “arise out of or relate to those activities”) is met if, “but for” the contacts between the defendant and the forum state, the cause of action would not have arisen.” *Terracom v. Valley Nat. Bank*, 49 F.3d 555, 561 (9th Cir.1995) citing *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385-386 (9th Cir.1990) (citations omitted), *rev'd on other grounds*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

The third prong of the test, reasonableness, is presumed once the court finds purposeful direction: “[w]e presume that an otherwise valid exercise of specific jurisdiction is reasonable.” *Ballard v. Savage*, 65 F.3d 1495, 1500 (1995) citing *Sher v. Johnson*, 911 F.2d 1357, 1364 (9th Cir.1990) (once court finds purposeful availment, it must presume that jurisdiction would be reasonable). The burden of proving unreasonableness shifts to defendant. *Ballard*, 65 F.3d at 1500.

Ninth Circuit law formerly required a plaintiff to demonstrate each of the three factors to establish specific jurisdiction (see *Data Disc, Inc. v. Sys. Tech. Assoc.*, 557 F.2d 1280, 1287 (9th Cir.1977)). A more flexible approach, however, has since been adopted. *Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287 F.3d 1182, 1188 (9th Cir.2002), citing *Brand v. Menlove Dodge*, 796 F.2d 1070, 1074 (9th Cir.1986). “Jurisdiction may be established with a lesser showing of minimum contacts ‘if considerations of reasonableness dictate.’” *Ochoa*, 287 F.3d at 1189 (citing *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir.1986); see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)). “Activity by the defendant need not physically take place in the forum state so as to constitute sufficient contact under the due process test ... The Supreme Court has consistently rejected the notion that absence of physical contacts with a forum state can defeat personal jurisdiction, ‘[s]o long as a commercial actor's efforts are purposefully directed toward residents of another State.’” *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1398 (9th Cir.1986) citing *Burger King*, 471 U.S. at 475-477; see also *Calder v. Jones*, 465 U.S. at 790. On the other hand, “both [the Ninth Circuit Court of Appeals] and the courts of California have concluded that ordinarily’ use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the

benefits and protection of the [forum] state.” *Peterson v. Kennedy*, 771 F.2d 1244, 1272 (9th Cir.1985) (finding defendant's two foreign-mailed cease and desist letters, dealing with plaintiff's potential patent infringement actions, insufficient to create personal jurisdiction in the forum state) (citing *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1254 (9th Cir.1980); see also *Floyd J. Harkness Co. v. Amezcua*, 60 Cal.App.3d 687, 692-93, 131 Cal.Rptr. 667, (1976); *Interdyne Co. v. SYS Computer Corp.*, 31 Cal.App.3d 508, 511-12, 107 Cal.Rptr. 499 (1973)).

\*4 “In judging minimum contacts, a court properly focuses on ‘the relationship among the defendant, the forum, and the litigation.’” *Calder v. Jones*, *supra*, 465 U.S. at 788-89. “The plaintiff's lack of ‘contacts’ will not defeat otherwise proper jurisdiction.” *Calder v. Jones*, *id.*

“Questions of personal jurisdiction admit of no simple solutions and that ultimately due process issues of reasonableness and fairness must be decided on a case-by-case basis.” *Forsythe v. Overmyer*, 576 F.2d 779, 783 (9th Cir.1978) citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446, 72 S.Ct. 413, 96 L.Ed. 485 (1952).

#### B. FACTUAL BACKGROUND.

In moving for dismissal for lack of personal jurisdiction, James Norberg, co-manager and co-owner of Norberg Paints, Inc., avers in pertinent part:

2. Norberg is a retailer of paint and paint products incorporated under the laws of South Dakota. Norberg's principal place of business is in Sioux Falls, South Dakota and has been for the entire 121 years of Norberg's existence.
3. Norberg is family-owned and operates a single store which is located at 326 East 14th Street, Sioux Falls, South Dakota. Norberg employs six employees.
4. Norberg has never conducted business in California and has never been licensed to do so.
5. Norberg is not registered to do business in California and has not designated an agent for service of process in California.
6. Norberg does not own any property in California.
7. Norberg does not advertise in California, it does not conduct any business operations in California and it does not have any employees in California.
8. Norberg has no customers in California.
9. Norberg has never directly sold any paint or paint products to any customer in California.
10. Norberg has never actively solicited business in California.
11. Norberg has never developed a sales force in California.
12. Norberg has never retained any California-based marketing company.
13. Norberg has never been listed in any California telephone directory.
14. Norberg has no California bank accounts.
15. Norberg does not operate and has never operated any kind of Internet website.
16. The paint sale between Norberg and Midwest occurred at the Sioux Falls, South Dakota store. At the request of Midwest, the paint manufacturer-The Glidden Company, dba ICI Paints-shipped the product to Stockton, California. Norberg did not ship the paint to California.

17. Norberg was not a party to the Penny Newman/Midwest painting contract.
18. No one from Norberg ever visited California or Penny Newman's Stockton Facility.
19. Norberg did not participate in the Penny Newman paint job.
20. California is not a convenient forum for Norberg or its employees. Litigating this matter in California would impose an unreasonable burden on Norberg and its employees due to the anticipated travel time and cost, the disruption of Norberg's business operations, and the inconvenience for Norberg's employees who would need to travel to California to defend this lawsuit.
- \*5 21. Traveling to California from Sioux Falls, South Dakota would require at least two days of travel. Because of travel time, each appearance in California would require an employee to miss a minimum of three days of work—two days for travel and a minimum of one day for the appearance. As a small business with only six employees, an employee's absence from the store substantially disrupts the day-to-day operations and creates scheduling conflicts. If these absences involve Norberg's key personnel, their absence will have an adverse effect on Norberg's paint sales and its income.

In opposition, Midwest submits the declarations of Craig Bower and Dennis Lingren. Bower, the founder and CEO of Midwest, avers:

2. MIDWEST has purchased paint products in the regular course of business directly from NORBERG ... for the at least the [sic] past 15 years. NORBERG and MIDWEST had agreed to a [sic] price schedule at the beginning of nearly every year to facilitate said purchases.
3. These products MIDWEST has purchased from NORBERG have been for painting jobs through out [sic] the United States including some in California, making MIDWEST a California customer of NORBERG.
4. I have never had any discussion with NORBERG's employees, including James Norberg, refusing to sell MIDWEST paint products for use outside South Dakota.
5. I am informed and believe all of MIDWEST's dealings with recommendations to cure the problems at PENNY NEWMAN's Stockton Facility had been directed to NORBERG, and NORBERG made recommendations on the curative measures to be taken.

Dennis Lindgren, an employee of Midwest, avers in pertinent part:

2. As part of my job duties at MIDWEST, I ordered paint products from NORBERG ... for painting through out [sic] the United States, including more than one job in California, which included PENNY NEWMAN[s] ... Stockton facility.
3. I also spoke with NORBERG employees on more than one occasion who made representations about the suitability of the paint products sold for painting PENNY NEWMAN's Stockton Facility.
4. I also spoke with NORBERG employees about the suitability of the paint products and MIDWEST's preparation efforts for the paint after MIDWEST had sent samples of the existing paint at PENNY NEWMAN's Stockton facility to NORBERG for review. During these conversations NORBERG's employees made representations on how to apply the paint as well as the appropriateness of the paint for its known applications while the work was being done in California.

*C. MERITS OF MOTION.*

1. *Purposeful Direction.*

Norberg argues that its sale of paint to another South Dakota company in South Dakota satisfies the purposeful direction requirement, even accepting that Midwest advised Norberg of its intent to use the paint for a job in California.

Norberg relies primarily on *Brand v. Menlove Dodge*, 796 F.2d 1070 (9th Cir.1986).

In *Brand*, Menlove Dodge, an auto dealership in Utah, bought a used 1979 Toyota landcruiser from another dealer and promptly resold it. Several months later, the purchaser returned the vehicle to Menlove upon discovering that the front-end assembly had been replaced with a front end from a 1972 model. Menlove then sold the vehicle to Patterson, a Utah used car dealer. Patterson sold the vehicle at the Los Angeles Auto Auction to Murray Brand, a Phoenix auto dealer. Brand sold it in Arizona. Brand's customer had problems with the front end and the wheels of the vehicle broke apart. Litigation between the purchaser and Brand resulted in jury verdict against Brand. Brand then filed suit in Central District of California against Menlove, Patterson, and the Los Angeles Auto Auction. Menlove did not appear and a default judgment was entered against it on fraud and negligence claims and compensatory and punitive damages were awarded. On appeal, the Ninth Circuit held that the district court did not have personal jurisdiction over Menlove. With regard to the purposeful availment requirement, the Ninth Circuit held:

\*6 Central to Brand's case is his allegation that Menlove sold the Toyota to Patterson knowing it would be resold in California. The alleged conduct places this case neatly between *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 ... (1980) and *Plant Food Co-op v. Wolfkill Feed & Fertilizer*, 633 F.2d 155 (9th Cir.1980). In *World-Wide Volkswagen*, defendant auto dealer sold a defective car to New York residents in New York. The car caused injuries to plaintiffs in Oklahoma, and they sued in Oklahoma court. The Supreme Court held that Oklahoma courts did not have jurisdiction over the auto dealer or its distributor based on the sale of the car, even though it was foreseeable that the car might be driven in Oklahoma. 444 U.S. at 296 ... The court set out the standards for asserting jurisdiction in product defect cases:

[I]f the sale of a product of a manufacturer or distributor ... is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise there has been the source of injury to its owner or others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that it will be purchased by customers in the forum State.

*Id.* at 297-98 ... The court emphasized that there was no evidence that the autos sold by the distributor were sold outside the New York-Connecticut area. *Id.* at 298 ....

In *Plant Food*, a Canadian fertilizer distributor, acting on orders received from Washington middlemen, shipped defective fertilizer to the plaintiff in Montana. We found that the Montana court had jurisdiction and distinguished *World-Wide Volkswagen* because the fertilizer distributor 'engaged in affirmative conduct to deliver its product to Montana.' 633 F.2d at 159. Defendant's contact with Montana was voluntary and financially beneficial to it. *Id.* 'When it knew the fertilizer was bound for Montana, [the defendant] could have objected or made other arrangements if it found exposure to Montana's long-arm jurisdiction unacceptable.' *Id.*

This case falls somewhere between these precedents. Unlike the *Plant Food* defendant, Menlove took no affirmative action to send the Toyota to California; the decision to resell the vehicle in that state was the unilateral act of a third party. *See Burger King*, 105 S.Ct. at 2183. Moreover, it seems to place an unnecessarily large burden on local distributors to say that if Menlove wanted to avoid jurisdiction in California, it should not have sold the Toyota to Patterson once he announced his intent to resell in that state. On other hand, unlike the defendants in *World-Wide Volkswagen*, Menlove allegedly had explicit knowledge that the car would be resold in California, and arguably delivered it into the stream of commerce with the expectation that it would be purchased by California consumers.

\*7 Because Menlove did not engage in affirmative conduct to deliver its product to California, but rather passively made a sale it allegedly knew would affect that state, we conclude that Menlove did not direct its activities purposefully at California so as to create a presumption of reasonableness of jurisdiction in the California courts. However, since Menlove did know that its activities would affect California interests to some extent, we conclude that this case falls into the category suggested in *Haisten*, where personal jurisdiction may be established on a lesser showing of minimum contacts with the state 'if considerations of reasonableness dictate.' 784 F.2d at 1397.

Norberg argues that, as in *Brand*, it only passively made a sale of paint to Midwest. Midwest requested that the paint be shipped to California and it was the paint manufacturer, ICI, who shipped the paint to California.

In opposition, Midwest primarily relies on *Calder v. Jones*, *supra*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804.

In *Calder*, Shirley Jones, a professional entertainer who lived and worked in California and whose television career was centered in California, brought suit in California Superior Court, alleging that she had been libeled in an article written and edited by petitioners, Florida residents, in Florida and published in the *National Enquirer*, a national magazine having its largest circulation in California. The Supreme Court held:

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-298 ....

Petitioners argue that they are not responsible for the circulation of the article in California. A reporter and an editor, they claim, have no direct economic stake in their employer's sales in a distant State. Nor are ordinary employees able to control their employer's marketing activity. The mere fact that they can 'foresee' that the article will be circulated and have an effect in California is not sufficient for an assertion of jurisdiction. *World-Wide Volkswagen Corp. v. Woodson*, *supra*, at 295 ... They do not 'in effect appoint [the article their] agent for service of process.' *World-Wide Volkswagen v. Woodson*, *supra*, at 296. Petitioners liken themselves to a welder employed in Florida who works on a boiler that subsequently explodes in California. Cases which hold that jurisdiction will be proper over the manufacturer ... should not be applied to the welder who has no control over and derives no direct benefit from his employer's sales in that distant State.

\*8 Petitioner's analogy does not wash. Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of the injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under the circumstances, petitioners must 'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article.

465 U.S. at 788-790.

Midwest argues that, like the petitioners in *Calder*, Norberg's employees "intentionally made" statements about the suitability of the paint preparation and products they knew would have an effect in California. Unlike the defendant in *Brand*, Midwest contends, Norberg took affirmative action by arranging for the paint's arrival in California for use on Penny Newman's facility and reviewed samples of the existing paint shipped to South Dakota and made affirmative misrepresentations to Midwest's employees about how to apply the paint and the appropriateness of the paint while the work was being done in California.

Norberg argues that *Calder* has no application to the resolution of this motion because it is used in cases involving intentional torts against international or national defendants where the brunt of the harm is felt in the forum state.

“Based on these interpretations of *Calder*, the ‘effects’ test requires that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Dole Food Co.*, *supra*, 303 F.3d at 1111. With regard to the requirement of an “intentional act”, the Ninth Circuit explained in *Schwarzenegger v. Fred Martin Motor Co.*, *supra*, 374 F.3d at 806:

... ‘Intentional act’ has a specialized meaning in the context of the *Calder* effects test. We have generally applied the ‘intentional act’ test to actions sounding in tort ... The Restatement (Second) of Torts defines ‘act’ as follows:

The word ‘act’ is used throughout the Restatement [ ] to denote an external manifestation of the actor's will and does not include any of its results, even the most direct, immediate, and intended.

*Id.* § 2 (1964). ‘Thus, if the actor, having pointed a pistol at another, pulls the trigger, the act is the pulling of the trigger and not the impingement of the bullet upon the other's person.’ *Id.* § 2 cmt. c. We construe ‘intent’ in the context of the ‘intentional act’ test as referring to an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result on consequence of that act. (The result or consequence of the act is relevant, but with respect to the third part of the *Calder* test—‘harm suffered in the forum.’)

\*9 Norberg argues that *Calder*'s “effects” test does not apply because Midwest does not claim that Norberg committed an intentional tort and because Norberg is a small local South Dakota company.

Norberg further argues that, even if *Calder*'s effects test applied, it would not create specific personal jurisdiction in California because of the lack of an alleged intentional act and the lack of any economic damage to Midwest in California. Citing *Dole Food Co., Inc.*, *supra*, 303 F.3d at 1113, Norberg asserts that, for jurisdictional purposes, corporations like Midwest are deemed to have suffered economic harm at the location of the alleged “bad act” or the corporation's principal place of business, both of which are in South Dakota.

In *Dole Food Co.*, 303 F.3d at 1112-1113, the Ninth Circuit discussed the apparent conflict in its cases concerning the test for determining the factor of causing harm in the forum state. One line of cases requires that the “brunt of the harm” be suffered in the forum state, *id.*, citing *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir.1993), while the other line of cases found jurisdiction even though the bulk of the harm occurred outside of the forum state, *id.*, citing *Keeton v. Hustler Magazine*, 465 U.S. 770, 780, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) (dissenting opinion). *Dole Food Co.* concluded that, under either test, Dole suffered sufficient economic harm in California to give rise to jurisdiction in California. *Id.* at 1113. The Ninth Circuit stated in pertinent part: “Our precedents recognize that in appropriate circumstances a corporation can suffer economic harm both where the bad acts occurred and where the corporation has its principal place of business.” *Id.* In *Yahoo! v. La Ligue Contre le Racisme*, 433 F.3d 1199 (9th Cir.), *cert. denied*, --- U.S. ----, 126 S.Ct. 2332, 164 L.Ed.2d 841 (2006), the Ninth Circuit held:

In this circuit, we construe *Calder* to impose three requirements: ‘the defendant allegedly [must] have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.’ *Schwarzenegger*, 374 F.3d at 803 ... In some of our cases, we have employed a slightly different formulation of the third requirement, specifying that the act must have ‘caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state.’ *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir.2000) ... The ‘brunt’ of the harm formulation originated in the principal opinion in *Core-Vent Corp. v. Nobel Indus. AR*, 11 F.3d 1482 (9th Cir.1993). That opinion required that the ‘brunt’ of the harm be suffered in the forum state; based on that requirement, it concluded that there was no purposeful availment by the defendant. *Id.* at 1486. A dissenting judge would have found purposeful availment. Relying on the Supreme Court's opinion in

*Keeton v. Hustler Magazine*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 ... (1984), he specifically disavowed the 'brunt' of harm formulation. *Core-Vent*, 11 F.3d at 1492 (Wallace, C.J., dissenting) ('[T]he Supreme Court has already rejected the proposition that the brunt of the harm must be suffered in the forum.'). Without dissenting the disputed 'brunt' of the harm formulation, a concurring judge agreed with the dissenter that purposeful availment could be found. *Id.* at 1491. (Fernandez, J., concurring)

\*10 We take this opportunity to clarify our law and to state that the 'brunt' of the harm need not be suffered in the forum state. If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state. In so stating we are following *Keeton*, decided the same day as *Calder*, in which the Court sustained the exercise of personal jurisdiction in New Hampshire even though '[i] is undoubtedly true that the bulk of the harm done to petitioner occurred outside New Hampshire.' 465 U.S. at 780 ....

This is a close question because of the evidence that Norberg, with knowledge that Midwest's job was in California, affirmatively represented to Midwest that the paint was suitable for the Penny Newman job and that Norberg, after being sent a sample of the surface being painted, again advised Midwest that the paint was suitable. This evidence distinguishes the authorities relied upon by Norberg in contending that it passively sold the paint to Midwest. Norberg was told of the job location, the structure and surface to be painted, and knew that the paint was to be applied and was to cover a silo in Stockton, California. Midwest has established the purposeful direction prong of the specific personal jurisdiction test.

## 2. "But For" Factor.

Midwest argues that this factor is satisfied because Midwest would not have suffered the loss alleged by Penny Newman "but for" Norberg's misrepresentations about the suitability of the paint for the job that were made after the start of the project when Midwest re-contacted Norberg about the paint problems experienced in California and sent Norberg a piece of failed paint.

Norberg relies primarily on *Scott v. Breeland*, 792 F.2d 925 (9th Cir.1986) in arguing that this factor is not satisfied. In *Scott v. Breeland*, a flight attendant was allegedly assaulted by a member of a music group, the Oak Ridge Boys, on board the airplane. She and her husband sued the Oak Ridge Boys and the band member who had committed the assault in the Central District of California. The District Court dismissed the action for lack of personal jurisdiction and the Ninth Circuit affirmed, holding that the fact that some members of the Oak Ridge Boys changed planes in San Francisco on the date of the alleged assault was insufficient to support the exercise of specific jurisdiction over the Oak Ridge Boys. The Ninth Circuit held in pertinent part:

... [F]or specific jurisdiction to lie, the Scotts' cause of action must arise out of or result from the defendants' California activities. The Scotts' claims against The Oak Ridge Boys, Inc., alleging negligence in employing Breeland and ratification of Breeland's acts, do not 'arise[ ] out of or result [ ] from' the plane-changing in California by some members of the group or sale of records in California.

792 F.2d at 928-929.

Relying on *Scott*, Norberg argues that Midwest's claims arise out of and relate only to Norberg's activities outside California:

\*11 Midwest's claims cannot arise from Norberg's California-related activities because none exist. Not only does Norberg conduct no business in California, Norberg was not a party to the contract between Penny Newman and Midwest, never sent any employees to California or to the Stockton Facility, and did not participate in the subject paint job.

Midwest argues that Norberg's reliance on *Scott* "is misguided and makes no sense." Midwest contends:

Here the underlying action 'arose out of' NORBERG's sale of the wrong paint and its related misrepresentations to MIDWEST about the suitability of that paint. NORBERG does not dispute that it knew the paint products MIDWEST purchased were for use in California, nor can it do so given it was responsible for arranging delivery of the paint for their arrival at the California job site. And any doubt as to its knowledge is eliminated by the facts showing that it was later contacted with respect to giving further advice when problems later arose in California and it received a sample of the failed paint from California. Notwithstanding the fact that NORBERG's misconduct arguably occurred outside of California, it is undisputed that the consequences of its actions were felt and suffered within California by PENNY NEWMAN and MIDWEST.

In reply, Norberg contends that this factor is not satisfied because the factor is premised on some conduct by the defendant that occurs in the forum state:

In situations where a defendant has engaged in forum-related activity but the alleged harm does not arise directly from these activities, the Ninth Circuit has adopted a 'but for' test to analyze whether a causal connection exists between those activities and the eventual harm. *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir.1990), rev'd on other grounds 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). Although the 'but for' test allows for a more attenuated causal chain, it expressly "preserves the requirement that there be some nexus between the cause of action and the defendant's activities in the forum." *Shute*, at 385 (emphasis added). Here, Midwest concedes that Norberg's alleged 'misconduct' occurred outside of California ... Thus, the test is inapplicable because there is no California-related starting point for analysis of whether Midwest's harm would not have occurred 'but for' Norberg's these activities [sic].

Again, this is a close question. However, the evidence presented by Midwest indicates that all of Norberg's alleged misrepresentations were made to Midwest in South Dakota. Norberg did nothing in California. Norberg did not ship the paint to California and never traveled to California. Midwest sent the samples of the existing paint to Norberg in South Dakota and from there Norberg allegedly made representations to Midwest about the appropriateness and proper application of the paint. Nonetheless, Midwest's claim against Norberg arises out of Norberg's forum-related activities, i.e., its sale of paint to Midwest for a job Norberg knew was in California and the alleged misrepresentations by Norberg made during that job about the suitability of the paint for the application in California and the proper method to use the paint. Midwest has established the "but for" prong of the specific jurisdiction test.

### 3. Exercise of Jurisdiction Unreasonable.

\*12 The third factor is whether the exercise of specific jurisdiction over the defendant would be unreasonable.

"For jurisdiction to be reasonable, it must comport with 'fair play and substantial justice.' ... '[W]here a defendant who purposefully had directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *Panavision Intern., L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir.1998). In addressing the reasonableness of the exercise of jurisdiction, seven factors are considered:

(1) the extent of a defendant's purposeful interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of 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 forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

*Id.* No one factor is dispositive; a court must balance all seven. *Id.*

a. *Degree of Interjection*

“Even if there is sufficient “interjection” into the state to satisfy the purposeful availment prong, the degree of interjection is a factor to be weighed in assessing the overall reasonableness of jurisdiction under the reasonableness prong.” *Panavision*, 141 F.3d at 1323.

Norberg argues that its degree of purposeful interjection in California is “nil.” It was not a party to the Penny Newman contract, it never visited California or the Stockton Facility and did not participate in the painting job. Despite its knowledge that the paint was to be used in California, it had no continuing obligations or operations in California, does not do business there and owns no property there.

Midwest argues that Norberg's purposeful interjection through the effects of its actions on Penny Newman and Midwest has been established. The fact that Norberg was not a party to the painting contract is misplaced because of Midwest's allegations of negligent misrepresentation. That Norberg did not visit California is irrelevant because Norberg had its agent, a Glidden paint representative, arrive at the Stockton Facility. See *Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287 F.3d 1182, 1189 (9th Cir.2002) (“If Ramey was acting as Martin Farms' agent in [directing its recruiting activities towards Arizona], Ramey's activities suffice to provide specific jurisdiction over Martin Farms.”).

The degree of interjection is slight. As discussed, all of Norberg's actions took place in South Dakota. That Glidden, the paint manufacturer, traveled to California to inspect the job, does not undermine this fact, especially when there is no evidence that Glidden was the agent of Norberg.

b. *Burden on Norberg.*

Norberg asserts that the burden on it will be extreme. It only has six employees, depositions and hearings in California will disrupt the day to day operations of the store and create scheduling conflicts, appearances in California will require at least two days of travel, and the absence of key employees will have an adverse effect on Norberg's sales and income.

\*13 Midwest argues that “[t]his era of modern transportation, email, fax machines, and discount air travel has made it much less burdensome for a party to defend itself in a different forum and it will not be unfair to subject it to the burdens of litigating in a different forum for disputes relating to the foreign forum's business activity. Midwest contends that depositions of Norberg employees may be taken by telephone or other remote electronic means by stipulation. Further, Midwest contends, the burden on Norberg is minimized by the fact “despite the apparent conflict of interest”, Norberg is represented by that same counsel representing Glidden.

The burden on Norberg, a small corporation, in litigating this action in California outweighs the availability of electronic communication. The fact that Norberg is represented by the same attorney representing Glidden does not diminish the burden on Norberg.

c. *Conflict with South Dakota Law.*

Neither party discusses this factor. This factor is neutral in resolving whether the exercise of personal jurisdiction over Norberg is reasonable.

d. *California's Interest.*

Norberg argues that California has no interest in the resolution of Midwest's claims against Norberg: “Norberg and Midwest are South Dakota companies, the allegations against Norberg stem from events that occurred in South Dakota and the potential harm Midwest may face will also occur in South Dakota.” The fact that Midwest is not a California resident, Norberg contends, only heightens the unreasonableness of imposing jurisdiction over Norberg.

Midwest argues that California has a definite interest in protecting the property and persons from harm caused by negligent misrepresentations. While California has a interest in the dispute between Penny Newman and Midwest, it has little interest in the indemnity dispute between Midwest and Norberg, neither of which is a California resident.

*e. Most Efficient Forum, Importance of Forum and Existence of Alternative Forum.*

Norberg argues that South Dakota is the most efficient forum for resolving Midwest's claims against it, noting that both Norberg and Midwest are from South Dakota and that South Dakota recognizes the tort of negligent misrepresentation and has a statute covering contribution.

Midwest responds that California is the most efficient forum, arguing that resolution in this forum will result in full and complete resolution of this matter and will avoid the possibility of inconsistent verdicts.

At the hearing, the Court was informed that Norberg has filed a collection action against Midwest arising from this paint sale in the South Dakota state court and that Midwest has filed a cross-complaint in that action against Norberg alleging the same allegations set forth in this federal action. This pending parallel action renders hollow Midwest's concerns about inconsistent verdicts if personal jurisdiction over Norberg is not found. Further, Penny Newman, who is the only California resident in this action, has not sued Norberg.

\*14 These factors weigh against the exercise of personal jurisdiction. Norberg has carried its burden of establishing that the exercise of personal jurisdiction over it will be unreasonable.<sup>1</sup>

*CONCLUSION*

For the reasons set forth above:

1. Third-Party Defendant Norberg Paints, Inc.'s motion to dismiss Midwest Paint Services, Inc.'s Amended Third Party Complaint pursuant to Rule 12(b)(2), Federal Rules of Civil Procedure is GRANTED.
2. Counsel for Norberg Paints, Inc. shall prepare and lodge a form of order setting forth the ruling in this Memorandum Decision within five (5) court days following the date of service of this decision.

IT IS SO ORDERED.

**All Citations**

Not Reported in F.Supp.2d, 2007 WL 4531700

**Footnotes**

1 Midwest, citing *Data Disc, Inc. v. Systems Technology Assocs., Inc.*, 557 F.2d 1280, 1285 n. 2 (9th Cir.1977), argues that resolution of personal jurisdiction over Norberg should be deferred until resolution of the action on the merits. Midwest asserts:

The nature and extent of NORBERG's involvement, namely the representations made to MIDWEST and others about the paint products, are key to the underlying merits of the negligent misrepresentation cause of action. The parties have not undergone initial disclosure under Federal Rule of Civil Procedure, Rule 26, nor have they conducted any discovery in this case. At the very least, MIDWEST would request that this Court would defer ruling on this motion with intertwines both procedural and substantive issues so as to allow the merits of the case to be developed through discovery. MIDWEST

discovery will involve the method of NORBERG's paint sales, the volume of sales to California or from other California customers besides MIDWEST, and other points it believes will establish the merits of the case as they are enmeshed with the jurisdictional arguments raised by NORBERG.

However, Midwest concedes that there is no basis for general personal jurisdiction in California. Midwest's proposed discovery will not assist the court in determining whether specific personal jurisdiction exists. Further, unlike *Data Disc*, where there were conflicts in the declarations, here the basic averments are not disputed and do not demonstrate that the jurisdictional facts are enmeshed with the facts underlying Midwest's claim for negligent misrepresentation.

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