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COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

JIM SCHUMACHER,

Appellant,

v.

IMG GROUP, LLC,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent IMG Group, LLC ("IMG") is a start-up company with its principle and only place of business in Salt Lake City, Utah. IMG is working to research and develop proprietary technologies useful in the building and construction industry. The intent of IMG's research and development is to eventually manufacture a saleable product. However, IMG, for reasons explained below, does not currently market, manufacture, sell or distribute any product or service in Utah, Washington or elsewhere, and it is presently relying on venture capital, member funding and individual investors for its day-to-day operating budget.

By way of background, IMG hired Appellant, Jim Schumacher in late 2005 and assigned him to work on the development of a new reinforced resin material for use in plastic composites. That same year IMG also hired two other individuals to help with their research and development efforts, Larry Tinker and Gary Feldscher. Schumacher lives in Washington, Tinker lives in San Diego and Feldscher lives in Northern California. While the three employees did some office work from their respective homes, most of the development work was done outside of Washington, and IMG did not hire any of these employees to conduct business for or represent IMG in their home states.

As sometimes happens, things did not go as planned, and the three men did not progress on their work as quickly as IMG had hoped. In late 2006, IMG became frustrated by a lack of progress. To aggravate matters, Schumacher stopped submitting progress reports outlining the work he was supposed to be doing. At one point, Schumacher openly refused to perform a research project requested by his manager. By mid-2007, the situation among the three employees had turned to open insubordination.

Ultimately, Schumacher, Tinker and Feldscher refused to sign patent papers necessary for IMG to perfect its intellectual property rights in the technology it had hired Schumacher and the other two employees to develop. As a result, IMG terminated their contracts and, on October 1, 2007, initiated a lawsuit in Salt Lake County Court against the three former employees. In that action, IMG complained that Schumacher, Tinker and Feldscher willingly accepted payment of salary and other benefits but failed to perform their duties in good faith, and have now colluded and refuse to assist IMG's patent application process and other efforts to perfect its intellectual property, all in violation of their agreements and the common law.

Schumacher appeared and answered in the Utah action, raising no objections to the jurisdiction of the Utah courts, and pressing the same substantive argument that he alleged in his Washington suit —that he is

not obliged to honor his contract obligations because, he claims, IMG never paid him a bonus he alleges is due.

Based on these facts, Judge Serko correctly concluded that:

1. Washington's courts lack both general and specific personal jurisdiction over IMG. IMG is a Utah corporation that is licensed to do business in Utah. It conducts no business in Washington, has no offices in Washington, does not own property in Washington, and does not design, develop, manufacture, sell or market any products in Washington. Schumacher is the only employee IMG has ever had with any connection to Washington and his only connection is his personal choice to live in Washington while performing work for IMG primarily in non-Washington locations.
2. Schumacher's claims are also properly dismissed under the independent grounds of forum non conveniens. Utah is the locus of the dispute and it is the only jurisdiction where venue and personal jurisdiction are proper for all four of the parties involved – IMG, Schumacher, Tinker and Feldscher – something Schumacher has never disputed. Notions of comity and judicial economy counsel in favor of a single action joining all parties, rather than as many as four separate actions, all involving the same facts, claims and defenses.

Following dismissal of Schumacher's complaint, Judge Serko also properly awarded IMG its fees under RCW 4.28.185(5). Judge Serko's fee award was well considered and proper, and should not be disturbed on appeal. Moreover, the cases Schumacher cites to attack Judge Serko's award are inapposite or support IMG's position.

For these reasons the Court of Appeals should affirm Judge Serko's ruling dismissing this matter for lack of personal jurisdiction and on the

basis of forum non conveniens, and should further affirm Judge Serko's award of fees under RCW 4.28.185(5).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Judge Serko properly dismissed Appellant's complaint for lack of personal jurisdiction where (a) neither the terms of Schumacher's employment agreement nor the history of the parties' negotiations evidence the purposeful availment necessary to support a finding of specific jurisdiction, and (b) IMG has not had sufficient contacts with the state of Washington to subject it to the general jurisdiction of Washington's courts.

2. Whether Judge Serko properly dismissed Appellant's complaint under the doctrine of forum non conveniens where another action involving the same parties is presently pending in Utah, Schumacher has answered that action and consented to jurisdiction, and the Utah action includes other necessary parties over whom Washington's courts cannot exercise jurisdiction.

3. Whether pursuant to RCW 4.28.185(5), Judge Serko properly taxed against plaintiff, the reasonable attorneys' fees and costs incurred by IMG to obtain dismissal of plaintiff's claims on the basis of improper personal jurisdiction.

III. STATEMENT OF THE CASE

A. The Parties

IMG is a limited liability corporation incorporated in the State of Utah, with its principle and *only* place of business in Utah. Ct. Rec. at 14-14 (Prince Decl. ¶ 2). IMG was formed to research and develop various technologies useful in the construction industry, including processes and applications for the reinforcement of plastic resins through the use of natural fibers and fillers for plastic composites. *Id.* IMG hired Schumacher along with Larry Tinker to assist with developing and securing the intellectual property necessary to manufacture these technologies. *Id.* at 16 (Prince Decl. ¶ 5). Neither Schumacher nor Tinker were hired to sell IMG's products or to represent IMG in the sale or marketing of its yet undeveloped products. Instead, IMG hired an individual by the name of Gary Feldscher, the third defendant in the pending Utah action, to handle sales and marketing. *Id.* at 15 (Prince Decl. ¶ 3). Feldscher was tasked with identifying contacts and distribution channels for the future marketing and sale of IMG's products. *Id.* Feldscher, to IMG's knowledge, did not approach any Washington corporations in this regard. *Id.*

IMG has never had plans to open facilities or conduct business in Washington and does not:

- have any offices in Washington;
- market or sell any products in Washington;
- have any contracts with Washington businesses;
- own any property in Washington;
- maintain a website accessible to Washington residents;
- sell products over the internet to Washington residents;
- introduce products into the stream of commerce which, with reasonable certainty, would reach residents in the state of Washington; or
- have a registered agent for service in Washington.

Id. at 14-15 (Prince Decl. ¶ 2).

While Schumacher lived in Washington during the time he worked for IMG (id. at 1 (Compl. at ¶2.1)), and performed some office work from his home, the majority of the actual development work by Schumacher was done in Kansas. *Id.* at 17 (Prince Decl. ¶ 9). Other work was performed in Austria, Germany and New Jersey and, on two occasions, when their usual testing facility in Oklahoma was unavailable, Schumacher oversaw some testing done on equipment at Washington State University. *Id.* (Prince Decl. ¶¶ 9-10).

At the beginning of the employment relationship, it was Schumacher who reached out from Washington to IMG in Utah, not the reverse. *Id.* at 15 (Prince Decl. ¶ 3). Schumacher was actively seeking work, and an acquaintance of Schumacher's mentioned this to Feldscher, who was then an IMG employee, and who told Schumacher IMG might

have a position available. *Id.* Schumacher sent his resume to IMG in Utah and then traveled to Salt Lake City at his personal expense to interview for the position. *Id.* (Prince Decl. ¶ 4). IMG did not solicit Schumacher's resume or application. *Id.* (Prince Decl. ¶ 3).

Neither Schumacher nor IMG intended to avail themselves of Washington law in regards to the contract between them. Schumacher's contract with IMG specifically provides that it will "be governed by and construed under the law of the State of Utah." *Id.* at 9 (Compl., Ex. A at § 6.8). As part of his agreement, Shumacher also consented to the jurisdiction of the Utah courts to hear any disputes arising out of his employment agreement. *Id.* (Compl., Ex. A at § 6.9). In addition, Schumacher's contract contemplated regular travel outside of Washington, (id. at 6 (Compl., Ex. A at § 3.1(c))), and it specifically provided that IMG could require Schumacher to relocate. *Id.* at 6 (Compl., Ex. A at § 4.5). The plan, when Schumacher was hired on October 31, 2005, was that he would, at some point, be required to relocate outside of Washington State either to Salt Lake City or to Kansas, Southern Utah, or even Austria, depending on where and when IMG entered its full research and development phase. *Id.* at 16 (Prince Decl. ¶ 6).

Schumacher's residence in Washington was neither necessary to, nor a factor in, IMG's decision to employ him. *Id.* at 16-17 (Prince Decl.

¶ 7). IMG did not intend to and it did not contract with Schumacher to perform work for IMG in Washington, to conduct business for IMG in Washington, to market or sell its products in Washington, or to solicit customers or contracts in Washington. *Id.* Indeed, Schumacher represented to IMG at the time of his hire that he was subject to a non-competition agreement in Washington that would *prohibit him* from representing IMG in Washington. *Id.* at 17 (Prince Decl. ¶ 7).

Consistent with the parties' agreement and original intent, Schumacher traveled extensively for IMG to Kansas, California, Florida, Illinois, New Jersey, and Wisconsin within the United States and to international locations in Austria, Canada, France and Germany. *Id.* (Prince Decl. ¶ 9). Schumacher traveled outside of Washington a total of 108 days between January 2006 and June 2007. *Id.* When he wasn't traveling out of state, Schumacher conducted research into obtaining materials and equipment for IMG's business from suppliers and businesses, many of whom were based outside of Washington. *Id.* (Prince Decl. ¶ 10).

B. IMG's Suit in Utah and Schumacher's Answer, Appearance, and Subsequent Washington Action

On October 1, 2007, after an increasing pattern of insubordination culminated in Schumacher, Tinker and Feldscher refusing to sign necessary patent documents, IMG filed suit against the three men in Salt

Lake County, Utah. *Id.* at 18, 29-106 (Prince Decl. ¶ 11 & Ex. B). That suit seeks damages and injunctive relief against each of the former employees for failure to abide by the terms of their contracts with IMG, as well as damages for tortious interference and civil conspiracy. *Id.* With respect to Schumacher, IMG's suit in Utah is premised on the same contract he sought to invalidate in the Complaint he filed with the Pierce County Superior Court. *Id.*

On December 27, 2007, Schumacher appeared and answered IMG's Utah complaint. *Id.* at 107-111 (Prince Decl., Ex. C). Schumacher did not contest the jurisdiction of the Utah courts, thereby waiving any arguments that personal jurisdiction or venue is improper in Utah. *Id.* This was a knowing and intentional consent to the jurisdiction of the Utah court. Although Schumacher appeared pro se, his answer in the Utah action, bears a fax line reading "David Smith Law" across the top of each page. *Id.* In this action, Mr. Schumacher is represented by the Law Offices of David Smith.

On January 10, 2008, Schumacher served IMG, out of state, with the Summons and Complaint in this action. *Id.* at 12-13. Schumacher's Complaint here seeks only declaratory relief. *Id.* at 1-11. Specifically, Schumacher asks the Court to invalidate the contract on which IMG's suit against him in Utah is predicated. *Id.* Schumacher's Complaint alleged

jurisdiction over IMG based on two theories: (1) that the "wrongful acts of Defendant and resulting damages to the Plaintiff . . . all occurred in Pierce County, Washington"; and (2) that "IMG is a Utah Corporation doing business in Pierce County, Washington." *Id.* at 1-2 (Compl. at ¶¶ 1.2 & 2.2.)

IV. PROCEDURAL HISTORY

Plaintiff Jim Schumacher filed this action in Pierce County Superior Court on December 4, 2007. *Id.* at 178, 184 (Sanders Decl. ¶2 & Ex. A). He served IMG with a copy of the complaint, out of state in Utah, on January 10, 2008. *Id.* at 182 (Sanders Decl., Ex. A). In response, on March 10, 2008, IMG filed its Motion to Dismiss for Lack of Personal Jurisdiction or on the Basis of Forum Non Conveniens. *Id.* at 112-135. On March 28, 2008, after full briefing and oral argument by both parties, the Court granted IMG's motion, and dismissed plaintiff's claims with prejudice for both lack of personal jurisdiction and forum non conveniens. *Id.* at 165-166. Schumacher sought reconsideration of Judge Serko's Order of dismissal on April 1, 2008. *Id.* at 167-71. IMG filed an application for fees on April 7, 2008. *Id.* at 172-77. After full briefing and argument, Schumacher's request for reconsideration was denied. *Id.* at 206-11. Judge Serko subsequently granted IMG's request for fees on

June 18, 2008, entered final judgment, and awarded IMG fees totaling $33,876.28. *Id.* at 270-273. Schumacher now appeals.

V. STANDARD OF REVIEW

Appellant bears the ultimate burden of showing of personal jurisdiction is proper. *Raymond v. Robinson*, 104 Wn. App. 627, 633 (2001); *Precision Laboratory Plastics v. Micro Test, Inc.*, 96 Wn. App. 721, 725 (1999); *CTVC of Hawaii, Co. v. Shinawatra*, 82 Wn. App. 699, 708 (1996); *see also Bershaw v. Sarbacher*, 40 Wn. App. 653, 655 (1985) ("Upon a challenge to jurisdiction, the party asserting jurisdiction has the burden of establishing its existence."). Where underlying jurisdictional facts are undisputed, the existence of personal jurisdiction is a question of law that may be reviewed de novo by the Court of Appeals. *Raymond* 104 Wn. App. at 633; *see also Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 595 (1993) (citing *Hein v. Taco Bell, Inc.*, 60 Wn. App. 325, 328 (1991)).

The Court of Appeals reviews a trial court's decision to dismiss on forum non conveniens grounds for abuse of discretion. *Sales v. Weyerhauser Co.*, 163 Wn.2d 14, 19 (2007). "Abuse of discretion means something more than a mere error of judgment. Abuse of discretion is not shown unless the court's discretion was manifestly unreasonable or on

untenable legal grounds." *See, e.g., Hawkins v. Rhay,* 78 Wn.2d 389, 416, 474 P.2d 557 (1970).

Similarly, "in order to reverse a fee award [under RCW 4.28.185(5)], it must be shown that the trial court manifestly abused its discretion." *Scott Fetzer Co. v. Weeks,* 122 Wn.2d 141,148, 859 P.2d 1210 (1993) ("Fetzer II"). The Court of Appeals should not disturb the trial court's award of fees so long as it is reasonable. *Id.*

VI. ARGUMENT

A. The Trial Court Properly Dismissed Schumacher's Suit for Lack of Personal Jurisdiction

Personal jurisdiction is a prerequisite for hailing any defendant into a Washington court, and is a requirement founded in the concept of due process. *See Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Int'l Shoe Co. v. Washington,* 326 U.S. 310 (1945); RCW 4.28.180 & .185. Here, to satisfy minimum due process requirements for the exercise of personal jurisdiction, IMG must be given proper notice and have sufficient minimum contacts with Washington to be subject to the exercise of jurisdiction in Washington. *Id.* Schumacher bears the burden of establishing that personal jurisdiction over IMG is proper. *Raymond,* 104 Wn. App. at 633; *Precision Laboratory Plastics,* 96 Wn. App. at 725; *CTVC of Hawaii,* 82 Wn. App. at 708; *see also Bershaw,* 40 Wn. App. at

655. Schumacher, despite having ample opportunity to do so, did not meet his burden below.

1. Washington Lacks General Jurisdiction Over IMG

Washington courts recognize general jurisdiction over business defendants where those defendants carry on "substantial and continuous" business activities within the state. *Raymond*, 104 Wn. App. at 633; *see also Helicopteros Nacionales v. Hall,* 466 U.S. 407, 414-15 (1984). A party attempting to establish general jurisdiction faces an extremely difficult burden. *Amoco Egypt Oil Co. v. Leonis Navigation Co.,* 1 F.3d 848, 851 n.3 (9th Cir. 1993). Casual, isolated acts within the state are insufficient to confer general jurisdiction. *Raymond,* 104 Wn. App. at 633.

Moreover, Washington courts have found a lack of general personal jurisdiction even where the defendant's contacts with Washington consisted of:

> . . . (1) placing advertisements in four national magazines that reach Washington consumers; (2) sending brochures and informational materials or otherwise contacting approximately 150 Washington consumers, at least in part due to its national advertising; (3) negotiating terms with Washington consumers via phone and mail; (4) selling approximately 10 percent of its slide-out units to Washington consumers during a five-year period, at least in part due

> to its national advertising; (5) assembling a list of past customers residing in Washington and distributing this list to potential customers in Washington; (6) authorizing warranty repairs within Washington; (7) sending a technician to Washington to service Raymond's slide-out unit; and (8) orally extending Raymond's warranty while Raymond was in Washington.

Id. at 634. IMG's contacts with Washington do not even come close to approaching the inadequate contacts in *Raymond.* Rather, IMG:

- Does not market its products in Washington;
- Does not sell or ship products to Washington;
- Has no contracts or dealings with Washington companies or consumers;
- Has no offices or other facilities in Washington;
- Owns no property in Washington; and
- Has no registered agent in Washington.

Ct. Rec. at 14-15 (Prince Decl. ¶2). Judge Serko therefore correctly found that IMG is not subject to general personal jurisdiction in Washington.

2. No Specific Jurisdiction Exists to Hear Schumacher's Complaint

Washington may also exercise personal jurisdiction over out of state defendants on the grounds of specific jurisdiction. Specific jurisdiction may be asserted only when the non-resident defendant has had "fair warning" that its activities in Washington may subject it to the jurisdiction of Washington's courts. *Burger King Corp. v. Rudzewicz,* 471

U.S. 462, 472 (1985). Specific jurisdiction is codified in Washington's Long-Arm Statute at RCW 4.28.185. Washington courts have consistently held that RCW 4.28.185 is coextensive with the limits of due process. *See Shute v. Carnival Cruise Lines,* 113 Wn.2d 763, 767 (1989) *reversed and remanded on other ground by Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991); *Deutsch v. West Coast Mach. Co.,* 80 Wn.2d 707, 711 (1972). As such, "the statutory issue . . . and the constitutional issue . . . merge into a single inquiry: Is the assertion of specific jurisdiction compatible with due process?" *Van Steenwyk v. Interamerican Mgmt. Consulting Corp.,* 834 F. Supp. 336, 340 (E.D. Wash. 1993) (applying Washington law on specific personal jurisdiction).

Under this standard, specific jurisdiction exists if Schumacher can show the following:

1. IMG performed some act or consummated some transaction within Washington by which it purposefully availed itself of the privilege of conducting activities in Washington, thereby invoking the benefits and protections of Washington law;

2. His claims arise out of or result from IMG's activities in Washington; and

3. The exercise of jurisdiction is reasonable.

See, e.g., Van Steenwyk, 834 F. Supp. at 340 (articulating three factor analysis); *Slepian v. Guerin,* No. 98-35039, 1999 WL 109676 at *1 (9th

Cir. March 1, 1999) (same); *Shute,* 113 Wn.2d at 767 (same). All three prongs must be satisfied. If Schumacher cannot meet his burden as to any one prong of this test, then his assertion of specific personal jurisdiction fails. *Van Steenwyk,* 834 F. Supp. at 340.

a. IMG Has Not Purposefully Availed Itself of the Privilege of Conducting Activities in Washington

"The requirement that the plaintiff[] show[s] purposeful availment ensures that the defendant's conduct and connection with the forum State are such that the defendant should reasonably anticipate being haled into court there." *Burger King,* 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980)). Where plaintiff's claims sound in contract, "[t]he existence of a contract between a resident of the forum state and a non-resident defendant is insufficient by itself to create personal jurisdiction over the non-resident." *Van Steenwyk,* 834 F. Supp. at 340 (internal quotations omitted); *see also Burger King,* 471 U.S. at 478; *MBM Fisheries, Inc. v. Bollinger Machine Shop & Shipyard, Inc.,* 60 Wn. App. 414, 423 (1991).

(i) Schumacher's Employment Agreement Is Not Enough to Show Purposeful Availment

Here, Schumacher identifies just one contact that relates to his claims in this lawsuit: the fact that he signed his IMG employment agreement while physically present within the state of Washington. App.

Br. at 15. That Schumacher signed the agreement in Washington, however, is not nearly enough to support a finding that IMG "purposefully availed" itself of the benefits of Washington law, especially since IMG executed the agreement in Utah. *See e.g., McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 816 (9th Cir. 1988) (although plaintiff executed contract in forum state, no purposeful availment existed where "the substance of the relationship was formed" in a foreign jurisdiction and defendant executed contract there and sent it to plaintiff by mail).

In addition, both the terms of the contract and the history of the parties' negotiations demonstrate that IMG never sought to avail itself of the benefits of Washington law. By choosing Utah law and Utah courts to resolve disputes between the parties, IMG clearly sought the benefits and protections of Utah law, not Washington. *See Lak, Inc. v. Deer Creek Enters.,* 885 F.2d 1293, 1295 (6th Cir. 1989) (argument that defendant purposed availed itself of Michigan law "is not helped by the fact that the parties chose to have the contract governed by the law of Florida."); *Tidy Car Int'l, Inc. v. Firestine,* 810 F. Supp. 199, 205 (E.D. Mich. 1993) (New York choice of law provision "weighed against" finding that defendant purposefully availed himself of Michigan law).

This conclusion is reinforced by the history of the parties' negotiations, in which Schumacher traveled to Utah to interview with

IMG, but no one from IMG set foot in Washington. Ct. Rec. at 15-16 (Prince Decl. ¶¶ 3-4). Likewise, the decision to hire and discharge Schumacher was made in Utah, not Washington. *Id.*; *see also Charlesworth v. Marco Mfg. Co.,* 878 F. Supp. 1196, 1201 (E.D. Pa. 1995) (no specific jurisdiction where decision to hire and fire plaintiff were made outside of forum state). And, while Schumacher did have some work-related communications with Utah by mail and telephone, it is well established that such communications "do not qualify as purposeful activity." *Peterson v. Kennedy,* 771 F.2d 1244, 1262 (9th Cir. 1985) ("[O]rdinarily 'use of the mails, telephone, or other [such] communications simply do not qualify as purposeful activity invoking the benefits and protection of the [forum] state.'") (citation omitted); *see also McGlinchy,* 845 F.2d AT 816 (although plaintiff executed contract in forum state, no purposeful availment existed where 'the substance of the relationship was formed'" in a foreign jurisdiction and defendant executed contract there and sent it to plaintiff by mail) (internal citation omitted); *Van Steenwyk,* 834 F. Supp. at 341 ("a non-resident defendant's use of mail, telephone, or other means of . . . communication does not ordinarily qualify as purposeful activity.") (citing *Roth v. Garcia Marquez,* 942 F.2d 617, 622 (9th Cir. 1991)).

In addition, Schumacher's contract with IMG contemplated him relocating at some point, and IMG had discussions with him regarding relocation to Salt Lake City, Southern Utah, and even Austria. Ct. Rec. at 16 (Prince Decl. at ¶ 6). Washington was never an option. *Id.* His residence in Washington, then, was for his own convenience and was not necessary for the performance of his agreement with IMG. In these circumstances, courts have held that the plaintiff's choice to live in a state while fulfilling an employment agreement for an employer in another state does not purposefully avail the employer of the jurisdiction of the employee's home state. *See, e.g., Pennebacker v. Wayfarer Ketch Corp.,* 777 F. Supp. 1217, 1221 (E.D. Pa. 1991) ("plaintiff's decision to live in Pennsylvania while employed by defendant [a California corporation] and receive some of his paychecks at his home address in Pennsylvania are essentially unilateral decisions on his part for his own convenience which cannot provide a basis of jurisdiction."); *Slepian*, 1999 WL 109676 at *2 (finding no personal jurisdiction in plaintiff's home state of Oregon where "employment contract was negotiated in California and performed by [defendant] in California and by [plaintiff] nationwide).

Romann v. Geissenberger Manufacturing Corporation, 865 F. Supp. 255, 264 (E.D. Pa. 1994), partially abrogated on other grounds in *Eagle Traffic Control v. James Julian, Inc.,* 933 F. Supp. 1251, 1255-56

(E.D. Pa. 1996), is particularly instructive. There, the Court found a lack of personal jurisdiction even where the out-of-state defendant employed the plaintiff as a salesman *in the forum state*. In *Romann,* the plaintiff contended that jurisdiction was proper because

> [H]e spent thirty to forty percent of his time generating Pennsylvania business while a GMC employee, he maintained an office in Pennsylvania dedicated solely to his GMC affairs, he received his paychecks in Pennsylvania and spent ninety-five percent of his administrative time working out of his Pennsylvania office. In addition, GMC paid his Pennsylvania office telephone bills as well as other expenses and costs associated with his Pennsylvania office. As evidence of GMC's presence in the state, Romann avers that GMC is registered to do business in Pennsylvania and has sold and shipped GMC products into the commonwealth. He further states that GMC's national sales manager is a Pennsylvania resident who works substantially out of a Pennsylvania office, and that Romann and the national sales manager communicated extensively between their Pennsylvania offices about GMC business. Finally, as evidence of the extent of GMC's Pennsylvania business, Romann attaches to his motion a copy of a non-competition agreement between GMC and another former employee that includes Pennsylvania among the places in which competing conduct is prohibited.

Id. at 258. The court disagreed, finding that even all this was not enough:

> The unilateral decisions of Romann . . . to reside in Pennsylvania and receive paychecks there do not constitute purposeful

> contacts by GMC, and cannot serve as the basis for the exercise of personal jurisdiction over Romann's employer. The Court reaches the same conclusion with respect to the Pennsylvania offices maintained by Romann . . . . The record suggests that these offices were maintained for the convenience of their occupants, and not as some purposeful availment by GMC of the privilege of conducting business in Pennsylvania.

Id. at 261-62 (internal quotations omitted). IMG's contacts with Washington are far less than those found to be insufficient by the court in *Romann*. *See also Layton v. E-Distributions, Inc.*, No. 404-CV-1238, 2005 WL 928613 at *9 (E.D. Mo. 2005) (in case involving claims arising from employment agreement between forum state resident hired to solicit business for foreign corporation nationwide, court found lack of personal jurisdiction where plaintiff's residence in forum state was not required under agreement and plaintiff had nationwide territory); *Lucachick v. NDS Americas, Inc.*, 169 F. Supp. 2d 1103 (D. Minn. 2001) (finding lack of personal jurisdiction where "only connection between the employment contract and Minnesota" was the plaintiff's residence which he did not dispute was "a personal choice and not a requirement of the contract").

Finally, although Schumacher spent some time working for IMG from his home in Washington, his location was irrelevant to his agreement with IMG. Schumacher, for instance, spent significant amounts of time

(108 days over the course of his time working for IMG) traveling to Kansas, Illinois, New Jersey, Florida, California and Wisconsin, as well as international travel to Canada, Austria and France.

In short, Schumacher's presence in Washington and IMG's "accommodation of [his] choice of residence were not coupled with any other contacts initiated by [IMG] and directed toward the forum." *Slepian,* 1999 WL 109676 at *2. Schumacher's services for IMG "were never directed at [Washington] residents or [Washington] businesses." *Id.*; *see also Van Steenwyk,* 834 F. Supp. at 342 (purposeful availment not established where "the economic relationships created by the contract were to have found their fulfillment outside" Washington). As such, he cannot show that IMG engaged in sufficient minimum contacts to satisfy the test for a finding of purposeful availment.

(ii) The Authority Cited by Schumacher is Inapposite

Schumacher argues that because IMG contracted with someone who happens to be a Washington resident, Washington's Courts may properly exercise personal jurisdiction over IMG. This alone, however, is not enough to show the purposeful availment necessary for a finding of specific jurisdiction. Schumacher cited the very same authority to Judge Serko that he now cites this Court, *Confico of Seattle, Ltd. v. Weiss,* 25

Wn. App. 195 (1980). Like Judge Serko, this Court should reject that authority as inapposite and unavailing.

First, the Court of Appeals decided *Confico* five years before the U.S. Supreme Court decided *Burger King*. The *Burger King* analysis has been squarely adopted in Washington, and allows for the exercise of long-arm jurisdiction only to the extent allowed by due process. *See Grange Ins. Ass'n v. State,* 110 Wn.2d 752, 758 (1988) (noting that the same standards employed by the court in *Burger King* have been adopted in Washington). Judge Serko, resolving the facts in the light most favorable to Mr. Schumacher, properly applied this analysis in dismissing Mr. Schumacher's claims for lack of personal jurisdiction.

Second, the argument Mr. Schumacher advances under *Confico,* that entering a contract with a Washington resident automatically confers personal jurisdiction over an out-of-state defendant, was addressed head-on in *Burger King* and was squarely rejected:

> If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests, . . . or on "conceptualistic . . . theories of the pace of contracting or of performance." . . . Instead, we have emphasized the need for a "highly

> realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." . . . It is these factors – prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing – that must be evaluated in determining whether the defendant purposefully established minimum contacts.

Id. at 478-79. In light of *Burger King,* it seems doubtful that Washington's courts would reach the same decision today that they reached in *Confico*. And, in fact, no Washington court since *Burger King* has applied *Confico's* narrow holding to exercise personal jurisdiction over an out-of-state defendant solely on the basis of a contract.

Third, even if *Confico* remains good law, it is distinguishable on its facts. In *Confico* the court found that the employee at issue was subject to personal jurisdiction in Washington because his employment agreement afforded him "the protection of Washington's laws affecting employer-employee relationships and its laws governing Confico's rights to conduct business as a corporate entity." *Confico*, 125 Wn. App. at 197. No similar reasoning applies here. IMG did not purposefully avail itself of the protections of Washington law. Instead, it expressly disclaimed them in favor of Utah law through a valid choice of law and forum selection

clause. Ct. Rec. at 9 (Compl., Ex. A at § 6.9). As such, even if the Court adopts the reasoning in *Confico* it still does not apply to this case where the parties expressly specified the law of a particular forum, Utah, should govern their agreement.

b. There Is No Nexus Between Schumacher's Claims and IMG's Alleged Forum-Related Activities

Schumacher also cannot establish the requisite connection between his claims and any contact by IMG with Washington. Under this requirement, plaintiff's claims "must result from 'alleged injuries that arise out of or relate to [IMG's] activities' in the forum state. *Burger King,* 471 U.S. at 472 (quoting *Helicopteros*, 466 U.S. at 414). The required "relationship between the defendant, the forum, and the litigation" simply does not exist here. *Id.* To the contrary, plaintiff alleges that his contract with IMG is void for lack of performance on IMG's part. Any such performance or non-performance could not have occurred in Washington because IMG had no activities here. Moreover, the agreement was negotiated in Utah, is subject to the laws of Utah, and includes a Utah forum selection clause.

c. Asserting Jurisdiction in This Instance Would Be Unreasonable

The exercise of specific jurisdiction over IMG in Washington also would be unreasonable. In determining the reasonableness of jurisdiction,

courts balance the following factors, no one of which is necessarily 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 convenient and effective relief; and (7) the existence of an alternative forum.

Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1487-88 (9th Cir. 1993); *see also Shute,* 113 Wn.2d at 767 (holding that exercise of jurisdiction must not offend traditional notions of fair play and substantial justice, with consideration given to the quality and extent of the defendant's activities in Washington, the relative convenience of the parties, the benefits and protections which Washington law affords the parties, and basic equities of the situation). In this case, the factors weigh strongly against the assertion of jurisdiction in Washington:

- *Purposeful Interjection:* Where, as here, plaintiff cannot establish purposeful availment, "the first factor of purposeful interjection weighs heavily in [defendant's] favor." *Terracom v. Valley Nat'l Bank,* 49 F.3d 555, 561 (9th Cir. 1995); *see also* §A(2)(b) above.
- *Burden on IMG*: The burden on IMG clearly would be high, because it maintains no office and conducts no operations in Washington or in any other state except for

Utah. Moreover witnesses and documents regarding the contract at issue and Schumacher's activities under that contract are more readily found in Utah, not Washington.

- *Conflict with Utah's Sovereignty*: In this case, proceeding in Washington would offend the sovereignty of Utah, particularly since: (1) the parties voluntarily vested Utah's courts with the jurisdiction to hear disputes arising under their agreement; (2) the parties specifically provided that Utah's laws should apply to their agreement; and (3) there is a currently pending action in the Utah courts regarding the issues raised in plaintiff's suit here, to which plaintiff has waived any arguments against personal jurisdiction or improper venue. *Gibbs v. Gibbs*, 73 P. 641, 643 (Utah 1903).

- *Washington's Interest*: While Washington clearly has an interest in resolving disputes involving its residents, this interest is necessarily diminished whereas here, the issues relate to events centered around Utah and turn on the application of Utah law.

- *Most Efficient Resolution*: The most efficient resolution of this action is to permit the pending Utah action to proceed, unencumbered by a parallel action in Washington, especially where the contract at issue is expressly subject to the jurisdiction of the Utah courts, Schumacher consented to and does not dispute such jurisdiction, and a Utah court will be in the best position to apply and interpret Utah law governing the contract.

- *Plaintiff's Interest*: While litigating in Utah may be less convenient for plaintiff, his interests would be served by allowing only one action to proceed. Because he has appeared in the Utah action and must defend there in any case, that action will proceed on a parallel track to this action no matter what this Court does. "In any event, neither the Supreme Court nor [the Ninth Circuit] has given much weight to inconvenience to the plaintiff." *Core-Vent Corp.*, 11 F.3d at 1490. Indeed, "the law of personal jurisdiction is 'asymmetrical.' The primary concern is for the defendant's burden." *Fed. Deposit Ins. Corp. v. British*

Am. Ins. Co., Ltd., 828 F.2d 1439, 1444 (9th Cir. 1987) (internal citation omitted)

- *Alternative Forum*: "The plaintiff bears the burden of proving the unavailability of an alternative forum." *Core-Vent Corp.*, 11 F.3d at 1490. In light of the forum selection clause selecting Utah as the proper forum for disputes arising under the contract, and the pending Utah action to which plaintiff has waived any challenge to personal jurisdiction or venue, plaintiff clearly cannot meet this burden. *See Amoco Egypt Oil,* 1 F.3d at 853 (plaintiff did not meet burden of proving unavailability of alternative forum where proceedings were already pending in Egypt).

The foregoing factors dictate that the exercise of jurisdiction in Washington would be unreasonable and that this dispute belongs in Utah. *See Patton Elec. Co. v. Rampart Air, Inc.*, 777 F. Supp. 704, 712 (N.D. Ind. 1991) (where Indiana action sought declaratory relief and asserted fraud claims related to pending Texas action, exercise of personal jurisdiction was held unreasonable because, inter alia (1) Indiana had little interest in the dispute, which arose in Texas and was controlled by Texas law; (2) resolving action in Texas would be more efficient; and (3) "substantive social policies" would be served "by thwarting plaintiff's attempt to engage in forum shopping.").

B. Judge Serko Properly Dismissed Appellant's Suit Under the Doctrine of Forum Non Conveniens

Since 1974, Washington courts have recognized the doctrine of forum non conveniens, under which a court may decline to exercise jurisdiction over a case when the convenience of the parties and the ends

of justice would be better served if the action were brought in another forum. *Sales,* 163 Wn.2d at 20; *see also Werner v. Werner,* 84 Wn.2d 360, 377-78 (1974) (holding that the doctrine of forum non conveniens contemplates the discretionary declination of jurisdiction where, in the court's view, the difficulties of litigation militate for the dismissal of the action, subject to the defendant's agreement to submit to the jurisdiction of the more convenient forum). The doctrine of forum non conveniens is seen "as an inherent discretionary power of the courts." *Id.* at 378.

State courts have long been empowered with the right to dismiss cases on the grounds of foreign non conveniens. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 504-507 (1947) ("We later expressly said that a state court 'may in appropriate cases apply the doctrine of forum non conveniens.'").[1] When applying the doctrine of forum non conveniens to dismiss or stay an action, courts must balance both private and public interest factors. *Sales,*

[1] *Gulf Oil* was subsequently vacated by statutory amendments to the federal courts' venue statutes, which now require transfer of cases rather than dismissal. This has not altered Washington's reliance on the factors announced in *Gulf Oil* that courts should apply when determining whether application of the doctrine is appropriate. *See, e.g., Lynch v. Pack,* 68 Wn. App. 626, 629-630 (1993) (employing factors from *Gulf Oil* to determine whether dismissal based on forum non conveniens was appropriate). Moreover, federal courts still recognize application of the forum non conveniens doctrine to dismiss cases when the more appropriate venue is a state or foreign court over which the federal courts have no authority to transfer cases. *See, e.g., Johnson v. G.D. Searle & Co.,* 552 A.2d 29, 32 (Md. Ct. App. 1989) ("[Forum non conveniens] is also applicable to federal courts where the only alternative forum is a state court."). Similarly, state courts are not empowered to transfer cases to the courts of other states.

2008 WL 325353 at *2; *see also Lynch v. Pack,* 68 Wn. App. 626, 629-30 (1993). The private interest factors include:

- Relative ease of access to sources or proof;
- Availability of compulsory process for attendance of unwilling, and the cost of obtaining of willing, witnesses;
- Possibility of view of the premises; and [2]
- All other practical problems that make trial of a case easy, expeditious and inexpensive.

Id.[3] The public interest factors include:

- Judicial economy;
- The costs imposed on the community to try the case;
- An interest in having localized controversies decided at home;
- The trial of a diversity case in the forum whose laws apply, rather than having a foreign court interpret another state's laws.

Id.

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[2] There is nothing in either the pending Utah action or Schumacher's Washington action which suggests that a site inspection or other view of the premises will be necessary. However, were such a review necessary it would necessarily take place in Utah where IMG is located. This factor, therefore, weighs either in favor of IMG to the extent a view of the premises is required, or is neutral as to both parties.

[3] Courts when weighing the parties' private interests have also looked to forum selection clauses as a manifestation of the parties' intent to litigate disputes in a particular forum. *See, e.g., Hoffer v. Infospace.com, Inc.,* 102 F. Supp. 2d 556, 573 (D.N.J. 2000) (finding transfer under federal forum non conviens statute appropriate, in part, based on valid forum selection clause). Here, IMG and Schumacher's agreement contains a forum selection clause, albeit nonexclusive, selecting Utah as the forum for disputes arising under their agreement. This factor was appropriately considered by Judge Serko in her decision to decline jurisdiction and appropriately gives effect to the parties' intent.

Judge Serko properly found that the "forum non conveniens factors weigh[ed] heavily in favor of Utah." Rep. of Proceedings at 3:15-16 (Mar. 28, 2008).[4] This finding was based on the unrebutted record evidence before Judge Serko as presented in the parties' briefing and declarations, including the following:

- *Sources of Proof:* The sources of proof regarding Schumacher's employment agreement and his conduct arising out of that agreement are primarily located in Utah, where IMG maintains its principle place of business and business records, not Washington. Ct. Rec. at 18 (Prince Decl.¶ 12). *See Lynch* 68 Wn. App. at 632 (affirming dismissal on forum non conveniens grounds where documents and witnesses were almost evenly split between Washington and forum state).
- *Availability of Compulsory Process*: Second, most of the witnesses to the events giving rise to both IMG and Schumacher's claims reside in Utah, or in locations apart from Washington. Ct. Rec. at 14-15 (Prince Decl. at ¶ 2.) Indeed, the only witness to Schumacher's claims who resides in Washington is Schumacher himself. Two pivotal witnesses, his co-defendants, Tinker and Feldscher, reside outside of Washington in California. Compulsory process will not as a matter of law suffice to hail them or any other non-resident witnesses into Washington's courts, and Schumacher provided no evidence below to suggest that either Tinker or Feldscher would cooperate in the prosecution of Schumacher's Washington action. Certainly Schumacher had the opportunity to provide declarations from his co-defendants in the Utah action and chose not to. Nevertheless, Tinker and Feldscher are subject to compulsory attendance in Utah through their status as

[4] At the time of the filing of Respondent's Brief, the verbatim report of proceedings had not yet been transmitted by the Pierce County Clerk to the Court of Appeals, and, therefore had not been numbered for the Court's record. As such, Respondent cites directly to the verbatim report of proceedings.

parties to that action. *Lynch*, 68 Wn. App. 632-33 (affirming dismissal on forum non conveniens grounds where there was "at least . . . a question" that some unwilling witnesses could not be compelled to testify in the Washington action).

In addition the costs even for willing witnesses to participate in this action are substantially higher in Washington than Utah. Again, Schumacher is the only party, and potentially the only witness, who resides in Washington. As such, all other IMG and any other witnesses, including the defendants in the Utah action who live in San Diego and Sacramento, California, as well as the individuals at IMG who negotiated Schumacher's employment agreement and to whom Schumacher reported, must travel to Washington.

- *Other Practical Problems*: The pending Utah action involves not only IMG and Schumacher, but Tinker and Feldscher, who are also named as defendants in that action. Tinker and Feldscher reside in San Diego and Sacramento, California, respectively. The *only* location where personal jurisdiction and venue are proper as to all defendants, then, is Utah. Indeed, all of the defendants to that action have consented to the application of Utah law to disputes arising from their employment agreements, and Schumacher and Tinker expressly consented to the jurisdiction of the Utah courts. Ct. Rec. at 54 ((Prince, Ex. B., Tinker Agreement, Section 6.9)). It would be more expeditious and certainly less expensive to all involved – both parties and courts – if only one action proceeded at this juncture. And, the only location where all parties are properly present is Utah.

- *Judicial Economy*: Judicial economy favors having one court hear this dispute, not two, or three, or even four. Moreover, Schumacher's claims in this declaratory judgment action are defenses in the Utah action. Without question, he will raise the exact same arguments in both forums if the separate actions both proceed.

- *Costs to the Community*: Significant costs are associated in both time and effort to the court and the community in moving a case through the judicial system. Washington

can bear these costs off to the Utah courts by allowing the action already filed there to proceed while dismissing the present action. *See, e.g., Frederick v. Advanced Financial Solutions, Inc.*, No. 4:06-CV-238, 2007 WL 2188335 at *5 (E.D. Tex. Sept. 26, 2007) (finding community interest factor weighed in favor of transfer under federal forum non conveniens statute where forum district's interest in litigation was "scant").

- *Local Interest in Deciding Local Controversies*: The interest in having localized controversies decided at home is almost certainly better served by allowing a Utah court to hear a controversy between a Utah company and an individual who performed work for that company under an employment agreement governed by Utah law that expressly specifies Utah as the forum for disputes. *Lynch* 68 Wn. App. at 634 (finding local interest was better served by allowing Montana court to decide dispute involving Montana corporations).
- *Avoiding Foreign Interpretation of another State's Law*: There is no dispute that jurisdiction is proper in the Utah courts and that Utah law applies to Schumacher's agreement with IMG. As such, preference should be given to the Utah courts to decide how to apply Utah law to the agreement in dispute between the parties. *Id.* (finding that foreign jurisdiction's courts were more likely to be familiar with interpretation and application of that jurisdiction's law).

Judge Serko's ruling dismissing this action under the doctrine of forum non conveniens was, therefore, amply supported by the record.

Washington courts in similar cases have dismissed actions in favor of the action proceeding in the foreign jurisdiction. In *Lynch,* for instance, the Washington Court of Appeals affirmed dismissal on forum non conveniens grounds a case between a Washington resident who brought

suit against a Montana resident for alleged misrepresentations and breach of warranties arising out of a stock purchase. *Lynch,* 68 Wn. App. at 628. In that case, the Court was faced with the following facts:

- Plaintiff Lynch was a Washington resident who had been solicited by defendant Pack's accountant to purchase stock in two Montana based companies owned by Pack, a Montana resident.
- The stock purchase agreement which was the subject of the suit was executed in Washington, and contained a choice of law provision selecting Montana law to govern disputes under the agreement.
- Plaintiff Lynch traveled to Montana on two occasions, and defendant Pack traveled to Spokane on three occasions to negotiate the stock purchase agreement.
- Plaintiff Lynch purchased 51% of the outstanding shares of two of Pack's companies, and the remaining 49% were placed in escrow in Spokane pursuant to the purchase agreement.
- Lynch and Park each identified about an even number of witnesses living in Washington and Montana who would be necessary to resolve Lynch's claims.
- The physical operations of the companies whose stock Lynch purchased were located in Montana.

Lynch, 68 Wn. App. at 631-35. Despite Pack's rather extensive contacts with Washington, the Court of Appeals found "the local interest in resolution of [the] litigation [was] likely to be higher in Montana."

A similar conclusion should be reached here where IMG, unlike Pack's activities toward Lynch, did not solicit Schumacher in Washington, did not travel to Washington to consummate its agreement with

Schumacher, did not transfer any property to Washington, and has the bulk of its documents and witnesses pertaining to Schumacher in Utah. Moreover, like the facts in *Lynch,* IMG and Schumacher executed an agreement selecting a foreign jurisdiction's law (and venue), and IMG's primary and only operations are located in Utah. Under the reasoning in *Lynch,* then, dismissal for forum non conveniens is appropriate based on the circumstances of the relationship between IMG and Schumacher. *See also J.H. Baxter & Co. v. Central Nat. Ins. Co. of Omaha,* 105 Wn. App. 657, 660 (2001) (dismissing insurance coverage declaratory judgment action where parallel action existed in California, and where the most important disputed claim arose in California).

Finally, Schumacher argues that Judge Serko did not and could not make findings of fact sufficient to support dismissal under the doctrine of forum non conveniens because the parties had not yet engaged in discovery. App. Br. at 10. Schumacher does not and cannot cite to a single Washington case supporting his position. Specifically, no Washington authority requires either that the lower court enter specific findings to support dismissal on the basis of forum non conveniens, or that the parties be permitted to engage in discovery on those factors prior to dismissal. Courts frequently dismiss cases on the basis of forum non conveniens at an early stage and without discovery. *See, e.g., Lynch,* 68

Wn. App. at 629 (lower court dismissed case on basis of forum non conveniens less than 60 days after case was filed and in response to motion to dismiss filed one month after case was filed).

Schumacher had ample opportunity to rebut the evidence presented by IMG to support dismissal on the basis of forum non conveniens by presenting his own competing declarations. He did not do so. He claims discovery is needed to identify key witnesses and documents. However, this is Schumacher's case. He should be well aware of where his sources of proof are likely to be, and he offered nothing below to suggest those sources are anywhere but outside the state of Washington. As such, the overwhelming weight of unrebutted evidence before Judge Serko supports dismissal on the basis of forum non conveniens in favor of the pending Utah action.[5]

C. The Trial Court Properly Awarded IMG's Reasonable Attorneys' Fees

1. The Award of Fees Was Appropriate

Judge Serko properly awarded IMG its reasonable attorneys' fees under RCW 4.28.185(5), which provides, in pertinent part:

> In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in

[5] Even were the Court to find that Judge Serko's ruling did not provide sufficiently detailed findings of fact, the proper remedy is to remand this matter to Judge Serko for entry of those findings.

> the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

The Washington Supreme Court in *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109 (1990) (Fetzer I), held that:***

> [A] foreign defendant over whom long-arm jurisdiction is improperly asserted determinedly has had *less* than minimal contacts with the state. As a direct result of the plaintiff's resort to the long-arm statute, however, the defendant suddenly finds himself in need of Washington counsel and responsible for abiding Washington laws and courts rules – "burdens and inconveniences which would have been avoided had the trial been conducted at the place of his domicile." . . . This defendant thus presents the paradigm case for an award of fees under RCW 4.28.185(5).

Id. at 114 (emphasis in original, citations omitted).

The Court's decision in *Fetzer I* announced bedrock principles for the award of attorneys' fees under RCW 4.28.185(5), including:

- An award of attorneys' fees is proper under RCW 4.28.185(5) where the defendant prevails only on the jurisdictional question, and the merits of the case are not decided. *Fetzer I at 114* (". . . the plain language of the long-arm statute's fee award provision, as well as the cases in which we have applied and interpreted that provision, fully support our conclusion that the statute authorizes trial courts to award attorney fees to defendants who prevail jurisdictionally.").
- Even if a court lacks jurisdiction to hear the underlying dispute between the parties, it nonetheless has the

jurisdiction to award fees under RCW 4.28.185(5). *Fetzer I* at 116 ("The better approach has been recognized to be that the court, having jurisdiction to determine its jurisdiction, has the power to award costs even if jurisdiction is found to be wanting.").

- Appropriate fees under RCW 4.28.185(5) are calculated using a lodestar approach. *Fetzer I* at 123-24 ("For purposes of determining reasonable fee awards under RCW 4.28.185(5), we favor the lodestar approach. We do not reject entirely the factors approach, however, but rather expect that its various considerations will be subsumed within the adjusted lodestar amount.").

Here, IMG was served out of state, invoking the long arm jurisdiction of this Court under RCW 4.28.185(1). Ct. Rec. at 182 (Sanders Decl. at Ex. A). IMG obtained dismissal of plaintiff's claims for lack of personal jurisdiction and forum non conveniens. IMG, therefore, meets all the criteria outlined in RCW 4.28.185(5) for an award of attorneys' fees.

While the Appellant correctly notes that the language of RCW 4.28.185(5) is permissive and vests the Court with the discretion to award fees, the facts of this case amply support an award of fees. *Id.* Indeed, the Washington Supreme Court in *Fetzer I* found the trial court's award of fees under RCW 4.28.185(5) appropriate where:

- The plaintiff commenced an action against an out of state vacuum cleaner retailer, along with several other defendants;
- The defendant retailer answered and denied that jurisdiction was proper;

- The defendant retailer brought a motion contesting jurisdiction nearly seven months after the complaint was filed; and
- The Court ultimately found jurisdiction lacking.

Fetzer I, 114 Wn.2d at 111. In fact, the Court in *Fetzer I* labeled these circumstances the "paradigm case for an award of fees under RCW 4.28.185(5)." *Id.*

Here, Mr. Schumacher reached out to IMG, a Utah company, for a job, signed an employment agreement with a Utah forum selection clause, and even had discussions with IMG about moving to Utah. He could have sought counsel and brought this suit in Utah, where IMG resides and conducts business. Instead, he filed a lawsuit in Pierce County, where, like the "paradigm case" in *Fetzer I,* IMG, a foreign corporation, was improperly hailed into Washington court under Washington's long-arm statute. IMG retained Washington counsel and moved for dismissal based on lack of jurisdiction and forum non conveniens. IMG's motion was granted by the Court, and upheld on reconsideration. Under these circumstances, almost identical to those considered in *Fetzer I*, an award of fees is appropriate and well within the Court's sound discretion.

In an attempt to counter the application of *Fetzer I*, plaintiff suggests, relying on *Park Hill Corp. v. Sharp,* 60 Wn. App. 283 (1991), that the Court should consider three factors in deciding whether to award

fees in this matter: (1) whether the underlying suit was intended to harass a foreign defendant; (2) whether plaintiff's claims were frivolous; and (3) whether plaintiff delayed or obstructed resolution of the jurisdictional question. Plf.'s Opp. at 3. While these factors might amplify the need to award attorneys' fees in a particular case they were not the sole factors considered by the Court in *Park Hill* and should not be treated as dispositive here.

As an initial matter, in *Park Hill* the trial court dismissed the matter, not on jurisdictional or venue grounds, but *on its merits*. *Park Hill*, 60 Wn. App. at 285-86. Then, following dismissal on the merits, the foreign defendants requested attorneys' fees. The court denied the request and concluded:

> Plaintiffs' fraudulent conveyance or transfer action against the children of Sally B. Chambers was not frivolous and was not brought to harass such Defendants. Such Defendants did not attend the trial in Washington and were deposed in their resident states. ***Any burdens and inconveniences which the children of Sally B. Chambers would have been [sic] avoided had the trial been conducted in their three different resident states were balanced by the conveniences to them resulting from the trial of this action in Washington State where all four children could be represented by a single attorney who was already representing their mother. There was no more convenient forum than***

> ***Washington.*** Traditional notions of fair play and substantial justice were not offended by having the children of Sally B. Chambers appear in this state, and no award of attorney's fees is necessary to prevent a violation of traditional notions of fair play and substantial justice.

Park Hill, 60 Wn. App. at 288 n.7 (emphasis added) . Unlike the defendants in *Park Hill,* the merits of Mr. Schumacher's claims were not decided here, and IMG received no corresponding benefit to litigating only jurisdictional issues in Washington. *Id.* In fact, the opposite is true. First, IMG incurred the expense of retaining Washington counsel specifically to contest jurisdiction – precisely the burden RCW 4.28.185(5) was intended to remedy under the reasoning of the Washington Supreme Court in *Fetzer I.* Second, a more appropriate forum existed for IMG and Mr. Schumacher's claims. IMG had already filed suit in Utah against Mr. Schumacher and two other defendants with employment contracts identical to the contract that Mr. Schumacher contested here. That Utah is a superior forum cannot be disputed by Mr. Schumacher who has consented to jurisdiction in Utah. In short, *Park Hill* is inapposite.[6]

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[6] The court's decision in *Park Hill* should be disregarded for two additional reasons. First, the trial court in that case couched its decision not to award fees in terms of "traditional notions of fair play and substantial justice," an analytical framework expressly rejected by the Washington Supreme Court. *Fetzer,* 114 Wn.2d at 116 ("We thus now hold that 'fair play and substantial

2. The Amount of Fees Awarded Was Reasonable

IMG was awarded fees totaling $35,360.65 for work performed in securing jurisdictional dismissal of plaintiff's claim. Judge Serko carefully considered this fee award, reducing and deducting fees she found to be unreasonable. *See* Rep. of Proceedings at 3-5 (June 6, 2008). All of IMG's attorneys' fees were detailed in the billing statements and declarations of James Sanders and Brian M. Flock provided to the Court in support of IMG's Application for Fees. Moreover, the fees awarded were justified in light of the nature of the issues involved, the market in which counsel practice, and counsel's own background and experience. Indeed, in the Supreme Court's second *Fetzer* opinion ("*Fetzer II*"), issued *15 years ago*, the court awarded fees totaling more than $22,000 in a dispute regarding vacuum cleaners valued at a mere $19,000. *Fetzer*, 122 Wn.2d 141, 141 (1993) . That award, by its terms, was limited to those fees incurred to secure jurisdictional dismissal. *Id.* at 149 ("a prevailing defendant should not recover more than an amount necessary to compensate him for the added litigative burdens resulting from the

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justice' no longer should be invoked to determine appropriate fees awards under the long-arm statute."). Second, neither party in *Park Hill* appealed the lower court's findings of fact and conclusions of law regarding the award of fees. *Park Hill,* 60 Wn. App. at 288. The Court of Appeals affirmed denial of the award on this ground and noted in dicta that the denial was within the trial court's discretion and supported by substantial evidence. *Id.*

plaintiff's use of the long-arm statute"). IMG's request is hardly unreasonable in light of the award in *Fetzer II.*

Plaintiff's reliance on the concurring opinion in *Fetzer I* to challenge the amount of IMG's requested fees is misplaced. IMG has engaged in no conduct that could reasonably be characterized as "outrageous abuse by a defendant" that "escalate[d] a simple jurisdictional issue into a predatory legal foray." App. Br. at 22-24. Unlike the defendant in *Fetzer I & II* who waited several months to move for dismissal on jurisdictional grounds, thereby driving up the defendant's own costs and legal fees, IMG *immediately* moved for dismissal in lieu of answering plaintiff's complaint. IMG has engaged in precisely the sort of activity the concurring opinion in *Fetzer I* hoped to promote.

3. Appellant's Arguments Based on the Parties' Contract Are Unavailing

Appellant finally argues that Judge Serko's award of fees was inappropriate because the parties' contract contains an express fee shifting provision. App. Br. at 20-21. That provision allows the prevailing party to obtain its fees in any litigation on the underlying contract. Appellant's argument against the award of fees, here, based on this provision is misplaced.

First, Appellant's argument is premised on the very same argument he advanced to Judge Serko: a full trial on the merits is needed before dismissal for lack of jurisdiction or an award of fees is ever appropriate. Except now, Appellant also suggests that even though IMG obtained jurisdictional dismissal in Washington, it must now wait until a full trial on the merits is held in Utah before it can properly be awarded its fees. This proposition ignores the fact that Washington's long-arm statute has no bearing or effect in the Utah action, nor does a Utah court have the power to award fees for the dismissal of a suit in Washington.

Second, Washington's long-arm statute provides IMG with alternate grounds for an award of fees apart from the parties' contract. The parties' contract does not say that IMG cannot seek its fees under this or any other statute that might contain fee shifting language. The parties' agreement, instead, provides a fee shifting arrangement between the parties not found in any other statute that allows the prevailing party on the merits of a dispute about the parties' agreement to seek its fees from the non-prevailing party. This additional agreement between the parties does not abrogate the applicability of other fee shifting statutes under applicable state law.

VII. CONCLUSION

For the foregoing reasons, the Court should affirm Judge Serko's ruling dismissing Schumacher's case for lack of personal jurisdiction and under the doctrine of forum non conveniens. The Court should also affirm Judge Serko's award of fees as reasonable.

RESPECTFULLY SUBMITTED this 20th day of October, 2008.

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DECLARATION OF SERVICE

I, Debbie Burge, declare as follows: that on the 20th day of October, 2008, BRIEF OF RESPONDENT was served on opposing counsel via legal messenger at the following addresses:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 20th day of October, 2008.

Debbie Burge
Legal Secretary

FILED
COURT OF APPEALS
DIVISION II

08 OCT 20 PM 3:50

STATE OF WASHINGTON
BY_____
DEPUTY

ORIGINAL

No. 37721-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JIM SCHUMACHER,

Appellant,

v.

IMG GROUP, LLC,

Respondent.

APPENDIX OF OUT-OF-STATE AUTHORITIES SUPPORTING BRIEF OF RESPONDENT

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Signed at Seattle, Washington this 20th day of October, 2008.

Debbie Burge
Legal Secretary

EXHIBIT A

H

United States Court of Appeals,Ninth Circuit.
AMOCO EGYPT OIL COMPANY; Egyptian General Petroleum Corporation, Plaintiffs-Appellants,
v.
LEONIS NAVIGATION COMPANY, INC., Defendant-Appellee.
No. 91-35978.

Argued and Submitted April 5, 1993.
Decided July 28, 1993.

Oil platform owner sued Philippine corporation for damages sustained when corporation's ship collided with the platform. The United States District Court for the Western District of Washington, Carolyn R. Dimmick, District Judge, dismissed action, and plaintiffs appealed. The Court of Appeals, Boochever, J., held that district court lacked personal jurisdiction over Philippine corporation.

Affirmed.

West Headnotes

[1] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
When factual assertions are essentially uncontroverted, Court of Appeals reviews district court's ruling on personal jurisdiction de novo. U.S.C.A. Const.Amends. 5, 14.

[2] Federal Civil Procedure 170A ⚿1825

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1825 k. Motion and Proceedings Thereon. Most Cited Cases
Where court bases jurisdictional ruling on affidavits and discovery materials without holding evidentiary hearing, dismissal is appropriate only if plaintiff has failed to make prima facie showing of personal jurisdiction. U.S.C.A. Const.Amends. 5, 14.

[3] Constitutional Law 92 ⚿3962

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3962 k. In General. Most Cited Cases
(Formerly 92k305(4.1))

Federal Courts 170B ⚿76.1

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.1 k. In General. Most Cited Cases
(Formerly 170Bk76)
To establish jurisdiction, plaintiff must show that forum state's jurisdictional statute confers jurisdiction and that exercise of jurisdiction accords with federal constitutional principles of due process. U.S.C.A. Const.Amends. 5, 14.

[4] Constitutional Law 92 ⚿3965(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases

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(Formerly 92k305(6))

Federal Courts 170B ⚿79

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk79 k. Corporate Activities and Contacts Within District; Doing Business in General. Most Cited Cases
Under Washington's long-arm statute, which provides for service on foreign corporation "doing business" in Washington, doing business and due process inquiries are the same, and courts have general jurisdiction over nonresident defendants who conduct substantial and continuous business in Washington of such character as to give rise to legal obligation. West's RCWA 4.28.080(10), 4.28.185; U.S.C.A. Const.Amends. 5, 14.

[5] Constitutional Law 92 ⚿3965(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases
(Formerly 92k305(6))

Federal Courts 170B ⚿79

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk79 k. Corporate Activities and Contacts Within District; Doing Business in General. Most Cited Cases
Due process requirements are satisfied when in personam jurisdiction is asserted over nonresident corporate defendant that has minimum contacts with forum such that maintenance of suit does not offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amends. 5, 14.

[6] Federal Courts 170B ⚿86

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk86 k. Aliens or Alien Corporations. Most Cited Cases
District court lacked personal jurisdiction, under Washington's long-arm statute, over Philippine corporation which owned vessel in action arising from collision in Egyptian waters; exercise of personal jurisdiction would have been unreasonable, since corporation had no connections with Washington and no agent or office elsewhere in United States, plaintiffs had their bases of operations in Egypt, and maritime liability limitation proceedings were pending in Egypt. West's RCWA 4.28.080(10), 4.28.185; U.S.C.A. Const.Amends. 5, 14.

[7] Federal Courts 170B ⚿86

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk86 k. Aliens or Alien Corporations. Most Cited Cases
When defendant is from foreign nation rather than from another state, sovereignty barrier is high and undermines reasonableness of exercise of personal jurisdiction. U.S.C.A. Const.Amends. 5, 14.

[8] Federal Civil Procedure 170A ⚿1825

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1825 k. Motion and Proceedings Thereon. Most Cited Cases
Party opposing motion to dismiss for lack of per-

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sonal jurisdiction has burden to prove unavailability of an alternative forum. U.S.C.A. Const.Amend. 14.

***849** Louis P. Sheinbaum,Waesche, Sheinbaum & O'Regan, New York City, for plaintiffs-appellants.
Graydon S. Staring, Lillick & Charles, San Francisco, CA, for defendant-appellee.

Appeal from the United States District Court for the Western District of Washington.

Before: BOOCHEVER, THOMPSON, and KLEINFELD, Circuit Judges.

BOOCHEVER, Circuit Judge:
This is an appeal from the district court's dismissal of an action against a foreign corporation for lack of personal jurisdiction. We affirm.

BACKGROUND

The Panay Sampaguita, a ship sailing from Singapore to France, collided with an oil platform in Egyptian waters. The ship was owned by a Panamanian corporation and bareboat chartered FN1 by Leonis Navigation ("Leonis"), a Philippine corporation with its headquarters in Manila. The platform was jointly owned by Amoco Egypt Oil Company, a Delaware corporation with its principal offices in Egypt, and Egyptian General Petroleum***850** Corporation ("EGPC"), an instrumentality of the Egyptian government charged with exploitation of its oil resources. Amoco Egypt and EGPC (together, "Amoco") filed suit against Leonis for $250,000,000 in damages in the United States District Court for the Western District of Washington.

> FN1. Under a bareboat charter, the owner gives the charterer full possession and control of the vessel for a period of time. The charterer is responsible for directing the operations of the vessel and providing the master and crew. Admiralty law treats the bareboat charterer as the owner for many purposes. *See Reed v. The Yaka,* 373 U.S. 410, 412, 83 S.Ct. 1349, 1351-52, 10 L.Ed.2d 448 (1963).

Leonis' contacts with Washington derive from its bareboat chartering of the Panay Sampaguita and three other vessels. Leonis subchartered all four vessels to Leo Maritime Co., Ltd., which further subchartered one of the vessels, the Luzon Sampaguita, to Navix Line, Ltd. ("Navix"). At the direction of time charterer Navix, the Luzon sailed exclusively between Tacoma and Japan carrying Washington logs, making seven round trips between the date of Leonis' charter and the date the complaint was filed. The Panay and the two other vessels also called on Washington ports during the same period, but on a more random and infrequent basis.

Incident to its boat chartering, Leonis had some additional contacts with Washington. The bills of lading to which Leonis was a party were executed by Washington businesses and provided that disputes would be decided under United States law. Leonis paid the Luzon's crew with U.S. dollars that were purchased in Washington. An agent of Navix purchased supplies and services for Leonis crew members while the Luzon was in Washington. Leonis also obtained a certificate of financial responsibility for environmental claims from the United States Coast Guard in Washington, D.C., a requirement for any vessel entering United States waters.

The district court dismissed Amoco's complaint, ruling that because Leonis was not licensed to do business, had no offices or property, based no employees, sold no products, did not advertise, and had no shareholders in the State of Washington, the court could not exercise general jurisdiction over Leonis. *See Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 411, 418-19, 104 S.Ct. 1868, 1870-71, 1874, 80 L.Ed.2d 404 (1984). Amoco timely appealed, claiming that Leonis' contacts were both purposeful and substantial enough to allow the district court to exercise jurisdiction over the claim.

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STANDARD OF REVIEW

[1][2] Because Amoco's factual assertions are essentially uncontroverted, we review the district court's ruling on personal jurisdiction de novo. *Shute v. Carnival Cruise Lines,* 897 F.2d 377, 380 (9th Cir.1990), *rev'd on other grounds,* 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). Where, as here, the district court bases its jurisdictional ruling on affidavits and discovery materials without holding an evidentiary hearing, dismissal is appropriate only if the plaintiff has failed to make a prima facie showing of personal jurisdiction. *Fields v. Sedgwick Associated Risks, Ltd.,* 796 F.2d 299, 301 (9th Cir.1986); *Data Disc, Inc. v. Systems Tech. Assocs., Inc.,* 557 F.2d 1280, 1285 (9th Cir.1977).

DISCUSSION

[3] To establish jurisdiction, Amoco must show that Washington's jurisdictional statute confers jurisdiction over Leonis and that the exercise of jurisdiction accords with federal constitutional principles of due process. *Shute,* 897 F.2d at 380; *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.,* 784 F.2d 1392, 1396 (9th Cir.1986). Because Amoco's claim against Leonis did not arise out of, and is unrelated to, Leonis' contacts with Washington, Amoco concedes that the district court may only hear the claim if Washington can exercise "general jurisdiction" over Leonis. *See Helicopteros,* 466 U.S. at 414 n. 9, 104 S.Ct. at 1872 n. 9.

A. *Washington's Jurisdictional Statute*

[4] The district court dismissed concerns with Washington law by stating that Washington's long-arm statute, Wash.Rev.Code § 4.28.185, is coextensive with constitutional standards. *See Shute,* 897 F.2d at 380. Section 4.28.185, however, deals only with specific jurisdiction. General jurisdiction is authorized by § 4.28.080(10), which provides for service of summons on a foreign corporation "doing business" in Washington. Washington courts have interpreted this section as conferring general jurisdiction over nonresident defendants who conduct "substantial" and "continuous" business in the state "of such a character as to give rise to a legal ***851** obligation." *Crose v. Volkswagenwerk Aktiengesellschaft,* 88 Wash.2d 50, 558 P.2d 764, 766-67 (1977) (en banc); *see Hein v. Taco Bell, Inc.,* 60 Wash.App. 325, 803 P.2d 329, 331 (1991). Although the Washington Supreme Court has never explicitly so stated, courts of appeal have consistently held that the "doing business" and due process inquiries are the same. *See MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.,* 60 Wash.App. 414, 804 P.2d 627, 630-31 (1991); *Hein,* 803 P.2d at 332. Thus " 'the statutory and constitutional standards merge into a single due process test,' " *Shute,* 897 F.2d at 380 (quoting *Pedersen Fisheries, Inc. v. Patti Indus.,* 563 F.Supp. 72, 74 (W.D.Wash.1983)), and we turn to the question of whether general jurisdiction over Leonis comports with due process requirements.

B. *Due Process*

[5] "Due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant that has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' " *Helicopteros,* 466 U.S. at 414, 104 S.Ct. at 1872 (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). The Supreme Court has bifurcated this due process determination into two inquiries, requiring, first, that the defendant have the requisite contacts with the forum state to render it subject to the forum's jurisdiction, and second, that the assertion of jurisdiction be reasonable. *See Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (majority agreeing on dismissal because assertion of jurisdiction was unreasonable, but disagreeing on whether minimum contacts existed).FN2 Because we conclude that the exercise of personal jurisdiction over Leonis would be

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unreasonable, we need not address the issue of contacts.[FN3] *See FDIC v. British-American Ins. Co., Ltd.*, 828 F.2d 1439, 1442 (9th Cir.1987); *Fields*, 796 F.2d at 302.

FN2. Although neither the Supreme Court nor this circuit has explicitly engaged in a separate reasonableness inquiry in a general jurisdiction case, *Asahi* 's interpretation of *International Shoe* as entailing separate contacts and reasonableness inquiries is not limited to the specific jurisdiction context but applies to all determinations of personal jurisdiction. *See Asahi*, 480 U.S. at 113, 107 S.Ct. at 1032-33.

FN3. Although the district court based its dismissal on a contacts analysis, we may affirm the district court's decision on any basis supported by the record. *United States v. Washington*, 969 F.2d 752, 755 (9th Cir.1992), *cert. denied*, 507 U.S. 1051, 113 S.Ct. 1945, 123 L.Ed.2d 651 (1993). We note, however, that in view of Leonis' lack of incorporation, license or authorization to do business, offices, property, employees, payment of taxes, advertising, solicitation, or sales in Washington, we doubt that Leonis' contacts with Washington are sufficiently "continuous and systematic" to support general jurisdiction. *See Helicopteros*, 466 U.S. at 416, 104 S.Ct. at 1873. The Supreme Court has upheld general jurisdiction only once, in a case involving contacts significantly more comprehensive than those presented here. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952). We have stated that "the *Perkins* holding that the cause of action need not arise out of the defendant's activities in the forum is limited to its unusual facts," *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir.1984), and regularly have declined to find general jurisdiction even where the contacts were quite extensive. *See, e.g., Shute*, 897 F.2d at 381; *Cubbage v. Merchent*, 744 F.2d 665, 667-68 (9th Cir.1984), *cert. denied*, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1331 (9th Cir.1984), *cert. denied*, 471 U.S. 1066, 105 S.Ct. 2143, 85 L.Ed.2d 500 (1985).

[6] We have listed the following factors to be balanced in determining reasonableness in a specific jurisdiction context:

the extent of purposeful interjection, the burden on the defendant to defend the suit in the chosen forum, the extent of conflict with the sovereignty of the defendant's state, the forum state's interest in the dispute; the most efficient forum for judicial resolution of the dispute; the importance of the chosen forum to the plaintiff's interest in convenient and effective relief; and the existence of an alternative forum.

Shute, 897 F.2d at 386; *see Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir.1981). We apply these same factors to the present general jurisdiction analysis. The burden is on the defendant to " 'present a compelling case' that the ***852** exercise of jurisdiction would, in fact, be unreasonable." *Shute*, 897 F.2d at 386 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S.Ct. 2174, 2185, 85 L.Ed.2d 528 (1985)).

1. Extent of Purposeful Interjection

This factor parallels the question of minimum contacts, which we have declined to decide. *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir.1988). We similarly put it aside here because the remaining six factors present a compelling case for unreasonableness.

2. Burden on Defendant

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"The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi,* 480 U.S. at 114, 107 S.Ct. at 1033. The burden on Leonis of defending the suit in Washington is considerable. Leonis' base of operations is in Manila. The company presently has no connections with Washington, nor does it have an agent or office anywhere else in the United States. *See Roth v. Garcia Marquez,* 942 F.2d 617, 623 (9th Cir.1991). Potential witnesses and evidence are not located in Washington. Although Amoco suggests that Egypt would be an equally burdensome forum for Leonis, the burden on the defendant is not a *forum non conveniens* question, but a function of due process requirements.

3. Conflict with Sovereignty of Defendant's State

[7] Where, as here, the defendant is from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction. *Pacific Atl. Trading Co. v. M/V Main Express,* 758 F.2d 1325, 1330 (9th Cir.1985). As the Supreme Court has noted, " '[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.' " *Asahi,* 480 U.S. at 115, 107 S.Ct. at 1034 (quoting *United States v. First Nat'l City Bank,* 379 U.S. 378, 404, 85 S.Ct. 528, 542, 13 L.Ed.2d 365 (1965) (Harlan, J., dissenting)). The international context of this case militates in favor of Leonis.

4. Forum State's Interest

Although the district court stated that "it cannot be said that Washington State with its extensive maritime trade does not have an interest in an allision between a shipping vessel and an oil platform," this interest is no greater or more specific than that of any port city around the world. *Asahi* cautions against such an overly broad definition of a state's interest. *Asahi,* 480 U.S. at 114, 107 S.Ct. at 1033. Washington has no interest in this claim. The vessel involved in the accident was not sailing from Washington and carried no Washington cargo. Neither the accident nor the lawsuit's outcome has any effect on Washington or its residents. Nor is there even an arguable basis for the application of Washington law to an accident in Egyptian waters involving a Philippine-owned ship bound from Singapore to France and an oil platform owned jointly by an Egyptian instrumentality and a Delaware corporation with its only base of operations in Egypt. *See id.* at 115, 107 S.Ct. at 1033-34. The absence of a forum state interest weighs heavily against the reasonableness of Washington's assertion of jurisdiction.

5. Most Efficient Resolution

Unlike the burden on the defendant, this factor involves a comparison of alternative forums. *See Shute,* 897 F.2d at 387; *Pacific Atl. Trading Co.,* 758 F.2d at 1331. The interest in obtaining the most efficient resolution of this controversy clearly points to Egypt and away from Washington. "The site where the injury occurred and where evidence is located usually will be the most efficient forum." *Pacific Atl. Trading Co.,* 758 F.2d at 1331. Moreover, assuming that Washington's choice of law rules would require the application of Egyptian law, the efficiency of proceeding in Washington is further diminished. *See id.; Insurance Co. of N. Am.,* 649 F.2d at 1273.

***853** 6. Convenient and Effective Relief for Plaintiff

Surprisingly, Amoco's interest in this litigation also suggests the unreasonableness of Washington jurisdiction. Both plaintiffs have all of their operations in Egypt; the accident on which the claim is based occurred in Egypt; and the bulk of the relevant evidence and witnesses are presumably located in Egypt. Amoco has no involvement with Washing-

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ton and has given no clear statement of its interest in having the claim litigated there.[FN4]

> FN4. It appears to us that the only possible reason for Amoco to seek Washington jurisdiction would be to attempt to avoid limitations on Leonis' liability under Egyptian law. Although limitation of liability might be a legitimate concern with regard to "effective relief," Amoco vigorously denies that this is its motive and fails to suggest another. We are thus left with absolutely no interest of Amoco in litigating in Washington.

7. Existence of Alternative Forum

[8] Amoco has the burden of proving the unavailability of an alternative forum. *Pacific Atl. Trading Co.*, 758 F.2d at 1331. It has not met this burden. Proceedings involving Leonis' liability for damages caused by the allision are already pending in Egypt. In accordance with the 1976 International Convention on Limitation of Liability for Maritime Claims, to which Egypt is a party, Leonis commenced a limitation action in Egypt to determine the extent of provable damages and limit its liability.[FN5] That action was filed on January 30, 1990, one day before Amoco filed the present claim. Both plaintiffs were named in the limitation action and notified of the proceedings. A limitation fund was established in Egypt, administered by the Egyptian court. Although Amoco has not filed any claims against the fund, an alternative forum for its claim against Leonis plainly exists.

> FN5. Under Egyptian law, an owner or charterer of a ship is entitled to limit its liability for claims, including property damage, unless "it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result." The court calculates the amount of the fund and distributes it to claimants as compensation for damages after determining their claims.

CONCLUSION

On balancing the above factors, we conclude that Leonis has presented a compelling case that the Washington district court's exercise of personal jurisdiction would be unreasonable. We therefore affirm the district court's judgment of dismissal.

AFFIRMED.

C.A.9 (Wash.),1993.
Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc.
1 F.3d 848, 1993 A.M.C. 2133

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EXHIBIT B

Supreme Court of the United States
BURGER KING CORPORATION, Appellant
v.
John RUDZEWICZ.
No. 83-2097.

Argued Jan. 8, 1985.
Decided May 20, 1985.

Franchisor brought action against franchisee alleging breach of franchise obligations and trademark infringement. The United States District Court for the Southern District of Florida entered judgment in favor of franchisor and franchisee appealed. The Court of Appeals for the Eleventh Circuit, 724 F.2d 1505,reversed and denied rehearing, 729 F.2d 1468. The Supreme Court, Justice Brennan, held that: (1) where it was not clear that Court of Appeals had found Florida long-arm statute unconstitutional as applied, Supreme Court did not have jurisdiction over appeal; (2) jurisdictional statement would be treated as petition for writ of certiorari; and (3) exercise of long-arm jurisdiction over Michigan franchisee in Florida did not offend due process.

Reversed and remanded.

Justice Stevens dissented and filed an opinion in which Justice White joined.

West Headnotes

[1] Federal Courts 170B ⚿453

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk453 k. Proceedings to Obtain Writ. Most Cited Cases
Where it was unclear whether Court of Appeals actually held statute unconstitutional as applied to the circumstances of the case, jurisdiction did not properly lie in the Supreme Court by appeal and appeal would be dismissed, with the jurisdictional statement treated as a petition for writ of certiorari, which would be granted. 28 U.S.C.A. § 1254(2).

[2] Federal Courts 170B ⚿455.1

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk455 Decisions Reviewable and Grounds for Issuance
170Bk455.1 k. In General. Most Cited Cases
(Formerly 170Bk455)
Parties cannot stipulate to a particular construction of state law, and thereby obtain jurisdiction over appeal to Supreme Court, where state law might, in fact, be in harmony with the Federal Constitution; Supreme Court's jurisdiction is properly invoked only where a Court of Appeals has squarely held that the statute is unconstitutional on its face or as applied and jurisdiction does not lie if the decision might rest on other grounds. 28 U.S.C.A. § 1254(2).

[3] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))
Due process clause protects an individual's liberty in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations; although the protection operates to restrict state power, it is ultimately a function of the individual liberty interest preserved by the due process clause rather than a function of

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federalism concern. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 ⚿3968

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3968 k. Consent; Forum-Selection Clauses. Most Cited Cases
(Formerly 92k305(4.1), 92k305(4))

Contracts 95 ⚿127(4)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court
95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases
Where forum selection provisions have been obtained through freely negotiated agreements and are not unreasonable and unjust, their enforcement does not offend due process. U.S.C.A. Const.Amend. 14.

[5] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Where forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, fair-warning requirement is satisfied if the defendant has purposefully directed his activities at residence of the forum and the litigation results from injuries that arise out of or relate to those activities.

[6] Federal Courts 170B ⚿84

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk84 k. Miscellaneous Particular Activities. Most Cited Cases
Publisher who distributes magazines in a distant state may fairly be held accountable in that forum for damages resulting therefrom an allegedly defamatory story.

[7] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other state for the consequences of their activities.

[8] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors and, where those individuals purposefully derive benefit from their interstate activities, it may be unfair to allow them to escape having to account in other states for the consequences that arise proximately from such activities and, for those reasons, forum may legit-

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imately exercise personal jurisdiction over a non-resident who purposefully directs activities toward forum residents.

[9] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Constitutional touchstone in long-arm jurisdiction cases is whether the defendant purposefully established minimum contacts in the forum state.

[10] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Foreseeability of causing injury in another state is not a sufficient benchmark for exercising personal jurisdiction; foreseeability which is critical to due process analysis is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.

[11] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Purposeful availment requirement for long-arm jurisdiction insures that defendant will not be haled into a jurisdiction solely as the result of random, fortuitous, or attenuated contacts or the unilateral activity of another party or a third person.

[12] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Jurisdiction is proper where the contacts of the defendant proximately result from actions by the defendant himself which create a substantial connection with the forum.

[13] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
So long as it creates a substantial connection with the forum, even a single act can support jurisdic- tion.

[14] Federal Courts 170B ⚿76.15

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.15 k. Transacting or Doing Business. Most Cited Cases
When defendant has availed himself of the privilege of conducting business in a forum, jurisdiction cannot be avoided merely because the defendant did not physically enter the forum state.

[15] Federal Courts 170B ⚿76.15

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170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.15 k. Transacting or Doing Business. Most Cited Cases
So long as a commercial actor's efforts are purposefully directed toward residents of another state, absence of physical contacts cannot defeat personal jurisdiction there.

[16] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Once it has been decided that a defendant has purposefully established minimum contacts with the forum state, the contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.

[17] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
Where defendant who purposefully has 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.

[18] Courts 106 ⚿85(3)

106 Courts
106II Establishment, Organization, and Procedure
106II(F) Rules of Court and Conduct of Business
106k85 Operation and Effect of Rules
106k85(3) k. Construction and Application of Particular Rules. Most Cited Cases
Jurisdictional rules may not be employed in such a way as to make litigation so gravely difficult and inconvenient that a party is unfairly at a severe disadvantage in comparison to his opponent.

[19] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Individual's contact with an out-of-state party cannot alone automatically establish sufficient minimum contacts in the other party's home forum to permit exercise of jurisdiction in that forum.

[20] Federal Courts 170B ⚿76.30

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.30 k. Contract Cases. Most Cited Cases
Parties' negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing, must be evaluated in determining whether the defendant has purposefully established minimum contacts with the forum.

[21] Federal Courts 170B ⚿76.30

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents;

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"Long-Arm" Jurisdiction in General
170Bk76.30 k. Contract Cases. Most Cited Cases
Michigan franchisee who deliberately reached out beyond his state of residence and negotiated with a Florida franchisor for purchase of a long-term franchise and the manifold benefits that would derive from affiliation with the nationwide organization, who entered into a carefully structured 20-year relationship which envisioned continuing and wide-reaching contacts with Florida, who accepted regulation of his business from the Miami headquarters of the franchisor, and who was required to make monthly payments to the franchisor in Miami was constitutionally subject to long-arm jurisdiction in Florida in dispute arising out of the franchise arrangement. West's F.S.A. § 48.193(1)(g); U.S.C.A. Const.Amend. 14.

[22] Federal Courts 170B 76.30

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.30 k. Contract Cases. Most Cited Cases
Although choice-of-law provision on a contract, standing alone, would be insufficient to confer jurisdiction in forum whose law is to apply, choice-of-law provision should not be ignored in considering whether defendant has purposefully invoked the benefits and protections of a state's law.

[23] Federal Courts 170B 76.15

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.15 k. Transacting or Doing Business. Most Cited Cases
State of residence of nationwide franchisor had more than a negligible interest in providing a convenient forum, notwithstanding the franchisor's size and ability to conduct litigation anywhere in the country; absent compelling consideration, defendant who has purposefully derived commercial benefit from his affiliations in a forum may not defeat jurisdiction there simply because of his adversary's greater net wealth.

[24] Federal Courts 170B 101

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases
To the extent that it is inconvenient for a party who has minimum contacts with a forum to litigate there, the considerations can be accommodated through change of venue, rather than denial of jurisdiction.

[25] Federal Courts 170B 76.1

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.1 k. In General. Most Cited Cases
(Formerly 170Bk76)
Inconvenience which Michigan franchisee would suffer from litigating franchise dispute in Florida was not so substantial as to render it unconstitutional to subject him to jurisdiction in Florida.

[26] Federal Courts 170B 96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
Evidence sustained trial court's finding that fran-

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chisee was not the victim of misrepresentation, fraud, or duress in connection with franchise agreement rendering it unconstitutional to subject him to jurisdiction in franchisor's state of residence.

|27| Federal Courts 170B ⇐76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Quality and nature of an interstate transaction may sometimes be so random, fortuitous, or attenuated that it cannot fairly be said that the potential defendant should reasonably anticipate being haled into court in another jurisdiction.

****2176** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Appellant is a Florida corporation whose principal offices are in Miami. It conducts most of its restaurant business through a franchise operation, under which franchisees are licensed to use appellant's trademarks and service marks in leased standardized restaurant facilities for a period of 20 years. The governing contracts provide that the franchise relationship is established in Miami and governed by Florida law, and call for payment of all required monthly fees and forwarding of all relevant notices to the Miami headquarters. The Miami headquarters sets policy and works directly with the franchisees in attempting to resolve major problems. Day-to-day monitoring of franchisees, however, is conducted through district offices that in turn report to the Miami headquarters. Appellee is a Michigan resident who, along with another Michigan resident, entered into a 20-year franchise contract with appellant to operate a restaurant in Michigan. Subsequently, when the restaurant's patronage declined, the franchisees fell behind in their monthly payments. After extended negotiations among the franchisees, the Michigan district office, and the Miami headquarters proved unsuccessful in solving****2177** the problem, headquarters terminated the franchise and ordered the franchisees to vacate the premises. They refused and continued to operate the restaurant. Appellant then brought a diversity action in Federal District Court in Florida, alleging that the franchisees had breached their franchise obligations and requesting damages and injunctive relief. The franchisees claimed that, because they were Michigan residents and because appellant's claim did not "arise" within Florida, the District Court lacked personal jurisdiction over them. But the court held that the franchisees were subject to personal jurisdiction pursuant to Florida's long-arm statute, which extends jurisdiction to any person, whether or not a citizen or resident of the State, who breaches a contract in the State by failing to perform acts that the contract requires to be performed there. Thereafter, the court entered judgment against the franchisees on the merits. The Court of Appeals reversed, holding that "[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process."

Held: The District Court's exercise of jurisdiction pursuant to Florida's long-arm statute did not violate the Due Process Clause of the Fourteenth Amendment. Pp. 2181-2190.

***463** (a) A forum may assert specific jurisdiction over a nonresident defendant where an alleged injury arises out of or relates to actions by the defendant *himself* that are purposefully directed toward forum residents, and where jurisdiction would not otherwise offend "fair play and substantial justice." Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum. Pp. 2181-2185.

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(b) An individual's contract with an out-of-state party cannot *alone* automatically establish sufficient minimum contacts in the other party's home forum. Instead, the prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing, must be evaluated to determine whether a defendant purposefully established minimum contacts within the forum. Pp. 2185-2186.

(c) Here, appellee established a substantial and continuing relationship with appellant's Miami headquarters, and received fair notice from the contract documents and the course of dealings that he might be subject to suit in Florida. The District Court found that appellee is an "experienced and sophisticated" businessman who did not act under economic duress or disadvantage imposed by appellant, and appellee has pointed to no other factors that would establish the *unconstitutionality* of Florida's assertion of jurisdiction. Pp. 2186-2190.

724 F.2d 1505 (CA11 1984), reversed and remanded.

Joel S. Perwin argued the cause and filed briefs for appellant.
Thomas H. Oehmke argued the cause and filed a brief for appellee.

Justice BRENNAN delivered the opinion of the Court.
The State of Florida's long-arm statute extends jurisdiction to "[a]ny person, whether or not a citizen or resident of this state," who, *inter alia,*"[b]reach [es] a contract in this state by failing to perform acts required by the contract to be performed in this state," so long as the cause of action ***464** arises from the alleged contractual breach. Fla.Stat. § 48.193(1)(g) (Supp.1984). The United States District Court for the Southern District of Florida, sitting in diversity, relied on this provision in exercising personal jurisdiction over a Michigan resident who allegedly had breached a franchise agreement with a Florida corporation by failing to make required payments in Florida. The question presented is whether this exercise of long-arm jurisdiction offended "traditional conception[s] of fair play and substantial justice" embodied in the Due Process Clause of the Fourteenth Amendment. ****2178***International Shoe Co. v. Washington,* 326 U.S. 310, 320, 66 S.Ct. 154, 160, 90 L.Ed. 95 (1945).

I

A

Burger King Corporation is a Florida corporation whose principal offices are in Miami. It is one of the world's largest restaurant organizations, with over 3,000 outlets in the 50 States, the Commonwealth of Puerto Rico, and 8 foreign nations. Burger King conducts approximately 80% of its business through a franchise operation that the company styles the "Burger King System"-"a comprehensive restaurant format and operating system for the sale of uniform and quality food products." App. 46.FN1 Burger King licenses its franchisees to use its trademarks and service marks for a period of 20 years and leases standardized restaurant facilities to them for the same term. In addition, franchisees acquire a variety of proprietary information concerning the "standards, specifications, procedures and methods for operating***465** a Burger King Restaurant." *Id.,* at 52. They also receive market research and advertising assistance; ongoing training in restaurant management; [FN2] and accounting, cost-control, and inventory-control guidance. By permitting franchisees to tap into Burger King's established national reputation and to benefit from proven procedures for dispensing standardized fare, this system enables them to go into the restaurant business with significantly lowered barriers to entry.[FN3]

FN1. Burger King's standard Franchise Agreement further defines this system as "a restaurant format and operating system, including a recognized design, decor, color scheme and style of building, uniform

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standards, specifications and procedures of operation, quality and uniformity of products and services offered, and procedures for inventory and management control...." App. 43.

FN2. Mandatory training seminars are conducted at Burger King University in Miami and at Whopper College Regional Training Centers around the country. See *id.*, at 39; 6 Record 540-541.

FN3. See App. 43-44. See generally H. Brown, Franchising Realities and Remedies 6-7, 16-17 (2d ed. 1978).

In exchange for these benefits, franchisees pay Burger King an initial $40,000 franchise fee and commit themselves to payment of monthly royalties, advertising and sales promotion fees, and rent computed in part from monthly gross sales. Franchisees also agree to submit to the national organization's exacting regulation of virtually every conceivable aspect of their operations.[FN4] Burger King imposes these standards and undertakes its rigid regulation out of conviction that "[u]niformity of service, appearance, and quality of product is essential to the preservation of the Burger King image and the benefits accruing therefrom to both Franchisee and Franchisor." *Id.*, at 31.

FN4. See, *e.g.*, App. 24-25, 26 (range, "quality, appearance, size, taste, and processing" of menu items), 31 ("standards of service and cleanliness"), 32 (hours of operation), 47 ("official mandatory restaurant operating standards, specifications and procedures"), 48-50 (building layout, displays, equipment, vending machines, service, hours of operation, uniforms, advertising, and promotion), 53 (employee training), 55-56 (accounting and auditing requirements), 59 (insurance requirements). Burger King also imposes extensive standards governing franchisee liability, assignments, defaults, and termination. See *id.*, at 61-74.

Burger King oversees its franchise system through a two-tiered administrative structure. The governing contracts ***466** provide that the franchise relationship is established in Miami and governed by Florida law, and call for payment of all required fees and forwarding of all relevant notices to the Miami headquarters.[FN5] The Miami headquarters sets policy and works directly with its franchisees in attempting to resolve major problems. See nn. 7, 9, *infra.* Day-to-day monitoring of franchisees, however, is conducted through a network of 10 district offices which in turn report to the Miami headquarters.

FN5. See *id.*, at 10-11, 37, 43, 72-73, 113. See *infra,* at 2187.

The instant litigation grows out of Burger King's termination of one of its franchisees,****2179** and is aptly described by the franchisee as "a divorce proceeding among commercial partners." 5 Record 4. The appellee John Rudzewicz, a Michigan citizen and resident, is the senior partner in a Detroit accounting firm. In 1978, he was approached by Brian MacShara, the son of a business acquaintance, who suggested that they jointly apply to Burger King for a franchise in the Detroit area. MacShara proposed to serve as the manager of the restaurant if Rudzewicz would put up the investment capital; in exchange, the two would evenly share the profits. Believing that MacShara's idea offered attractive investment and tax-deferral opportunities, Rudzewicz agreed to the venture. 6 *id.*, at 438-439, 444, 460.

Rudzewicz and MacShara jointly applied for a franchise to Burger King's Birmingham, Michigan, district office in the autumn of 1978. Their application was forwarded to Burger King's Miami headquarters, which entered into a preliminary agreement with them in February 1979. During the ensuing four months it was agreed that Rudzewicz and MacShara would assume operation of an existing facility in Drayton Plains, Michigan. MacShara attended

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the prescribed management courses in Miami during this period, see n. 2, *supra,* and the franchisees purchased $165,000 worth of restaurant equipment from Burger King's Davmor Industries division in ***467** Miami. Even before the final agreements were signed, however, the parties began to disagree over site-development fees, building design, computation of monthly rent, and whether the franchisees would be able to assign their liabilities to a corporation they had formed.[FN6] During these disputes Rudzewicz and MacShara negotiated both with the Birmingham district office and with the Miami headquarters.[FN7] With some misgivings, Rudzewicz and MacShara finally obtained limited concessions from the Miami headquarters,[FN8] signed the final agreements, and commenced operations in June 1979. By signing the final agreements, Rudzewicz obligated himself personally to payments exceeding $1 million over the 20-year franchise relationship.

FN6. The latter two matters were the major areas of disagreement. Notwithstanding that Burger King's franchise offering advised that minimum rent would be based on a percentage of "approximated capitalized site acquisition and construction costs,"*id.,* at 23, Rudzewicz assumed that rent would be a function solely of renovation costs, and he thereby underestimated the minimum monthly rent by more than $2,000. The District Court found Rudzewicz' interpretation "incredible." 7 Record 649.

With respect to assignment, Rudzewicz and MacShara had formed RMBK Corp. with the intent of assigning to it all of their interest and liabilities in the franchise. Consistent with the contract documents, however, Burger King insisted that the two remain personally liable for their franchise obligations. See App. 62, 109. Although the franchisees contended that Burger King officials had given them oral assurances concerning assignment, the District Court found that pursuant to the parol evidence rule any such assurances "even if they had been made and were misleading were joined and merged" into the final agreement. 7 Record 648.

FN7. Although Rudzewicz and MacShara dealt with the Birmingham district office on a regular basis, they communicated directly with the Miami headquarters in forming the contracts; moreover, they learned that the district office had "very little" decisionmaking authority and accordingly turned directly to headquarters in seeking to resolve their disputes. 5 *id.,* at 292. See generally App. 5-6; 5 Record 167-168, 174-179, 182-184, 198-199, 217-218, 264-265, 292-294; 6 *id.,* at 314-316, 363, 373, 416, 463, 496.

FN8. They were able to secure a $10,439 reduction in rent for the third year. App. 82; 5 Record 222-223; 6 *id.,* at 500.

468** The Drayton Plains facility apparently enjoyed steady business during the summer of 1979, but patronage declined after a recession began later that year. Rudzewicz and MacShara soon fell far behind in their monthly payments to Miami. Headquarters sent notices of default, and an extended period of negotiations began among the franchisees, the Birmingham district office, and the Miami headquarters. After several Burger King officials in Miami had engaged in prolonged but ultimately unsuccessful negotiations with the franchisees*2180** by mail and by telephone,[FN9] headquarters terminated the franchise and ordered Rudzewicz and MacShara to vacate the premises. They refused and continued to occupy and operate the facility as a Burger King restaurant.

FN9. Miami's policy was to "deal directly" with franchisees when they began to encounter financial difficulties, and to in-

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volve district office personnel only when necessary. 5 *id.*, at 95. In the instant case, for example, the Miami office handled all credit problems, ordered cost-cutting measures, negotiated for a partial refinancing of the franchisees' debts, communicated directly with the franchisees in attempting to resolve the dispute, and was responsible for all termination matters. See 2 *id.*, at 59-69; 5 *id.*, at 84-89, 94-95, 97-98, 100-103, 116-128, 151-152, 158, 163; 6 *id.*, at 395-397, 436-438, 510-511, 524-525.

B

Burger King commenced the instant action in the United States District Court for the Southern District of Florida in May 1981, invoking that court's diversity jurisdiction pursuant to 28 U.S.C. § 1332(a) and its original jurisdiction over federal trademark disputes pursuant to § 1338(a).[FN10] Burger King alleged that Rudzewicz and MacShara had breached their franchise obligations "within [the jurisdiction of] this district court" by failing to make the required payments "at plaintiff's place of business in Miami, Dade County, Florida," ¶ 6, App. 121, and also charged that they were tortiously infringing***469** its trademarks and service marks through their continued, unauthorized operation as a Burger King restaurant, ¶¶ 35-53, App. 130-135. Burger King sought damages, injunctive relief, and costs and attorney's fees. Rudzewicz and MacShara entered special appearances and argued, *inter alia,* that because they were Michigan residents and because Burger King's claim did not "arise" within the Southern District of Florida, the District Court lacked personal jurisdiction over them. The District Court denied their motions after a hearing, holding that, pursuant to Florida's long-arm statute, "a non-resident Burger King franchisee is subject to the personal jurisdiction of this Court in actions arising out of its franchise agreements." *Id.*, at 138. Rudzewicz and MacShara then filed an answer and a counterclaim seeking damages for alleged violations by Burger King of Michigan's Franchise Investment Law, Mich.Comp.Laws § 445.1501 *et seq.* (1979).

FN10. Rudzewicz and MacShara were served in Michigan with summonses and copies of the complaint pursuant to Federal Rule of Civil Procedure 4. 2 *id.*, at 102-103.

After a 3-day bench trial, the court again concluded that it had "jurisdiction over the subject matter and the parties to this cause." App. 159. Finding that Rudzewicz and MacShara had breached their franchise agreements with Burger King and had infringed Burger King's trademarks and service marks, the court entered judgment against them, jointly and severally, for $228,875 in contract damages. The court also ordered them "to immediately close Burger King Restaurant Number 775 from continued operation or to immediately give the keys and possession of said restaurant to Burger King Corporation,"*id.*, at 163, found that they had failed to prove any of the required elements of their counterclaim, and awarded costs and attorney's fees to Burger King.

Rudzewicz appealed to the Court of Appeals for the Eleventh Circuit.[FN11] A divided panel of that Circuit reversed the ***470** judgment,****2181** concluding that the District Court could not properly exercise personal jurisdiction over Rudzewicz pursuant to Fla.Stat. § 48.193(1)(g) (Supp.1984) because "the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida." *Burger King Corp. v. MacShara,* 724 F.2d 1505, 1513 (1984). Accordingly, the panel majority concluded that "[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process." *Ibid.*

FN11. MacShara did not appeal his judgment. See *Burger King Corp. v. MacShara,* 724 F.2d 1505, 1506, n. 1 (CA11 1984). In

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addition, Rudzewicz entered into a compromise with Burger King and waived his right to appeal the District Court's finding of trademark infringement and its entry of injunctive relief. See 4 Record 804-816. Accordingly, we need not address the extent to which the tortious act provisions of Florida's long-arm statute, see Fla.Stat. § 48.193(1)(b) (Supp.1984), may constitutionally extend to out-of-state trademark infringement. Cf. *Calder v. Jones*, 465 U.S. 783, 788-789, 104 S.Ct. 1482, 1486-1487, 79 L.Ed.2d 804 (1984) (tortious out-of-state conduct); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776, 104 S.Ct. 1473, 1479, 79 L.Ed.2d 790 (1984) (same).

[1][2] Burger King appealed the Eleventh Circuit's judgment to this Court pursuant to 28 U.S.C. § 1254(2), and we postponed probable jurisdiction. 469 U.S. 814, 105 S.Ct. 77, 83 L.Ed.2d 25 (1984). Because it is unclear whether the Eleventh Circuit actually held that Fla.Stat. § 48.193(1)(g) (Supp.1984)*itself* is unconstitutional as applied to the circumstances of this case, we conclude that jurisdiction by appeal does not properly lie and therefore dismiss the appeal.[FN12] Treating the jurisdictional ***471** statement as a petition for a writ of certiorari, see 2 8 U.S.C. § 2103, we grant the petition and now reverse.

FN12. The District Court had found both that Rudzewicz fell within the reach of Florida's long-arm statute and that the exercise of jurisdiction was constitutional. The Court of Appeals did not consider the statutory question, however, because, as Burger King acknowledged at argument, that court "accepted the parties' stipulation" that § 48.193 reached Rudzewicz "in lieu of [making] a determination of what Florida law provides." Tr. of Oral Arg. 12. Burger King contends that an appeal is proper "on the basis of the Circuit Court's holding that *given that stipulation* the statute was unconstitutional as applied." *Id.*, at 13 (emphasis added).

We disagree. Our "overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration," *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 98, 95 S.Ct. 289, 294, 42 L.Ed.2d 249 (1974) (construing 28 U.S.C. § 1253), would be threatened if litigants could obtain an appeal through the expedient of stipulating to a particular construction of state law where state law might in fact be in harmony with the Federal Constitution. Jurisdiction under 28 U.S.C. § 1254(2) is properly invoked only where a court of appeals *squarely* has "held" that a state statute is unconstitutional on its face or as applied; jurisdiction does not lie if the decision might rest on other grounds. *Public Service Comm'n v. Batesville Telephone Co.*, 284 U.S. 6, 7, 52 S.Ct. 1, 76 L.Ed. 135 (1931) (*per curiam*). Consistent with "our practice of strict construction" of § 1254(2), *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42, n. 1, 91 S.Ct. 156, 157, n. 1, 27 L.Ed.2d 174 (1970) (*per curiam*), we believe that an appeal cannot lie where a court of appeals' judgment rests solely on the stipulated applicability of state law. Rather, it must be reasonably clear that the court independently concluded that the challenged statute governs the case and held the statute itself unconstitutional as so applied. The Court of Appeals did neither in this case, concluding simply that "[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process." 724 F.2d, at 1513.

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Of course, if it were clear under Florida law that § 48.193(1)(g) governed every transaction falling within its literal terms, there could be no objection to a stipulation that merely recognized this established construction. But the Florida Supreme Court has not ruled on the breadth of § 48.193(1)(g), and several state appellate courts have held that the provision extends only to the limits of the Due Process Clause. See, *e.g.*, *Scordilis v. Drobnicki*, 443 So.2d 411, 412-414 (Fla.App.1984); *Lakewood Pipe of Texas, Inc. v. Rubaii*, 379 So.2d 475, 477 (Fla.App.1979), appeal dism'd, 383 So.2d 1201 (Fla.1980); *Osborn v. University Society, Inc.*, 378 So.2d 873, 874 (Fla.App.1979). If § 48.193(1)(g) is construed and applied in accordance with due process limitations as a matter of state law, then an appeal is improper because the statute cannot be "invalid as repugnant to the Constitution ... of the United States,"28 U.S.C. § 1254(2), since its boundaries are defined by, rather than being in excess of, the Due Process Clause. See, *e.g.*, *Calder v. Jones*, *supra*, 465 U.S., at 787-788, n. 7, 104 S.Ct., at 1486, n. 7; *Kulko v. California Superior Court*, 436 U.S. 84, 90, and n. 4, 98 S.Ct. 1690, 1695-1696, and n. 4, 56 L.Ed.2d 132 (1978).

II

A

[3][4] The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a ***472** forum with which he has established no meaningful "contacts, ties, or relations." ****2182***International Shoe Co. v. Washington*, 326 U.S., at 319, 66 S.Ct., at 160.[FN13] By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S.Ct. 2569, 2587, 53 L.Ed.2d 683 (1977) (STEVENS, J., concurring in judgment), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

FN13. Although this protection operates to restrict state power, it "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause" rather than as a function "of federalism concerns." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-703, n. 10, 102 S.Ct. 2099, 2104-2105, n. 10, 72 L.Ed.2d 492 (1982).

[5][6][7] Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there,[FN14] this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities, ***473***Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 1984).[FN15] Thus "[t]he 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 they will be purchased by consumers in the forum State" and those products subsequently injure forum consumers. *World-Wide Volkswagen Corp. v. Woodson*, *supra*, 444 U.S., at 297-298, 100 S.Ct., at 567-568. Similarly, a publisher who distributes

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magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story. *Keeton v. Hustler Magazine, Inc., supra;* see also *Calder v. Jones,* 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) (suit against author and editor). And with respect to interstate contractual obligations, we have emphasized that parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other State for the consequences of their activities. *Travelers Health Assn. v. Virginia,* 339 U.S. 643, 647, 70 S.Ct. 927, 929, 94 L.Ed. 1154 (1950). See also *McGee v. International Life Insurance Co.,* 355 U.S. 220, 222-223, 78 S.Ct. 199, 200-201, 2 L.Ed.2d 223 (1957).

FN14. We have noted that, because the personal jurisdiction requirement is a waivable right, there are a "variety of legal arrangements" by which a litigant may give "express or implied consent to the personal jurisdiction of the court." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, supra,* at 703, 102 S.Ct., at 2105. For example, particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction. See *National Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964). Where such forum-selection provisions have been obtained through "freely negotiated" agreements and are not "unreasonable and unjust," *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 15, 92 S.Ct. 1907, 1916, 32 L.Ed.2d 513 (1972), their enforcement does not offend due process.

FN15. "Specific" jurisdiction contrasts with "general" jurisdiction, pursuant to which "a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S., at 414, n. 9, 104 S.Ct., at 1872, n. 9; see also *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952).

[8] We have noted several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who "purposefully directs" his activities toward forum residents. A State generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. ****2183** *Id.,* at 223, 78 S.Ct., at 201; see also *Keeton v. Hustler Magazine, Inc., supra,* 465 U.S., at 776, 104 S.Ct., at 1479. Moreover, where individuals "purposefully derive benefit" from their interstate activities, ***474***Kulko v. California Superior Court,* 436 U.S. 84, 96, 98 S.Ct. 1690, 1699, 56 L.Ed.2d 132 (1978), it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity," it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity. *McGee v. International Life Insurance Co., supra,* 355 U.S., at 223, 78 S.Ct., at 201.

[9][10] Notwithstanding these considerations, the constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum State. *International Shoe Co. v. Washington, supra,* 326 U.S., at 316, 66 S.Ct., at 158. Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require,[FN16] the Court has con-

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sistently held that this kind of foreseeability is not a "sufficient benchmark" for exercising personal jurisdiction. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S., at 295, 100 S.Ct., at 566. Instead, "the foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.*, at 297, 100 S.Ct., at 567. In defining when it is that a potential defendant should "reasonably anticipate" out-of-state litigation, the Court frequently has drawn from the reasoning of *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-1240, 2 L.Ed.2d 1283 (1958):

> FN16. See, *e.g., World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 299, 100 S.Ct. 559, 568, 62 L.Ed.2d 490 (1980) (BRENNAN, J., dissenting); *Shaffer v. Heitner,* 433 U.S. 186, 219, 97 S.Ct. 2569, 2588, 53 L.Ed.2d 683 (1977) (BRENNAN, J., concurring in part and dissenting in part).

"The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application***475** of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

[11][12][13] This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, *Keeton v. Hustler Magazine, Inc.*, 465 U.S., at 774, 104 S.Ct., at 1478; *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S., at 299, 100 S.Ct., at 568, or of the "unilateral activity of another party or a third person," *Helicopteros Nacionales de Colombia, S.A. v. Hall, supra,* 466 U.S., at 417, 104 S.Ct., at 1873.[FN17] Jurisdiction is proper, however, ****2184** where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. *McGee v. International Life Insurance Co., supra,* 355 U.S., at 223, 78 S.Ct., at 201; see also *Kulko v. California Superior Court, supra,* 436 U.S., at 94, n. 7, 98 S.Ct., at 1698, n. 7.[FN18] Thus where the defendant "deliberately" has ***476** engaged in significant activities within a State, *Keeton v. Hustler Magazine, Inc., supra,* 465 U.S., at 781, 104 S.Ct., at 1481, or has created "continuing obligations" between himself and residents of the forum, *Travelers Health Assn. v. Virginia,* 339 U.S., at 648, 70 S.Ct., at 929, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

> FN17. Applying this principle, the Court has held that the Due Process Clause forbids the exercise of personal jurisdiction over an out-of-state automobile distributor whose only tie to the forum resulted from a customer's decision to drive there, *World-Wide Volkswagen Corp. v. Woodson, supra;* over a divorced husband sued for child-support payments whose only affiliation with the forum was created by his former spouse's decision to settle there, *Kulko v. California Superior Court,* 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); and over a trustee whose only connection with the forum resulted from the settlor's decision to exercise her power of appointment there, *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). In such instances, the defendant has had no "clear notice that it is subject to suit" in the forum and thus no opportunity to "alleviate the risk of burdensome litigation" there. *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S., at 297, 100

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S.Ct., at 567.

FN18. So long as it creates a "substantial connection" with the forum, even a single act can support jurisdiction. *McGee v. International Life Insurance Co.*, 355 U.S., at 223, 78 S.Ct., at 201. The Court has noted, however, that "some single or occasional acts" related to the forum may not be sufficient to establish jurisdiction if "their nature and quality and the circumstances of their commission" create only an "attenuated" affiliation with the forum. *International Shoe Co. v. Washington*, 326 U.S. 310, 318, 66 S.Ct. 154, 159, 90 L.Ed. 95 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S., at 299, 100 S.Ct., at 568. This distinction derives from the belief that, with respect to this category of "isolated" acts, *id.*, at 297, 100 S.Ct., at 567, the reasonable foreseeability of litigation in the forum is substantially diminished.

[14][15] Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. *Keeton v. Hustler Magazine, Inc.*, *supra*, 465 U.S., at 774-775, 104 S.Ct., at 1478; see also *Calder v. Jones*, 465 U.S., at 778-790, 104 S.Ct., at 1486-1487; *McGee v. International Life Insurance Co.*, 355 U.S., at 222-223, 78 S.Ct., at 200-201. Cf. *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 317, 63 S.Ct. 602, 605, 87 L.Ed. 777 (1943).

[16][17][18] Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S., at 320, 66 S.Ct., at 160. Thus ***477** courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute,""the plaintiff's interest in obtaining convenient and effective relief,""the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen Corp. v. Woodson*, *supra*, 444 U.S., at 292, 100 S.Ct., at 564. These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. See, *e.g.*, *Keeton v. Hustler Magazine, Inc.*, *supra*, 465 U.S., at 780, 104 S.Ct., at 1481; *Calder v. Jones*, *supra*, 465 U.S., at 788-789, 104 S.Ct., at 1486-1487; *McGee v. International Life Insurance Co.*, *supra*, 355 U.S., at 223-224, 78 S.Ct., at 201-202. On the other hand, where a defendant who purposefully has directed his activities at ****2185** forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another State may be accommodated through application of the forum's choice-of-law rules.[FN19] Similarly, a defendant claiming substantial inconvenience may seek a change of venue.[FN20] Nevertheless, minimum requirements inherent in the concept of "fair play and substantial***478** justice" may defeat the reasonableness of jurisdiction even if the defendant has pur-

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posefully engaged in forum activities. *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S., at 292, 100 S.Ct., at 564; see also Restatement (Second) of Conflict of Laws §§ 36-37 (1971). As we previously have noted, jurisdictional rules may not be employed in such a way as to make litigation "so gravely difficult and inconvenient" that a party unfairly is at a "severe disadvantage" in comparison to his opponent. *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 18, 92 S.Ct. 1907, 1917, 32 L.Ed.2d 513 (1972) (*re* forum-selection provisions); *McGee v. International Life Insurance Co., supra,* 355 U.S., at 223-224, 78 S.Ct., at 201-202.

FN19. See *Allstate Insurance Co. v. Hague,* 449 U.S. 302, 307-313, 101 S.Ct. 633, 637-640, 66 L.Ed.2d 521 (1981) (opinion of BRENNAN, J.). See generally Restatement (Second) of Conflict of Laws §§ 6, 9 (1971).

FN20. See, *e.g.,*28 U.S.C. § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought"). This provision embodies in an expanded version the common-law doctrine of *forum non conveniens,* under which a court in appropriate circumstances may decline to exercise its jurisdiction in the interest of the "easy, expeditious and inexpensive" resolution of a controversy in another forum. See *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-509, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947).

B

(1)

[19][20] Applying these principles to the case at hand, we believe there is substantial record evidence supporting the District Court's conclusion that the assertion of personal jurisdiction over Rudzewicz in Florida for the alleged breach of his franchise agreement did not offend due process. At the outset, we note a continued division among lower courts respecting whether and to what extent a contract can constitute a "contact" for purposes of due process analysis.[FN21] If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests, *International Shoe Co. v. Washington, supra,* 326 U.S., at 319, 66 S.Ct., at 159, or on "conceptualistic ... theories of the place of contracting or of performance," ***479***Hoopeston Canning Co. v. Cullen,* 318 U.S., at 316, 63 S.Ct., at 604. Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." *Id.,* at 316-317, 63 S.Ct., at 604-605. It is these factors-prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing-that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

FN21. See, *e.g., Lakeside Bridge & Steel Co. v. Mountain State Construction Co.,* 445 U.S. 907, 909-910, 100 S.Ct. 1087, 1088-1089, 63 L.Ed.2d 325 (1980) (WHITE, J., dissenting from denial of certiorari) (collecting cases); Brewer, Jurisdiction in Single Contract Cases, 6 U.Ark. Little Rock L.J. 1, 7-11, 13 (1983); Note, Long-Arm Jurisdiction in Commercial Litigation: When is a Contract a Contact?, 61 B.U.L.Rev. 375, 384-388 (1981).

**2186 [21] In this case, no physical ties to Florida can be attributed to Rudzewicz other than MacShara's brief training course in Miami.[FN22]

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Rudzewicz did not maintain offices in Florida and, for all that appears from the record, has never even visited there. Yet this franchise dispute grew directly out of "a contract which had a *substantial* connection with that State." *McGee v. International Life Insurance Co.*, 355 U.S., at 223, 78 S.Ct., at 201 (emphasis added). Eschewing the option of operating an independent local enterprise, Rudzewicz deliberately "reach[ed] out beyond" Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and ***480** the manifold benefits that would derive from affiliation with a nationwide organization. *Travelers Health Assn. v. Virginia*, 339 U.S., at 647, 70 S.Ct., at 929. Upon approval, he entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida. In light of Rudzewicz' voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random," "fortuitous," or "attenuated." *Hanson v. Denckla*, 357 U.S., at 253, 78 S.Ct., at 1239; *Keeton v. Hustler Magazine, Inc.*, 465 U.S., at 774, 104 S.Ct., at 1478; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S., at 299, 100 S.Ct., at 568. Rudzewicz' refusal to make the contractually required payments in Miami, and his continued use of Burger King's trademarks and confidential business information after his termination, caused foreseeable injuries to the corporation in Florida. For these reasons it was, at the very least, presumptively reasonable for Rudzewicz to be called to account there for such injuries.

> FN22. The Eleventh Circuit held that MacShara's presence in Florida was irrelevant to the question of Rudzewicz's minimum contacts with that forum, reasoning that "Rudzewicz and MacShara never formed a partnership" and "signed the agreements in their individual capacities." 724 F.2d, at 1513, n. 14. The two did jointly form a corporation through which they were seeking to conduct the franchise, however. See n. 6, *supra*. They were required to decide which one of them would travel to Florida to satisfy the training requirements so that they could commence business, and Rudzewicz participated in the decision that MacShara would go there. We have previously noted that when commercial activities are "carried on in behalf of" an out-of-state party those activities may sometimes be ascribed to the party, *International Shoe Co. v. Washington*, 326 U.S. 310, 320, 66 S.Ct. 154, 160, 90 L.Ed. 95 (1945), at least where he is a "primary participan[t]" in the enterprise and has acted purposefully in directing those activities, *Calder v. Jones*, 465 U.S., at 790, 104 S.Ct., at 1487. Because MacShara's matriculation at Burger King University is not pivotal to the disposition of this case, we need not resolve the permissible bounds of such attribution.

The Court of Appeals concluded, however, that in light of the supervision emanating from Burger King's district office in Birmingham, Rudzewicz reasonably believed that "the Michigan office was for all intents and purposes the embodiment of Burger King" and that he therefore had no "reason to anticipate a Burger King suit outside of Michigan." 724 F.2d, at 1511. See also *post*, at 2190 (STEVENS, J., dissenting). This reasoning overlooks substantial record evidence indicating that Rudzewicz most certainly knew that he was affiliating himself with an enterprise based primarily in Florida. The contract documents themselves emphasize that Burger King's operations are conducted and supervised from the Miami headquarters, that all relevant notices and payments must be sent there, and that the agreements were made in and enforced from Miami. See n. 5, *supra*. Moreover, the parties' actual course of dealing repeatedly confirmed that decisionmaking authority was vested in the Miami headquarters***481** and that the district office served largely as an intermediate link between

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the headquarters and the franchisees. When problems arose over building design, site-development fees, rent computation, and the defaulted payments, Rudzewicz and MacShara learned that the Michigan office was powerless to resolve their disputes and **2187 could only channel their communications to Miami. Throughout these disputes, the Miami headquarters and the Michigan franchisees carried on a continuous course of direct communications by mail and by telephone, and it was the Miami headquarters that made the key negotiating decisions out of which the instant litigation arose. See nn. 7, 9, *supra.*

[22][23] Moreover, we believe the Court of Appeals gave insufficient weight to provisions in the various franchise documents providing that all disputes would be governed by Florida law. The franchise agreement, for example, stated:

"This Agreement shall become valid when executed and accepted by BKC at Miami, Florida; it shall be deemed made and entered into in the State of Florida and shall be governed and construed under and in accordance with the laws of the State of Florida. The choice of law designation does not require that all suits concerning this Agreement be filed in Florida." App. 72.

See also n. 5, *supra.* The Court of Appeals reasoned that choice-of-law provisions are irrelevant to the question of personal jurisdiction, relying on *Hanson v. Denckla* for the proposition that "the center of gravity for choice-of-law purposes does not necessarily confer the sovereign prerogative to assert jurisdiction." 724 F.2d, at 1511-1512, n. 10, citing 357 U.S., at 254, 78 S.Ct., at 1240. This reasoning misperceives the import of the quoted proposition. The Court in *Hanson* and subsequent cases has emphasized that choice-of-law *analysis* - which focuses on all elements of a transaction, and not simply on the defendant's conduct-is distinct from minimum-contacts jurisdictional analysis-which focuses at the threshold*482 solely on the defendant's purposeful connection to the forum.FN23 Nothing in our cases, however, suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has "purposefully invoked the benefits and protections of a State's laws" for jurisdictional purposes. Although such a provision standing alone would be insufficient to confer jurisdiction, we believe that, when combined with the 20-year interdependent relationship Rudzewicz established with Burger King's Miami headquarters, it reinforced his deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there. As Judge Johnson argued in his dissent below, Rudzewicz "purposefully availed himself of the benefits and protections of Florida's laws" by entering into contracts expressly providing that those laws would govern franchise disputes. 724 F.2d, at 1513.FN24

FN23. *Hanson v. Denckla,* 357 U.S., at 253-254, 78 S.Ct., at 1239-1240. See also *Keeton v. Hustler Magazine, Inc.,* 465 U.S., at 778, 104 S.Ct., at 1480; *Kulko v. California Superior Court,* 436 U.S., at 98, 98 S.Ct., at 1700; *Shaffer v. Heitner,* 433 U.S., at 215, 97 S.Ct., at 2585.

FN24. In addition, the franchise agreement's disclaimer that the "choice of law designation does not *require* that all suits concerning this Agreement be filed in Florida," App. 72 (emphasis added), reasonably should have suggested to Rudzewicz that by negative implication such suits *could* be filed there.

The lease also provided for binding arbitration in Miami of certain condemnation disputes, *id.,* at 113, and Rudzewicz conceded the validity of this provision at oral argument, Tr. of Oral Arg. 37. Although it does not govern the instant dispute, this provision also should have made it apparent to the franchisees that they were dealing directly with the Miami headquarters and that the Birmingham district office was *not*"for all in-

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tents and purposes the embodiment of Burger King." 724 F.2d, at 1511.

(2)

[24][25] Nor has Rudzewicz pointed to other factors that can be said persuasively to outweigh the considerations discussed above and to establish the *unconstitutionality* of Florida's assertion of jurisdiction. We cannot conclude that Florida had no "legitimate interest in holding [Rudzewicz] answerable***483** on a claim related to" the contacts he had established in that State. *Keeton v. Hustler Magazine, Inc.*, 465 U.S., at 776, 104 S.Ct., at 1479; see also ****2188***McGee v. International Life Insurance Co.*, 355 U.S., at 223, 78 S.Ct., at 201 (noting that State frequently will have a "manifest interest in providing effective means of redress for its residents").[FN25] Moreover, although Rudzewicz has argued at some length that Michigan's Franchise Investment Law, Mich.Comp.Laws § 445.1501 *et seq.* (1979), governs many aspects of this franchise relationship, he has not demonstrated how Michigan's acknowledged interest might possibly render jurisdiction in Florida *unconstitutional*.[FN26] Finally, the Court of Appeals' assertion that the Florida litigation "severely impaired [Rudzewicz'] ability to call Michigan witnesses who might be essential to his defense and counterclaim," 724 F.2d, at 1512-1513, is wholly without support in the record.[FN27] And even to the extent that it is inconvenient ***484** for a party who has minimum contacts with a forum to litigate there, such considerations most frequently can be accommodated through a change of venue. See n. 20, *supra*. Although the Court has suggested that inconvenience may at some point become so substantial as to achieve *constitutional* magnitude, *McGee v. International Life Insurance Co., supra*, 355 U.S., at 223, 78 S.Ct., at 201, this is not such a case.

FN25. Complaining that "when Burger King is the plaintiff, you won't 'have it your way' because it sues all franchisees in Miami," Brief for Appellee 19, Rudzewicz contends that Florida's interest in providing a convenient forum is negligible given the company's size and ability to conduct litigation anywhere in the country. We disagree. Absent compelling considerations, cf. *McGee v. International Life Insurance Co.*, 355 U.S., at 223, 78 S.Ct., at 201, a defendant who has purposefully derived commercial benefit from his affiliations in a forum may not defeat jurisdiction there simply because of his adversary's greater net wealth.

FN26. Rudzewicz has failed to show how the District Court's exercise of jurisdiction in this case might have been at all inconsistent with Michigan's interests. To the contrary, the court found that Burger King had fully complied with Michigan law, App. 159, and there is nothing in Michigan's franchise Act suggesting that Michigan would attempt to assert exclusive jurisdiction to resolve franchise disputes affecting its residents. In any event, minimum-contacts analysis presupposes that two or more States may be interested in the outcome of a dispute, and the process of resolving potentially conflicting "fundamental substantive social policies," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S., at 292, 100 S.Ct., at 564, can usually be accommodated through choice-of-law rules rather than through outright preclusion of jurisdiction in one forum. See n. 19, *supra*.

FN27. The only arguable instance of trial inconvenience occurred when Rudzewicz had difficulty in authenticating some corporate records; the court offered him as much time as would be necessary to secure the requisite authentication from the Birmingham district office, and Burger King ultimately stipulated to their authenticity rather than delay the trial. See 7 Record

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574-575, 578-579, 582, 598-599.

[26] The Court of Appeals also concluded, however, that the parties' dealings involved "a characteristic disparity of bargaining power" and "elements of surprise," and that Rudzewicz "lacked fair notice" of the potential for litigation in Florida because the contractual provisions suggesting to the contrary were merely "boilerplate declarations in a lengthy printed contract." 724 F.2d, at 1511-1512, and n. 10. See also *post,* at 2190 (STEVENS, J., dissenting). Rudzewicz presented many of these arguments to the District Court, contending that Burger King was guilty of misrepresentation, fraud, and duress; that it gave insufficient notice in its dealings with him; and that the contract was one of adhesion. See 4 Record 687-691. After a 3-day bench trial, the District Court found that Burger King had made no misrepresentations, that Rudzewicz and MacShara "were and are experienced and sophisticated businessmen," and that "at no time" did they "ac [t] under economic duress or disadvantage imposed by" Burger King. App. 157-158. See also 7 Record 648-649. Federal Rule of Civil Procedure 52(a) requires that "[f]indings of fact shall not be set aside unless clearly erroneous," and neither Rudzewicz nor the Court of Appeals has pointed to record evidence that would support a "definite and firm conviction" that the District Court's findings are mistaken. *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). See also ***485 **2189** *Anderson v. Bessemer City,* 470 U.S. 564, 573-576, 105 S.Ct. 1504, ---- - ----, 84 L.Ed.2d 518 (1985). To the contrary, Rudzewicz was represented by counsel throughout these complex transactions and, as Judge Johnson observed in dissent below, was himself an experienced accountant "who for five months conducted negotiations with Burger King over the terms of the franchise and lease agreements, and who obligated himself personally to contracts requiring over time payments that exceeded $1 million." 724 F.2d, at 1514. Rudzewicz was able to secure a modest reduction in rent and other concessions from Miami headquarters, see nn. 8, 9, *supra;* moreover, to the extent that Burger King's terms were inflexible, Rudzewicz presumably decided that the advantages of affiliating with a national organization provided sufficient commercial benefits to offset the detriments.[FN28]

FN28. We do not mean to suggest that the jurisdictional outcome will always be the same in franchise cases. Some franchises may be primarily intrastate in character or involve different decisionmaking structures, such that a franchisee should not reasonably anticipate out-of-state litigation. Moreover, commentators have argued that franchise relationships may sometimes involve unfair business practices in their inception and operation. See H. Brown, Franchising Realities and Remedies 4-5 (2d ed. 1978). For these reasons, we reject Burger King's suggestion for "a general rule, or at least a presumption, that participation in an interstate franchise relationship" represents consent to the jurisdiction of the franchisor's principal place of business. Brief for Appellant 46.

III

[27] Notwithstanding these considerations, the Court of Appeals apparently believed that it was necessary to reject jurisdiction in this case as a prophylactic measure, reasoning that an affirmance of the District Court's judgment would result in the exercise of jurisdiction over "out-of-state consumers to collect payments due on modest personal purchases" and would "sow the seeds of default judgments against franchisees owing smaller debts." 724 F.2d, at 1511. We share the Court of Appeals' broader concerns and therefore reject any talismanic jurisdictional formulas; "the ***486** facts of each case must [always] be weighed" in determining whether personal jurisdiction would comport with "fair play and substantial justice." *Kulko v. California Superior Court,* 436 U.S., at 92, 98 S.Ct., at 1696-1697.[FN29] The "quality and nature" of an interstate transaction may sometimes be so

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"random," "fortuitous," or "attenuated" [FN30] that it cannot fairly be said that the potential defendant "should reasonably anticipate being haled into court" in another jurisdiction. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S., at 297, 100 S.Ct., at 567; see also n. 18, *supra.* We also have emphasized that jurisdiction may not be grounded on a contract whose terms have been obtained through "fraud, undue influence, or overweening bargaining power" and whose application would render litigation "so gravely difficult and inconvenient that [a party] will for all practical purposes be deprived of his day in court." *The Bremen v. Zapata Off-Shore Co.,* 407 U.S., at 12, 18, 92 S.Ct., at 1914, 1917. Cf. *Fuentes v. Shevin,* 407 U.S. 67, 94-96, 92 S.Ct. 1983, 2001-2002, 32 L.Ed.2d 556 (1972); *National Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311, 329, 84 S.Ct. 411, 421, 11 L.Ed.2d 354 (1964) (BLACK, J., dissenting) (jurisdictional rules may not be employed against small consumers so as to "crippl[e] their defense"). Just as the Due Process Clause allows flexibility in ensuring that commercial actors are not effectively ****2190** "judgment proof" for the consequences of obligations they voluntarily assume in other States, *McGee v. International Life Insurance Co.,* 355 U.S., at 223, 78 S.Ct., at 201, so too does it prevent rules that would unfairly enable them to obtain default judgments against unwitting customers. Cf. *United States v. Rumely,* 345 U.S. 41, 44, 73 S.Ct. 543, 545, 97 L.Ed. 770 (1953) (courts must not be " 'blind' " to what " '[a]ll others can see and understand' ").

FN29. This approach does, of course, preclude clear-cut jurisdictional rules. But any inquiry into "fair play and substantial justice" necessarily requires determinations "in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.' " *Kulko v. California Superior Court,* 436 U.S., at 92, 98 S.Ct., at 1697.

FN30. *Hanson v. Denckla,* 357 U.S., at 253, 78 S.Ct., at 1239; *Keeton v. Hustler Magazine, Inc.,* 465 U.S., at 774, 104 S.Ct., at 1478; *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S., at 299, 100 S.Ct., at 568.

***487** For the reasons set forth above, however, these dangers are not present in the instant case. Because Rudzewicz established a substantial and continuing relationship with Burger King's Miami headquarters, received fair notice from the contract documents and the course of dealing that he might be subject to suit in Florida, and has failed to demonstrate how jurisdiction in that forum would otherwise be fundamentally unfair, we conclude that the District Court's exercise of jurisdiction pursuant to Fla.Stat. § 48.193(1)(g) (Supp.1984) did not offend due process. The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice POWELL took no part in the consideration or decision of this case.

Justice STEVENS, with whom Justice WHITE joins, dissenting.

In my opinion there is a significant element of unfairness in requiring a franchisee to defend a case of this kind in the forum chosen by the franchisor. It is undisputed that appellee maintained no place of business in Florida, that he had no employees in that State, and that he was not licensed to do business there. Appellee did not prepare his French fries, shakes, and hamburgers in Michigan, and then deliver them into the stream of commerce "with the expectation that they [would] be purchased by consumers in" Florida. *Ante,* at 2182. To the contrary, appellee did business only in Michigan, his business, property, and payroll taxes were payable in that State, and he sold all of his products there.

Throughout the business relationship, appellee's

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principal contacts with appellant were with its Michigan office. Notwithstanding its disclaimer, *ante,* at 2185, the Court seems ultimately to rely on nothing more than standard boilerplate language contained in various documents, *ante,* at 2187, ***488** to establish that appellee " 'purposefully availed himself of the benefits and protections of Florida's laws.' " *Id.,* at 2187. Such superficial analysis creates a potential for unfairness not only in negotiations between franchisors and their franchisees but, more significantly, in the resolution of the disputes that inevitably arise from time to time in such relationships.

Judge Vance's opinion for the Court of Appeals for the Eleventh Circuit adequately explains why I would affirm the judgment of that court. I particularly find the following more persuasive than what this Court has written today:

"Nothing in the course of negotiations gave Rudzewicz reason to anticipate a Burger King suit outside of Michigan. The only face-to-face or even oral contact Rudzewicz had with Burger King throughout months of protracted negotiations was with representatives of the Michigan office. Burger King had the Michigan office interview Rudzewicz and MacShara, appraise their application, discuss price terms, recommend the site which the defendants finally agreed to, and attend the final closing ceremony. There is no evidence that Rudzewicz ever negotiated with anyone in Miami or even sent mail there during negotiations. He maintained no staff in the state of Florida, and as far as the record reveals, he has never even visited the state.

"The contracts contemplated the startup of a local Michigan restaurant whose profits would derive solely from food sales made to customers in Drayton Plains. The sale, which involved the use of an intangible trademark in Michigan and occupancy of a Burger King facility ****2191** there, required no performance in the state of Florida. Under the contract, the local Michigan district office was responsible for providing all of the services due Rudzewicz, including advertising and management consultation. Supervision, moreover, emanated from that office alone. To Rudzewicz, the Michigan office was for all intents and purposes the embodiment ***489** of Burger King. He had reason to believe that his working relationship with Burger King began and ended in Michigan, not at the distant and anonymous Florida headquarters....

"Given that the office in Rudzewicz' home state conducted all of the negotiations and wholly supervised the contract, we believe that he had reason to assume that the state of the supervisory office would be the same state in which Burger King would file suit. Rudzewicz lacked fair notice that the distant corporate headquarters which insulated itself from direct dealings with him would later seek to assert jurisdiction over him in the courts of its own home state....

"Just as Rudzewicz lacked notice of the possibility of suit in Florida, he was financially unprepared to meet its added costs. The franchise relationship in particular is fraught with potential for financial surprise. The device of the franchise gives local retailers the access to national trademark recognition which enables them to compete with better-financed, more efficient chain stores. This national affiliation, however, does not alter the fact that the typical franchise store is a local concern serving at best a neighborhood or community. Neither the revenues of a local business nor the geographical range of its market prepares the average franchise owner for the cost of distant litigation....

"The particular distribution of bargaining power in the franchise relationship further impairs the franchisee's financial preparedness. In a franchise contract, 'the franchisor normally occupies [the] dominant role'....

"We discern a characteristic disparity of bargaining power in the facts of this case. There is no indication that Rudzewicz had any latitude to negotiate a reduced rent or franchise fee in exchange for the added risk of suit in Florida. He signed a standard form contract whose terms were non-negotiable and

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which appeared ***490** in some respects to vary from the more favorable terms agreed to in earlier discussions. In fact, the final contract required a minimum monthly rent computed on a base far in excess of that discussed in oral negotiations. Burger King resisted price concessions, only to sue Rudzewicz far from home. In doing so, it severely impaired his ability to call Michigan witnesses who might be essential to his defense and counterclaim.

"In sum, we hold that the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida. Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process." 724 F.2d 1505, 1511-1513 (1984) (footnotes omitted).

Accordingly, I respectfully dissent.

U.S.Fla.,1985.
Burger King Corp. v. Rudzewicz
471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528, 53 USLW 4541

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EXHIBIT C

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878 F.Supp. 1196
878 F.Supp. 1196, 67 Fair Empl.Prac.Cas. (BNA) 651

United States District Court,N.D. Indiana,Fort Wayne Division.
Robert CHARLESWORTH, Plaintiff,
v.
MARCO MANUFACTURING CO., Defendant.
Civ. No. 1:94cv334.

Feb. 14, 1995.

Indiana resident brought age discrimination action against foreign corporation. On corporation's motion to dismiss or to transfer, the District Court, William C. Lee, J., held that: (1) District Court did not have specific jurisdiction over corporation, since corporation's contacts with Indiana did not relate to employee's start of employment with corporation or his termination therefrom; (2) District Court did not have general personal jurisdiction over foreign corporation; and (3) in interest of justice, venue would be transferred to United States District Court for the Central District of California.

Motion to dismiss denied; motion to transfer granted.

West Headnotes

[1] Federal Civil Procedure 170A ⚿1825

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1825 k. Motion and Proceedings Thereon. Most Cited Cases
When issue of personal jurisdiction is raised via motion to dismiss, burden of proof rests on party asserting jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[2] Federal Civil Procedure 170A ⚿1825

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1825 k. Motion and Proceedings Thereon. Most Cited Cases
Burden of proof on motion to dismiss for lack of personal jurisdiction is met by prima facie showing that jurisdiction is conferred by long-arm statute. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[3] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
In considering challenge to personal jurisdiction, court may receive and weigh affidavits, exhibits, or other evidence submitted by parties. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[4] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
In considering challenge to personal jurisdiction, court must construe all facts concerning jurisdiction in favor of nonmovant, including disputed or contested facts. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[5] Federal Courts 170B ⚿417

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk417 k. Federal Jurisdiction. Most Cited Cases
United States District Court for the Northern District of Indiana has jurisdiction over nonresident defendant only if Indiana court would have jurisdic-

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tion.

[6] Courts 106 ⚿12(2.15)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General
106k12(2.15) k. Transacting or Doing Business. Most Cited Cases
Indiana rule providing for jurisdiction over person doing business in Indiana is intended to extend personal jurisdiction to the extent allowed by due process. U.S.C.A. Const.Amends. 5, 14; Ind. Trial Procedure Rule 4.4.

[7] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))
Due process requires trial court to acquire personal jurisdiction over nonresident defendant before it renders judgment against that defendant. U.S.C.A. Const.Amends. 5, 14.

[8] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Before court can exercise personal jurisdiction it must determine that minimum contacts exist between forum state and nonresident defendant, which comport with due process. U.S.C.A. Const.Amends. 5, 14.

[9] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Minimum contacts exist between forum state and non-resident defendant, for purposes of determining personal jurisdiction, when maintenance of suit in question does not offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amends. 5, 14.

[10] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising There-

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from. Most Cited Cases
In determining whether it can exercise personal jurisdiction over nonresident defendant, district court must determine whether it is reasonable, due to nonresident defendant's conduct in connection with forum state, for nonresident defendant to anticipate being haled into court in forum state. U.S.C.A. Const.Amends. 5, 14.

[11] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))
Due process requires that, in order for court to exercise personal jurisdiction over nonresident defendant, that nonresident defendant have fair warning that a particular activity may subject it to jurisdiction of foreign sovereign. U.S.C.A. Const.Amends. 5, 14.

[12] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
In determining whether to exercise personal jurisdiction over nonresident defendant, court must determine whether nonresident defendant purposely availed himself of privilege of conducting activities within forum state.

[13] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Test for minimum contacts, for purposes of determining personal jurisdiction, is flexible and necessarily dependent upon facts of each case with particular attention being given to nature and quality of contacts. U.S.C.A. Const.Amends. 5, 14.

[14] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases

Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
District court may exercise jurisdiction over nonresident defendants if court has either specific or general jurisdiction over defendants.

[15] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Specific jurisdiction exists when defendant's contacts with forum are related to the controversy and

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those contacts reach a minimum threshold.

[16] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
If controversy does not arise out of defendant's contacts with forum, court may exercise general jurisdiction if defendant has continuous and systematic contacts with forum, even though those contacts have no relation to underlying controversy.

[17] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases

Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Specific jurisdiction requires only a minimum number of contacts, but also requires controversy to be related in some way to defendant's contact with forum; general jurisdiction requires greater amount of contacts, but permits court to include in its analysis contacts that have absolutely no relationship to the underlying dispute.

[18] Federal Courts 170B ⚿79

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk79 k. Corporate Activities and Contacts Within District; Doing Business in General. Most Cited Cases
United States District Court for the District of Indiana did not have specific jurisdiction over foreign corporation in former employee's age discrimination claim, since corporation's contacts with Indiana did not relate to employee's start of employment with corporation or his termination therefrom; corporation did not advertise available positions in Indiana, and decision to hire employee was not made in Indiana. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[19] Federal Courts 170B ⚿79

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk79 k. Corporate Activities and Contacts Within District; Doing Business in General. Most Cited Cases
United States District Court for the Northern District of Indiana did not have general personal jurisdiction over foreign corporation, in age discrimination suit by former sales manager who resided in Indiana; corporation had no facilities or employees in Indiana, less than one percent of corporation's sales were in Indiana, corporation had at most three distributors for its products in Indiana, and employee could not rely on fact that he resided in Indiana to establish jurisdiction. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[20] Federal Courts 170B ⚿76.15

170B Federal Courts
170BII Venue

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170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.15 k. Transacting or Doing Business. Most Cited Cases
Nonresident defendant's business contacts with forum must be so substantial and of such nature as to justify suit against defendant on causes of action arising from dealings entirely distinct from those activities, in order for court to exercise general personal jurisdiction over nonresident defendant.

[21] Federal Courts 170B ⚷76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
In determining whether it can exercise general personal jurisdiction over nonresident defendant, court must scrutinize nature and quality of contacts of defendant with forum state.

[22] Federal Courts 170B ⚷76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Sales of nonresident defendant's products in forum state give rise to general personal jurisdiction only where amount of sales is significant.

[23] Federal Courts 170B ⚷84

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk84 k. Miscellaneous Particular Activities. Most Cited Cases
In former employee's age discrimination action against foreign corporation, employee's communications with corporation's plant from his residence in forum was insufficient to establish jurisdiction. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[24] Federal Courts 170B ⚷76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Unilateral activity of those who claim some relationship with nonresident defendant cannot satisfy requirement of contact with forum state, for purposes of determining general personal jurisdiction.

[25] Federal Civil Procedure 170A ⚷1742(5)

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1742 Want of Jurisdiction
170Ak1742(5) k. Improper Venue. Most Cited Cases

Federal Courts 170B ⚷121

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)2 Venue Laid in Wrong Forum
170Bk121 k. In General. Most Cited Cases
Where district court lacked personal jurisdiction over defendant, venue was also inappropriate in district court, and it could either dismiss case outright, or, in interest of justice, transfer case to any district in which the cause of action could have

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been brought originally. 28 U.S.C.A. § 1406.

|26| Federal Courts 170B ⚿122

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)2 Venue Laid in Wrong Forum
170Bk122 k. Particular Determinations. Most Cited Cases
In Indiana resident's age discrimination action against California corporation, United States District Court for the Northern District of Indiana, after finding that it lacked personal jurisdiction over action, would, in interest of justice, transfer venue to United States District Court for the Central District of California, since corporation admitted that it was subject to personal jurisdiction there. 28 U.S.C.A. §§ 1391(c), 1406; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

***1199** John C. Theisen, Eric HJ Stahlhut, Gallucci Hopkins and Theisen, P.C., Fort Wayne, IN, for Robert Charlesworth.
Timothy F. Ryan, Sarvenaz Bahar, Morrison and Foerster, Los Angeles, CA, for Marco Mfg., Co.

ORDER

WILLIAM C. LEE, District Judge.
This matter is before the court on a motion to dismiss for lack of personal jurisdiction or, in the alternative, to transfer filed by the defendant Marco Manufacturing Co. ("Marco") on December 23, 1994. The parties completed briefing the motion on January 26, 1995. For the following reasons, Marco's motion to dismiss will be denied and Marco's motion to transfer will be granted.

Discussion

Plaintiff Robert Charlesworth ("Charlesworth") has sued his former employer, Marco, a California corporation, alleging that Marco terminated him in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621*et seq.* The relevant factual background of this case is as follows. On or about October 1990, Charlesworth was hired by Marco as a Sales Manager for the Midwest Region. Throughout the tenure of his employment by Marco, Charlesworth resided in Indiana. His primary duty while working for Marco was to expand its market share in the Midwest by contacting and persuading distributors to purchase Marco's products. Indiana was one of five Midwestern states in which Charlesworth was expected to generate business. As a result of Charlesworth's efforts, Marco sold its fireplaces to businesses throughout Indiana. While living and working in Indiana, Charlesworth routinely received progress reports, sales leads, and other communication from representatives of Marco's corporate office *via* telephone and facsimile in Indiana. Following the sale of Marco's fireplaces to distributors in Indiana, Charlesworth also serviced those fireplaces in the home of Indiana residents when problems arose with their operation. On or about March 7, 1994, Charlesworth was discharged by his immediate supervisor George Follett ("Follett").

Marco has filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(2) on the ground that this court lacks personal jurisdiction over Marco and that, consequently, venue in this district is improper. In the alternative, Marco requests this court to transfer this cause of action to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1404 and § 1406.

[1][2][3][4] When the issue of personal jurisdiction is raised via a Rule 12(b)(2) motion to dismiss, the burden of proof rests upon the party asserting jurisdiction. *Wessel Co., Inc. v. Yoffee & Beitman Mgmt. Corp.*, 457 F.Supp. 939, 940 (N.D.Ill.1978). This burden of proof is met by a prima facie showing that jurisdiction is conferred by the long-arm statute. *Neiman v. Rudolf Wolff & Co., Ltd.*, 619 F.2d 1189, 1190 (7th Cir.1980); *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir.1971);

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Wessel Co., Inc., 457 F.Supp. at 940. In considering a challenge to personal jurisdiction, a court may may receive and weigh affidavits, exhibits or other evidence submitted by the parties. *Nelson by Carson v. Park Industries, Inc.*, 717 F.2d 1120 (7th Cir.1983). However, the court must construe all facts concerning jurisdiction in favor of the non-movant, including disputed or contested facts. *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215 (7th Cir.1984); *Neiman*, 619 F.2d at 1190; *United States Railway Equipment Co. v. Port Huron & Detroit Railroad Co.*, 495 F.2d 1127, 1128 (7th Cir.1974); *O'Hare Int'l Bank*, 437 F.2d at 1176; *Maurice Sternberg, Inc. v. James*, 577 F.Supp. 882, 885 (N.D.Ill.1984).

[5][6] This court has jurisdiction over a non-resident defendant, such as Marco, only if an Indiana court would have jurisdiction. *Scott Turnock v. Cope*, 816 F.2d 332, 334 (7th Cir.1987); *Lakeside Bridge & Steel v. Mountain State Construction Co., Inc.*, 597 F.2d 596 (7th Cir.1979); *Patton Elec. Co., Inc. v. Rampart Air, Inc.*, 777 F.Supp. 704, 709 (N.D.Ind.1991). Indiana Rules of Procedure, Trial Rule 4.4, controls the issue of whether a federal court has personal jurisdiction over a ***1200** non-resident defendant. The pertinent portion of Trial Rule 4.4 states:

(A) Any person or organization that is a nonresident of this state, ... submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or his agent:

(1) doing any business in this state ...

Trial Rule 4.4(A) is intended to extend personal jurisdiction to the extent allowed by due process. *Nu-Way Systems v. Belmont Marketing*, 635 F.2d 617 (7th Cir.1980).

[7][8][9][10][11] Due process requires that a trial court acquire personal jurisdiction over a non-resident defendant before it renders a judgment against that defendant. *Kulko v. California Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978). Before a court can exercise personal jurisdiction it must determine that "minimum contacts" exist between the forum state and the non-resident defendant, which comport with due process. *International Shoe Co. v. Washington*, 326 U.S. 310, 315-17, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). Minimum contacts exist when maintenance of the suit in question "does not offend 'traditional notions of fair play and substantial justice' " *Id.* quoting *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940). A district court must determine whether it is reasonable, due to the non-resident defendant's conduct in connection with the forum state, for the non-resident defendant to anticipate being haled into court in the forum state. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Due process requires that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

[12][13] The court must also determine whether the non-resident defendant purposely availed himself or itself of the privilege of conducting activities within the forum state. *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). The test for minimum contacts is flexible and necessarily dependent upon the facts of each case with particular attention being given to the nature and quality of the contacts. *Lakeside*, 597 F.2d at 596.

In *Burger King*, the Supreme Court determined that the factors to be considered when determining whether the exercise of personal jurisdiction comports with "fair play and substantive justice" include: (1) the burden on the defendant, (2) the forum states' interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the states in furthering substantive social policies.

[14][15][16] This court may exercise jurisdiction

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over non-resident defendants if the court has either specific or general jurisdiction over the defendants. Specific jurisdiction exists when the defendant's contacts with the forum are related to the controversy and those contacts reach a "minimum" threshold. *International Shoe Co. v. Washington,* 326 U.S. at 315-17, 66 S.Ct. at 158. If the controversy does not arise out of the defendant's contacts with the forum, the court may exercise general jurisdiction if the defendant has "continuous and systematic" contacts with the forum, even though those contacts have no relation to the underlying controversy. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

[17] Specific jurisdiction requires only a minimum of contacts, but also requires the controversy to be "related" in some way to the defendant's contact with the forum. General jurisdiction requires a greater amount of contacts, but permits the court to include in its analysis contacts that have absolutely no relationship to the underlying dispute.

[18] Marco argues that Charlesworth's cause of action is unrelated to Marco's contacts with Indiana, and thus Charlesworth must show that this court has general personal jurisdiction over it. Charlesworth, however, takes the position that this court has both specific and general personal jurisdiction over Marco. Thus, this court must ***1201** first determine whether this litigation is related to Marco's contacts with this forum.

This litigation is a suit under the ADEA in which Charlesworth alleges that he was improperly terminated on the basis of his age. Clearly then, to make a showing of specific jurisdiction, Charlesworth must show that Marco's contacts with Indiana relate in some way to Charlesworth's start of employment with the company or his termination therefrom. After carefully studying the materials submitted to this court, this court finds that Charlesworth has completely failed to meet his burden of showing specific jurisdiction. In fact, Charlesworth has not shown that any of Marco's contacts with Indiana were related to the decision to hire or fire Charlesworth. For example, there is no showing that Marco solicited employees from Indiana by way of advertising available positions in Indiana. Additionally, it is undisputed that the decision to hire Charlesworth was made in California. Moreover, although Charlesworth claims that he was informed of his termination during a meeting with Follett in Indiana, there is no showing that the actual decision to terminate Charlesworth occurred any place other than in California. Consequently, as the present controversy does not arise out of Marco's contacts with Indiana, this court finds no basis on which to exercise specific personal jurisdiction over Marco.

[19][20][21] This court must next determine whether general personal jurisdiction over Marco is present. As noted earlier, where the controversy does not arise out of the defendant's contacts with the forum, as is the case here, the court may exercise jurisdiction if the defendant has "continuous and systematic business contacts" with the forum. *Helicopteros, supra,* 466 U.S. at 415-16, 104 S.Ct. at 1872-73. These contacts must be "so substantial and of such a nature as to justify suit against [the defendant] on causes of action arising from dealings entirely distinct from those activities." *International Shoe, supra,* 326 U.S. at 318, 66 S.Ct. at 159. The court must "scrutinize the nature and the quality of the contacts of the defendant with the forum state". *L.H. Carbide Corp. v. Piece Maker Co.,* 852 F.Supp. 1425, 1433 (N.D.Ind.1994). "In practice, the standard for establishing general jurisdiction is fairly high." *Intermatic Inc. v. Taymac Corp.,* 815 F.Supp. 290, 293 (S.D.Ind.1993), citing *Wilson v. Humphreys Ltd.,* 916 F.2d 1239, 1245 (7th Cir.1990).

Marco argues that its contact with Indiana is not "continuous and systematic". In support of its argument, Marco relies on the following facts: It has no facilities or employees in Indiana. It is not registered to do business in Indiana. It does not advertise in Indiana. It does not have a phone listing

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or bank account in Indiana. It does not produce its products in Indiana. All Marco products that enter Indiana are the properties of independent distributors and are no longer the property of Marco. Marco further points out that the only contacts it has with Indiana are (1) its former sales agent (Charlesworth) resides in Indiana, and (2) between 5.5%-7.3% of Charlesworth's annual sales and between 0.28%-0.36% of Marco's annual sales occurred in Indiana. After reviewing Marco's contacts with Indiana, this court agrees with Marco that its contacts with Indiana do not rise to the level of being "continuous and systematic".

[22] With respect to the amount of sales of Marco's products occurring in Indiana, the law is clear that such sales give rise to general personal jurisdiction only where the amount of sales is "significant". *L.H. Carbide,* 852 F.Supp. at 1435; *Boone v. Sulphur Creek Resort, Inc.,* 749 F.Supp. 195, 200 (S.D.Ind.1990). The amount of Indiana sales of Marco's products (between 0.28% and 0.36%) is not a significant amount. *See e.g., Romann v. Geissenberger Mfg. Corp.,* 865 F.Supp. 255, 261 (E.D.Pa.1994) (two to four percent of sales of non-resident defendant's product "is hardly reflective of the type of extensive and pervasive contact required."); *L.H. Carbide, supra,* 852 F.Supp. at 1436 (eight percent of non-resident defendant's national sales in forum state was found to be insignificant).

[23] With respect to Charlesworth's activities in Indiana as Marco's sales agent, it is undisputed that Marco had, at most, three distributors for its products in Indiana. Thus, Marco's sales and servicing responsibilities***1202** in Indiana were not very significant. In *L.H. Carbide, supra* at 1436, this court specifically found that a sales agent's "regular purchase transactions and transaction-related contacts" with four to five customers were not enough to assert general jurisdiction. Likewise, Charlesworth's communications with Marco's California plant from his Indiana residence is insufficient to establish jurisdiction. *Lakeside Bridge & Steel v. Mountain State Construction,* 597 F.2d 596, 604 (7th Cir.1979).

[24] Additionally, the law clearly states that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Nu-Way Systems v. Belmont Marketing,* 635 F.2d 617, 620 (7th Cir.1980) (citations omitted). Thus, Charlesworth may not rely on his own contacts within the state of Indiana in his attempt to establish that this court has jurisdiction over Marco. Nor may Charlesworth rely on the fact that he resides in Indiana. *Romann v. Geissenberger Mfg. Corp.,* 865 F.Supp. 255, 261-62 (E.D.Pa.1994) (plaintiff's unilateral decision to reside in Pennsylvania and receive paychecks there did not constitute purposeful contacts by [the defendant]). In light of the foregoing, it is abundantly clear that this court may not exercise general personal jurisdiction over Marco.

[25] This court, having determined that it lacks personal jurisdiction over defendant, now turns to Marco's alternative Motion to Transfer to the United States District Court for the Central District of California. Because this court lacks personal jurisdiction over Marco, venue is also inappropriate in this forum, and the court may either dismiss the case outright, or in the interest of justice, the court may transfer the case to any district in which the cause of action could have been brought originally. The decision whether to transfer is entrusted to the discretion of the district court. *Hapaniewski v. City of Chicago Heights,* 883 F.2d 576, 579 (7th Cir.1989).

[26] Marco asserts that personal jurisdiction and venue are proper in the United States District Court for the Central District of California and that the court should therefore transfer the case to that court. This court agrees.

The ADEA does not contain its own venue provision and, thus, venue is governed by the general venue statute, 28 U.S.C. § 1391(c). Pursuant to § 1391, venue is proper for a defendant corporation

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only in a "judicial district in which it is subject to personal jurisdiction at the time the action is commenced." Marco has admitted that it is subject to personal jurisdiction in the Central District of California. Therefore, in the interest of justice and in accordance with the purpose of 28 U.S.C. § 1406, this court will grant Marco's Motion to Transfer.

Conclusion

For all of the foregoing reasons, Marco's motion to dismiss is hereby DENIED. Further, Marco's motion to transfer this case to the United States District Court for the Central District of California is hereby GRANTED.

N.D.Ind.,1995.
Charlesworth v. Marco Mfg. Co.
878 F.Supp. 1196, 67 Fair Empl.Prac.Cas. (BNA) 651

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United States Court of Appeals,Ninth Circuit.
CORE-VENT CORP., Plaintiff-Appellant,
v.
NOBEL INDUSTRIES AB, Defendant,
andPer-Ingvar Branemark; Tomas Albrektsson; Ulf Lekholm; Lars Sennerby, Defendants-Appellees.
No. 91-56493.

Argued and Submitted April 8, 1993.
Decided Dec. 16, 1993.

California corporation sued Swedish doctors for antitrust violations and libel based on articles published in international medical journals. The United States District Court for the Central District of California, William Duffy Keller, J., dismissed for lack of personal jurisdiction. Corporation appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that exercise of jurisdiction over doctors would not comport with fair play and substantial justice.

Affirmed.

Fernandez, Circuit Judge, filed concurring opinion.

Wallace, Chief Judge, filed dissenting opinion.

West Headnotes

[1] Federal Courts 170B ⚿660.5

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk660 Certification and Leave to Appeal
170Bk660.5 k. Particular Actions and Rulings. Most Cited Cases
Upon finding that libel defendants were not subject to personal jurisdiction in state, district court was within its discretion in granting plaintiff's motion for entry of final judgment, since disposing of jurisdiction issue could obviate need for second trial, and jurisdictional question was unrelated to other issues in case against other defendants. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

[2] Federal Courts 170B ⚿417

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk417 k. Federal Jurisdiction. Most Cited Cases
Where there is no applicable federal statute governing personal jurisdiction, law of state in which district court sits applies.

[3] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Courts 106 ⚿12(2.1)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General
106k12(2.1) k. In General. Most Cited Cases
Pursuant to California long-arm statute, courts may exercise personal jurisdiction over defendants to extent permitted by due process clause of United States Constitution. U.S.C.A. Const.Amend. 14.

[4] Federal Courts 170B ⚿76.10

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170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Where defendant has not had continuous and systematic contacts with state sufficient to subject him or her to general jurisdiction, court may exercise personal jurisdiction if defendant has "minimum contacts" with forum, which exist if nonresident defendant purposefully directs his activities or consummates some transaction with forum or resident thereof, or performs some act by which he purposefully avails himself of privilege of conducting activities in forum, thereby invoking benefits and protections of its law, if claim is one which arises out of or relates to defendant's forum-related activities, and if exercise of jurisdiction comports with fair play and substantial justice, such that it is reasonable. U.S.C.A. Const.Amend. 14.

[5] Federal Courts 170B ⚿76.1

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.1 k. In General. Most Cited Cases
(Formerly 170Bk76)
In determining whether exercise of jurisdiction over nonresident defendant comports with "fair play and substantial justice," court must consider extent of defendant's purposeful interjection into forum state's affairs, burden on defendant of defending in forum, extent of conflict with sovereignty of defendant's state, forum state's interest in adjudicating dispute, most efficient judicial resolution of controversy, importance of forum to plaintiff's interest in convenient and effective relief, and existence of alternative forum; none of the factors is dispositive in itself, and all must be balanced. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law 92 ⚿3965(8)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(8) k. Media and Publishing. Most Cited Cases
(Formerly 92k305(5))

Federal Courts 170B ⚿86

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk86 k. Aliens or Alien Corporations. Most Cited Cases
Under California long-arm statute and principles of due process, district court in California could not exercise personal jurisdiction over four doctors in Sweden who allegedly defamed California corporation in articles published in international medical journals, since exercise of jurisdiction would not comport with fair play and substantial justice; while corporation was international, physicians were individual citizens of foreign country who lacked connections to United States and whose purposeful interjection into California was very limited. (Per O'Scannlain, Circuit Judge, with one Circuit Judge concurring.) U.S.C.A. Const.Amend. 14.

[7] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
In seeking to establish that nonresident defendants are subject to personal jurisdiction in state, plaintiff bears burden of proving unavailability of alternat-

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ive forum. U.S.C.A. Const.Amend. 14.

[8] Federal Courts 170B ⚿86

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk86 k. Aliens or Alien Corporations. Most Cited Cases
Swedish citizen's attendance at five medical conferences in California in four years did not constitute systematic and continuous contacts with California which would vest district court in California with general jurisdiction over citizen. (Per O'Scannlain, Circuit Judge, with one Circuit Judge concurring.) U.S.C.A. Const.Amends. 5, 14.

[9] Federal Courts 170B ⚿95

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk95 k. Objections, Waiver and Consent. Most Cited Cases
Swedish citizen did not agree to submit to jurisdiction in California for purposes of antitrust suit brought by California corporation, by virtue of settlement agreement between citizen and corporation in unrelated patent infringement case which provided that enforcement of that agreement was to occur in California courts. (Per O'Scannlain, Circuit Judge, with one Circuit Judge concurring.) U.S.C.A. Const.Amends. 5, 14.

[10] Federal Courts 170B ⚿95

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk95 k. Objections, Waiver and Consent. Most Cited Cases
Fact that Swedish corporation, at direction of Swedish citizen, filed suit against California corporation in unrelated action did not subject citizen to personal jurisdiction in California in all cases involving California corporation. (Per O'Scannlain, Circuit Judge, with one Circuit Judge concurring.) U.S.C.A. Const.Amends. 5, 14.

***1483** Patrick F. Bright,Bright & Lorig, Los Angeles, CA, for plaintiff-appellant.
Alan I. Becker, Burditt & Radzius, Chicago, IL, for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before: WALLACE, Chief Judge; O'SCANNLAIN and FERNANDEZ, Circuit Judges.

O'SCANNLAIN, Circuit Judge:
We are called upon to decide whether a federal district court in California should exercise personal jurisdiction over four doctors in Sweden who allegedly defamed a California corporation in articles published in international medical journals.

I

Until very recently, Core-Vent was a California corporation with its headquarters in Encino.[FN1] Core-Vent and its principal competitor, Nobelpharma AB ("Nobelpharma"), a Swedish corporation, are the two largest manufacturers of dental implants in the world.

FN1. According to the appellees, Core-Vent moved its headquarters to Nevada sometime after the district court's ruling.

Branemark, Albrektsson, and Lekholm are professors at the University of Gothenburg in Gothenburg, Sweden. Sennerby is a doctoral candidate at the University of Gothenburg. (We will refer to the appellees collectively as "the Swedish doctors.") All are Swedish citizens and none has visited the United States, or, in particular, California more than a few times on random occasions. Branemark visited California most extensively of the four and is alleged to have visited only five times in the last four years. Branemark is a director of No-

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belpharma, and also directs a research institute at the University that is allegedly financed by Nobelpharma. Albrektsson, Lekholm, and Sennerby work at the institute, and are alleged to be paid ***1484** consultants to Nobelpharma. According to Core-Vent, Albrektsson and Lekholm co-authored, at the direction of Nobelpharma and Branemark, an article published in the October 1989 issue of *Dental Clinics of North America* that "contained false and misleading comparisons of Core-Vent and Nobelpharma implants." The journal is distributed worldwide, including within California. Albrektsson and Sennerby similarly are alleged to have written, at Nobelpharma's direction, an article defaming Core-Vent. Their article was published in the *International Journal of Oral and Maxillofacial Implants,* which is also distributed worldwide. Core-Vent alleges that Branemark controlled these and other studies in order to further an antitrust conspiracy.

Core-Vent brought suit against Nobelpharma, three individual American citizens, and five Swedish citizens, including the four Swedish doctors. In addition to various claims against the defendants that are not parties to this appeal, Core-Vent brought antitrust claims against Branemark and libel claims against Albrektsson, Lekholm, and Sennerby. The Swedish doctors moved to dismiss the claims against them for lack of personal jurisdiction. The district court granted the motion. Final judgment was entered pursuant to Federal Rule of Civil Procedure 54(b). Core-Vent appeals.

II

[1] As a preliminary matter, we must consider the Swedish doctors' argument that the district court abused its discretion in granting Core-Vent's motion for the entry of final judgment.

Rule 54(b) of the Federal Rules of Civil Procedure provides in relevant part:

When more than one claim is presented in an action *...or when multiple parties are involved,* the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties *only upon an express determination that there is no just reason for delay* and upon an express direction for the entry of judgment.

(Emphasis added.) Here, the district court expressly determined that there was no just reason for delay because the jurisdictional claims were easily severable from the merits of the lawsuit. The court also concluded that allowing for immediate appeal would serve the efficient administration of justice.

In *Texaco, Inc. v. Ponsoldt,* 939 F.2d 794, 797 (9th Cir.1991), we held that "Rule 54(b) certification is proper if it will aid 'expeditious decision' of the case." *Id.* (quoting *Sheehan v. Atlanta Int'l Ins. Co.,* 812 F.2d 465, 468 (9th Cir.1987)). "However, Rule 54(b) certification is scrutinized to 'prevent piecemeal appeals in cases which should be reviewed only as single units.' " *Id.* at 797-98 (quoting *McIntyre v. United States,* 789 F.2d 1408, 1410 (9th Cir.1986) (internal citations and quotations omitted)).

We are satisfied that dealing with the jurisdictional issue now may obviate the need for a second trial, and thus aids expeditious decision of the case. The jurisdictional question at issue here is unrelated to the other issues in the case; thus, entry of final judgment will not lead to undesirable "piecemeal appeals." In short, the district court did not abuse its discretion in granting Core-Vent's motion under Rule 54(b).

III

The district court dismissed the claims against the Swedish doctors, concluding that it lacked personal jurisdiction over them.

[2][3] Where, as here, there is no applicable federal statute governing personal jurisdiction, the law of the state in which the district court sits applies. *See Hylwa, M.D., Inc. v. Palka,* 823 F.2d 310, 312 (9th

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Cir.1987). This case was brought in the Central District of California; California's long-arm statute allows courts to exercise personal jurisdiction over defendants to the extent permitted by the Due Process Clause of the United States Constitution. *Data Disc, Inc. v. Systems Tech. Assocs., Inc.,* 557 F.2d 1280, 1286 (9th Cir.1977). Thus, we "need only determine whether personal jurisdiction in this case would meet the requirements of due process." ***1485***Brainerd v. Governors of the Univ. of Alberta,* 873 F.2d 1257, 1258 (9th Cir.1989).

[4] "[D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (citations omitted). Where the defendant has not had continuous and systematic contacts with the state sufficient to subject him or her to general jurisdiction, the following three-part test is applied to determine whether the defendant has "minimum contacts" with the forum:

(1) The nonresident 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.

Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir.1987). Here, Core-Vent claims that the Swedish doctors purposefully directed their activities into California by publishing or causing to be published libelous articles about Core-Vent's products in international medical journals. The libel claims clearly "arose out" of the publication of the articles; [FN2] we thus need consider only the first and third elements of the minimum contacts test.

> FN2. The libel claims were brought against Albrektsson, Lekholm, and Sennerby but not Branemark. Antitrust claims were brought against Branemark. However, Core-Vent claims that the antitrust conspiracy was furthered through the articles. For purposes of this appeal, we will assume arguendo that the claims against Branemark arose out of the libelous articles that were allegedly written at Branemark's direction.

A

"The first step of the specific jurisdiction analysis involves a qualitative evaluation of the defendant's contact with the forum state," *Lake,* 817 F.2d at 1421, in order to determine whether the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Worldwide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). Fulfilling this step is not necessarily precluded by a lack of physical contacts with the forum. Rather, "within the rubric of 'purposeful availment' the [Supreme] Court has allowed the exercise of jurisdiction over a defendant whose only 'contact' with the forum state is the 'purposeful direction' of a *foreign* act having *effect* in the forum state." *Haisten v. Grass Valley Medical Reimbursement Fund,* 784 F.2d 1392, 1397 (9th Cir.1986) (citing *Calder v. Jones,* 465 U.S. 783, 789, 104 S.Ct. 1482, 1487, 79 L.Ed.2d 804 (1984)).

Core-Vent claims that the Swedish doctors' contacts with California are analogous to those of the individual defendants in *Calder.* The plaintiff in *Calder* was an entertainer who lived and worked in California. She brought suit there, claiming that she had been libeled by an article written in Florida and published in the National Enquirer, a newspaper published in Florida with a large circulation in California. Two of the defendants in the case, the editor

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of the paper and the reporter who wrote the story, moved for dismissal for lack of personal jurisdiction on the ground that they lacked physical contacts with California. *Calder,* 465 U.S. at 784-85, 104 S.Ct. at 1484-85.

The Court concluded that because "California [was] the focal point both of the story and of the harm suffered," *id.* at 789, 104 S.Ct. at 1486-87,"[j]urisdiction over [the defendants was] ... proper in California based on the 'effects' of their Florida conduct in California." *Id.* The Court stressed that the defendants had not engaged in "untargeted negligence" but instead had "expressly aimed" their tortious actions at a California resident. *Id.* at 789, 104 S.Ct. at 1487. In determining that the actions were "expressly ***1486** aimed" at the forum state, the Court considered the totality of the circumstances surrounding the events. *Id.* at 788, 104 S.Ct. at 1486. The activities that were the subject of the story took place in California, and the story was drawn from California sources. *Id.* at 788-89, 104 S.Ct. at 1486-87. Most significant, the court concluded defendants knew that the brunt of the harm would be suffered in California for two reasons. First, since the defendants knew that the plaintiff lived and worked in California, the defendant knew that the negative effects on the plaintiff's reputation would primarily be suffered there. *Id.* at 789-90, 104 S.Ct. at 1487. Second, the defendant knew that the National Enquirer had a large circulation in California-in fact the largest of any place in the country. The Court concluded that the effects of a libel would be felt most severely in the place where the libel was most extensively published. *Id.* "Under these circumstances," the Court concluded, the defendants "must [have] reasonably anticipat[ed] being haled into court" in California. *Id.* at 790, 104 S.Ct. at 1487 (citations omitted).

Calder thus established that personal jurisdiction can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered-and which the defendant knows is likely to be suffered-in the forum state.[FN3] Although *Calder* did not purport to make this an exclusive list of the circumstances under which the new "effects test" could be applied, we have thus far refused to extend the holding to defendants whose contacts are more remote. In *Casualty Assurance Risk Insurance Brokerage Co. v. Dillon,* 976 F.2d 596, 601 (9th Cir.1992), for example, we refused to accept the plaintiff's argument that the effects of libel are felt and jurisdiction exists wherever a corporate plaintiff resides. Likewise, in *McGlinchy v. Shell Chemical Co.,* 845 F.2d 802, 817 (9th Cir.1988), we refused to apply the *Calder* effects test when the underlying action involved a contract dispute, not a tort. *Cf., e.g., Brainerd,* 873 F.2d 1257 (jurisdiction upheld where facts were analogous to *Calder*).

> FN3. The dissent's reliance on *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), is misdirected. *Keeton* is distinguishable from both *Calder* and the instant case. In *Keeton* the defendant was a nationally published magazine; in *Calder* and here, the moving defendants were individuals employed by magazines. As the Court noted in *Keeton,*"jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him." 465 U.S. at 781 n. 13, 104 S.Ct. at 1482 n. 13. Thus, although California may well have had jurisdiction, according to *Keeton,* over the magazine that published the doctors' article, it does not follow that by the same rule California has jurisdiction over the doctors.

Whether the conduct in this case meets the *Calder* effects test is a close question. Core-Vent suggests that *Calder* is precisely analogous to the situation here. We are unpersuaded. First, we cannot conclude by analogy to *Calder* alone that the acts in question here were "expressly directed" at California. While in *Calder* the events underlying the libelous story occurred in California and the story

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was researched through California sources, here the libel concerned a product that was distributed worldwide. It has not been alleged that the product reached the doctors other than through the stream of commerce. Unlike in *Calder,* therefore, the articles cannot be seen as a comment on a California event. Moreover, while any article written in the National Enquirer might well be directed at a California audience, here, by contrast, although the medical journals were circulated worldwide, it has not been alleged that California was a primary audience for the medical journals or that the defendants knew that the journals would be circulated in that state.

Second, unlike in *Calder,* it is unclear whether the brunt of the harm was suffered in California. *Calder* involved a libel against an individual; this case involves a libel against a corporation. A corporation does not suffer harm in a particular geographic location in the same sense that an individual does. We concluded in *Dillon* that the harm from an allegedly libelous statement is not necessarily suffered in the place of incorporation. *Dillon,* 976 F.2d at 599-600. We have never considered whether such harm is primarily suffered in the place where the corporation is headquartered.

***1487** Although we cannot conclude that *Calder* is precisely analogous, *Calder* does not preclude the possibility that acts were expressly directed at the forum state. The libelous articles were written about the product of a California corporation, and the Swedish doctors were allegedly aware of the California affiliation. Moreover, the Swedish doctors allegedly intended their actions to cause harm in California. According to Core-Vent, the doctors wrote the articles with the express purpose of driving Core-Vent out of business.

Nor does *Calder* preclude us from deciding that the harm was suffered in California. The Swedish doctors argue that acts intended to harm a corporation cannot be said to be directed at any particular geographic location, and thus *Calder* does not apply to any case in which the plaintiff is a corporation. We must reject this contention. Such a categorical approach is antithetical to *Calder* 's admonishment that the personal jurisdiction inquiry cannot be answered through the application of a mechanical test but instead must focus on the relationship among the defendant, the forum, and the litigation within the particular factual context of each case. *Calder,* 465 U.S. at 789, 104 S.Ct. at 1487. Moreover, other circuits have implicitly rejected this argument, applying *Calder* without comment in cases with corporate plaintiffs. *See, e.g., First American First v. National Ass'n of Bank Women,* 802 F.2d 1511, 1517 (4th Cir.1986); *Blue Ridge Bank v. Veribanc, Inc.,* 755 F.2d 371 (4th Cir.1985); *see also Paccar Int'l, Inc. v. Commercial Bank of Kuwait,* 757 F.2d 1058, 1064 (9th Cir.1985) (suggesting by negative implication that the *Calder* analysis could apply in some situations where a corporation was the plaintiff). Thus, instead of easy categorization, determining where the brunt of the harm is felt requires a difficult case-specific analysis.

Here, there are powerful arguments on both sides. Unlike the corporation in *Dillon,* Core-Vent's principal place of business was in the forum state and thus any economic effects were arguably ultimately felt there. On the other hand, the brunt of the harm was perhaps felt most strongly where the libelous statements affected business most significantly. Core-Vent does not allege that this effect was felt most significantly in California. "Though neither side decisively triumphs under this analysis," *Roth v. Garcia Marquez,* 942 F.2d 617, 622 (9th Cir.1991), we will assume that purposeful availment prong has been satisfied. We need not decide this issue definitively, however, because we conclude in Part B that the exercise of jurisdiction would be unreasonable in any event. *See FDIC v. British-American Ins. Co., Ltd.,* 828 F.2d 1439, 1442 (9th Cir.1987) (declining to decide if the defendant had purposefully availed itself of the forum state in light of the conclusion that the exercise of jurisdiction would be unreasonable).

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B

"Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476-77, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985). However, "where a defendant who purposefully has 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." *Id.* Nevertheless, "jurisdictional rules may not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage in comparison to his opponent.' " *Id.* at 478, 105 S.Ct. at 2185 (citations omitted).

[5] In determining whether the exercise of jurisdiction over a nonresident defendant comports with "fair play and substantial justice," we must consider seven factors: (1) the extent of the defendants' purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient ***1488** and effective relief; and (7) the existence of an alternative forum. *Paccar,* 757 F.2d at 1065. None of the factors is dispositive in itself; instead, we must balance all seven. *Roth v. Garcia Marquez,* 942 F.2d 617, 623 (9th Cir.1991). We consider each factor in turn.

1

[6] We first consider the extent of the Swedish doctors' purposeful interjection into the forum state. Although perhaps sufficient to meet the purposeful availment test, the Swedish doctors' contacts with the forum state are nevertheless attenuated. Some of our cases have suggested that once the minimum contacts threshold is met the degree of intrusion into the forum becomes irrelevant. *See Corporate Invest. Business Brokers v. Melcher,* 824 F.2d 786, 787 (9th Cir.1987). We made plain in our very first case to articulate the reasonableness factors, however, that the extent of interjection is to be considered:

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].

Insurance Company of North America v. Marina Salina Cruz, 649 F.2d 1266, 1271 (9th Cir.1981). We went on to conclude, "[t]he smaller the element of purposeful interjection, the less is jurisdiction to be anticipated and the less reasonable is its exercise." *Id.* This is consistent with the approach of the Supreme Court. In *Burger King,* 471 U.S. at 476, 105 S.Ct. at 2184, for example, the Court stated that the minimum contacts must be evaluated "in light of" the reasonableness factors, suggesting that the minimum contacts and reasonableness factors occupy a sliding scale. Similarly, as one commentator noted, the Court in *Asahi Metal Industry Company v. Superior Court,* 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), suggested that "a greater volume of additional connections is required to justify the exercise of jurisdiction" when the reasonableness factors weigh in the defendant's favor. *See* Earl M. Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California,* 1987 Duke L.J. 669, 689-90. In any event, the cases purporting not to consider the extent of contacts are ambiguous; although claiming that the degree of interjection is irrelevant, the cases have explicitly considered the extent of contacts in deciding how much weight to give other factors. *Compare, e.g., Sinatra v. National En-*

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quirer, 854 F.2d 1191, 1199 (refusing to consider the extent of availment), *with id.* at 1199 (looking at continuing contacts with forum state in determining burden). In short, we conclude that notwithstanding cases suggesting otherwise, we must consider the exiguity of the Swedish doctors' contacts with California in conducting the balance. Since the doctors' contacts were attenuated, this factor weighs in their favor. However, we cannot say that it weighs heavily in their favor given our assumption that they were sufficient to meet the purposeful availment prong.

2

We next consider the burden on the Swedish doctors of defending a lawsuit in California. The Supreme Court has recognized that defending a lawsuit in a foreign country can impose a substantial burden on a nonresident alien. "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi,* 480 U.S. at 114, 107 S.Ct. at 1033. The burden in this case is particularly great because the Swedish doctors have no ongoing connection to or relationship with the United States. *Cf. Sinatra,* 854 F.2d at 1199 ("The continuing contacts between the [Swiss] [c]linic's United States-based agent and California translate into less of a litigation burden than if the Clinic maintained no physical presence or agent within the United States.").

Our cases have also been inconsistent in determining whether the corresponding burden on plaintiff in bringing the claims against the defendant in an alternate forum should lessen the impact of this factor on the overall reasonableness determination. *Compare,* ***1489** *e.g., Pacific Atlantic Trading Co. v. M/V Main Exp.,* 758 F.2d 1325 (9th Cir.1985) ("the burden on the defendant is the primary concern" and thus the possible burden on the plaintiff does not dilute the strength of this factor), *with Sinatra,* 854 F.2d at 1199 ("the burden on the defendant must be examined in light of the corresponding burden on the plaintiff"). We need not reconcile these standards today, however, because the burdens in this case fall asymmetrically. The burden on the Swedish doctors of defending in California would be substantially greater than the burden on Core-Vent in bringing their claims in Sweden. The doctors are individuals with little or no physical contacts with California. Core-Vent, on the other hand, is a large international corporation with worldwide distribution of its products. Regardless whether the burden on the plaintiff is considered, this factor weighs heavily in favor of the doctors.

Despite its strong weight, this factor alone is not dispositive. "Modern advances in communications and transportation have significantly reduced the burden of litigating in another country." *Sinatra,* 854 F.2d at 1199. While defending the lawsuit in California would be difficult for the Swedish doctors, it would not be impossible.

3

The next factor concerns the extent to which the exercise of jurisdiction would conflict with the sovereignty of the defendants' state. "[T]he foreign-acts-with-forum-effects jurisdictional principle must be applied with caution, particularly in an international context." *Pacific Atlantic Trading Co.,* 758 F.2d at 1330. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi,* 480 U.S. at 115, 107 S.Ct. at 1034 (citation omitted). "[L]itigation against an alien defendant creates a higher jurisdictional barrier than litigation against a citizen from a sister state because important sovereignty concerns exist." *Sinatra,* 854 F.2d at 1199.

In determining how much weight to give this factor, we have focused on the presence or absence of connections to the United States in general, not just to the forum state. Sovereignty concerns weigh more heavily when the defendants have no United States-

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based relationships. *Id.* at 1191. For example, in *Sinatra,* we found it significant that the defendant-a Swiss clinic-had an agent in the United States who actively solicited business in California and considered California one of the clinic's best sources of American clients. *Id.* at 1191; *see also Asahi,* 480 U.S. at 112-13, 107 S.Ct. at 1032 (absence of agent or subsidiary in the United States enhanced sovereignty concerns); *FDIC v. British-American Ins. Co.,* 828 F.2d 1439, 1444 (9th Cir.1987) (absence of officer, affiliate or subsidiary in United States significant in evaluating sovereignty concerns). Here, the Swedish doctors are individuals with no United States-based relationships. Thus, the sovereignty factor also weighs heavily in the Swedish doctors' favor.

4

We next consider California's interest in adjudicating the suit. "California maintains a strong interest in providing an effective means of redress for its residents [who are] tortiously injured." *Sinatra,* 854 F.2d at 1200; *cf. Asahi,* 480 U.S. at 118-19, 107 S.Ct. at 1035 (weak state interest because plaintiff is non-resident of California). Here, when the allegedly libelous articles were published and when the lawsuit was brought, Core-Vent was incorporated and had its operations in California. This factor weighs in Core-Vent's favor.

5

The next factor concerns the efficiency of the forum. In evaluating this factor, we have looked primarily at where the witnesses and the evidence are likely to be located. *Id.* We decline to speculate where the evidence and witnesses are likely to be located in this case, however, because neither party has addressed this issue. The fact that the lawsuit will continue in California with other parties tips the efficiency factor in Core-Vent's favor.

***1490** 6

[7] We finally consider whether an alternate forum exists, as well as the convenience and effectiveness of relief for the plaintiff. Here, the claims against the Swedish doctors could possibly be brought in Sweden. The plaintiff bears the burden of proving the unavailability of an alternative forum. *Pacific Atlantic,* 758 F.2d at 1331. Core-Vent has not met its burden of proving that it would be precluded from suing the doctors in Sweden. "Doubtless [it] would prefer not to, but that is not the test." *Garcia Marquez,* 942 F.2d at 625.

The maintenance of a suit in Sweden may be costly and inconvenient for Core-Vent, but Core-Vent has not shown that its libel claims cannot be effectively remedied there. *See Sinatra,* 854 F.2d at 1201. Moreover, Core-Vent can get full relief from the remaining defendants in its action in California. The effectiveness of relief does not seem to be compromised by the dismissal of the doctors.

In any event, neither the Supreme Court nor our court has given much weight to inconvenience to the plaintiff. As we noted in *Garcia Marquez,*"no doctorate in astrophysics is required to deduce that trying a case where one lives is almost always a plaintiff's preference." 942 F.2d at 624. A mere preference on the part of the plaintiff for its home forum does not affect the balancing; indeed, this factor is insignificant in this case.

7

We conclude, based on these factors, that the Swedish doctors have presented a compelling case that the exercise of jurisdiction would not comport with fair play and substantial justice and would thus be unreasonable. We are not unmindful that California has a strong interest in providing a forum to those who are injured in its state. However, where the plaintiff is an international corporation and where the defendants are individual citizens of a foreign country who lack connections to the United States and whose purposeful interjection into the forum state has been very limited, that interest must

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give way. Requiring the doctors to submit to the jurisdiction of the court would impose substantial burdens on them and would interfere with the sovereignty of a foreign nation. The Supreme Court in *Asahi* indicated that a plaintiff seeking to hale a foreign citizen before a court in the United States must meet a higher jurisdictional threshold than is required when the defendant is a United States citizen. Indeed, commentators have suggested that the international factors were determinative in *Asahi. See, e.g.,* Maltz, *supra* Part III.B.A., at 689-91. We conclude that Core-Vent has not met this higher threshold here.

IV

Core-Vent makes several additional arguments regarding the district court's refusal to exercise jurisdiction over Branemark. None has merit.

[8] We reject the contention that the district court can exercise general jurisdiction over Branemark. In support of its claim that Branemark has had systematic and continuous contacts with California, Core-Vent alleges only that Branemark attended five medical conferences in California over the last four years. Branemark cannot be "haled into a jurisdiction as a result of random, fortuitous, or attenuated contacts." *Lake,* 817 F.2d at 1421.

[9] We likewise reject the argument that Branemark agreed to submit to jurisdiction in California. In an unrelated patent infringement case, Core-Vent, Nobelpharma, and Branemark entered into a settlement agreement that provided, in part, that the enforcement of the agreement was to occur in California courts. That agreement has no bearing on this suit.

[10] Core-Vent finally contends that because Nobelpharma, at Branemark's direction, filed suit against Core-Vent in California in an unrelated action, Branemark should be subject to personal jurisdiction in all cases involving Core-Vent. Core-Vent offers no support for the proposition that in such circumstances the exercise of jurisdiction is proper. We reject the argument.

***1491** V

In sum, we conclude that the district court properly declined to exercise jurisdiction over the Swedish doctors.

AFFIRMED.

FERNANDEZ, Circuit Judge, concurring:

I agree with Chief Judge Wallace that purposeful availment can be found in this case.

However, based upon the authorities cited by Judge O'Scannlain and by Judge Wallace, I am convinced that it would be unreasonable to require the Swedish doctors to come to this country to litigate with Core-Vent. Surely we would impose unreasonable burdens upon these scientists, whose sole act was to write a couple of articles in Sweden with knowledge (or even intent) that some copies would reach our shores. If Core-Vent truly believes that it is important to sue these individuals for their actions and that it cannot obtain sufficient satisfaction by pursuing their alleged principal, Core-Vent can go to Sweden.

In fine, we need not decide whether our law is murky, ambiguous, or even inconsistent in places. I do not do so. Whether the atmosphere is fuliginous or crystalline, we can sure-footedly walk the path to the answer in this case.

Thus, I concur.

WALLACE, Chief Judge, dissenting:

The facts we must assess in this appeal, as alleged in Core-Vent's complaint, demonstrate that Drs. Albrektsson, Lekholm, Sennerby, and Branemark (collectively, the Swedish doctors) engaged in tortious conduct purposefully directed at Core-Vent, a resident of the forum state, and intended to cause harm in the forum state. After weighing the relevant factors, I conclude that the Swedish doctors have not presented a compelling argument that the dis-

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trict court's exercise of personal jurisdiction over them would be unreasonable. Therefore, I dissent.

In its first amended complaint, Core-Vent alleges that Drs. Albrektsson and Lekholm are paid consultants of Nobelpharma. Together they co-authored an article published in the October 1989 edition of *Dental Clinics of North America*"that contained false and misleading comparisons of Core-Vent and Nobelpharma implants." Dr. Sennerby is a Nobelpharma-financed dentist, who in 1990, with Dr. Malmquist, a United States citizen, co-authored an article in the *International Journal of Oral and Maxillofacial Implants,* which falsely represented the success rate of Core-Vent's implants to be only 9.3%. In 1990, Drs. Albrektsson and Sennerby co-authored an article in the *International Journal of Prothodontics,* which misrepresented the relative success rates of Nobelpharma and Core-Vent implants, falsely stated that Core-Vent's implants did not meet the criteria for success, and falsely stated that Core-Vent's claims to the contrary were "unprofessional." Nobelpharma had the right to review these articles before they were submitted for publication.

Core-Vent does not allege that Dr. Branemark wrote any defamatory articles. Rather, it alleges he is a Nobelpharma director and that he, "by distributing funds otherwise not available from other sources, controlled the studies to exaggerate the success of [Nobelpharma's] implants and the alleged danger in purchasing from anyone else." It is further alleged that Dr. Branemark used the Nobelpharma funds at his disposal to "flood[ ] the profession with biased and misleading marketing publications which, while giving the appearance of scientific objectivity, are, in fact, biased articles written to promote the products of ... Nobelpharma, and denigrate, through false comparative advertising, the products of competitors." Core-Vent further alleges that these publications "were circulated in this district to the damage of [Core-Vent]."

Dr. Nizick, the President and Chief Executive Officer of Core-Vent, has confirmed that the above allegations are "true and correct" to the best of his "knowledge and belief." The Swedish doctors assert in their declarations and in their brief that they are independent scholars, but they do not directly controvert any of Core-Vent's factual allegations, including the allegation that they hired ***1492** others to or were paid to write allegedly defamatory articles.

For purposes of this appeal, Core-Vent's allegations must be accepted as true. *Fields v. Sedgwick Associated Risks,* 796 F.2d 299, 301 (9th Cir.1986)(*Fields*). The issue, then, is whether a federal district court may exercise jurisdiction over foreign defendants, who intentionally publish defamatory articles about a forum resident in the forum. Core-Vent bears the burden of establishing that jurisdiction over the Swedish doctors would be proper. *Data Disc, Inc. v. Systems Technology Assocs.,* 557 F.2d 1280, 1285 (9th Cir.1977). However, because the district court relied only upon the parties' written submissions, Core-Vent need only make a prima facie showing of jurisdiction. *Id.* We review the holding of the district court on this issue de novo. *Fields,* 796 F.2d at 301.

Judge O'Scannlain's analysis leads him to conclude that jurisdiction is absent and would affirm the district court. Judge Fernandez writes separately, agreeing with me that there was purposeful availment, but voting that there is a lack of jurisdiction and, in effect, joining in the result of Judge O'Scannlain's opinion on reasonableness, stating his own reasons for his position. I take a third position, and write to demonstrate the failure of the Swedish doctors to meet their burden of proof to overcome Core-Vent's prima facie showing of jurisdiction.

As Judge O'Scannlain states, we use the following test to determine whether specific jurisdiction over a nonresident defendant is proper:

(1) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself

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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.

Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir.1987). Although Judge O'Scannlain has correctly stated the jurisdictional test, I disagree with his application. I therefore turn to my analysis of the three factors described in *Lake.*

I

The leading case dealing with purposeful direction is *Calder v. Jones,* 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984)(*Calder*). There, the Supreme Court determined that California courts could exercise jurisdiction over an editor and a reporter who caused a defamatory article to be published in Florida and circulated in California because the tortious conduct was "expressly aimed" at the forum state. 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 *effect* in the forum state." *Haisten v. Grass Valley Medical Reimbursement Fund,* 784 F.2d 1392, 1397 (9th Cir.1986)(*Haisten*). Nevertheless, Judge O'Scannlain reads *Calder* narrowly. His opinion seems to argue that but for the fact that "defendants knew that the brunt of the harm would be suffered in California," op. at 1486, jurisdiction would not have been found. In *Calder,* the fact that the author and editor knew the brunt of the harm from their article would be suffered in California was a factor that weighed in favor of purposeful direction, but it was not a prerequisite. *See Calder,* 465 U.S. at 788-89, 104 S.Ct. at 1486-87. To the contrary, the Court held that jurisdiction was proper because "petitioners [were] primary participants in an alleged wrongdoing intentionally directed at a California resident." *Id.* at 790, 104 S.Ct. at 1487.

In addition, Judge O'Scannlain's argument ignores one very important fact: the Supreme Court has already rejected the proposition that the brunt of the harm must be suffered in the forum. *Keeton v. Hustler Magazine,* 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984)(*Keeton*) (decided the same day as *Calder*). In *Keeton,* the Court held that limited jurisdiction was proper even though it was "undoubtedly true that the bulk of the harm done to petitioner occurred outside [the forum]." ***1493***Id.* at 780, 104 S.Ct. at 1481. In fact, *Keeton* expressly recognized that a plaintiff may sue in any forum with which the defendant has minimum contacts and seek recovery for damages suffered in other forums. *Id.* Reading *Calder* and *Keeton* together, it is clear that Judge O'Scannlain's new test, which requires that a defendant "caus[e] harm, the brunt of which is suffered-and which the defendant knows is likely to be suffered-in the forum state," op. at 1486, is an erroneous statement of the law. No such requirement exists. Indeed, it is inconsistent with the teachings of the Supreme Court.

In an attempt to justify his interpretation of *Calder,* Judge O'Scannlain suggests that we have always read *Calder* narrowly. Op. at 1486. The opinion asserts that *Calder* does not mean that the "effects of libel are felt and jurisdiction exists wherever a corporate plaintiff resides." *Id., citing Casualty Assurance Risk Ins. Brokerage Co. v. Dillon,* 976 F.2d 596, 601 (9th Cir.1992). Even if this were true, it is not relevant because in this case the defamatory articles were actually published in the forum. As *Dillon* itself recognizes, the effects of libel are felt and jurisdiction is proper in any forum in which the article is actually published. *Id.; see also Keeton,* 465 U.S. at 776-78, 104 S.Ct. at 1479-80; *Sinatra v. National Enquirer,* 854 F.2d 1191, 1195 (9th Cir.1988)(*Sinatra*).

Judge O'Scannlain also finds a relevant distinction in the fact that Core-Vent is a corporation and the petitioner in *Calder* was an individual. Op. at 1486. This exposes a fundamental misperception of Judge

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O'Scannlain's analysis. His opinion focuses on the nature of Core-Vent, its contacts with the forum, and how it is affected by the harm. But the jurisdictional inquiry should focus on the Swedish doctors, their contacts with the forum, and their intent to cause harm. *See Keeton,* 465 U.S. at 780-81, 104 S.Ct. at 1481.

Judge O'Scannlain next asserts that "we [have] refused to apply the *Calder* effects test when the underlying action involved a contract dispute, not a tort." Op. at 1486, *citing McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 817 (9th Cir.1988). This dicta is irrelevant because the underlying action in this case is libel-a tort-the same underlying action found in *Keeton* and *Calder.* It is also an incorrect statement of historical fact. *See Haisten,* 784 F.2d at 1399 (applying *Calder* analysis to insurance contracts).

Finally, Judge O'Scannlain suggests that analogy to *Calder* does not support a finding that the articles were expressly directed at California because the events underlying the articles did not occur in California and the articles were not researched through California sources. Op. at 1486. This ignores the fact that in *Calder,* the Court did not rely on the research methods employed in writing the story. *Calder,* 465 U.S. at 787 n. 6, 104 S.Ct. at 1485. Jurisdiction was found because the libelous story was published within the forum to the detriment of a forum resident. *Id.* at 789-90, 104 S.Ct. at 1487. As in *Calder,* the Swedish doctors were "primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis." *Id.* at 790, 104 S.Ct. at 1487.

Ironically, Judge O'Scannlain then disavows his analysis of *Calder* and ultimately "assumes that the purposeful availment prong has been satisfied." Op. at 1487. I would go one step further based on *Keeton* and *Calder* and hold expressly that Core-Vent's uncontroverted allegations are sufficient to establish a prima facie case that the Swedish doctors have purposefully directed their tortious conduct at the forum. On this issue, Judge Fernandez has joined my analysis. Thus, for purposes of this case, a majority of the panel agree that purposeful availment has been established.

II

The second part of the *Lake* test for jurisdiction requires that the claim arise out of or relate to the Swedish doctors' forum-related activities. As to this issue, the Swedish doctors raise no defense and I conclude that this part of the test was met.

***1494** III

I now turn my attention to the third part of the *Lake* test: reasonableness. Because Judge Fernandez and I agree that Core-Vent has met its burden of showing that the Swedish doctors purposefully directed their conduct at the forum, jurisdiction is presumed to be reasonable. *Brainerd v. Governors of the Univ. of Alberta,* 873 F.2d 1257, 1260 (9th Cir.1989)(*Brainerd*); *Haisten,* 784 F.2d at 1397. The burden of proof is now on the doctors to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 477, 105 S.Ct. 2174, 2185, 85 L.Ed.2d 528 (1985)(*Burger King*); *Brainerd,* 873 F.2d at 1260; *Haisten,* 784 F.2d at 1397, 1400.

We have in the past, as Judge O'Scannlain does now, referred to seven questions that may be raised in determining whether jurisdiction is reasonable. However, Judge O'Scannlain's analysis of several of these is erroneous.

The first pertains to the extent of the Swedish doctors' contacts with the forum. Judge O'Scannlain concludes that the contacts are "attenuated." But how does this help? By definition, foreign acts with forum effects will be "attenuated" to some extent because the acts which give rise to the effects occur outside the forum. The Swedish doctors argue only that Core-Vent has not proven that their acts were

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expressly aimed at California or that the brunt of the harm was suffered in California. These arguments are the same as those analyzed in part I and must fail for the same reasons.

On the other hand, Core-Vent has alleged that the Swedish doctors wrote the articles at the behest of and with the financial backing of Nobelpharma, with the purpose of causing Core-Vent harm. Core-Vent also alleges that the articles were circulated in California, causing it to lose business in California. In other words, Core-Vent has alleged that the doctors were "primary participants in an alleged wrongdoing intentionally directed at a California resident." *Calder,* 465 U.S. at 790, 104 S.Ct. at 1487. Because these uncontroverted allegations must be accepted as true for purposes of this appeal, *Fields,* 796 F.2d at 301, the resolution of this first inquiry weighs strongly in Core-Vent's favor.

The second inquiry relates to the burden on the Swedish doctors of defending a lawsuit in California. Although I agree with Judge O'Scannlain that this factor weighs in the doctors' favor, it does so lightly. The Swedish doctors argue that "the requisite travel, involving a distance of 5454 miles across nine time zones, is an onerous burden." The convenience of modern transportation and telecommunications facilities, however, has eased this burden to the point that well-educated, well-financed professionals would not be unduly burdened by the travel requirements. *See Sinatra,* 854 F.2d at 1199.

Judge Fernandez appears to put his primary reason for concurring in the result of Judge O'Scannlain's reasonableness analysis on this single factor. But we are required to balance all factors. *Decker Coal Co. v. Commonwealth Edison Co.,* 805 F.2d 834, 840 (9th Cir.1986), *citing Olsen by Sheldon v. Government of Mexico,* 729 F.2d 641, 649 (9th Cir.)(*Olsen*) ("To determine reasonableness, we consider the relative significance of each factor and balance them all."), *cert. denied,* 469 U.S. 917, 105 S.Ct. 295, 83 L.Ed.2d 230 (1984). In doing so, this single factor cannot, in my judgment, rule the result.

The Swedish doctors' next argument is that defending in a foreign legal system would be extremely burdensome. *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 114, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987). This oft-repeated argument is true, generally; but the jurisdictional inquiry is made on a case-by-case basis. The Swedish doctors do not provide any evidence that defending in a foreign legal system would be burdensome *to them.* They do not suggest that it would be difficult to transport evidence, witnesses, or attorneys from Sweden to California. *See Olsen,* 729 F.2d at 649. In fact, Core-Vent has alleged that Nobelpharma's***1495** attorneys are conducting the Swedish doctors' defense. This would decrease any burden on the Swedish doctors significantly. I do not suggest that defending in California would place no burden at all on the Swedish doctors. Certainly they would be inconvenienced. But " '[u]nless such inconvenience is so great as to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction.' " *Roth v. Garcia Marquez,* 942 F.2d 617, 623 (9th Cir.1991), *quoting Hirsch v. Blue Cross, Blue Shield,* 800 F.2d 1474, 1481 (9th Cir.1986).

The third question relates to conflict with the sovereignty of Sweden. Ordinarily, as Judge O'Scannlain suggests, this factor would weigh heavily in the Swedish doctors' favor. But the Swedish doctors have not presented arguments that implicate a significant interference with Sweden's sovereignty in this case. They argue that this case would interfere with the "right of Swedish courts to resolve disputes involving Swedish citizens." But this case also involves an American corporation, and the application of California law. The Swedish doctors argue that they have direct professional ties with governmental institutions. But these ties are not alleged to be implicated in this case. Finally, the doctors argue that Core-Vent has not demonstrated that jurisdiction would not impinge upon Sweden's sovereignty. This is true, but it misperceives the location

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of the burden of proof. The burden is on the Swedish doctors to make a compelling case that jurisdiction would be unreasonable, *Burger King,* 471 U.S. at 477, 105 S.Ct. at 2184-85, not the other way around.

The fourth inquiry relates to the forum state's interest in adjudicating the suit. "False statements of fact harm both the subject of the falsehood *and* the readers of the statement." *Keeton,* 465 U.S. at 776, 104 S.Ct. at 1479. California has a strong interest in providing a forum in which its residents can seek redress from those who knowingly cause them injury there. *See Calder,* 465 U.S. at 790, 104 S.Ct. at 1487. In addition, California has an interest in "employ[ing] its libel laws to discourage the deception of its citizens." *Keeton,* 465 U.S. at 776, 104 S.Ct. at 1479. These interests require that this factor be weighed heavily in Core-Vent's favor.

I agree with Judge O'Scannlain's weighing of the final three factors, but I also conclude that they are not important or determinative.

IV

In this case, the Swedish doctors' purposeful direction of tortious activity into California and the state's strong concomitant interest in providing a forum in which its residents may seek redress of their grievances must be weighed against the burden on the Swedish doctors in having to litigate in a foreign legal system and any possible interference with Sweden's sovereignty. I conclude that the Swedish doctors have failed to meet their burden requiring them to present a compelling case that jurisdiction would be unreasonable. The Swedish doctors purposefully directed their tortious conduct into the forum for the purpose of harming Core-Vent. They should not now be heard to complain that it would be unfair to require them to defend themselves in a forum in which they intended their tortious conduct to have its effect. *See Brainerd,* 873 F.2d at 1260; *Haisten,* 784 F.2d at 1402. Traditional notions of fair play and substantial justice require no less.

I respectfully dissent.

C.A.9 (Cal.),1993.
Core-Vent Corp. v. Nobel Industries AB
11 F.3d 1482, 62 USLW 2391, 27 Fed.R.Serv.3d 1230

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EXHIBIT D

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▷

United States District Court,E.D. Pennsylvania.
EAGLE TRAFFIC CONTROL, INC.,
v.
JAMES JULIAN, INC., James Julian, Inc. of Delaware and James J. Julian.
No. 96-CV-2454.

July 18, 1996.

Subcontractor on highway construction projects brought action against prime contractors and their area manager, claiming violations of Racketeer Influenced and Corrupt Organizations Act (RICO) and state law. On motions to dismiss filed by prime contractors and area manager, the District Court, Joyner, J., held that: (1) alleged attempt by area manager to defraud subcontractor out of jury award it had previously won in the District Court was insufficient to confer personal jurisdiction over area manager; (2) exercise of personal jurisdiction over prime contractors comported with due process; (3) subcontractor sufficiently alleged pattern of racketeering activity for purposes of RICO claim; (4) prime contractors and area manager were capable of associating with each other to form RICO enterprise; (5) interests of justice did not require transfer of venue; and (6) District Court would not, under doctrine of abstention, refrain from hearing action in favor of ongoing parallel action brought by prime contractors against subcontractor in state court.

Ordered accordingly.

West Headnotes

[1] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
Once challenged, burden is on plaintiff to prove personal jurisdiction.

[2] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
Prior to trial, plaintiff need only make prima facie showing of personal jurisdiction and courts must take plaintiff's facts as true for purposes of analysis.

[3] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))
In order for court to exercise personal jurisdiction over nonresident defendant, due process requires that there must be some affirmative act by which nonresident defendant purposefully avails itself of privilege of conducting activities within forum state, thus invoking benefits and protections of its laws; these acts must be such that defendant should reasonably anticipate being haled into court in forum state. U.S.C.A. Const.Amend. 14.

[4] Federal Courts 170B ⚿76.35

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.35 k. Other Particular Types of Cases. Most Cited Cases
Alleged attempt by contractors' nonresident manager to defraud subcontractor of jury award it had previously won in district court was insufficient to

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provide the district court with personal jurisdiction over the manager in subcontractor's subsequent action against the manager and contractors under Racketeer Influenced and Corrupt Organizations Act (RICO). U.S.C.A. Const.Amend. 14; 18 U.S.C.A. §§ 1961-1968.

[5] Constitutional Law 92 ⚿3965(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases
(Formerly 92k305(6))

Federal Courts 170B ⚿84

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk84 k. Miscellaneous Particular Activities. Most Cited Cases
District court's exercise, pursuant to Pennsylvania long-arm statute, of personal jurisdiction over foreign corporation on grounds it was authorized to do business within Pennsylvania comported with due process; foreign corporation's act in becoming authorized to do business was affirmative act by which it purposefully availed itself of privilege of conducting activities within Pennsylvania, thus invoking benefits and protections of its laws. U.S.C.A. Const.Amend. 14; 42 Pa.C.S.A. § 5301(a)(2)(i).

[6] Federal Courts 170B ⚿82

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk82 k. Agent Within District; Parent and Subsidiary. Most Cited Cases
Foreign corporation consented to suit in Pennsylvania by designating in-state registered agent. U.S.C.A. Const.Amend. 14; 42 Pa.C.S.A. § 5301(a)(2)(ii).

[7] Racketeer Influenced and Corrupt Organizations 319H ⚿10

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(A) In General
319Hk4 Racketeering or Criminal Activ- ity
319Hk10 k. Fraud in General. Most Cited Cases
Subcontractor's allegation that prime contractors committed mail fraud in conjunction with various highway construction projects constituted adequate pleading of racketeering activity for purposes of claim under Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. §§ 1961(1), 1962(a).

[8] Racketeer Influenced and Corrupt Organizations 319H ⚿31

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(A) In General
319Hk24 Pattern of Activity
319Hk31 k. Multiple Mailings or Communications; Mail or Wire Fraud. Most Cited Cases
Subcontractor's allegation that prime contractors' wrongdoing, including mail fraud, had been ongoing for at least 12 months and continued until present time constituted adequate pleading of pattern of racketeering activity element of claim under Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. § 1961(5).

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[9] Racketeer Influenced and Corrupt Organizations 319H ⚿28

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(A) In General
319Hk24 Pattern of Activity
319Hk28 k. Continuity or Relatedness; Ongoing Activity. Most Cited Cases
One way to prove threat of continuing racketeering activity, for purposes of satisfying pattern of racketeering activity element of claim under Racketeer Influenced and Corrupt Organizations Act (RICO), is to show that defendants' wrongful acts constitute its regular way of doing business. 18 U.S.C.A. § 1961(5).

[10] Racketeer Influenced and Corrupt Organizations 319H ⚿75

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(B) Civil Remedies and Proceedings
319Hk68 Pleading
319Hk75 k. Injury; Causation. Most Cited Cases
Subcontractor's allegations that prime contractors used income gained from their racketeering activity to maintain themselves and that this maintenance allowed prime contractors to injure subcontractor were insufficient to satisfy injury element necessary for claim under Racketeer Influenced and Corrupt Organizations Act (RICO) section making it unlawful for any person through pattern of racketeering activity to acquire or maintain interest in enterprise engaged in interstate commerce. 18 U.S.C.A. § 1962(b).

[11] Racketeer Influenced and Corrupt Organizations 319H ⚿58

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(B) Civil Remedies and Proceedings
319Hk56 Persons Entitled to Sue or Recover
319Hk58 k. Injury in General. Most Cited Cases
To recover under Racketeer Influenced and Corrupt Organizations Act (RICO) section making it unlawful for any person through pattern of racketeering activity to acquire or maintain interest in enterprise engaged in interstate commerce, plaintiff must show that it has been injured by control of RICO enterprise in addition to showing injury from predicate acts themselves. 18 U.S.C.A. § 1962(b).

[12] Racketeer Influenced and Corrupt Organizations 319H ⚿50

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(A) In General
319Hk50 k. Association with or Participation in Enterprise; Control or Intent. Most Cited Cases
Prime contractors and their area manager were capable of associating with each other to form Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise, for purposes of subcontractor's claim under RICO section making it unlawful for any person employed by or associated with any enterprise to conduct or participate in conduct of such enterprise's affairs through pattern of racketeering activity, where subcontractor alleged that prime contractors were separate corporate entities and that prime contractors' area manager was independently associated with each. 18 U.S.C.A. § 1962(c).

[13] Racketeer Influenced and Corrupt Organizations 319H ⚿38

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(A) In General
319Hk33 Enterprise
319Hk38 k. Separateness from Predic-

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ate Acts, Pattern, or Persons. Most Cited Cases
For purposes of establishing claim under Racketeer Influenced and Corrupt Organizations Act (RICO) section making it unlawful for any person employed by or associated with any enterprise to conduct or participate in conduct of such enterprise's affairs through pattern of racketeering activity, defendant and enterprise cannot be one and same entity, because entity cannot associate with itself. 18 U.S.C.A. § 1962(c).

[14] Conspiracy 91 ⚷18

91 Conspiracy
91I Civil Liability
91I(B) Actions
91k18 k. Pleading. Most Cited Cases
In order to state conspiracy claim under Racketeer Influenced and Corrupt Organizations Act (RICO), in addition to pleading violation of substantive RICO offense, plaintiff must also allege basics of conspiracy claim, including its duration, its object and actions taken to achieve its purpose. 18 U.S.C.A. § 1962(d).

[15] Federal Courts 170B ⚷104

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk104 k. Matters Considered. Most Cited Cases

Federal Courts 170B ⚷105

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk105 k. Plaintiff's Choice of Forum; Forum Shopping. Most Cited Cases
In addition to factors listed in venue statute, courts have great discretion to consider several other factors to determine whether transfer of venue would be proper: plaintiff's choice of forum, relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance of willing witnesses, possibility of viewing premises, if applicable, all other practical problems that make trial of case easy, expeditious and inexpensive, and "public interest" factors, including relative congestion of court dockets, choice of law consideration and relationship of community in which courts and jurors are required to serve to occurrences that give rise to litigation. 28 U.S.C.A. § 1404(a).

[16] Federal Courts 170B ⚷105

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk105 k. Plaintiff's Choice of Forum; Forum Shopping. Most Cited Cases
Plaintiff's choice of forum should rarely be disturbed. 28 U.S.C.A. § 1404(a).

[17] Federal Courts 170B ⚷106.5

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk106 Determination in Particular Transferable Actions
170Bk106.5 k. In General. Most Cited Cases
(Formerly 170Bk106)
Interest of justice did not require transfer of venue for subcontractor's action against prime contractors, in which subcontractor alleged violations of Racketeer Influenced and Corrupt Organizations Act (RICO) and of various Delaware statutes, from Eastern District of Pennsylvania to Delaware, though Delaware state law applied in case and parallel action had been filed by prime contractors

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against subcontractor in Delaware, where complaint alleged that two of five breached contracts related to construction projects in Pennsylvania and that prime contractors attempted to defraud subcontractor out of jury verdict it had won in Eastern District of Pennsylvania, witnesses and evidence were found in both Pennsylvania and Delaware, and Delaware and Eastern District were in close proximity. 18 U.S.C.A. §§ 1961-1968; 28 U.S.C.A. § 1404(a).

[18] Federal Courts 170B ⚿101

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases
Public interest considerations weigh in favor of transferring action to forum where related action is pending. 28 U.S.C.A. § 1404(a).

[19] Federal Courts 170B ⚿41

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk41 k. Nature and Grounds in General. Most Cited Cases
Abstention is doctrine whereby federal court refrains from litigating action in favor of on-going state action; abstention is, however, the exception, not the rule.

[20] Federal Courts 170B ⚿41

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk41 k. Nature and Grounds in General. Most Cited Cases
In deciding whether to invoke abstention doctrine, courts are to conduct careful balancing of factors, but with balance heavily weighted in favor of exercise of jurisdiction.

[21] Federal Courts 170B ⚿47.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk47 Particular Cases and Subjects, Abstention
170Bk47.1 k. In General. Most Cited Cases
District court would not, under doctrine of abstention, refrain from hearing subcontractor's action against prime contractors, in which subcontractor alleged violations of Racketeer Influenced and Corrupt Organizations Act (RICO) and of various Delaware statutes, in favor of ongoing parallel action brought by prime contractors against subcontractor in Delaware court, though claims asserted in both actions involved many of same contracts, Delaware action was filed first, Delaware state law governed case and Delaware state courts had concurrent jurisdiction over subcontractor's RICO claims; claims asserted in both actions were not identical, Delaware action was in approximately same procedural status, and there was no evidence to support prime contractors' contention that subcontractor's motive in filing federal action was vexatious. 18 U.S.C.A. §§ 1961-1968.

[22] Federal Courts 170B ⚿41

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk41 k. Nature and Grounds in General. Most Cited Cases
Prospect of applying state law does not weigh in favor of abstention since very premise of diversity jurisdiction is that federal courts are competent to adjudicate state issues.

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***1254** Joseph A. McGinley, Lavin, Coleman, Finarelli and Gray, Philadelphia, PA, for plaintiff.
Stanley C. Macel, III, Connolly, Bove, Lodge, & Hutz, Wilmington, DE, for defendants.

MEMORANDUM

JOYNER, District Judge.
Plaintiff Eagle Traffic Control, Inc. ("Eagle") has brought this action alleging violations of several Delaware state laws as well as the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1984 & Supp.1996) ("RICO") by Defendants James Julian, Inc. ("JJI"), James Julian, Inc. of Delaware ("JJID") and James J. Julian. JJID and Mr. Julian seek to be dismissed from this action on the ground that they are not subject to personal jurisdiction in this Court. All three Defendants seek to dismiss the complaint for failure to state a claim upon which relief may be granted, or alternatively, to dismiss or transfer the action to the District of Delaware for improper venue or under the doctrine of abstention.

Factual Background

Eagle is a Pennsylvania corporation in the business of providing traffic control services to construction companies.[FN1] Both JJI and JJID are Delaware corporations in the business of doing highway construction work. Mr. Julian is an individual residing in Delaware and is the area manager for each corporation as well as the Vice-President of JJID. Between 1993 and 1995, Eagle entered into two subcontracts with JJI and one subcontract with JJID to provide products, services, labor and goods on three different highway construction projects in Delaware. JJI and JJID were the prime contractors hired by the Delaware Department of Transportation ("DelDOT"). Eagle also entered into two subcontracts with JJI to perform work on two highways in Pennsylvania.

FN1. These facts are culled from Eagle's Amended Complaint, filed after this Motion's briefing was completed. Defendants' recent letter to this Court indicates that it does not object to our use of the Amended Complaint to decide the instant Motion.

Pursuant to the Delaware subcontracts, Eagle was to be paid contract fees during the course of each contract as well as "retainages" that were to be withheld until the end of each project. Eagle alleges that JJI and JJID repeatedly misrepresented to DelDOT that they were paying Eagle when, in fact, Mr. Julian was directing them not to. Defendants allegedly made these misrepresentations in order to continue receiving funds from DelDOT. With respect to the Pennsylvania subcontracts, Eagle alleges that JJI has breached each subcontract. JJI allegedly did this in order to strengthen its bargaining power with respect to the Delaware subcontracts.

Finally, the Complaint alleges that Defendants have committed fraud regarding a jury verdict Eagle won in this Court against a third party called Addco. Eagle alleges that JJI has wrongfully charged Eagle the precise***1255** amount Eagle won in the other case in an attempt to prevent Eagle from recognizing the benefit of its verdict.

DISCUSSION

1. PERSONAL JURISDICTION

[1][2] JJID and Mr. Julian have challenged Eagle's assertion of personal jurisdiction over them. Once challenged, the burden is on plaintiff to prove personal jurisdiction. *Grand Entertainment Group v. Star Media Sales,* 988 F.2d 476, 482 (3d Cir.1993). Prior to trial, a plaintiff need only make a prima facie showing of jurisdiction and courts must take the plaintiff's facts as true for the purposes of the analysis. *Mellon Bank PSFS Nat'l Ass'n v. Farino,* 960 F.2d 1217, 1223 (3d Cir.1992); *National Cathode Corp. v. Mexus Co.,* 855 F.Supp. 644, 647 (S.D.N.Y.1994).

Federal courts have personal jurisdiction over nonresident defendants to the extent permitted in the

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state in which the federal court sits. Fed.R.Civ.P. 4(e). Therefore, our first step is to examine Pennsylvania law. Relevant to this action, Pennsylvania's long-arm statute provides general personal jurisdiction over a corporation if that corporation is incorporated under or qualified as a foreign corporation under the laws of the Commonwealth or if it has consented to suit in the Commonwealth. 42 Pa.Cons.Stat.Ann. § 5301(a)(2)(i & ii) (1981 & Supp.1995). Pennsylvania grants specific personal jurisdiction over a person for causes of action arising from that person's activities within the forum. 42 Pa.Cons.Stat.Ann. § 5322(a).

The United States Supreme Court, in turn, has defined the due process limit of Constitutionally permitted non-resident jurisdiction in a series of decisions including *International Shoe Co. v. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) and *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). It has held that jurisdiction is proper when:

the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State. Thus where the defendant 'deliberately' has engaged in significant activities within a State, or has created 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there.

Burger King, 471 U.S. at 475-76, 105 S.Ct. at 2184.

[3] Accordingly, there must be some affirmative act "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). These acts must be "such that [the defendant] should reasonably anticipate being haled into court" in the forum state. *World-Wide Volkswagen,* 444 U.S. at 297, 100 S.Ct. at 567. The Third Circuit has repeatedly held that courts should take a "highly realistic" view when deciding whether to assert personal jurisdiction over a non-resident defendant. *Mellon Bank,* 960 F.2d at 1224; *Grand Entertainment,* 988 F.2d at 482.

A. Mr. Julian

[4] Turning to this action, Eagle bases personal jurisdiction over Mr. Julian on his alleged contempt of court in attempting to defraud Eagle of the jury award it won here. Eagle concedes that there is no other basis for personal jurisdiction over Mr. Julian. Eagle cites two cases from other jurisdictions holding that personal jurisdiction exists over a person who knowingly and actively aids and abets a party in violating a court order on the basis of a "super contact" with that forum. *Reebok Int'l, Ltd. v. McLaughlin,* 49 F.3d 1387, 1391 (9th Cir.), *cert. denied,* 516 U.S. 908, 116 S.Ct. 276, 133 L.Ed.2d 197 (1995); *Waffenschmidt v. MacKay,* 763 F.2d 711, 714 (5th Cir.1985), *cert. denied,* 474 U.S. 1056, 106 S.Ct. 794, 88 L.Ed.2d 771 (1986). Eagle maintains that Mr. Julian is in contempt of court for allegedly trying to defraud it out of its jury verdict.

Mr. Julian rightfully contests this argument. The cases cited by Eagle are not analogous to this action. In those cases, the courts exercised personal jurisdiction over ***1256** the foreign parties so that they could proceed on contempt actions against them. Here, in contrast, there are and have been no contempt proceedings; rather, Eagle sues Mr. Julian for fraud. For this reason, even if we were to apply the "super contact" theory, Mr. Julian would not fit within its scope. Accordingly, personal jurisdiction cannot be based on this argument and he shall be dismissed from this action.

B. JJID

[5] Eagle bases general personal jurisdiction over JJID on the ground that it is qualified to do business within this state as a foreign corporation.

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Pennsylvania's personal jurisdiction statute expressly grants jurisdiction in such an instance. JJID nonetheless contests personal jurisdiction by pointing to one of this Court's previous rulings, *Romann v. Geissenberger Mfg. Corp.*, 865 F.Supp. 255 (E.D.Pa.1994).

There, we held that although a foreign corporation was qualified to do business in Pennsylvania, we had no jurisdiction over that corporation because it did not otherwise have "systematic and continuous contacts" with the Commonwealth. *Id.* at 260. We have re-examined that particular holding and find that it is in conflict with Third Circuit precedent and therefore, is not controlling in this instance.

The Third Circuit has ruled that based on Pennsylvania's jurisdiction statute, a foreign corporation is subject to suit in Pennsylvania even if its only contact with the state is its authorization to do business in Pennsylvania. *Bane v. Netlink, Inc.*, 925 F.2d 637 (3d Cir.1991). In the alternative, the Court held that pursuant to the then-current authorization statute, being authorized to do business in Pennsylvania carried with it consent to be sued in Pennsylvania because all authorized corporations had to designate the Secretary of State as their registered service agent. *Id.* at 640.

By the time we decided *Romann,* the authorization statute had been amended to make designation of an in-state registered agent optional. 15 Pa.Cons.Stat.Ann. § 4124(a)(4) (1995). We held that the statute's change was significant enough to affect *Bane* 's precedential value. Upon re-examination, we do not find this to be so. The bottom line is that Pennsylvania's long-arm statute provides for personal jurisdiction when a foreign corporation takes the particular action of becoming authorized to do business in Pennsylvania.

The statute complies with due process because becoming authorized is an affirmative act "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson,* 357 U.S. at 253, 78 S.Ct. at 1240. Further, it paves the path for a situation in which the defendant "should reasonably anticipate being haled into court." *World-Wide Volkswagen,* 444 U.S. at 297, 100 S.Ct. at 567. For these reasons, we find that JJID is subject to personal jurisdiction pursuant to 42 Pa.Cons.Stat.Ann. § 5301(a)(2)(i).

[6] In the alternative, we find that JJID has consented to suit in this forum by designating an in-state registered agent. 42 Pa.Cons.Stat.Ann. § 5301(a)(2)(ii); *Bane,* 925 F.2d at 640. Accordingly, this Court has general personal jurisdiction over JJID.

2. RICO CLAIMS

We turn now to Defendants' second argument, that Eagle's complaint fails to state a claim upon which relief can be granted under RICO and that therefore Count V should be dismissed.[FN2]

> FN2. Defendants make a brief argument that Count V lacks sufficient specificity. We find that Eagle adequately explains its RICO claim and therefore deny dismissal on this ground.

A. Racketeering Activity

[7] A pleading requirement under RICO is to allege that the defendant took part in "racketeering activity." 18 U.S.C. § 1962(a). Defendants argue that Eagle's complaint should be dismissed because it does not allege that they committed any of the racketeering acts listed in RICO's predicate offenses list. Defendants are correct in stating that the list of predicate offenses provided in 18 U.S.C. § 1961(1) is all-inclusive. ***1257***Tabas v. Tabas,* 47 F.3d 1280, 1291 (3d Cir.), *cert. denied,* 515 U.S. 1118, 115 S.Ct. 2269, 132 L.Ed.2d 275 (1995). The list, though, includes the offense of mail fraud. Eagle's complaint alleges that Defendants' unlawful acts included mail fraud. Because mail fraud is a predicate act and because Eagle's complaint alleges, in part,

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mail fraud, we find that Eagle has adequately pleaded racketeering activity under RICO.

B. Pattern of Racketeering Activity

[8][9] Defendants argue that even if Eagle has pleaded a racketeering activity, it has not pleaded a pattern of activity, as required by RICO. 18 U.S.C. § 1961(5) (" 'a pattern of racketeering activity' requires at least two acts of racketeering activity"). The Supreme Court has held that in addition to mere numerosity, a plaintiff must show a threat of continuing activity. *H.J., Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 240, 109 S.Ct. 2893, 2900, 106 L.Ed.2d 195 (1989). One way this can be done is by showing that defendants' wrongful acts constitute its "regular way of doing business." *Id.* at 242-43, 109 S.Ct. at 2902; *Tabas,* 47 F.3d at 1293; *Barticheck v. Fidelity Union Bank/First Nat'l State,* 832 F.2d 36, 39 (3d Cir.1987).

Eagle alleges that Defendants' wrongdoing has been ongoing for at least twelve months and continues until the present time. We find that, taking Eagle's complaint as a whole and making reasonable inferences therefrom, Eagle has adequately alleged that mail fraud is part of Defendants' regular way of doing business. *Id.* Further, we find that Eagle has adequately alleged that Defendants' wrongful acts are continuous and pose a present threat of additional criminal activity. *Hughes v. Consol-Pa. Coal Co.,* 945 F.2d 594, 610 (3d Cir.1991), *cert. denied,* 504 U.S. 955, 112 S.Ct. 2300, 119 L.Ed.2d 224 (1992). For these reasons, we find that Eagle has adequately alleged a pattern of racketeering activity.

C. 18 U.S.C. § 1962(a)

We turn now to Defendants' arguments in support of dismissing Eagle's individual claims under RICO. First, Section 1962(a) makes it unlawful for:

> any person who has received any income derived ... from a pattern of racketeering activity ... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in ... interstate commerce.

Defendants contend that Eagle makes no allegation that could support a claim under § 1962(a). They point out that there is no allegation that any Defendant invested any proceeds from racketeering activity in an enterprise or that such an investment injured Eagle. *Lightning Lube, Inc. v. Witco Corp.,* 4 F.3d 1153, 1188-89 (3d Cir.1993). Eagle does not contest this argument, and as the necessary allegations are in fact missing from the complaint, Eagle's claims under § 1962(a) shall be dismissed.

D. 18 U.S.C. § 1962(b)

[10][11] Section 1962(b) makes it unlawful for "any person through a pattern of racketeering activity ... to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." As with § 1962(a), a plaintiff must show that it has been injured by the control of the RICO enterprise in addition to showing injury from the predicate acts themselves. *Lightning Lube,* 4 F.3d at 1191.

Eagle contends that Defendants used the income gained from its racketeering activity to maintain themselves and that this maintenance allowed Defendants to injure Eagle. This argument, "that the use and investment of racketeering income keeps the defendant alive so that it may continue to injure plaintiff" has been repeatedly rejected by the courts. *Id.* at 1188, 1191. As above, we find that Eagle has failed to plead an "injury independent from that caused by the pattern of racketeering activity." *Id.* at 1191. For that reason, Eagle's claims under § 1962(b) shall be dismissed.

E. 18 U.S.C. § 1962(c)

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[12] Section 1962(c) makes it unlawful for "any person employed by or associated with ***1258** any enterprise ... to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." An enterprise may be comprised of individuals or corporations and may take the form of a legal entity or an association in fact. 18 U.S.C. § 1961(4); *Shearin v. E.F. Hutton Grp., Inc.,* 885 F.2d 1162, 1165-66 (3d Cir.1989).

[13] Defendants attest that Eagle has alleged that they are but one entity, and that therefore, there is no separate RICO enterprise. It is well-established that the defendant and the enterprise cannot be one and the same entity, because an entity cannot associate with itself. So, in *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.,* 30 F.3d 339, 344 (2d Cir.1994), the Second Circuit held that a parent company could not be an enterprise with its subsidiary company because the two were one and the same.

Eagle, however, has alleged that JJI and JJID are separate entities and that Mr. Julian is independently associated with each. We find that this case is similar to *Securitron Magnalock Corp. v. Schnabolk,* 65 F.3d 256, 263 (2d Cir.1995), *cert. denied,* 516 U.S. 1114, 116 S.Ct. 916, 133 L.Ed.2d 846 (1996). There, one man owned two separate companies and the three combined to commit RICO predicate acts. Each independent entity benefited from the wrongful acts. The Second Circuit held that a § 1962(c) action could proceed against all three defendants because each was alleged to be separate from the other. Similarly, the Seventh Circuit found that a sole proprietor could associate with his company to form a RICO enterprise when the company had employees other than the sole proprietor. *McCullough v. Suter,* 757 F.2d 142, 144 (7th Cir.1985).

Like the Second and Seventh Circuits, we find that because Eagle has alleged that JJI and JJID are distinct from each other and that Mr. Julian is distinct from each corporation that they are capable of associating with each other to form a RICO enterprise. 65 F.3d at 263. Based on Eagle's allegations, therefore, we will not dismiss this claim against Defendants.

F. 18 U.S.C. § 1962(d)

[14] Having found that Eagle may proceed on one of its RICO claims against Defendants, we look at its conspiracy claim. This section makes it unlawful "for any person to conspire to violate any of the [above] provisions." 18 U.S.C. § 1962(d). Accordingly, in addition to pleading violation of a substantive RICO offense, a plaintiff must also allege the basics of a conspiracy claim, including its duration, its object and the actions taken to achieve its purpose. *Shearin,* 885 F.2d at 1166.

Defendants claim that Eagle has failed to plead allegations that would support a conspiracy claim. We disagree. Eagle's complaint makes all the above allegations, and in sufficient detail. *Rose v. Bartle,* 871 F.2d 331, 365-66 (3d Cir.1989). For that reason, the complaint states a claim under § 1962(d) and this claim shall not be dismissed.

3. VENUE

[15] The principle of venue is one of locality: "it concerns the forum where a lawsuit may be brought and judicial authority exercised. By limiting a plaintiff's choice of forum beyond those courts which have personal and subject matter jurisdiction, venue statutes protect defendants from litigating in an unfair or inconvenient location." *Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc.,* 869 F.Supp. 152, 154 (S.D.N.Y.1994). 28 U.S.C. § 1404(a) provides that "[f]or the [1] convenience of parties and [2] witnesses, and [3] in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." In addition to these three factors, courts have great discretion to consider several other factors to determine whether a transfer would be proper:

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(1) Plaintiff's choice of forum;

(2) Relative ease of access to sources of proof;

(3) Availability of compulsory process for attendance of unwilling witnesses;

(4) Cost of obtaining attendance of willing witnesses;

(5) Possibility of viewing premises, if applicable;

***1259** (6) All other practical problems that make trial of a case easy, expeditious, and inexpensive; and

(7) "Public interest" factors, including the relative congestion of court dockets, choice of law consideration, and the relationship of the community in which the courts and jurors are required to serve to the occurrences that give rise to the litigation.

Romann, 865 F.Supp. at 264; *Stewart Org., Inc. v. Ricoh Corp.,* 487 U.S. 22, 29, 108 S.Ct. 2239, 2243-44, 101 L.Ed.2d 22 (1988).

[16] The first factor, plaintiff's choice of forum, "should rarely be disturbed," *Gulf Oil Co. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947) as it is "a paramount consideration." *Shutte v. Armco Steel Corp.,* 431 F.2d 22, 25 (3d Cir.1970), *cert. denied,* 401 U.S. 910, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971). In exercising their discretion, courts consistently hold that a "[plaintiff's] choice is deserving of less weight where none of the operative facts of the action occur in the forum selected by the plaintiff." *National Mortg. Network, Inc. v. Home Equity Centers, Inc.,* 683 F.Supp. 116, 119 (E.D.Pa.1988); *see also, Schmidt v. Leader Dogs for the Blind, Inc.,* 544 F.Supp. 42, 47 (E.D.Pa.1982); *Fitzgerald v. Central Gulf Steamship Corp.,* 292 F.Supp. 847, 849 (E.D.Pa.1968).[FN3]

> FN3. A plaintiff's choice of forum is also not credited if it is chosen to vex and harass a defendant. *Gulf Oil,* 330 U.S. at 507, 67 S.Ct. at 842. Defendants claim that Eagle chose this forum with an improper motive; however, they provide no factual support, in the form of affidavits or otherwise, to support this claim. Eagle's choice is not weakened on this count, therefore.

[17] Eagle's Amended Complaint alleges that two of the breached contracts relate to construction projects in Pennsylvania, one in the Eastern District of Pennsylvania. These breaches were allegedly undertaken in order to further Defendants' RICO activities. Further, Eagle alleges that Defendants attempted to defraud Eagle out of a jury verdict it won in this Court. These allegations sufficiently implicate Pennsylvania to make Eagle's choice of forum an important consideration.

Second, taking Eagle's facts as true, we find that the witnesses and evidence are found in both Pennsylvania and Delaware. Further, the proximity of this and the Delaware district court lessens the relevance of many other factors, such as availability of compulsory process and cost of attendance of witnesses. In addition, Pennsylvania has an interest in this action, because Eagle alleges some form of misuse of its highway funds. These factors, then, do not demonstrate that Pennsylvania is an inherently inconvenient or inappropriate forum for Defend- ants.

Third, both parties agree that Delaware state law, in addition to federal law, will apply to this case. Although "[t]here is an appropriateness ... in having the trial ... in a forum that is at home with the state law that must govern the case," this Court is able to fairly apply Delaware state law. *DeMateos v. Texaco, Inc.,* 562 F.2d 895, 900 (3d Cir.1977), *cert. denied,* 435 U.S. 904, 98 S.Ct. 1449, 55 L.Ed.2d 494 (1978) (quoting *Gulf Oil,* 330 U.S. at 509, 67 S.Ct. at 843).

[18] Finally, a parallel action was filed by Defendants against Eagle in Delaware's Superior Court two weeks before this action was filed. Public interest considerations weigh in favor of transferring an ac-

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tion to a forum where a related action is pending. However, in light of all the other factors weighing in favor of retention, this factor does not overcome the interest placed on Eagle's choice of forum.

For the above reasons, we find that it is not in the interest of justice for this action to be transferred to the District of Delaware pursuant to 28 U.S.C. § 1404(a) and therefore, shall deny this part of Defendants' motion.

4. ABSTENTION

[19][20] Abstention is a doctrine whereby a federal court refrains from litigating an action in favor of an on-going state action. Abstention is, however, "the exception, not the rule." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). It has never been "a doctrine of equity that a federal court should exercise its judicial discretion***1260** to dismiss a suit merely because a State court could entertain it." *Alabama Pub. Serv. Comm'n v. Southern R. Co.,* 341 U.S. 341, 361, 71 S.Ct. 762, 774, 95 L.Ed. 1002 (1951). Rather, courts are to conduct a careful balancing of factors, but with "the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 16, 103 S.Ct. 927, 937, 74 L.Ed.2d 765 (1983).

[21] Defendants' argument in favor of abstention is that: (1) abstention will avoid piecemeal litigation; (2) the Delaware action was filed first; (3) the federal forum is inconvenient; (4) Delaware state law governs this action; (5) Delaware state courts have concurrent jurisdiction over Eagle's RICO claim and (6) Eagle's motive in filing this second, federal action is vexatious. The Supreme Court has listed each of these factors as a reason why abstention may be appropriate. *Moses H. Cone Hosp.,* 460 U.S. at 26, 103 S.Ct. at 942; *Colorado River,* 424 U.S. at 818, 96 S.Ct. at 1246-47.

We have carefully considered Defendants' arguments and find that the equities do not weigh in favor of abstention. First, it does not appear as if the claims asserted in the two actions are identical, although they do both involve many of the same contracts. This Court has previously ruled that it need not abstain simply because it cannot provide a comprehensive determination of the rights of the parties. *See e.g., Weitz v. Burton Photo Indus., Inc.,* No. 95-4280, 1996 Westlaw 165525 at *3 (E.D.Pa. Apr. 9, 1996); *Allied Nut & Bolt, Inc. v. NSS Indus., Inc.,* 920 F.Supp. 626, 630 (E.D.Pa.1996).

Second, we do not apply the "first-filed" factor rigidly. Rather, we look to the amount of progress made in each action. *Moses H. Cone Mem. Hosp.,* 460 U.S. at 22, 103 S.Ct. at 940. From what we understand, the Delaware action is in approximately the same procedural status as this action. Third, considering our ruling on venue, we reject Defendants' contention that this forum is inconvenient.

[22] Fourth, simply because Delaware state law will be important in this case, or because Delaware state courts have concurrent jurisdiction over RICO claims, does not convince us to relinquish jurisdiction. "[T]he presence of federal-law issues must always be a major consideration weighing against surrender." *Id.* at 26, 103 S.Ct. at 942. In addition, the prospect of applying state law does not weigh in favor of abstention since the very premise of diversity jurisdiction is that "federal courts are competent to adjudicate [state] issues." *Cottman Transmission Sys., Inc. v. Lehwald, Inc.,* 774 F.Supp. 919, 923 (E.D.Pa.1991).

Finally, as noted above in footnote three, there is no evidence to support Defendants' contention that Eagle's motive in filing this action was vexatious. Considering all of Defendants' arguments and independently evaluating this action, we decline to abstain from this action. Rather, we will exercise our "virtually unflagging obligation ... to exercise the jurisdiction given" us. *Colorado River,* 424 U.S. at 817, 96 S.Ct. at 1246.

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An appropriate Order follows.

ORDER

AND NOW, this 18th day of July, 1996, upon consideration of Defendants' Combined Joint Motion to Dismiss James Julian, Inc. of Delaware and James J. Julian and all RICO Allegations, and Motion in the Alternative to Dismiss, Stay or Transfer this Action to the District of Delaware and response thereto, the Motion is hereby GRANTED in PART. The Motion is hereby Granted in that (1) James J. Julian is hereby DISMISSED from this action and (2) Plaintiff's Claims in Count V under 18 U.S.C. § 1962(a & b) are hereby DISMISSED against all Defendants.

The Motion is hereby DENIED in all other re- spects.

E.D.Pa.,1996.
Eagle Traffic Control, Inc. v. James Julian, Inc.
933 F.Supp. 1251, RICO Bus.Disp.Guide 9100

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EXHIBIT E

EXHIBIT F

United States Court of Appeals,Ninth Circuit.
FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver of the Western National Bank of Lovell, Wyoming, Plaintiff-Appellant,
v.
BRITISH-AMERICAN INSURANCE COMPANY, LTD., Defendant-Appellee.
No. 86-6639.

Argued and Submitted July 6, 1987.
Decided Sept. 29, 1987.

The Federal Deposit Insurance Corporation, as receiver for insolvent bank, sued to recover alleged fraudulent conveyance made to foreign company in connection with purchase agreement negotiated outside of United States. The United States District Court, Central District of California, Harry L. Hupp, J., granted defendant's motion to dismiss for lack of personal jurisdiction, and the FDIC appealed. The Court of Appeals, Nelson, Circuit Judge, held that defendant was not subject to district court's personal jurisdiction, though agent of defendant picked up funds in California and used national bank located in California to wire funds to defendant.

Affirmed.

West Headnotes

[1] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
When there is no dispute as to underlying facts, district court's determination whether personal jurisdiction can be exercised is question of law, which Court of Appeals can review de novo.

[2] Federal Courts 170B 96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
Plaintiff bears burden of establishing that court has personal jurisdiction over nonresident defendant.

[3] Constitutional Law 92 3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Federal Courts 170B 76.1

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.1 k. In General. Most Cited Cases
(Formerly 170Bk76)
In order to establish personal jurisdiction over nonresident defendant, plaintiff must show that forum state's jurisdictional statute confers personal jurisdiction, and that exercise of jurisdiction accords with due process. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))
Due process requires that nonresident defendants have certain minimum contacts with forum so that maintenance of suit does not offend traditional

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notions of fair play and substantial justice. U.S.C.A. Const.Amend. 14.

[5] **Federal Courts 170B 76.1**

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.1 k. In General. Most Cited Cases
(Formerly 170Bk76)
Courts may exercise either general or specific jurisdiction over nonresident defendants.

[6] **Federal Courts 170B 86**

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk86 k. Aliens or Alien Corporations. Most Cited Cases
Foreign company which received alleged fraudulent conveyance in connection with purchase agreement negotiated in foreign country was not subject to district court's in personam jurisdiction, though agent of company picked up check in California and used national bank located in California to wire funds to company, where purchase agreement contemplated one-time transaction for sale of assets located in Fiji, company had no other contacts with forum, parties had agreed that purchase agreement would be governed by Fiji law, and Fiji appeared to be most efficient forum for resolution of dispute. U.S.C.A. Const.Amend. 14.

[7] **Federal Courts 170B 97**

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk97 k. Determination of Venue Questions. Most Cited Cases
In deciding whether it can exercise personal jurisdiction over nonresident defendant, court should give greater weight to defendant's expectations and burdens than to burden of requiring plaintiff to litigate action elsewhere.

[8] **Federal Courts 170B 96**

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
Plaintiff who seeks to subject foreign defendant to court's in personam jurisdiction has burden of proving unavailability of alternative forum.

***1440** E. Whitney Drake, Washington, D.C., and Marshall G. Mintz, Los Angeles, Cal., for plaintiff-appellant.
John P. McKay, Los Angeles, Cal., for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before NELSON, HALL and THOMPSON, Circuit Judges.

NELSON, Circuit Judge:
The Federal Deposit Insurance Corporation ("FDIC") appeals the district court's dismissal of its action against the British-American Insurance Company ("BAIC") for lack of personal jurisdiction. FDIC initiated this action as the receiver of Western National Bank to recover $2 million of the bank's funds that were allegedly fraudulently transferred to BAIC for the purchase of its Fiji branch. We note jurisdiction under 28 U.S.C. § 1291 (1982) and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The parties agree that the facts are essentially undisputed. Milton Polland, a resident of Los Angeles, California, was a representative of Anant Kumar Tripati and his corporation, the Fort Lincoln Companies. Sometime prior to May 1983, Polland called David Thurlow, General Manager of BAIC's home office in Nassau, Bahama Islands, to solicit the purchase of BAIC's Fiji branch. Polland and Thurlow communicated via telephone and letter between Nassau and Los Angeles, and Polland eventually***1441** flew to Malaysia and met with Thurlow to negotiate the terms of the contract.

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After BAIC and Polland reached an agreement, BAIC executed the contract in Nassau, and sent it by mail to Polland in Los Angeles for execution. The contract included provisions stating that the contract would be governed by Fiji law, that notices would be sent to Polland in Los Angeles, and that the "Place of Completion" would be Nassau. The contract also indicated that Polland had to obtain all government approvals from the Dominion of Fiji necessary to consummate the lawful transfer of the Fiji branch office. In addition, Polland had to form a new Fiji company, Southwest Pacific Assurance Co., Ltd. ("Southwest"), for the purpose of acquiring and operating BAIC's Fiji office. The agreed purchase price was $2 million.

On May 2 and 3, 1983, Justin Tierney, a vice president of one of BAIC's subsidiaries, was in Los Angeles on an unrelated matter. He had no prior knowledge or involvement in the sale agreement. George Ragsdale, BAIC's counsel in North Carolina, called Tierney in Los Angeles, and asked him to stay a few days in order to pick up the $2 million cashier's check from Polland. Polland signed the contract in Los Angeles and used funds from a Fort Lincoln Companies' account to obtain the cashier's check, which was drawn on Imperial Bank in Los Angeles. On May 5, 1983, after Polland delivered the check to Tierney, Tierney endorsed the check, went to the Bank of America branch near the Los Angeles airport, and requested the bank to wire-transfer the money to BAIC via the Bank of America in the Bahamas.

Polland never obtained proper approval from the Fiji government prior to the transfer, and BAIC neglected to give notice of the transfer to the Fiji Commissioner of Insurance until the end of May 1983. During that period, the Federal Bureau of Investigation began to investigate Tripati, an officer of Southwest, for alleged embezzlement and wire fraud. On December 7, 1983, the Fiji Commissioner of Insurance informed BAIC that the transfer to Polland was not approved and that the Commissioner had seized control of the Fiji branch. FDIC, as the receiver of the insolvent Western National Bank of Lovell, Wyoming (the source of Fort Lincoln Companies' funds), and as judgment creditor of Tripati and the Fort Lincoln Companies, initiated an action against BAIC to set aside the allegedly fraudulent conveyance of the Fiji branch for $2 million. On October 20, 1986, the district court dismissed the action for lack of personal jurisdiction over BAIC. FDIC timely appealed.

ISSUE PRESENTED

Whether the district court erred in dismissing the action for lack of personal jurisdiction.

DISCUSSION

I. STANDARD OF REVIEW

[1][2] The district court's determination whether personal jurisdiction can be exercised is a question of law, reviewable de novo when the underlying facts are undisputed. *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir.1986). The plaintiff bears the burden of establishing that the court has personal jurisdiction. *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir.1986).

II. ANALYSIS

[3][4] In order to establish personal jurisdiction over BAIC, a nonresident defendant, FDIC must show that the forum state's jurisdictional statute confers personal jurisdiction over BAIC, and that the exercise of jurisdiction accords with federal constitutional principles of due process. *Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir.1987). Because the California statute extends jurisdiction to the maximum extent permitted by due process, Cal.Civ.Proc.Code § 410.10 (West 1973), the jurisdictional inquiries under the state statute and due process principles can be conducted as one analysis. *Pacific Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir.1985). Due process requires that nonresident defendants have certain minimum ***1442** contacts with the forum so that maintenance of a suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).

[5] Courts may exercise either general or specific personal jurisdiction over nonresident defendants. *Fields*, 796 F.2d at 301. General jurisdiction exists when the nonresident has " 'substantial' or 'continuous and systematic' contacts with the forum state." *Id.* (quoting *Haisten*, 784 F.2d at 1396).

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Since FDIC does not contend that the court has general jurisdiction over BAIC, the district court's order should be reviewed to determine whether FDIC established specific (*i.e.*, limited) jurisdiction.

This circuit has established a three-part test for analyzing whether specific jurisdiction may be exercised:

(1) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents 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.

Lake, 817 F.2d at 1421 (citations omitted); *see also Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786, 789 (9th Cir.1987). Because we find that the exercise of personal jurisdiction over BAIC is unreasonable, we need not determine whether the first two prongs of the test are satisfied. *Fields*, 796 F.2d at 302; *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir.1981); *Rocke v. Canadian Automobile Sport Club*, 660 F.2d 395, 399 (9th Cir.1981); *see also Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987) (Stevens, J., concurring) (noting that a finding of unreasonableness is a sufficient basis for defeating the assertion of personal jurisdiction); *cf. Corporate Inv. Business Brokers*, 824 F.2d at 788-91.

[6] Jurisdiction may be exercised reasonably if " 'under the totality of the circumstances the defendant could reasonably anticipate being called upon to present a defense in a distant forum.' " *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 649 (9th Cir.) (quoting *Taubler v. Giraud*, 655 F.2d 991, 993 (9th Cir.1981)), *cert. denied*, 469 U.S. 917, 105 S.Ct. 295, 83 L.Ed.2d 230 (1984). This circuit has identified seven relevant factors in determining the reasonableness of asserting jurisdiction over a nonresident defendant:

(1) The extent of purposeful interjection into the forum state;

(2) The burden on the defendant of defending in the forum;

(3) The extent of conflict with the sovereignty of 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 plaintiff's interest in convenient and effective relief;

(7) The existence of an alternative forum.

Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 840 (9th Cir.1986); *Lake*, 817 F.2d at 1421-22; *Corporate Inv. Business Brokers*, 824 F.2d at 790. Each factor will be analyzed below and balanced into the reasonableness inquiry.

1. *Purposeful Interjection*

The district court concluded that Tierney performed the "ministerial act of an employee used as a delivery person" during his visit to Los Angeles and that this was insufficient to establish purposeful direction of BAIC's business activities toward California. We agree. Polland, not BAIC, directly solicited the sale of the Fiji branch by calling the Nassau office; the contract negotiations were conducted in Malaysia; and Fiji law was designated as the governing law. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482, 105 S.Ct. 2174, 2187, 85 L.Ed.2d 528 (1985) (noting***1443** that although a governing law provision standing alone is not sufficient to confer jurisdiction, "[n]othing in our cases ... suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's laws' for jurisdictional purposes"). The fact that Polland, who solicited the sale agreement, was a California resident was fortuitous, not purposeful.

It is clear that a contract alone is not sufficient to establish purposeful interjection into a forum state. *See Burger King Corp.*, 471 U.S. at 478-79, 105

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S.Ct. at 2185; *Hirsch v. Blue Cross, Blue Shield,* 800 F.2d 1474, 1480 n. 3 (9th Cir.1986). The negotiations and contemplated future consequences of the contract (*i.e.,* whether continuing contacts with California were envisioned) must be considered in analyzing BAIC's purposeful interjection of its activities into California. *See* *Burger King Corp.,* 471 U.S. at 479, 105 S.Ct. at 2185. In the instant case, no future relationship was contemplated; the contract was simply a one-time agreement. *Cf.* *id.* at 479-80, 105 S.Ct. at 2185-86 (long-term franchise agreement contemplated continuing and wide-reaching contacts); *Corporate Inv. Business Brokers,* 824 F.2d at 790 (continuing benefits would be derived from association with franchisor in forum state). Tierney's remaining in Los Angeles to pick up the $2 million payment and wire it to Nassau does not rise to the level of "affirmative conduct ... which allows or promotes the transaction of business within the forum state." *Decker Coal Co.,* 805 F.2d at 840. The subject of the contract was in Fiji, the governing law was Fiji's, and the defendant's only significant performance in California was picking up a check for an already completed and executed contract. This circuit has recognized that the receipt of payment alone for services rendered outside the forum state is not sufficient to support personal jurisdiction. *Pacific Atl. Trading Co.,* 758 F.2d at 1329.

FDIC attaches some significance to the use of California banks by Tierney. First, the fact that the cashier's check was drawn on Imperial Bank is of little significance; the bank on which the check was drawn was a result of Polland's discretion and unilateral activity, which is an inappropriate consideration for the assertion of jurisdiction over BAIC. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 416-17, 104 S.Ct. 1868, 1873, 80 L.Ed.2d 404 (1984). Second, the use of the facilities of national banks such as the Bank of America (*i.e.,* Tierney wired the money to Nassau via Bank of America), whose powers are granted by the National Bank Act, 12 U.S.C. §§ 21-216d (1982), does not amount to the invocation of state benefits. *Thomas J. Palmer, Inc. v. Turkiye Is Bankasi A.S.,* 105 Cal.App.3d 135, 153-54, 164 Cal.Rptr. 181, 192 (1980).

BAIC's key nexus to California-the temporary physical presence of Tierney in California-is not sufficient to overcome the lack of any indicia of a calculated effort by BAIC to conduct business in California. An analogous fact pattern in a Fifth Circuit case supports this conclusion. In *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.,* 700 F.2d 1026 (5th Cir.1983), *cert. denied,* 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 561 (1984), the court declined to exercise specific jurisdiction over a nonresident corporation although: the defendant corporation agreed to purchase goods to be manufactured in the forum state; payment for the orders was to be made in the forum state, extensive communications were exchanged between the parties from their respective states prior to executing the agreement; *officers of the defendant corporation traveled to the forum state to close the deal;* and the contract was formally created by the defendant's acceptance in the forum state. The court found the above factors "relevant," but insufficient to outweigh the fact that the contract required no significant performance by the defendant in the forum state, involved only one transaction, and was governed by the law of the defendant's residence. In addition, the plaintiff solicited the transaction and substantially negotiated it outside the forum state. *Id.* at 1029-32. The basic quality and nature of the defendant's contact with the forum state, therefore, on balance, ***1444** outweighed the defendant's forum contacts. The facts of the instant case lead to a similar conclusion.

In sum, the transaction between Polland and BAIC appears to be the "random," "fortuitous," or "attenuated" type of contact insufficient to support jurisdiction without violating the principles of fair play and substantial justice. *Burger King Corp.,* 471 U.S. at 486, 105 S.Ct. at 2189. In addition, "[t]he smaller the element of purposeful interjection, the less is jurisdiction to be anticipated and the less reasonable is its exercise." *Insurance Co. of N. Am.,* 649 F.2d at 1271. This factor, therefore, weighs against jurisdiction in California.

2. *Burden of Litigating in California*

[7] The burden of litigating in a foreign forum has become less significant as a result of advances in communication and transportation. *Decker Coal Co.,* 805 F.2d at 841; *Corporate Inv. Business Brokers,* 824 F.2d at 791. However, the law of personal jurisdiction is "asymmetrical." *Insurance Co. of N. Am.,* 649 F.2d at 1272. The primary

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concern is for the defendant's burden. *Id.* In a case such as this, in which the defendant "has done little to reach out to the forum state," the burden of defending itself in a foreign forum militates against exercising jurisdiction. *Id.*

3. *Conflict with Foreign Sovereignty Interests*

Although not a dispositive consideration, a foreign nation presents a higher sovereignty barrier than another state within the United States. *Gates Learjet Corp. v. Jensen,* 743 F.2d 1325, 1333 (9th Cir.1984), *cert. denied,* 471 U.S. 1066, 105 S.Ct. 2143, 85 L.Ed.2d 500 (1985). Since the defendant is a resident of a foreign nation, the subject of the controversy is a Fiji corporation, and the contract designates Fiji law as the governing law, this factor also tends to undermine the reasonableness of asserting personal jurisdiction over BAIC.

4. *Interest of the Forum State*

If California law governed the dispute, California would have a substantial interest in adjudicating it. *See Jacobs/Kahan & Co. v. Marsh,* 740 F.2d 587, 592 (7th Cir.1984). The parties, however, designated a foreign forum (*i.e.,* Fiji) in the contract's controlling law provision, and California's interest in adjudicating this dispute in its courts is not particularly great. California's interest would be greater if the nonresidents in this case engaged in commercial activity that is subject to explicit statutory regulation in California (such as the sale of insurance to California residents or the issuance of shares in a California corporation) or in the alleged negligent manufacture of a product that caused physical injury to forum residents. *Kipperman v. McCone,* 422 F.Supp. 860, 874 (N.D.Cal.1976).

5. *Most Efficient Resolution*

Fiji appears to be the most efficient forum to resolve this dispute. First, the contract interpretation is governed by Fiji law. Second, the dispute centers around BAIC's alleged failure to comply with Fiji law, its alleged failure to transfer good title from one Fiji corporation to another, and the Fiji Commissioner's subsequent actions in seizing the Fiji Branch. In addition, the key negotiations took place in Malaysia. Therefore, any witnesses to the negotiations could be transported much more conveniently to Fiji than to California. Although witnesses or records from BAIC's home office in Nassau would have to be transported a considerable distance to Fiji, the key evidence (including Fiji government officials) appears to be located in Fiji. *See Asahi Metal Indus. v. Superior Court,* 480 U.S. 102, 107 S.Ct. 1026, 1033-35, 94 L.Ed.2d 92 (1987) (holding that, in suit by Taiwanese manufacturer for indemnification against Japanese manufacturer, the assertion by California court of personal jurisdiction over Japanese manufacturer was unreasonable).

6. *Convenient and Effective Relief for Plaintiff*

Since the FDIC is a national governmental agency, it would prefer litigating its ***1445** claim in the United States, although California is not more convenient than any other state. *See Cubbage v. Merchent,* 744 F.2d 665, 672 (9th Cir.1984),*cert. denied,* 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985) (noting that because plaintiff was a California resident, California courts would be more accessible to him). It is not clear, however, why the FDIC's recovery would be any less likely in a Fiji court of law. *See Rocke,* 660 F.2d at 400. In addition, litigating in foreign forums is not unprecedented for the FDIC. The transcript of the hearing on BAIC's motion to dismiss reveals that the FDIC is presently litigating a dispute with the Bank of New Zealand in Fiji.

7. *Availability of an Alternative Forum*

[8] FDIC bears the burden of proving the unavailability of an alternative forum. *Pacific Atl. Trading Co.,* 758 F.2d at 1331. Although it has argued that California would be a more convenient forum, it has not met its burden of proving that it would be precluded from suing BAIC outside of California. *See Gates Learjet Corp.,* 743 F.2d at 1333-34.

CONCLUSION

In light of the due process requirement that the defendant's expectations and burdens should be weighed more heavily than the plaintiff's hardships, *Rocke,* 660 F.2d at 400, FDIC has not met its burden of establishing the existence of personal jurisdiction over BAIC. We therefore affirm the district court's dismissal of the action for lack of personal jurisdiction.

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AFFIRMED.

C.A.9 (Cal.),1987.
Federal Deposit Ins. Corp. v. British-American Ins. Co., Ltd.
828 F.2d 1439

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C
United States District Court,E.D. Texas,Sherman Division.
Gordon **FREDERICK**, Plaintiff,
v.
ADVANCED FINANCIAL SOLUTIONS, INC. and Metavante Corporation, Defendants.
No. 4:06-CV-238.

Sept. 26, 2007.

Background: Employee brought breach of contract action against his former employer and employer's parent company. Following removal from state court, defendants moved to transfer venue to the Western District of Oklahoma and employee amended his complaint to add allegations of Age Discrimination in Employment Act (ADEA) violations.

Holding: The District Court, Richard A. Schell, J., held that balance of convenience and justice substantially weighed in favor of transfer.

Motion granted.

West Headnotes

[1] Federal Courts 170B 131

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)3 To What District Action May Be Transferred
170Bk131 k. In General. Most Cited Cases

Federal Courts 170B 132

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)3 To What District Action May Be Transferred
170Bk132 k. Amenability to Process and Personal Jurisdiction. Most Cited Cases

On a transfer for the convenience of parties and witnesses, in the interest of justice, venue must be proper in the transferee court and the transferee court must have personal jurisdiction over the defendant. 28 U.S.C.A. § 1404(a).

[2] Federal Courts 170B 101

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases
The court should balance two categories of interests in determining whether to transfer venue: (1) the convenience of the litigants, and (2) the public interests in the fair and efficient administration of justice. 28 U.S.C.A. § 1404(a).

[3] Federal Courts 170B 101

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases

Federal Courts 170B 104

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk104 k. Matters Considered. Most Cited Cases

Federal Courts 170B 105

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in

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Proper Forum
170Bk105 k. Plaintiff's Choice of Forum; Forum Shopping. Most Cited Cases
The convenience factors, used by a court in determining whether it should transfer venue, are as follows: (1) the plaintiff's choice of forum; (2) the convenience of the parties and witnesses; (3) the place of the alleged wrong; (4) the cost of obtaining the attendance of witnesses; (5) the accessibility and location of sources of proof; and (6) the possibility of delay and prejudice if transfer is granted. 28 U.S.C.A. § 1404(a).

[4] Federal Courts 170B 104

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk104 k. Matters Considered. Most Cited Cases
The public interest factors, used by a court in determining whether it should transfer venue, are as follows: (1) the administrative difficulties caused by court congestion; (2) the local interest in adjudicating local disputes; (3) the unfairness of burdening citizens in an unrelated forum with jury duty; and (4) the avoidance of unnecessary problems in conflict of laws. 28 U.S.C.A. § 1404(a).

[5] Federal Courts 170B 144

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)4 Proceedings and Effect of Change
170Bk144 k. Presumptions and Burden of Proof. Most Cited Cases
The party who files a motion to change venue for the convenience of parties and witnesses, in the interest of justice, bears the burden of proving why venue should be changed; to prevail, the litigant must demonstrate that the balance of convenience and justice substantially weighs in favor of transfer. 28 U.S.C.A. § 1404(a).

[6] Federal Courts 170B 101

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases
The court should not transfer venue where the result will be merely to shift the expense and inconvenience from one party to the other. 28 U.S.C.A. § 1404(a).

[7] Federal Courts 170B 819

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk819 k. Change of Venue; Disqualifying Judge; Continuance. Most Cited Cases
The district court's decision to grant or deny a motion to transfer for the convenience of parties and witnesses, in the interest of justice, will be reversed only for an abuse of discretion. 28 U.S.C.A. § 1404(a).

[8] Federal Courts 170B 106.5

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk106 Determination in Particular Transferable Actions
170Bk106.5 k. In General. Most Cited Cases

Federal Courts 170B 109

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk106 Determination in Particular Transferable Actions
170Bk109 k. Contracts; Insurance; Sales. Most Cited Cases
Balance of convenience and justice substantially weighed in favor of transferring employee's breach of

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contract and ADEA action against employer and employer's parent company from Eastern District of Texas to Western District of Oklahoma, and therefore district court would grant defendants' motion to transfer based on the convenience of parties and witnesses, in the interest of justice; employer was terminated in Oklahoma City, Oklahoma, employer's principal place of business was in Oklahoma, it appeared the case would progress just as expeditiously in the Western District of Oklahoma, and transferring the case would not cause any delay or prejudice, as the case was still in its infancy, and the Eastern District of Texas had scant local interest in the adjudication of employee's claims, as a substantial portion of the alleged breach of contract or ADEA violations occurred in Oklahoma. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; 28 U.S.C.A. § 1404(a).

[9] Federal Courts 170B 101

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases

Federal Courts 170B 104

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk104 k. Matters Considered. Most Cited Cases
Typically, the most important factor in determining whether to transfer venue for the convenience of parties and witnesses, in the interest of justice, is whether substantial inconvenience will be visited upon key fact witnesses should the court deny transfer; the location of nonparty fact witnesses is the primary consideration in assessing this factor. 28 U.S.C.A. § 1404(a).

[10] Federal Courts 170B 101

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases
The availability and convenience of party-witnesses is generally insignificant in determining whether to transfer venue for the convenience of parties and witnesses, in the interest of justice, because a transfer based on this factor would only shift the inconvenience from movant to nonmovant. 28 U.S.C.A. § 1404(a).

[11] Federal Courts 170B 143

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)4 Proceedings and Effect of Change
170Bk143 k. Affidavits and Evidence in General. Most Cited Cases
A movant for transfer of venue based on the convenience of parties and witnesses, in the interest of justice, must specifically identify key nonparty witnesses and outline the substance of their testimony; general allegations of inconvenience are insufficient. 28 U.S.C.A. § 1404(a).

[12] Federal Courts 170B 101

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases
In considering whether substantial inconvenience will be visited upon key fact witnesses, in determining whether to transfer venue for the convenience of parties and witnesses, in the interest of justice, district courts must ensure that the motion for transfer does not become a battle of numbers. 28 U.S.C.A. § 1404(a).

[13] Federal Courts 170B 101

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170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases

Federal Courts 170B 104

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk104 k. Matters Considered. Most Cited Cases
District courts should not transfer a case merely because a few witnesses would otherwise be inconvenienced; the court must instead consider the content of the witnesses' testimony in determining whether this factor weighs in favor of transfer. 28 U.S.C.A. § 1404(a).

[14] Federal Courts 170B 109

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk106 Determination in Particular Transferable Actions
170Bk109 k. Contracts; Insurance; Sales. Most Cited Cases
Where an action involves breach of contract, federal courts should consider, where the contract was negotiated or executed, where it was to be performed, and where the alleged breach occurred in determining whether to transfer venue for the convenience of parties and witnesses, in the interest of justice. 28 U.S.C.A. § 1404(a).

[15] Federal Courts 170B 106.5

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk106 Determination in Particular Transferable Actions
170Bk106.5 k. In General. Most Cited Cases
Under the ADEA, the court should look to where the injury occurred in determining whether to transfer venue for the convenience of parties and witnesses, in the interest of justice. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; 28 U.S.C.A. § 1404(a).

[16] Federal Courts 170B 101

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases

Federal Courts 170B 104

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk104 k. Matters Considered. Most Cited Cases
Although the accessibility and location of sources of proof remain considerations in a court's analysis of a motion to transfer venue based on the convenience of parties and witnesses, in the interest of justice, they are of only slight significance due to the increasing ease of storage, communication, copying, and transportation of documents and information. 28 U.S.C.A. § 1404(a).

[17] Federal Courts 170B 101

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases

Federal Courts 170B 104

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170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk104 k. Matters Considered. Most Cited Cases
The citizens in the district where the alleged wrong took place have a strong interest in correcting that alleged wrong, for purposes of determining whether to transfer venues based on the convenience of parties and witnesses, in the interest of justice. 28 U.S.C.A. § 1404(a).

***701** Horace Newton Cunningham, III, Robert Hal Bezucha, Roberts, Cunningham & Stripling, Dallas, TX, for Plaintiff.
Pamela M. Ploor, Judith Williams-Killackey, Quarles & Brady, Milwaukee, WI, Jason Edward Winford, Baker & McKenzie, LLP, Dallas, TX, for Defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

RICHARD A. SCHELL, District Judge.
Pending before the court is the Defendants' "Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) and Brief in Support" (docket entry # 11). After considering the Defendants' motion, the Plaintiff's response (docket entry # 14), the Defendants' reply (docket entry # 17) and the Plaintiff's sur-reply thereto (docket entry # 18), the court is of the opinion that the Defendants' motion should be granted and this case should be transferred. Therefore, the court hereby ORDERS that this case be transferred to the Western District of Oklahoma.

I. BACKGROUND

On May 9, 2006, the Plaintiff filed his original petition in the 366th Judicial District Court of Collin County, Texas. In his petition, the Plaintiff alleged that he entered into a written contract of employment with his prior employer, Defendant Advanced Financial Solutions, Inc. ("AFS"), in May 2002. The employment contract provided that "... upon your termination, unless due to your resignation or your termination for cause you will be paid 6(six) months severance. This will be calculated on the previous 6 months total compensation or $157,000.00 whichever is greater." [FN1] Pl. Orig. Pet., p. 3, ¶ 14. In July 2004, Defendant Metavante Corporation acquired Defendant AFS. *Id.* at ¶ 15. Defendant Metavante Corporation is the parent company of Defendant AFS. Defs. Mtn. to Transfer Venue, Decl. of Gary Nelson, p. 1, ¶ 2.[FN2] In February 2006, Defendant***702** AFS terminated the Plaintiff's employment. Pl. Orig. Pet., p. 3, ¶ 16. The Plaintiff alleges that he was not terminated for cause; therefore, the Plaintiff contends that he is entitled to receive his severance. The Defendants, however, have failed to pay the Plaintiff his severance. Accordingly, the Plaintiff sued the Defendants for breach of contract.

FN1. The court was not provided with a copy of the written contract of employment.

FN2. Defendant AFS is a corporation organized under the laws of the State of Oklahoma with its principal place of business in Oklahoma City, Oklahoma. Defs. Notice of Removal, p. 2, ¶ 5. Defendant Metavante Corporation is a corporation organized under the laws of the State of Wisconsin with its principal place of business in Brown Deer, Wisconsin. *Id.*

On June 13, 2006, the Defendants removed this lawsuit to this court based on diversity of citizenship. On September 14, 2006, the Defendants filed the instant motion to transfer venue pursuant to 28 U.S.C. § 1404(a), seeking a transfer of the Plaintiff's lawsuit to the Western District of Oklahoma. Thereafter, on September 15, 2006, the Plaintiff filed his first amended complaint. In his first amended complaint, the Plaintiff not only alleged a breach of contract cause of action but also an Age Discrimination in Employment Act ("ADEA") cause of action. According to the Plaintiff's first amended complaint, management for Defendant AFS made age-related comments at staff meetings. Pl. First Amd. Compl., p. 4, ¶ 23. Further, the Plaintiff alleges that Defendant AFS's management decided not to retain older employees within the Plaintiff's division. *Id.* at ¶ 24. Ultimately, the Plaintiff contends that he was terminated because of his age. *Id.* at p. 5, ¶ 28.

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II. DISCUSSION

A. LEGAL STANDARD

[1] "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where [the case] might have been brought." 28 U.S.C. § 1404(a) (2000). For a section 1404(a) transfer to be proper, two initial conditions must be met. First, venue must be proper in the transferor court. *Houston Trial Reports, Inc. v. LRP Publ'ns, Inc.*, 85 F.Supp.2d 663, 667 n. 1 (S.D.Tex.1999). Second, the transferee court must be a "district or division where [the case to be transferred] might have been brought." *Id.* Venue must be proper in the transferee court and the transferee court must have personal jurisdiction over the defendant. *Id.*

[2][3] "A motion to transfer under § 1404(a) [ ] calls on the district court to weigh in the balance a number of case-specific factors." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988). "The court should balance two categories of interest in determining whether to transfer venue: (1) the convenience of the litigants, and (2) the public interests in the fair and efficient administration of justice." *Hanby v. Shell Oil Co.*, 144 F.Supp.2d 673, 676 (E.D.Tex.2001). The convenience factors are as follows:

> (1) The plaintiff's choice of forum;
>
> (2) The convenience of the parties and witnesses;
>
> (3) The place of the alleged wrong;
>
> (4) The cost of obtaining the attendance of witnesses;
>
> (5) The accessibility and location of sources of proof; and
>
> (6) The possibility of delay and prejudice if transfer is granted.

Id. at 676-77.

[4] The public interest factors are as follows:

> (1) The administrative difficulties caused by court congestion;
>
> (2) The local interest in adjudicating local disputes;
>
> (3) The unfairness of burdening citizens in an unrelated forum with jury duty; and
>
> ***703** (4) The avoidance of unnecessary problems in conflict of laws.

Id. at 677.

[5][6][7] The party who files a motion to change venue under section 1404(a) bears the burden of proving why venue should be changed. *See Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir.1989). "To prevail, the litigant must demonstrate that the balance of convenience and justice substantially weighs in favor of transfer." *Mohamed v. Mazda Motor Corp.*, 90 F.Supp.2d 757, 768 (E.D.Tex.2000) (citation omitted). "The court should not transfer venue where the result will be merely to shift the expense and inconvenience from one party to the other." *Enserch Int'l Exploration, Inc. v. Attock Oil Co., Ltd.*, 656 F.Supp. 1162, 1167 n. 15 (N.D.Tex.1987) (citation omitted). The district court's decision to grant or deny a motion to transfer under section 1404(a) will be reversed only for an abuse of discretion. *In re Horseshoe Entm't*, 337 F.3d 429, 432 (5th Cir.2003).

B. ANALYSIS

1. The Propriety of the Defendants' Motion to Transfer

The first issue is whether the Defendants' motion to transfer satisfies both conditions for transfer under section 1404(a). The first condition is that venue must be proper in the transferor court. The second condition is that the transferee court must be a "district or division where [the case to be transferred] might have been brought."§ 1404(a). Here, the parties do not dispute that venue is proper in this court. Further, the parties do not dispute that this action could have been brought in the Western District of Oklahoma. Accordingly, the court shall now turn to whether the convenience and public

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interest factors substantially weigh in favor of transfer.

2. The Merits of the Defendants' Motion to Transfer

a. Plaintiff's Choice of Forum

[8] Courts in this circuit have traditionally considered the plaintiff's choice of forum a strong factor that weighs against transfer.[FN3] Recently, however, the Fifth Circuit concluded that district courts should deem the plaintiff's choice of forum less important. In *In re Horseshoe Entertainment*, 337 F.3d 429 (5th Cir.2003), the Fifth Circuit concluded that "the plaintiff's choice of forum is clearly a factor to be considered but in and of itself it is neither conclusive nor determinative." *Id.* at 434 (citation omitted); *see also Garner v. Wolfinbarger*, 433 F.2d 117, 119 (5th Cir.1970) ("[The plaintiff's choice of forum] is not controlling. *Ultimately the trial judge must use his discretion.*"(emphasis added) (footnote omitted)). The plaintiff's forum choice is given less weight when the plaintiff brings suit outside of its home district. *The Whistler Group, Inc. v. PNI Corp.*, 2003 WL 22939214, *2 (N.D.Tex.2003).

> FN3. *See, e.g., Robertson v. Kiamichi R.R. Co., L.L.C.*, 42 F.Supp.2d 651, 655 (E.D.Tex.1999) (Report and Recommendation of Hines, J.) ("[T]here is a strong presumption favoring plaintiff's choice of forum."); *TV-3, Inc. v. Royal Ins. Co. of Am.*, 28 F.Supp.2d 407, 411 (E.D.Tex.1998) (Steger, J.) ("[T]he plaintiff's choice of forum is considered a strong factor."(citation omitted)).*But cf. Reed v. Fina Oil & Chem. Co.*, 995 F.Supp. 705, 714 (E.D.Tex.1998) (Schell, J.) ("[T]he deference given to a plaintiff's choice of forum is greater in a *forum non conveniens* transfer than it is in a § 1404(a) transfer."(citation omitted)).

Here, the Plaintiff argues that he chose to litigate this case in the Eastern District of Texas because he resides in Collin County, Texas which is situated within the Eastern District of Texas. Additionally, the Plaintiff argues that he worked for the Defendants from his home in Collin County, Texas. Conversely, the Defendants ***704** urge this court to afford minimal deference to the Plaintiff's choice of forum because the Defendants contend that the contract at issue was negotiated in Oklahoma, the decision not to pay the Plaintiff any severance was made in Oklahoma and the Plaintiff was terminated in Oklahoma.

The court concludes that the Plaintiff's desire to litigate this case in this court counsels in favor of denying the Defendants' motion to transfer. The Plaintiff's decision to defend venue in this district is a factor that "is entitled to some deference." *Lindloff v. Schenectady Int'l*, 950 F.Supp. 183, 185 (E.D.Tex.1996). Because this factor is not controlling, however, the court must weigh this factor against the other factors in deciding whether to transfer this case. *See Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co.*, 844 F.Supp. 1163, 1165 (S.D.Tex.1994) ("Today, the [plaintiff's] choice of forum is only one of many factors for a court to consider."(citation omitted)).

b. Convenience of the Parties and Witnesses and Cost of Obtaining the Attendance of Witnesses

[9][10] "Typically, the most important of the above factors is whether substantial inconvenience will be visited upon key fact witnesses should the court deny transfer." *Mohamed*, 90 F.Supp.2d at 774 (citations omitted). "The location of nonparty fact witnesses is the primary consideration in assessing this factor." *Houston Trial Reports, Inc.*, 85 F.Supp.2d at 669. Moreover, "[t]he availability and convenience of party-witnesses is generally insignificant because a transfer based on this factor would only shift the inconvenience from movant to nonmovant." *Quicksilver, Inc. v. Academy Corp.*, 1998 WL 874929, *2 (N.D.Tex. Dec.3, 1998).

[11][12][13] The movant must "specifically identify key [nonparty] witnesses and outline the substance of their testimony." *Mohamed*, 90 F.Supp.2d at 775 (quotation, citations and footnote omitted). General allegations of inconvenience are insufficient. *Id.* In considering this factor, district courts must ensure that a motion for transfer does not become "a battle of numbers." *Fletcher v. S. Pac. Transp. Co.*, 648 F.Supp. 1400, 1402 (E.D.Tex.1986). District courts should not transfer a case merely because a few witnesses would otherwise be inconvenienced. *Mohamed*, 90 F.Supp.2d at 775. The court must

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instead consider the content of the witnesses' testimony in determining whether this factor weighs in favor of transfer. *Kettler v. Presstek, Inc.*, 2003 WL 21788870, *3 n. 6 (N.D.Tex. July 31, 2003). When nearly all of the nonparty witnesses that will testify concerning disputed issues reside elsewhere, this factor weighs in favor of transferring the case. *See id.* at *2-*3.

Here, the Defendants enumerate four witnesses. However, three of the four witnesses are employees of Defendant AFS, all of whom work in Oklahoma. The Defendants' remaining witness, Thomas Dean, a former executive vice-president of AFS, currently works and resides in Oklahoma. According to Mr. Dean's affidavit, the Plaintiff approached him about working for AFS. Defs. Mtn. to Transfer Venue, Decl. of Thomas Dean, p. 2, ¶ 8. Additionally, Mr. Dean supervised the Plaintiff for approximately one year. *Id.* at p. 1, ¶ 3.

The Plaintiff counters that the Defendants will not be inconvenienced if the lawsuit remains in the Eastern District of Texas. On the contrary, the Plaintiff argues that he will suffer a financial strain and inconvenience if the case is transferred to Oklahoma. Pl. Resp., Exh. A, Decl. of Gordon Frederick, p. 2, ¶ 7. Although the Defendants contend that the Plaintiff traveled to Oklahoma several times per month during his employment with AFS, the Plaintiff notes that such ***705** travel was at the Defendants' expense. On balance, the court concludes that the convenience of the parties and witnesses and the relative cost of obtaining the presence of the witnesses does not weigh in favor of transfer.

c. Place of the Alleged Wrong

[14] "Where, as here, the action involves breach of contract, federal courts should consider, 'where the contract was negotiated or executed, where it was to be performed, and where the alleged breach occurred.' " *James J. Flanagan Shipping Corp. v. Mediterranean Shipping Co. S.A.*, 2007 WL 2461817, *2 (E.D.Tex.2007) (Clark, J.) (citations omitted). From the evidence presented, it appears that the contract was negotiated in both Texas and Oklahoma. The Plaintiff's performance of the contract occurred both in Texas and Oklahoma. However, any decision by the Defendants not to pay the Plaintiff his severance (the alleged breach) occurred in Oklahoma.

[15] Under the ADEA, the court should look to where the injury occurred. *Quinn v. Bowmar Publishing Co.*, 445 F.Supp. 780, 783 (D.Md.1978). In suits alleging age discrimination in employment, the injury typically occurs in the district where the plaintiff was discharged. *Id.* Here, the Plaintiff was terminated in Oklahoma City, Oklahoma. Defs. Mtn. to Transfer Venue, Decl. of Gary Nelson, p. 3, ¶ 18.[FN4] As such, an essential element of the Plaintiff's ADEA cause of action (the loss of the Plaintiff's employment) occurred in Oklahoma City, Oklahoma.[FN5] *See Quinn*, 445 F.Supp. at 783. The court finds that this factor weighs in favor of transfer.

> FN4. Further, staff meetings, where any alleged age-related discriminatory remarks were made, took place in Oklahoma City, Oklahoma. Defs. Mtn. to Transfer Venue, Decl. of Gary Nelson, p. 3, ¶ 16.
>
> FN5. Although the Plaintiff felt the effects of his discharge in Collin County, Texas, the court notes that the Plaintiff was actually discharged while he was in Oklahoma.

d. Accessibility and Location of Sources of Proof

[16] "Although the accessibility and location of sources of proof remain considerations in the Court's transfer analysis, they are of only slight significance due to the increasing ease of storage, communication, copying, and transportation of documents and information ..." *Cummins-Allison Corp. v. Glory Ltd.*, 2004 WL 1635534, *6 (E.D.Tex.2004). Here, Defendant AFS's principal place of business is in Oklahoma; accordingly, documents and other evidence which will likely be presented in this case are located in Oklahoma. However, since the Defendants' sources of proof could be easily transported to Texas, the court finds this factor to be neutral.

e. Location of Counsel

The Fifth Circuit recently held that a district court committed reversible error by considering this factor. *In re Horseshoe Entm't*, 337 F.3d at 434 ("The factor of 'location of counsel' is irrelevant ...."); *In*

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re Volkswagen AG, 371 F.3d 201, 206 (5th Cir.2004) ("[R]eliance on the location of counsel as a factor to be considered in determining the propriety of a motion to transfer venue was an abuse of discretion."). Accordingly, this factor is irrelevant.

f. Possibility of Delay and Prejudice if Transfer is Granted and Administrative Difficulties Caused by Court Congestion

As of September 30, 2006, there were 3,079 cases pending in the Eastern District of Texas. *U.S. District Court-Judicial Caseload Profile for the 12-Month Period Ending September 30, 2006,* www.uscourts. ***706** gov. By contrast, there were 1,260 cases pending in the Western District of Oklahoma. *Id.* The weighted filings in the Eastern District of Texas were 550 per judge as opposed to 331 per judge in the Western District of Oklahoma. *Id.* Additionally, the median time interval from filing to disposition of civil cases in the Eastern District of Texas was 9.0 months. *Id.* The median time interval from filing to trial in the Eastern District of Texas was 17.7 months. *Id.* The median time interval in the Western District of Oklahoma from filing to disposition of civil cases, however, was 9.1 months. *Id.* The median time interval from filing to trial in the Western District of Oklahoma was 16.4 months. *Id.*

Therefore, it appears that this case should progress just as expeditiously in the Western District of Oklahoma. Further, this case is still in its infancy. Although the court has issued a scheduling order, discovery has apparently not yet occurred. Accordingly, transferring this case to the Western District of Oklahoma will not cause any delay or prejudice in the timely disposition of this case. This factor is neutral.

g. Local Interest in Adjudicating Local Disputes and Unfairness of Burdening Citizens in an Unrelated Forum with Jury Duty

[17] The citizens in the District where the alleged wrong took place have a strong interest in correcting that alleged wrong. *Reed,* 995 F.Supp. at 716; *Lindloff,* 950 F.Supp. at 186. "The Supreme Court has determined that '[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.' " *In re Volkswagen AG,* 371 F.3d at 206, citing *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-09, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). Here, the Plaintiff's breach of contract and ADEA causes of action stem from his employment with AFS, a company which has its principal place of business in Oklahoma. As noted above, a substantial portion of any breach of contract or ADEA violations occurred in Oklahoma. Therefore, it appears to the court that this District has scant local interest in the adjudication of the Plaintiff's claims. Accordingly, the citizens of the Eastern District of Texas should not be burdened with jury duty regarding the same. As such, the court finds that these factors weigh in favor of transfer.

h. Avoidance of Unnecessary Problems in Conflict of Laws

The Defendants argue that the Plaintiff's breach of contract claim is subject to the laws of the State of Oklahoma. Apparently, AFS provided the Plaintiff with an offer letter which stated that employment concerns should be construed pursuant to the laws of the State of Oklahoma. Since the court was not provided with a copy of the offer letter, the court will afford no weight to the Defendants' argument. However, even if Oklahoma law applies to the Plaintiff's breach of contract cause of action, federal law applies to the Plaintiff's ADEA cause of action. Accordingly, the court finds that this factor is neutral.

III. CONCLUSION

Having balanced the relevant factors, including the place of the alleged wrong and the local interest in adjudicating local disputes, the court concludes that the balance of convenience and justice substantially weighs in favor of transfer. Accordingly, the Defendants' "Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a)" (docket entry # 11) is **GRANTED.** Therefore, the court hereby **ORDERS** that this case be **TRANSFERRED** to the Western District of Oklahoma. Additionally, the Defendants' "Motion and Memorandum***707** to Stay Discovery Pending a Decision on Their Motion to Transfer Pursuant to 28 U.S.C. § 1404(a)" (docket entry # 20) and the Plaintiff's "Motion to Compel and Brief in Support" (docket entry # 25) are **DENIED AS MOOT.**If necessary, the Plaintiff may re-urge his motion to compel with the transferee court.

IT IS SO ORDERED.

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E.D.Tex.,2007.
Frederick v. Advanced Financial Solutions, Inc.
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EXHIBIT G

Westlaw.
73 P. 641
26 Utah 382, 73 P. 641

C

Supreme Court of Utah.
GIBBS
v.
GIBBS.
Aug. 15, 1903.

Appeal from District Court, Millard County; Thomas Marioneaux, Judge.

Action by Monetta Gibbs against J. F. Gibbs. From a judgment in favor of defendant, plaintiff appeals. Reversed.

West Headnotes

Divorce 134 ⚷7

134 Divorce
134I Nature and Form of Remedy
134k7 k. Remedies in Personam and in Rem. Most Cited Cases
Where, in an action for divorce, the defendant appears, and joins issue by answer, the nature of the proceeding is thereby changed from a proceeding in rem to one in personam.

Divorce 134 ⚷66

134 Divorce
134IV Proceedings
134IV(B) Venue
134k66 k. In General. Most Cited Cases
Rev. St. 1898, § 1208, provides that proceedings in divorce shall be commenced and conducted as proceedings in civil cases, and the court may decree a dissolution of the marriage contract between plaintiff and defendant in all cases wherein the plaintiff for one year next prior to the commencement of the proceedings shall have been an actual and bona fide resident of the county within the jurisdiction of the court for any one of the following causes, including adultery. *Held,* that since, under Const. art. 8, § 7, vesting the district courts of the state with original jurisdiction, the district court of the county in which a plaintiff in an action for divorce resided had jurisdiction of the subject-matter of an action for divorce for adultery committed in another county, defendant's appearance and failure to object that an action should be tried in the county where the alleged adultery was committed constituted a waiver of any objection to the jurisdiction of the court in the county where suit was brought.

Venue 401 ⚷3

401 Venue
401I Nature or Subject of Action
401k3 k. Constitutional and Statutory Provisions. Most Cited Cases
Const. art. 8, § 5, provides that all civil and criminal business arising in any county must be tried in such county, unless a change of venue be taken in such cases as may be provided by law. *Held,* that the word "business," as so used, meant "causes of action," and did not include or apply to any case which did not involve a trial, and is not subject to a change of venue.

Venue 401 ⚷3

401 Venue
401I Nature or Subject of Action
401k3 k. Constitutional and Statutory Provisions. Most Cited Cases
The word "business," as so used, should be limited to business pending before the court, so that it applied only to actions and other proceedings actually brought.

***642** J. W. N. Whitecotton and Samuel R. Thurman, for appellant.
Warner, Houtz, Prentiss & Warner, for respondent.

BASKIN, C. J.
This is an action of divorce, and was instituted in Millard county. The ground upon which the divorce is sought is the alleged adultery of the defendant, charged in the complaint as having been committed

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in Piute county. The defendant admitted in his answer that he and the plaintiff are husband and wife, and that the latter now is, and for more than one year last past has been, a bona fide resident of Millard county, but denied that he had committed the adultery alleged in the complaint, "or with any person or persons or at all."No objection was made to the venue of said action in the answer or otherwise. After the respective parties had introduced their evidence, the case was submitted, and the same taken under advisement. Afterwards the court, in a lengthy opinion, held that "the cause of action, under section 5, art. 8, of the Constitution, in which it is provided that ' all civil and criminal business arising in any county, must be tried in such county, unless a change of venue be taken, in such cases as may be provided by law,' arose out of Milliard county and in Piute county, if anywhere," and that the venue was improperly laid in Millard county, and thereupon dismissed the action.

In this, as in most of the other, states, the action for divorce is statutory, and a decree is not obtainable except for the causes and in the manner prescribed by the statute. Section 1208, Rev. St. 1898, provides: "Proceedings in divorce shall be commenced and conducted in the manner provided by law for proceedings in civil cases, except as hereinafter provided, and the court may decree a dissolution of the marriage contract between the plaintiff and defendant in all cases wherein the plaintiff, for one year next prior to the commencement of the proceedings shall have been an actual and bona fide resident of the county within the jurisdiction of the court, for any one of the following causes, to wit."Among the causes thereinafter mentioned is adultery. The provision relating to the residence of plaintiff is mandatory. The plaintiff was precluded thereby from suing for and obtaining a divorce in the county in which the alleged adultery was committed. If, therefore, the construction given to section 5, art. 8, of the Constitution, by the court below, is sustained, plaintiff has no remedy whatever. As the subject of divorce is a matter of statutory regulation, it is competent for the Legislature, in granting the right to impose such limitations and conditions as in its wisdom it may deem proper, and generally, in this country, for the purpose of preventing collusive and fraudulent divorces, the statutes granting the right have, as our statute has done, required the bona fide residence of the plaintiff for a fixed period in the jurisdiction in which the action for divorce is instituted. In view of the prevalence of cases in which persons have become temporary residents in states under whose laws divorces could be readily obtained, for no other purpose than to obtain divorces, such restrictions are salutory, and have been universally sustained by the courts. The conditions upon which the Legislature in this state has granted the right of divorce are valid and binding upon the courts in the absence of a clear and explicit restriction of that right in the Constitution. The Constitution does not define what constitutes a cause of action, nor does it contain any provision from which it can be ascertained where either a local or transitory cause of action arises. Therefore resort must be had to the practice which prevails at common law or in equity. In special statutory causes of action and in criminal causes of action the place where the cause of action arises can generally be determined from the respective terms of the statute. As the defendant appeared in the suit, and filed an answer, and submitted his defense on the merits, the action is in personam. When the defendant is a nonresident, and is not personally served with summons, and does not enter an appearance, then the proceeding of divorce is in rem, and only the marriage relation can be dissolved by decree; but when he appears and joins issue by answer the nature of the proceeding is changed to that of a proceeding in personam, and both the dissolution of the status of marriage and a personal judgment for alimony may be decreed. 1 Nelson on Divorce, § 5, pp. 13, 14; 2 Bish. Mar. & Div. § 25 et seq., and section 81. In the case at bar the evidence is not in the record, but the defendant is charged with having committed the wrong complained of in Piute county.

Suppose that at the time of the alleged adultery the

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plaintiff had not been, nor has since become, a bona fide resident in any county of the state for the period required by the statute, would either a cause of action or a right of action have accrued in her favor? Certainly not, for the residence of *643 the plaintiff for the statutory period is a traversable fact, which the plaintiff, to recover, must prove. It follows, therefore, that the alleged adultery was not the sole element of plaintiff's cause of action, and that a cause of action for divorce, under the statute, can only arise within the county in which the action is brought, and in which the plaintiff has been a bona fide resident for one year prior to the institution of the suit. The term "all civil and criminal business," as used in section 5, art. 8, of the Constitution, does not change the common-law practice inrespect to venue in either civil or criminal actions, but is simply an announcement of the common law upon that subject. This court held, in the cases of White v. Rio Grande Wes. Ry. Co., 25 Utah, 346, 71 Pac. 593; Konold v. Rio Grande Wes. Ry. Co., 16 Utah, 155, 51 Pac. 256; Deseret Irr. Co. v. McIntyre, 16 Utah, 402, 52 Pac. 628; Mosby v. Gisborn, 17 Utah, 275, 54 Pac. 121; and Condon v. Leipsiger, 17 Utah, 501, 55 Pac. 82-that the word "business" was used in section 5, art 8, Const., in the sense of causes of action. That that term was used only in that sense is evident from the fact that contested causes of action, and not business transacted by courts or individuals, are alone issuable, and the subject of trials in the civil courts."A trial is the examination before a competent tribunal of the facts or law put in issue in a cause for the purpose of determining such issue."21 Am. & Eng. Ency. Pl. & Pr. p. 956. Also Bouvier's, Anderson's, Black's, and Rapalje's Law Dictionaries. It follows that the term "business," when viewed in connection with the context of the clause of the Constitution in question, cannot be rationally construed to apply to any case which does not involve a trial, and is not subject to a change of venue. A matter pending before a court in which there are no contesting parties does not involve a trial in any sense of that word, and a change of venue in such a matter would, indeed, be a novelty. A trial itself, as also matters not involving a trial, acted upon by a court in one sense, is court business. From necessity the term "business" can only apply to contested causes of action which alone are issuable and subject to trial. That it was used by the framers of the Constitution only in the sense of "causes of action," and that the proper venue in both civil and criminal actions, as at common law, is the place where the cause of action arises or the crime is committed, to me seems clear.

Again, there is no doubt but that under section 7, art. 8, Const., which vests the district courts of the state with original jurisdiction, the district court in Millard county has jurisdiction of the subject-matter of this action. Therefore, as it is an action inpersonam, and as the defendant appeared, answered, and submitted his defense upon the merits, he waived all objections to the venue, and the court thereby acquired jurisdiction of his person, and had authority to, and should have, rendered a decree upon the merits. Even in a criminal case the defendant may waive his constitutional right to a trial in the county or district where the crime is alleged to have been committed. Bishop, in his work on Criminal Procedure (volume 1, § 50), after referring to the fact that some of the state Constitutions contain direct provisions that the trial shall be in the county, or in the county or district, where the offense was committed, says: "Still this sort of provision, being for the benefit of defendant, may be waived, as, if one applies to the court for a change of venue, he waives his right to be tried in the county where indicted."So, in this state, the clause of the Constitution in question being for the benefit of defendants, the right of the defendant to a trial in the county where the cause of action has arisen is waived in a civil action when the court has jurisdiction of the subject-matter of the suit, and the defendant appears and answers, without objecting to the venue. 22 Ency. Pl. & Pr. 815, 816; White v. Rio Grande Wes. Ry. Co., 25 Utah, 346, 71 Pac. 593; Fields v. Daisy Min. Co. et al., 26 Utah,-, 73 Pac. 521. This decision, and the decision in White v. Rio Grande Wes. Ry. Co., supra, is not in har-

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mony with the decision in the case of Konold v. Rio Grande Wes. Ry. Co., 16 Utah, 151, 51 Pac. 256, and the subsequent decisions of this court which sustain that case on the subject of venue, and which was followed by the trial judge in the case at bar. These decisions, on the subject of venue, do not establish any rule of property under which titles have been or can be acquired, but merely relate to a rule of practice. If such had been the case, notwithstanding my opinion that they are erroneous, and that I have, as a member of this court, dissented from the rendition of some of them, I would not assent to their disturbance.

It is ordered that the judgment dismissing the action be, and the same is hereby, reversed, with costs, and that the case be remanded, with directions to the court below to reinstate the same, and proceed to render a decree on the evidence adduced at the trial.

McCARTY, J. (concurring).

There is but one question involved in this appeal, and that is, did the district court of Millard county have jurisdiction of the subject-matter of the action? The learned judge who tried the case, on the authority of the case of Konold v. Railway Co., 16 Utah, 151, 51 Pac. 256, dismissed the action, holding that the court was without jurisdiction. In that case Konold, the plaintiff, who was injured in Emery county, Utah, by the explosion of defendant's boiler, brought an action for personal injuries against the defendant company in Weber county, Utah. The defendant answered, and a trial was had, which resulted in a verdict in favor of plaintiff. Defendant appealed, and in this court for the first time, as appears*644 from the record in that case, raised the question of jurisdiction, claiming that under the provisions of section 5, art. 8, Const., the district court had no jurisdiction of the subject-matter of the action. The provisions of the state Constitution referred to, so far as material here, provide as follows: "Until otherwise provided by law, a district court at the county seat of each county shall be held at least four times a year. All civil and criminal business arising in any county must be tried in such county, unless a change of venue be taken in such cases as provided by law."This court, in construing the foregoing provisions of the Constitution in Konold v. Railway Co., supra, held that: "The word 'business' was used as a general term to include causes of action and all other business which might arise in any county, and the manifest intention was that all suits, civil and criminal, should be brought and the cases tried in the county in which the causes of action arose, unless a change of venue should be taken in such cases as might be provided by law. The last clause of the provision confers upon the Legislature discretionary power to provide for a change of venue in cases where that body may deem it necessary; but even in this class of cases the Legislature has no power to authorize an action to be brought, in the first instances, in any other county than the one in which the cause arose."And again: "The interpretation which we are thus impelled to give is also in harmony with all our notions concerning venue, for when we speak of venue we mean the county of jurisdiction in which the acts are alleged to have occurred, and from which the jury are to come to try the issue;" citing Bouvier's Law Dict. And the court further says: "It is a fundamental right of every defendant to an action in this state to have the same commenced and tried within the county where the acts are alleged to have occurred, subject to a change of venue in such cases as may be provided by law. To prevent the Legislature from taking away this right, express words of inhibition were not necessary.*** The declaration itself operated as a restraint upon the legislative power."Proceeding further, the court says "that no demand in writing was necessary or proper [for a change of venue], because the court had no power to grant a change of venue under the circumstances, but could simply dismiss the case upon becoming aware that the cause of action arose in another county than the one in which it was commenced."It will be observed that this court in that case not only held that the word "business," as used in the foregoing provisions of the Constitution, includes the term "causes of action," but also the acts of commission or omission that create and constitute a

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cause of action. If the court had held that the word "business," as used, was equivalent and meant "causes of action" only, and stopped there, then the venue, as fixed by statute, would be the proper place of trial, and, in the absence of statutory regulation on the subject, the rule of common law respecting venue would govern. But, as stated above, the court went further, and held that an action can be brought only in the county where the business arises upon which such action is based; that is, the place of such business fixes the venue in the case, and it matters not whether the right of action is a creature of statute or existed at common law, because the provision of the Constitution referred to includes "all civil and criminal business." Now, in this case, the alleged act of adultery which gave plaintiff a right of action, and which constitutes and is the very essence of her cause of action, was committed, if committed at all, in Piute county, Utah. But counsel for plaintiff contends that, notwithstanding the alleged act of adultery was committed in Piute county, the injury done plaintiff was at her home in Millard county; hence "the business did not wholly arise in the county where the crime was committed."In other words, the adulterous act of defendant in Piute county and the injury it wrought plaintiff in Millard county are two of the elements necessary to constitute her cause of action. Therefore, under the rule laid down in the case of Deseret Irrigation Co. v. McIntyre, 16 Utah, 398, 52 Pac. 628, the action was properly brought in Millard county. This theory of counsel for plaintiff is not only unsound in principle, but is in direct contravention of the provisions of section 1208, Rev. St. 1898. If the damages suffered by the plaintiff were an essential element of a cause of action in a suit for divorce on the grounds of adultery, then, in accordance with the well-established rules of practice, it would be incumbent upon the plaintiff to allege and prove such damages in order to maintain his action, which, of course, is not required, nor would it be permitted, in an action of this character, where the act complained of is adultery.

Section 1208, Rev. St. 1898, so far as material in this case, provides that: "The court may decree a dissolution of the marriage contract between the plaintiff and defendant in all cases wherein the plaintiff, for one year next prior to the commencement of the proceedings shall have been an actual and bona fide resident of the county within the jurisdiction of the court, for any of the following causes, to-wit: *** Adultery committed by defendant subsequent to marriage, *** conviction of defendant for felony."It will thus be readily observed from the foregoing provisions of the statute that the adulterous act alone of the defendant, if proved, as alleged, is sufficient of itself, regardless of the effect such act may have had on the mind of the plaintiff at her home in Millard county or elsewhere, to entitle her to a decree annuling the marriage relation. Hence, I fail to see wherein the rule announced in the case of Deseret Co. v. McIntyre,***645** supra, is at all applicable to the case under consideration.

Applying the rule followed in the case of Konold v. Railway Co., supra, to this case, it must be conceded that the "business" which gave plaintiff a right of action, and is the very basis of her cause of action, namely, the adulterous act of defendant, arose wholly in Piute county. This being so, if the construction given the foregoing provision of the Constitution by this court in the case of Konold v. Railway Co., supra, is sound and correct, then it necessarily follows that the trial court did not err in dismissing the case under consideration for want of jurisdiction. For the purpose of illustration, suppose plaintiff, at the time of bringing her action for divorce, had commenced another action for damages against the alleged paramour of her husband, and had alleged the act of adultery complained of in this case as one of a series of acts and circumstances that took place in Piute county from which the inference of alienation of her husband's affections could be drawn, could it be seriously contended that under the rule announced in the Konold Case the "business" arose in Millard county? I think not, and yet in the latter case damage would be a constituent and necessary element in the cause of action, which

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it would be necessary to allege; and, if more than nominal damages were demanded, it would be necessary to prove such damages. Again, for further illustration, suppose that plaintiff, instead of bringing the present action, had instituted criminal proceedings against her husband for the alleged adultery, and had succeeded in getting him convicted, and then had brought her action for divorce, alleging in her complaint that the defendant had been convicted of a felony in Piute county, and the record proof in the case showed such to be the fact, could it be consistently held, in the face of the doctrine declared in the case of Konold v. Railway Co., supra, and reaffirmed by this court in a number of subsequent decisions, that, because of such conviction, the plaintiff may have suffered mental pain and anguish at her home in Millard county, that the "business" (the conviction for a felony) arose (took place) there also? If so, then I fail to comprehend the full import of the expression of the court in that case, notwithstanding the language used appears to be free from doubt and ambiguity.

The fact that the right to sue, under certain circumstances, for a divorce, is a creature of the statute, does not relieve the situation, because the clause in the Constitution, above referred to, includes all classes of actions that may come before the courts. Therefore the conclusion is irresistible that, unless the case of Konold v. Railway Co., supra, be overruled, the judgment of the district court dismissing the action must be affirmed, notwithstanding it will result in leaving the plaintiff without a remedy, however meritorious her demands for relief may be; and that, too, in face of section 11, art. 1, Const., which provides that "all courts shall be open and every person, for an injury done to him in his person, property, or reputation, shall have a remedy by due course of law, which shall be administered, without denial or unnecessary delay.***"

If the allegations of plaintiff's complaint are true-and, for the purpose of determining the question before us, we must assume them to be true-she has suffered one of the most grievous wrongs that it would be possible for the defendant to inflict. This being so the question arises, ought this court to be bound by and adhere to the construction placed upon section 5, art. 8, Const., in the Konold Case, which construction renders abortive section 11, art. 1, of the same instrument, when applied to the wrongs sought to be redressed in this case, and many others of a like character that may and probably will arise in the future, when a different construction, of which section 5, art. 8, is susceptible, would give full force and effect to both provisions in all cases? It is an elementary rule of constitutional construction that all parts of a Constitution relating to the same subject should be considered together, and, if it can be done by any reasonable construction, made to harmonize, and every part rendered effective. In the case of State v. Lewis, 26 Utah, -, 72 Pac. 388 (recently decided by this court), Justice Bartch, speaking for the court, tersely and correctly stated the rule as follows: "If possible, the whole instrument-every section, every clause, every word-must be given effect. Where provisions seem to conflict, a construction which will harmonize them, if practicable, will be adopted, and in constructing them it must be presumed that the framers of the Constitution used the words in their ordinary and natural sense. One provisions of the Constitution will not be permitted to defeat another if by any reasonable interpretation both can be given effect."Cooley's Const. Lim. 71-74. When tested by this rule, it becomes apparent to me that the clause of the Constitution which reads, "All civil and criminal business arising in any county must be tried in such county, unless a change of venue be taken in such cases as may be provided by law," means what it says, and says what it means. It must be borne in mind that at the time the constitutional convention adopted the clause referred to and made it a part of the organic law of the state it had under consideration the judicial department of the state, and was dealing with the subject of courts and matters that directly pertained to them. And, the word "business" having been used in connection with the courts, is it not reasonable to presume that the convention intended the term to be used and ap-

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plied in the sense in which it is generally and popularly understood and employed *646 when applied to courts?"It is a general rule that words of a Constitution must be understood in the sense in which they are popularly employed, unless the context or the very nature of the subject indicates otherwise."Black, Int. Laws, 25; Suth. Stat. Const. 247, 248. In this state custom and usage have given the term "civil and criminal business" a clear and well-defined meaning when used in connection with the courts. When the civil or criminal business of a court is spoken of, it is generally, and I might add universally, understood to mean and refer to the business pending before the court, or that which has been transacted and disposed of by the court. When a heinous and diabolical crime has been committed, the act constituting the crime does not come within the category of the term "business," even though the word be given the broadest and most comprehensive meaning of which it is susceptible. Therefore I am forced to the conclusion that the word "business," as it is used in the Constitution, refers to matters only that are pending before the court, and not to criminal acts committed for which the culprit may or may not be arrested, prosecuted, and punished, nor to disputes between individuals over commercial and other transactions that may or may not be brought before the courts.

That the foregoing conclusions harmonize with the intent and purposes of the provision of section 5, art. 8, Const., is evident from the fact that the members of the constitutional convention, in their discussion of this clause of the Constitution at the time it was incorporated into that instrument, made use of the words "business" and "cases" interchangeably. It must be conceded that the word "cases," when used in connection with the courts, refers only to matters pending before them. The term "business" having thus been associated with that of "cases," is it not reasonable to presume that the convention intended it to also include only such matters which have been brought into court, and over which the court has acquired jurisdiction to hear and dispose of? Black, Inter. Laws, 135. An examination of other provisions of the Constitution may shed some light on this much-confused and vexed question.Section 12, art. 1, in so far as material here, provides that "in all criminal prosecutions the accused shall have the right *** to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."This provision of the Constitution fixes the venue in criminal cases in the county or district in which the offense is alleged to have been committed. Should the Legislature at any time, because of the limited population or meager revenue of some counties, or for any other reason, provide for holding the district court at one place for two or more counties in the district (and the clause "until otherwise provided by law," found in section 5, art. 8, Const., implies that the Legislature may so provide), under this provision of the Constitution the accused in some cases might be tried outside of the county, but within the district, in which the offense is alleged to have been committed. This, however, could not be done if we are to follow the construction given section 5, art. 8, in the case of Konold v. Ry. Co., supra, as the foregoing provisions of the Constitution would be in conflict with each other, whereas the construction herein contended for harmonizes those provisions, and gives full force and effect to each. Therefore it is not only allowable, but, in my judgment, it becomes the duty of this court, if it can by any reasonable and practicable construction, to harmonize and render effective the several provisions, even though in so doing it becomes necessary to overrule the case of Konold v. Ry. Co., supra, which case has been fruitful of much confusion and uncertainty in the bringing of actions in this state since the rules therein declared were announced.

The questions and principles involved do not in any way relate to, and would not, in any event, affect, property rights, nor in the least degree disturb business affairs. Therefore the rule of stare decisis that impels courts to be bound by and follow, as a precedent, a decision that has declared an unsound doctrine, because of property rights having been ac-

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quired and the business affairs of a commonwealth adjusted in accordance with the rules promulgated by such decision, does not control where, as in this case, the principles involved are wholly remedial. In the case of Kimball v. Grantsville, 19 Utah. 368, 395, 57 Pac. 1, 8, 45 L. R. A. 628, the court, in discussing this question, say: "Where, however, there has been but a single decision, which is clearly erroneous, and important private or public rights are concerned, *** or where the points involved were decided contrary to the well-established legal principles which ought to have governed, and injustice or hardship would result, *** or where it is manifest that the law has been erroneously decided, and no material property rights or business rules have been established thereunder, the doctrine of stare decisis ought not to be applied, so as to prevent a reconsideration of the former action of the court. Would it not be an open violation of the rule to declare that a decision, however erroneous, however opposed to legislative enactments or constitutional provision, is nevertheless conclusive evidence of the law, and that the courts make the law, as well as define its application?"The court, after discussing the reason for the rule of state decisis, proceeds: "But the rule does not prevent the use of judicial discretion, in a proper case, where the law has been misconceived or violated; nor does it demand that what is not law shall become the law. Ratner it induces the court, if it has digressed from, to return to, well-established principles."***647** Black, in his work on Interpretation of Law (page 403), says: "If a prior decision is clearly erroneous, whether from a mistaken conception of the law or through a misapplication of the law to the facts, and especially if it is injurious or unjust in its operation, while no injurious results would be likely to follow from a reversal of it, it is not only an allowable departure from the rule of stare decisis, but it is the imperative duty of the court to overrule it." Paul v. Davis, 100 Ind. 422;Linn v. Minro, 4 Nev. 462; Rumsey v. N. Y. & N. E. R. R. Co., 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600; Callender's Adm'r v. Keystone Mut. Life Ins. Co., 23 Pa. 471; 1 Kent's Comm. 476, 477. There being, as above stated, no principle involved here that will or can disturb business rules and interests, or in any way affect property rights, as the question under consideration relates to practice, and not to substantive law, I join with the Chief Justice in overruling the case of Konold v. Ry. Co., supra, and all subsequent decisions of this court wherein they are in conflict or inconsistent with the conclusions reached in this case.

It therefore necessarily follows that the question as to where civil actions may be commenced must be determined by reference to the provisions of the statute on this subject, and, in the absence of statutory regulation, resort must be had to the rules of common law. As the statute of this state provides that a plaintiff seeking a divorce must bring his action in the county where he resides, the district court of Millard county had jurisdiction of the subject-matter of the action, and the defendant, having answered, without objection, waived jurisdiction as to his person.

For the reasons herein stated, I concur in the opinion of the Chief Justice reversing the judgment, with directions to the trial court to reinstate the case and proceed to render a decree on the merits.

BARTCH, J. (dissenting as to the constitutional construction of the majority of the court in three cases, but concurring in the judgment in each of two of them, and favoring a rehearing in the other).

After careful examination of the opinions of my Brethren, which are now before me as the final expression of their views respecting the questions involved herein, I find myself utterly unable to agree with them in their interpretation of the Constitution. This is also true as to the case of Fields v. The Daisy Gold Mining Co. et al., 26 Utah, -, 73 Pac. 521, respecting the constitutional construction contained in the opinion which is now before me for my consideration, and likewise as to White v. Rio Grande Western R. Co., 25 Utah, 346, 71 Pac. 593, which case is still before us on petition for rehearing, and in which I concurred in the result, and where one of the district judges, who sat in the case

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in the appellate court, filed a concurring opinion. Since the same provisions of the Constitution were construed in each of these cases the views herein expressed will, in the main, be applicable to each case. The precise question is whether the legal business arising in any county must be tried in the county where it arises.

It may be observed at the outset that a perusal of the various opinions shows that neither one of my Brethren agrees with the other, nor is satisfied with the views of the other, as to what is the meaning or the proper interpretation of the important provisions of the organic law with which they are dealing. They appear simply to unite in one thing, and that is, in their hostility to the interpretation which a unanimous court placed upon the same constitutional provisions in the case of Konold v. Rio Grande Wes. Ry. Co., 16 Utah, 151, 51 Pac. 256. That case was decided soon after the adoption of the Constitution, and was thereafter followed by a long line of cases, which with it established the rule of practice that has prevailed in this state ever since. The majority have not only united in hostility to the interpretation of a unanimous court, but in hostility to the evident intention, as I shall attempt to show, of the framers of the Constitution, and of the people-the sovereignty-that adopted it. The gravity of the situation, and what I conceive to be for the best interests of the several counties within this commonwealth and of individuals, impel me to express my views in opposition to the interpretation which is now being placed upon our Constitution. The judicial mind has always approached the construction of the organic law of a section of country with the gravest considerations for the welfare of the subjects and the stability of the government. Especially should such interpretation receive the closest scrutiny when, as in this instance, it is proposed to declare meaningless a plain and unambiguous term employed in the Constitution, and by substitution to overturn the judicially as well as the constitutionally declared policy of the state, respecting the subject affected. The exercise of great caution in such case is due from the interpreters of the law not only as a protection to the best interests of the sovereignty itself, but also out of respect to the wisdom, the integrity, the honor, and the patriotism of its agent who framed the instrument.

When the people within the territorial limits of this state conceived the idea and determined to organize a constitutional government, the several communities-as is but just to assume-naturally selected from among the foremost of their number the individuals who afterwards assembled in convention and framed the instrument which was to constitute their rule of action. Reference to the roll of the members of that convention discloses many names which are entitled to all the consideration which intelligence*648 and experience, honor and integrity, patriotism and office can bestow. Among them were men of thought, lawyers of ripe experience, writers skilled in the use of the pen and of words. We must assume, because of that decent respect due to their wisdom, their sagacity, and their loyalty to the high and sacred trust reposed in them, that the instrument which was drafted and designed to promote the welfare and happiness of the people of the state received their utmost careful deliberation before it received their final approval and decision. The results of their action, embodying the general measures of utility and the rules of action and practice which they thus adopted and declared for the new government, was the product of the combined thought and skill of that convention, and by adoption became, and is now, the will of the sovereignty. Every department of the state is equally bound to respect it as authority, and the judiciary, whose province it is to interpret it, must, when performing that function, because of the very nature of the instrument and of its paramount character, presume that every word, every phrase, every sentence contained in it received that careful scrutiny from the framers which its importance demanded, and was employed deliberately and designedly. The Constitution thus is the embodiment of the judgment of the representatives who framed it and of the body politic. No tribunal can or ought approach a decision affecting that instrument without

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entertaining a feeling of profound respect for a judgment supported by such authority; and while a judge, in the examination and decision of a question under it, is not bound to bow to that judgment implicitly, but must exercise the understanding with which Providence has endowed him, with the independence expected of him by the public, and demanded by the best interests of the government, still he has no right to substitute his own notion of what the phraseology of a particular provision should be for that of the sovereign power, or to assume power to declare meaningless a word, or phrase, or sentence when it does not appear from the context that the same had been inserted into the instrument through mistake or inadvertence of the scrivener, and where there is no ambiguity, repugnance, or conflict.

The provision of the Constitution because of which this controversy arose is found in section 5, art. 8, and the section reads: "The state shall be divided into seven judicial districts, for each of which, at least one, and not exceeding three judges, shall be chosen by the qualified electors thereof. The term of office of the district judges shall be four years. Except that the district judges elected at the first election shall serve until the first Monday in January, A. D. 1901, and until their successors shall have qualified. Until otherwise provided by law, a district court at the county seat of each county shall be held at least four times a year. All civil and criminal business arising in any county, must be tried in such county, unless a change of venue be taken, in such cases as may be provided by law. Each judge of a district court shall be at least twenty-five years of age, a member of the bar, learned in the law, a resident of the territory or state of Utah three years next preceding his election, and shall reside in the district for which he shall be elected. Any district judge may hold a district court in any county at the request of the judge of the district, and upon a request of the Governor, it shall be his duty to do so. Any cause in the district court may be tried by a judge pro tempore, who must be a member of the bar, sworn to try the cause, and agreed upon by the parties, or their attorneys of record."The part of this section principally under consideration, reads: "All civil and criminal business arising in any county, must be tried in such county, unless a change of venue be taken, in such cases as may be provided by law," and was incorporated into the section by amendment. 2 Proc. Const. Conv. p. 1503. Before and at the time of the framing of the Constitution the judicial power of the territory, which was to become the new state, was "vested in a supreme court, district courts, probate courts, and in justices of the peace" (1 Comp. Laws Utah 1888, p. 44, § 9), and the legal business was then transacted according to the practice at common law, except where otherwise provided by statute. The territory, in respect to the district courts, was divided into four judicial districts, and causes were frequently transferred from one district to another for trial. Probate courts were held in each county, and had exclusive jurisdiction in matters relating to the estates of deceased persons and of guardianship, and in cases of insane persons. Evidently that system of jurisprudence was unsatisfactory to the framers of the Constitution, for in that instrument they provided that the judicial power of the state should be "vested in a Senate sitting as a court of impeachment, in a supreme court, in district courts, in justices of the peace, and such other courts inferior to the supreme court as may be established by law."Section 1, art. 8, Const. It will be noticed that it was a radical departure from the judicial system then in vogue, and we cannot assume that it was made without that deliberation which the importance of the subject demanded. That departure at once abolished all the probate courts, held hitherto in every county, and conferred upon the district courts the jurisdiction which, up to that time, had been exercised by the probate courts. It will also be noticed that in section 5, above quoted, provision was made for seven districts instead of four, as under the territory, and that, until otherwise provided by law, a district court is required to be held at the county seat in every county of the state at least four times a year, instead of ***649** in each district as formerly. It seems quite clear, from an examination

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of the several sections relating to the judicial department as contained in article 8, that a complete system of judicial procedure, different from that which existed in the territory, was provided for every county in the state. Indeed, that article, as originally drafted, independently of the amendment to section 5, by implication required that all legal business arising in any county must be tried or disposed of in the county where it arises, and such seems to have been the opinion expressed and acquiesced in by the members of the constitutional convention, as appears by reference to the proceedings. 2 Proc. Const. Conv. p. 1503. But how section 5, as amended, and as it finally became a part of the Constitution, can be construed so as to permit the legal business of any county to be tried in some other county than where the business arose, except by change of venue in such cases as may be provided by law, without doing violence to the familiar rules of constitutional construction and the manifest intention of the convention that framed and of the people who adopted the instrument, is utterly beyond my comprehension. And it would seem, from the diversified opinions, that the judges who have precipitated so grave a question, once settled and understood, again into the vortex of uncertainty, are themselves not altogether free from doubt as to their conception of what the language which they have construed means, having completely failed to convince each other as to what the correct interpretation is.

Mr. Chief Justice Baskin, however, in White v. Rio Grande West. Ry. Co., supra, says: "Although 'business' is a word of extensive signification under any legal or general definition of the term, it is meaningless in the connection in which it is used in the Constitution, and the clause in which it occurs can be made intelligible only by substituting in its place the words 'causes of action'.*** It is apparent from the context of the clause of the Constitution before quoted that it was the intention of the framers of the Constitution to require criminal and civil causes of action arising in any county to be tried in such county, unless the venue should be changed; and, as business is not one of the elements of either an action, or of a cause of action, or a right of action, especially in respect to criminal actions or actions arising from torts, it is equally apparent that word was erroneously used instead of the term 'causes of action'. Therefore, in construing the clause under consideration, the latter words must be substituted for the former. The clause, after the substitution, is still so indefinite and general as to render it necessary in each case in which the venue is made an issue to resort to the common law in order to determine whether the venue has been properly laid."

In Fields v. Daisy Gold Min. Co., supra, he says: "In order to render the provision of the Constitution in question intelligible, the term 'causes of action', as held in White v. Rio Grande Wes. Ry., supra, must, in construing said section, be substituted for the word 'business'. When so substituted the provision in question is simply a declaration of the common law on the subject of venue."The same construction prevails in this case. Thus my learned Brother deliberately strikes out of the organic law the word "business," the meaning of which is well understood in common as well as legal parlance; substitutes in lieu thereof the words "causes of action"; and characterizes that word of plain and comprehensive signification as meaningless in the connection in which it is used. He says the clause in which it occurs can only be made intelligible by substitution, and that, as the word is not an element of an action, or cause of action, or right of action, it is apparent that it was erroneously used instead of "causes of action." Is it possible that the members of the constitutional convention were guilty of such a reckless use of words as is thus indicated? Is it possible that they performed the high and sacred functions, intrusted to them by a confiding people, with such stupidity? Can it be that in attempting to change a judicial system, as we have seen, because it was unsatisfactory, in a vital provision of the Constitution they used a meaningless word, and thereby perpetuated the very system in practice which they sought to change? That they used the

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word deliberately is clear from a perusal of the record of their proceedings, to which reference has hereinbefore been made. If it was deliberately employed, were, then, those men, among them lawyers of much experience, writers of acknowledged ability skilled in the use of language, nevertheless guilty of using a familiar word, in an important provision of the supreme law of the state, in such a way as to render it meaningless, and thwart the very object which they were aiming to accomplish, which was the changing of the then existing policy respecting the proceedings of courts? Let us see, then, whether it is "equally clear" from the context that the word "business" was used erroneously for the words "causes of action." Making the substitution as outlined by the learned Chief Justice, the provision in question reads: "All civil and criminal causes of action arising in any county must be tried in such county, unless a change of venue be taken, in such cases as may be provided by law."My Brother says, in the White Case, supra, that "the constituent elements of a legal cause of action consist of a wrongful act by the defendant, or the omission by him of a legal duty which he owes to the plaintiff, and of either the material damage to the plaintiff caused thereby, or of the damage which the law implies therefrom."In Fields v. Daisy Gold Min. Co., supra, he quotes approvingly***650** from the opinion of Mr. Justice Cooley in Post v. Campau, 42 Mich. 96, 3 N. W. 275, as follows: "The elements of a cause of action are, first, a breach of duty owing by one person to another; and, second, a damage resulting to the other from the breach."It will thus be observed that, according to his own conception of the meaning of the term "causes of action," it embraces only that part of the legal business, to be tried by a court, which arises out of a wrong done by the defendant, either by commission or omission, and the damage caused thereby, or, in other words, out of a breach of duty by one person and the damage resulting therefrom to another. Here, then, according to his own construction and definition of the term, is a clear limitation to business wherein there is a party plaintiff and a party defendant. What, then, may I ask, is to be done with a case or business which does not arise because of a breach of duty owing by one resulting in damage to another? Where is that class of business to be tried by the district courts?

As we have seen, the framers of the Constitution, in their wisdom, saw fit to abolish the probate courts, and confer upon the district courts jurisdiction of the business which those courts, in the territorial days, tried or transacted. It can hardly be denied that the great mass of cases tried by those probate courts were not such as are embraced or included within the technical term "causes of action." For instance, can it be said that a petition for letters of administration of the estate of a deceased person, or for letters of guardianship, or an application for the sale of real estate or personal property, or for the allowance of an administrator's or executor's account, or a petition in lunacy, especially in the absence of any contest, is the result of a cause of action, and included in the provision of the Constitution under consideration, as his honor construes it? Surely no case in any of these classes arises because of a breach of duty owing by one person and damage resulting to another from the breach, and yet all such cases, with other special matters and proceedings, not constituting actions or an action, are within the jurisdiction of, and must, under the Constitution, be tried by, the district courts. Now, I apprehend that no one will be willing to undertake to maintain that causes of action and their trials do not constitute business in court, nor that the trial of probate and special matters do not likewise constitute business in court; and if it be the case-as it would seem all must admit upon reflection-that causes of action and probate and other special proceedings all alike constitute business, then was not the use of the word "business," the comprehensive, general term, in the Constitution, vastly more fortunate than would have been the use of the words "causes of action," the restricted technical term? Was it not wisdom that, upon the framers of the Constitution having abolished the probate courts, and given enlarged general jurisdiction to the district courts, dictated the use of the word "business" as the appro-

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priate term to carry out their designs? Is it not clear that they employed that word understandingly, deliberately, and from choice? How can it be said, when the purposes and objects, as they appear from the instrument itself, are considered, that the word was used erroneously? As we have seen, the undoubted purpose of the framers of the Constitution was to adopt a judicial policy other than had hitherto prevailed in the territory, and different, in the rules of practice, respecting venue, from that existing at common law; and, to make the change from the common law in these particulars certain, they inserted into the article on the judicial department the provision in question by amendment; which provision is peculiar to our Constitution, not, so far as I have ever been able to ascertain, being found in any other. But, notwithstanding all this, my learned Brother says the rules of practice relating to venue are still the same as at common law and under other Constitutions. At all events, such is the result of his construction placed upon the provision in question. If this is true, then it convicts the members of the constitutional convention of doing an absurd thing-of placing into the organic law a senseless and useless provision. But by what rule of construction can such a result be justified as to a constitutional provision which is neither ambiguous, nor repugnant to, nor in conflict with any other provision in the instrument, especially when another construction gives the clause effect?

It is a cardinal rule of constitutional construction that every word, phrase, and sentence-the whole instrument-must, if possible, be given effect, and if, from the imperfection of human language, there are grave doubts as to the meaning intended, or as to the extent of any power given, then the well-settled rule is that the objects and purposes which induced the grant of the power, especially if they can be ascertained from the instrument itself, should have great influence in the interpretation. "We know of no rule," says Mr. Chief Justice Marshall, "for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred." Gibbons v. Ogden, 9 Wheat. 189, 6 L. Ed. 23.

Again, in this case my Brother, referring to the word "business," says: "That term was only used in that sense [sense of "causes of action"] is evidence from the fact that contested causes of action, and not the business transacted by courts or individuals, are alone issuable, and the subject of trials in the civil courts," and defines the word "trial" as "the examination before a competent tribunal of the facts or law put in issue ***651** in a cause for the purpose of determining such issue," and then says: "It follows that the term 'business,' when viewed in connection with the context of the clause of the Constitution in question, cannot be rationally construed to apply to any case which does not involve a trial, and is not subject to any change of venue. A matter pending before a court in which there are no contesting parties does not involve a trial in any sense of that word, and a change of venue in such a matter would indeed be a novelty."To me the law, as thus stated by my learned Brother, is much more of a novelty than would be a change of venue as to matters not issuable, but which are subjects to be investigated and disposed of by the court. Indeed, such law seems to be an anomaly in constitutional construction. Of course, no one pretends that the word, "business," as used in the provision under consideration, was intended by the framers of the Constitution to embrace the ordinary private business of individuals. When those framers inserted that clause into the Constitution they were dealing with courts, and matters to be disposed of by them, and not with private business matters, with which the courts have nothing to do; and when they used the term "business" they used it with reference to legal matters to be transacted in court, whether issuable or not. This seems too clear from the context, as well as from reason, for argument. The clause in question makes no distinction whatever between matters issuable and matters not issuable, and the word "trial," which my Brother defines, is not used in the provision at all. The word "tried"-the past tense of "try"-is used, and Webster

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defines "try": "To examine or investigate judicially; to examine by witnesses or other judicial evidence and the principles of law."Such is the ordinary legal meaning of the word "try," and this is the sense in which the word "tried" was employed. The word "business," therefore, was clearly intended to include all matters which were to be examined or investigated judicially by the courts, and not simply issuable matters or causes of action. Does not, then, the Chief Justice, when he resorts to the word "trial," which nowhere occurs in the provision, and by a very restricted technical definition thereof limits the signification of the word "business," himself create a novelty in constitutional construction? Surely, I know of no rule of construction which has been hitherto announced that permits this. Is it not manifest that my Brother's conclusion, that the term "business" cannot be rationally construed to apply to any case which does not involve a trial and is not subject to a change of venue, and that a matter in which there are no contesting parties is not subject to a change of venue, is wholly unwarranted under the language of the Constitution? Courts are constantly called upon to try matters which are not issuable in the technical sense, and in which there are no contesting parties. Such are most matters of probate. For example, when a petition for letters of administration is filed, the court investigates the case, examines the evidence of witnesses and other legal evidence, applies the principles of law; in other words, tries and decides the case, although there be no contesting parties whatever. Can it be said that this is not "business," in the ordinary meaning of the term-the sense in which it was employed in the Constitution? Suppose in such case the judge in whose court the petition is filed is disqualified because of his interest in the estate, or for other cause, is it possible that no change of venue can be granted, or that a change of venue would be a novelty? Undoubtedly the Legislature may provide for, and courts may grant, a change of venue as to cases not amounting to causes of action, where there is no issue in the technical sense of that term, and where there are no contesting parties. Evidently many such cases arise in probate proceedings, all of which are included within the term "business" and the constitutional provision as to change of venue, but not within the term "causes of action." In my judgment, therefore, no judge is justified in substituting the restricted technical term "causes of action" for the comprehensive, general word "business." I regard it clear from the authorities, as also upon principle, that substitution, in the construction of a constitutional provision, is never justified, unless a mistake in the use of a word is clearly manifest from the context. In this case a mistake is not only not manifest, but it is plainly apparent from the context of the provision in which the word occurs, and from the whole article, of which the provision forms a part, that the word was used designedly, and that it is the most fortunate term to give expression to and to effectuate the purposes and objects of those who employed it. The fallacy of my Brother's construction lies in the fact that by substitution he strikes out a general term, applicable to many subjects, and inserts one of its significations. Business undoubtedly means causes of action, but it means something more. It means as well cases and matters to be tried in the courts, and which, as we have seen, are not included within the term "causes of action." I have never before seen a case where such a construction of a constitutional provision was, under such circumstances, attempted, and I apprehend the history of jurisprudence will be searched in vain for a parallel.

The Konold Case, supra, and several other Utah cases, are cited, but in none of them was there a substitution made, and in the Konold Case this court by unanimous decision said: "The word 'business' was used as a general term to include causes of action and all other business which might arise in any county."This was in reference to ***652** legal business to be transacted in court. No judge of this court, prior to the White Case, supra, has ever attempted to substitute, in an opinion of the court, "causes of action" for the word "business." The Chief Justice says: "When so substituted, the provision in question is simply a declaration of the common law on the subject of venue."He thus impliedly

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admits that, in the absence of such substitution, the provision is not a declaration of the common law on the subject of venue. But what right has a court or judge to change, by substitution, a provision of a Constitution that is not a declaration of the common law into one that is? And if the provision, as thus construed, is simply declaratory of the common law, then of what use is it in the Constitution? Why not strike out the entire provision as useless and meaningless, instead of substituting one term for another, which renders it so? The common law would prevail without any provision declaratory of it. This court has frequently held that the common law is in force in this state where not superseded by constitutional or statutory provision. It was so under the territory, when the Constitution was being drafted, and the men who drafted it must be presumed to have been aware of such fact. These absurd results show how dangerous it is for a court to depart from the language expressed in a constitution, how dangerous it is for a court to substitute its notion of what a provision ought to be for what it really is. If a plain provision of the organic law can be thus altered by judicial construction, what guaranty is there that other provisions may not likewise be changed, until the whole instrument becomes mutilated, and the will of the sovereignty becomes the mere will of the judges? Under this innovation upon the familiar rules of constitutional construction, it seems to me the door is wide open to declare any provision of the Constitution to be just what the judges think it ought to be, not what the instrument itself shows it to be.

Let us now examine Mr. Justice McCarty's interpretation. He says the provision in question "means what it says and says what it means."Now, if my Brother had stopped right here, I would have taken no exception to his construction; but he goes on, and says: "I am forced to the conclusion that the word 'business', as it is used in the Constitution, refers to matters only that are pending before the court."As will be noticed, this construction, restricts the meaning of the word "business" to matters only that are "pending before the court." The Constitution says "business arising in any county," and so my Brother substitutes by implication the phrase "pending before the court" for the word "arising," and thus the provision as reconstructed by him would read: "All civil and criminal business pending before the court in any county must be tried in such county," etc. So that, after all, the provision, as contained in the Constitution, does not say "just what it means," for it says "business arising," while his honor says it means only "business pending before the court." According to this construction, the word "business" does not include causes of action accrued, nor probate and other legal matters existing in the county, but which have not yet been actually brought into the court in the county; and the question is, where must they be brought and tried? Does such a construction, leading to such results, do justice to the wisdom and patriotism of the able men who framed our Constitution? Does it not establish a dangerous precedent to look so lightly upon the language employed in the organic law of our state?

In support of his interpretation the learned justice quotes the familiar rule of constitutional construction that, "if possible, the whole instrument-every section, every clause, every word-must be given effect"; but does he give effect to the word "arising"? Is it not clear that he violates the very rule which he claims to invoke? Without pursuing this construction further-which, in my judgment, is clearly erroneous -I will simply say that the observations made herein as to the interpretation of the Chief Justice apply equally to this. For the purposes of comparison, however, it may be well here to restate the products of substitution express and implied. They are as follows: (1) "All civil and criminal causes of action arising in any county must be tried in such county," etc. (2) "All civil and criminal business pending before the court in any county must be tried in such county," etc. Such are the substitutes now produced by judicial construction for what seems to me to be a plain and unambiguous provision of the Constitution reading: "All civil and criminal business arising in any county must be

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tried in such county," etc., and which has been upheld, as it stands, by this court, in numerous cases.

It will be noticed that my Brethren are not very harmonious as to just what the substitute should be. As to which one is finally to stand as the rule of action in this state, neither one of their opinions discloses; and, as both are so utterly at variance with my understanding of the rules of construction, I am unable to concur with either. I cannot give my judicial consent to any construction of the Constitution which, in my judgment, is not only violative of the familiar rules of constitutional construction, and of the manifest intention of the framers of the instrument and will of the people who adopted it, but also revolutionary, in that it overturns the settled policy of the common wealth as inaugurated by the organic law. While it is the province of judges to construe the Constitution, still they are equally bound with all other officers and subjects of the government to observe and obey its ***653** mandates, and not for light reasons to declare its terms meaningless, nor to so construe it as to render useless a single word or sentence where another reasonable construction will give it effect. Though judges of a court of last resort, we are yet servants, yet subjects bound absolutely by the declared will of the sovereignty.

I also disagree with my Brethren respecting venue and jurisdiction under the same provision of the Constitution. In the White Case, supra, the Chief Justice says: "The clause of the Constitution requiring actions arising in any county to be tried in such county does not affect the general jurisdiction of the district courts. Therefore the court below had jurisdiction over the subject-matter of the action, and a defendant can waive his right, under the Constitution, to have an action against him tried in the county where the cause of action arose."This evidently results from his construction rendering the provision in question simply declaratory of the common law, as was hereinbefore shown. The provision, as has been observed, being construed away as meaningless and useless, he logically and naturally applies the rule of the common law as to venue and jurisdiction. These conclusions of the Chief Justice have been followed in the Fields Case and in this one, in both of which cases Mr. Justice McCARTY concurs on this point. Just how he can do this, being unwilling, as I have already shown, to brush aside the word "business," and hold the constitutional provision meaningless and useless, I am unable to comprehend. His opinion does not seem to make this clear, at least not to my mind. Surely, if that provision and the one found in article 1, § 26, Const., have any force, the place of bringing a suit and of trial cannot be waived in this state. Now, let us look at these provisions in the light of the elementary rule stated by him that "all parts of a constitution relating to the same subject should be considered together, and, if it can be done by reasonable construction, made to harmonize, and every part rendered effective."Again stating the provision in section 5, art. 8, it is: "All civil and criminal business arising in any county must be tried in such county, unless a change of venue be taken in such cases as may be provided by law."The one in section 26, art. 1, reads: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."As will be noticed, this last provision clearly relates to the one in section 5, because that is not declared to be otherwise than mandatory and prohibitory, and therefore relates to the same subject, so that, according to the rule of construction relied upon by Mr. Justice McCARTY, the two provisions must be considered together, and both be given effect, if it can be done. That they can and ought to be considered together and be given effect is too apparent for argument, for neither conflicts with the other, and both are expressive of the intent of the framers of the Constitution. The provision in section 5, however, standing alone, is in form mandatory. It is true the word "must" is sometimes construed as "may"-permissive-but this only when the context requires it. Here the context plainly shows the provision to be mandatory. It is a command, and hence the word "must" cannot be construed as permissive, but must be given the signification which

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it imports. That the intention was to make this provision in effect mandatory is also clear from the fact that the words "civil" and "criminal" are employed in the same connection, civil business and criminal business being all placed in the same catagory. Now, from time out of mind, when a person was indicted for murder, for instance, a criminal offense, the prosecution had to be instituted in the county or jurisdiction where the offense was committed, and tried there, unless a change of venue was granted according to law. In such case the place of trial was jurisdictional. This was so at common law, and undoubtedly was known to the framers of the Constitution, many of whom were experienced lawyers, as appears from the list of names, familiar with the criminal law and rules of criminal procedure. They were also aware that at common law, as a general rule, in civil proceedings, the defendant might waive the place of trial. When, therefore, they placed civil and criminal business in the same category, is it not clear that their intention was to require civil as well as criminal cases to be commenced and tried in the county where the business arose? The context thus plainly indicates the intention of the framers of the Constitution and the mandatory character of the provision. That all cases must be commenced, in the first instance, in such county, is also clear from the clause respecting the change of venue; for it will doubtless be conceded that no change of venue can be taken in any case until suit has been brought. Suppose, however, there should be some doubt of the mandatory and jurisdictional character of this provision, then by construing this provision and the one of section 26 together, under the rule stated, it would certainly seem that all such doubt would be removed, for by considering both provisions together, and giving each effect, they would be the same as if the language of the one in section 5 were: "All civil and criminal business arising in any county must be tried in such county, unless a change of venue be taken in such cases as may be provided by law, and this provision is mandatory and prohibitory."The effect of this language would manifestly be that all civil and criminal business-that is, causes of action, probate matters, and special proceedings not amounting to a cause of action-which might arise in any county would have to be tried in the county where it arose, and could be tried in no other county or jurisdiction, except in cases where a change ***654** of venue was provided by law. Surely my Brethren will not undertake to maintain that the sovereign power of the state cannot confer upon district courts general jurisdiction of subject-matter, and at the same time confine such jurisdiction within certain prescribed territorial limits. If it is within the power of the sovereignty to do this-which, it seems, all must admit-then, indeed, it is difficult to perceive how it could be done in much clearer and plainer language than that employed in the two provisions here being considered, or how the intention to make a provision mandatory could be made more apparent from the context. That the framers of the Constitution intended to make the trial of all legal business in the county where it arises, except in cases of a change of venue as might be provided by law, mandatory, and thus confine the jurisdiction of the district courts within county limits, and place civil business on the same plane as criminal as to venue, also appears from the record of their proceedings (2 Proc. Const. Conv. 1503), where it will be seen that, when the provision in section 5 was proposed as an amendment, it contained after the word "law" the words "or upon consent of the parties, in writing, in civil cases."These words were objected to by an able lawyer upon the ground that they might interfere with the "general proposition for a change of venue in civil cases, whether the parties stipulated or not."The objection prevailed, and the words were stricken out. When the amendment was proposed, the mover thereof, also a lawyer of ability, referring to the article of which the amendment forms a part, said: "I think the article by implication now would require that all the business should be transacted in the county where it arises. My only purpose was to make it certain that all the business should be tried in the county where it arises, and I want to add this with the qualification there of cases where a change of venue might be taken as provided by law. There may be some

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criminal case where all the jurors in the county are prejudiced, and it would be necessary to remove it into another county; and then in civil cases, if parties want to stipulate it into another county, they can do so."It will thus be observed that the purposes of the mover of the amendment were clearly stated to the members of the convention, and acquiesced in, so far as appears from the record of proceedings, without a single dissenting voice, except as to the purpose of permitting, by stipulation in civil cases, a change in the place of trial, and, the advisability of such stipulation being questioned, that part of the amendment relating to it was stricken out, and thereupon the amendment in the shape of the provision in question herein was, as appears, unanimously adopted. It will further be observed that the mover of the amendment said his purpose was to make it certain that all the business should be tried in the county, etc., and "all the business" manifestly includes the bringing of suits as well as the trials of them, for clearly the bringing of suits is business, as much so as any other part of legal proceedings. Likewise, when the constitutional provision says "all civil and criminal business" it means the bringing of suits as well as other legal business. Is it not clear, beyond all reasonable controversy, from these proceedings, and from the context of section 5, that the framers of the Constitution deliberately attempted and intended to compel all the legal business arising in any county to be commenced and tried in such county, except in cases of change of venue as might be provided by law; and, while conferring general jurisdiction over subject-matter upon the district courts, to confine such jurisdiction in each county to the territorial limits of the county, in the absence of such change of venue? If this be true-and it certainly seems to be verified by their language-then has it come to this: that, no matter what determination on the part of the framers of the Constitution, and of the people who adopted the instrument, no matter what language is employed, no matter what purposes and objects actuated and controlled the framing of the instrument, when a district court has once been given general jurisdiction over subject-matter, such jurisdiction cannot be confined to the limits of the county in which such court is sitting, not even by the sovereign power of the state? I must confess my inability to find any case either in England or America where ever before any court has so held, or has attempted to introduce such an innovation upon familiar rules of constitutional construction.

Undoubtedly a Constitution may prescribe the limits within which such a court may act, and restrict its power to act to cases arising within such limits, although the same class of cases may also arise in other parts of the state, and in such event it has no jurisdiction to try such cases arising without its territorial limits, although it has general jurisdiction of the same kind of subjects-that is, of the subject-matter-within its prescribed limits. "A court," says Mr. Bishop, "sitting outside of its local limits, is without authority."Bish. New Crim. Proc. § 317. It is equally true that under our Constitution a court is without authority as to cases or business arising outside its local limits, in the absence of an authorized change of venue."The jurisdiction of a court means the power conferred upon it by the Constitution or statute to act within the prescribed limits, not exceeding the boundaries of the government creating it, over property within the state, citizens of the state, or persons coming within its jurisdiction, in relation to a subject-matter within the scope of the powers conferred upon it, to hear and determine, in the manner and at the place appointed by law, the issues between the parties, or any matter so lawfully ***655** brought before it."Brown on Jurisdiction, § 13; Bishop's New Crim. Proc. § 893; Ex Parte Parker, 6 S. C. 472; People v. O'Neil, 47 Cal. 109.

Mr. Justice McCARTY says the construction given in the Konold Case, supra-which is the same as I now contend for-renders the provision here under consideration repugnant to the provision in section 12, art. 1, Const., that in criminal prosecutions the accused shall have the right "to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been com-

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mitted."I am unable to perceive any repugnance whatever between the two provisions under the construction given in that case, which in no manner changes the language of the instrument. The provision in section 5, it is true, does not mention district, but it provides for the granting of a change of venue by the Legislature, and when such change is granted as to any case such case may be tried in the district-that is, in some other county in the district-which would be in strict compliance with section 12, because it would give the defendant the right to have it tried in the county or district. The accused has no right to demand that his case be tried in the district outside the county where it arose, but simply that it be tried in such county or district. Construing the two provisions together as parts of the Constitution referring to the same subject, under the rule stated by his honor, they mean that the case must be tried in the county where the business arose, except when a change of venue is granted, and that then the accused has a right to demand that it be tried in the district. This gives both provisions effect, and is in harmony with the plain intent of the makers of the Constitution.

We come now to the question whether, under our Constitution, the place of trial can be waived or changed by consent of the parties or otherwise, except by change of venue as may be provided by law. This court, in the Konold Case, supra, and in numerous other cases, by unanimous opinion decided this question in the negative, upon the ground that the place of trial was, under section 5, jurisdictional, and upheld the provision in controversy as it appears in that section without any change in its language. My Brethren now, however, say that a defendant may waive his right under the Constitution to have the case tried in the county where it arose by his failure to object at the time of the trial, or by his consent to have it tried in some other county. Having gotten rid of the effect of the constitutional provision by construction, as we have seen, they apply the common-law rules. It is true some constitutional rights of a defendant in an action may be waived by him. This is so as to rights which are merely personal to him, mere personal privileges; but he cannot, by consent or otherwise, waive jurisdictional rights in which the public have an interest. Nor can he by consent confer jurisdiction upon the court to try a case where otherwise it would have none. Jurisdiction comes only from the law. Consent of litigants cannot confer it. The Constitution may confer it or restrict it, and if it does either, the courts and the Legislature are bound thereby, and the defendant may at any stage of a proceeding raise the point that the court is without jurisdiction.

In State v. Mortensen (decided at the present term) 26 Utah,-, 73 Pac. 562, where the question of waiver was considered, this court said: "In general, the rights guarantied to every accused person in a criminal action by the Constitution may be divided into two classes-those in which the public have an interest, as well as the individual, and which are jurisdictional as affecting the power of the court to try the cause; and those in the nature of privileges which are merely personal to the accused, for his benefit, and do not affect the general public."We there held that of such rights those coming within the first class could not be waived, and that those falling within the second class could, in the absence of constitutional or statutory restraint, be waived. We further held that the defendant might, at any stage of a proceeding, raise the question that the court had no jurisdiction. Now suppose it were admitted that the provisions of sections 5 and 12 were not, in express terms, mandatory, could then the litigants waive the place of trial? Whether they could or not would clearly depend upon the objects and purposes of the provisions respecting public interests and benefit in having the business arising in any county tried in such county. Before the adoption of the Constitution, as is well known, there were but four judicial districts, each comprising many counties, and court, except in a few instances, was held in but one county in a district. The public and litigants were generally compelled to travel long distances to transact legal business in the district courts, although the probate business was then

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transacted in each county. Notwithstanding the fact that district court was generally held in but one county in a district, cases were frequently transferred from one district to another under the same system of procedure which my Brethren are now again restoring, in the teeth of the Constitution, thereby increasing the expense of litigants and the inconvenience to the public. The plaintiff was not even confined to the district where the business arose, but might bring his suit in any district and have it tried there, unless a change of venue was demanded in the trial court. This caused the business to drift to the centers of population, vastly to the disadvantage of the more remote counties. Referring to this state of affairs, this court, in *656 the Konold Case, said: "That the system was unsatisfactory to the populace was notorious, and is evidenced by the radical changes made by the Constitution, not only respecting the place of trial and change of venue, but also the places for the holding of terms of court, which terms, under the state government, are to be held in every county. Would it be reasonable, in view of these facts and the circumstances which existed when the Constitution was framed, to hold that the framers of that instrument, especially those from the counties whose people were subject to the extra burdens and hardships, inserted into that instrument the provision of section 5, above quoted, for no other purpose than to continue in force the very practice and system which had been notoriously condemned? This, too, in face of the fact that the Constitution provides for the holding of terms of court in every county of the state, and thus removes the excuse for the existence of the former practice. Evidently the intention was to prevent the Legislature from continuing in existence what had been denounced as a wrong, and possibly fears were entertained that under the practice in vogue the business of the courts would gravitate too much to the centers of population, in derogation of the more remote counties."How can it be said, in the face of such facts and circumstances, that the public has no interest in the place of trial, especially since the district courts now have also jurisdiction of probate matters? Have not the people-the public-of every county in this commonwealth an interest in having their legal business transacted in the county where it arises? Reading the Constitution thus, in the light of history, it would seem absolutely apparent that the framers of that instrument, and the people in adopting it, must have regarded the public as being interested in the place of trial of legal business. The public having such interest, the place of trial falls within the first class of constitutional rights above referred to, is jurisdictional, and cannot be waived. A fortiori is this true when the mandatory character of the provisions of the Constitution are considered. Evidently the provisions relating to the place of trial were made mandatory so that each county should have the burdens of its own litigation arising within its territorial limits, and also reap the benefits growing out of it. The system thus inaugurated-the displacement of the old and adoption of the new-thereupon became a public policy of the state, and the public generally are interested in it and in maintaining it.

It is apparent, therefore, that the district courts in this state have no jurisdiction of the subject-matter in cases arising outside of their territorial limits, and have no jurisdiction to try such cases so arising, except where changes of venue is provided by law; and the law is well settled that neither the agreement of parties, nor their consent, nor their failure to object can confer jurisdiction upon a court which otherwise would have none. The state itself confers the jurisdiction. "It is a maxim," says Judge Cooley, "in the law, that consent can never confer jurisdiction; by which is meant that the consent of parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and upon considerations of general public policy defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties."Cooley, Const. Lim. 491. In Brown on Jurisdiction, § 10, it is said: "The court is the creature of the law, and upon considerations of general public policy the law defines, limits, extends, or restricts its jurisdiction, and the acts of the parties can

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neither enlarge nor restrict its powers by consent."Again, in section 12, the author says: "The state bestows the jurisdiction. Jurisdiction, being the power to judicially administer the law, must emanate from the sovereign power of the body politic it represents. This power is derived, as we have before said, from the supreme power of the state."In Bishop, New Crim. Proc. § 123, it is said: "Jurisdiction comes solely from the law; in no degree from the consent of litigants. So that neither consent nor anything else can authorize a court to act in a cause outside the sphere which the law has ordained for it."In Oakley v. Aspinwall, 3 N. Y. 547, it was said: "Where no jurisdiction exists by law, it cannot be conferred by consent; especially against the prohibition of a law which was not designed merely for the protection of a party to a suit, but for the general interests of justice."So, in Mills v. Commonwealth, 13 Pa. 627, Mr. Justice Coulter, delivering the opinion of the court, said: "It is contended that the counsel of the prisoner consented to his being tried at this adjourned court of quarter sessions, and, if they did, it ought not to weigh a feather in the scale of justice. They may have been ignorant of the law and of his rights, and therefore made no objection. But it is not the consent of counsel which can constitute a tribunal by which a citizen may be tried and punished. It is the law of the land, and that alone, which can constitute and establish such a tribunal. I need not repeat the authorities which establish that consent cannot give jurisdiction. In criminal proceedings especially that axiom has grown with the growth and strengthened with the strength of the law. Trials by lynch law might otherwise be valid; for at times I dare say a man might consent to their jurisdiction in hope or in fear, or perhaps in ignorance. But autrefois acquit or autrefois convict could not be pleaded in that case, nor in this, because it is a lawful trial only that can be effectually so pleaded."In ***657**Harris v. People, 128 Ill. 585, 21 N. E. 563, it was observed: "It is said that the right to a trial by jury is a right which the defendant may waive. This may be admitted, since every plea of guilty is, in effect, a waiver of the right to a trial by the legally constituted tribunal. But, while a defendant may waive his right to a jury trial, he cannot by such waiver confer jurisdiction to try him upon a tribunal which has no jurisdiction by law."Likewise, in Smiths v. County, 1 Iowa, 492, it appears that a district court on appeal from a county court dismissed an application relating to a certain subject on the ground that the "county court was not authorized to entertain the application, coming at the time and in the manner it did before that court," although the county court had jurisdiction of such subject-matter. On appeal to the Supreme Court it was insisted that, no question having been made before the county court as to its authority to entertain the application, the objection came too late for the first time in the district court, and therefore should have been disregarded. Referring to the county court, the Supreme Court said: "No failure to object could confer upon the court a power to hear and determine a subject-matter which it was not authorized to try. In other words, consent would not confer such jurisdiction."In Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690, Mr. Justice Harlan, delivering the opinion of the court, said: "This court must, upon its own motion, guard against any invasion of the jurisdiction of the Circuit Court of the United States as defined by law, where the want of jurisdiction appears from the record brought here on appeal or writ of error. At the present term it was held that whether the Circuit Court has or has not jurisdiction is a question which this court must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon the merits."So, in United States v. Rogers (D. C.) 23 Fed. 658, Mr. Justice Parker said: "Jurisdiction can be raised at any stage of a criminal proceeding. It is never presumed, but must always be proved; and it is never waived by a defendant. If this principle be correct, it follows that the party who is charged with a crime, and arrested in one district to be removed for trial to another, can raise the question, as an objection to his removal, that he cannot be tried in that other, or that the trial cannot be had there for want of jurisdiction in the court either over the person, the subject-matter, or

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the place where the crime was committed."In Southern Exp. Co. v. Todd, 56 Fed. 104, 5 C. C. A. 432, Sanborn, Circuit Judge, said: "The objection urged by counsel for the defendant is that this action could be brought against the Georgia corporation only in the district of the residence of the plaintiffs in Texas, or in that of the residence of the defendant, in Georgia, and that, therefore, the Circuit Court for the Eastern District of Arkansas was without jurisdiction. In answer to the suggestion that this objection comes too late after judgment against their client they invoke the rule of the federal courts that if the want of jurisdiction is discovered at any time before the final disposition of the action it must be dismissed. The vice of this contention lies in the fact that it confounds the jurisdiction of the court with the personal privilege of the party. When an action is brought in a Circuit Court, and it appears from the complaint or the record that there is a controversy between citizens of different states, and that the amount in dispute is sufficient under the acts of Congress, that court has jurisdiction, although it may not be brought in the district of the residence of either the plaintiff or the defendant. The essential jurisdictional facts in such a case are the diverse citizenship and the amount in controversy. These facts must, no doubt, appear upon the record, and where they do not appear the federal court may take notice of their absence, and dismiss the case at any stage of the proceedings. The cases to which we are referred by defendant's counsel as authority for the position that the defendant is not too late with its objection here are cases of this character."

Likewise, under a constitutional provision that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate should be commenced in the county in which the real estate was situated, the Supreme Court of California, in an action to quiet an adverse claim to land, brought originally in a county other than the one where the land was situated, held, as also upon several occasions, that the court had no jurisdiction over the case, that this objection could not be waived, and that the action should be dismissed. Fritts v. Camp, 94 Cal. 393, 29 Pac. 867; Urton v. Woolsey, 87, Cal. 38, 25 Pac. 154; Gurnee v. Superior Court, 58 Cal. 88. In Haywood v. Johnson, 41 Mich. 598, 2 N. W. 926, a similar ruling was made. 1 Bish. New Crim. Proc. §§ 96, 316; Brown on Jurisdiction, §§ 4, 26, 26b, 27; 1 Freeman on Judgments, § 146; 4 Bl. Comm. 425, 426; Ex parte Parker, 6 S. C. 472; Plano Mfg. Co. v. Rasey, 69 Wis. 246, 34 N. W. 85; Shuler v. State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211; Dicks v. Hatch, 10 Iowa, 380; Oil City v. McAboy, 74 Pa. 249; People v. Campbell, 4 Parker, Cr. R. 386; People v. Hodges, 27 Cal. 340; People v. Myers, 1 Colo. 508; Board v. Thompson, 39 Ill. 566; Low v. Rice, 8 Johns. 409; Clayton v. Per Dun, 13 Johns. 218; Richardson v. Welcome, 6 Cush. (Mass.) 331; Matter of Ryers et al., 72 N. Y. 1, 28 Am. Rep. 88; Fidler v. Hall, 59 Ky. 461; Peninsular Ry. Co. v. Howard, 20 Mich. 18; Scott v. Sandford, 19 How. 393, 15 L Ed. 691; Jackson v. Ashton, 8 Pet. 148, 8 L. Ed. 898; ***658**Cameron v. Hodges, 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. Ed. 132; Hegler v. Faulkner, 127 U. S. 482, 8 Sup. Ct. 1203, 32 L. Ed. 210; Metcalf v. Watertown, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543.

The Chief Justice, in the White Case, cites a number of cases on the question of waiver of constitutional and statutory rights, but upon examination it will be found that all of them refer to such rights as are merely personal for the protection and convenience of the defendant or the litigants-in the nature of personal privileges, in which the general public have no interest, and fall within the second class hereinbefore mentioned. I assert with confidence that no case, either in this country or in England, can be found, where, as in these cases, any court has ever, in construing a constitution, stricken out of a plain provision, not in conflict with another provision, a plain and unambiguous word, having a meaning harmonizing with the context, and used in its natural and ordinary sense, and substituted therefor one of its significations, or some other expression, which restricted its meaning, and then held

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that the provision might be waived. These decisions become the more marvelous when it is considered that they are being rendered by a divided court, no two of the judges agreeing as to the construction of the Constitution that ought to prevail; and that they overturn not only a long line of cases, previously decided by the unanimous court, in which the same word and provision were considered, but also overturn a hitherto settled policy of the state, and leave the question of venue and jurisdiction in almost hopeless confusion and uncertainty.

The Chief Justice, in this case of Gibbs v. Gibbs, referring to the Konold and other cases in line with it, says: "These decisions on the subject of venue do not establish any rule of property under which titles have been or can be acquired, but merely relate to a rule of practice. If such had been the case, notwithstanding my opinion that they are erroneous, and that I have, as a member of this court, dissented from the rendition of some of them, I would not assent to their disturbance."Respecting this last sentence it is but the statement of facts when I say that the Konold Case and some others construing the provision in dispute were decided, and the policy relating to courts judicially declared, before the present Chief Justice became a member of this court. Mr. Justice McCARTY says: "There being no principles involved here that will or can disturb business rules and interests, or in any way affect property rights, as the question under consideration relates to practice, and not to substantive law, I join with the Chief Justice in overruling the case of Konold v. Ry. Co., supra, and all subsequent decisions of this court wherein they are in conflict or inconsistent with the conclusions reached in this case."He also says the "principles involved" do not "in the least degree disturb business affairs," nor relate to or "affect property rights," and that, therefore, the rule of stare decisis does not apply. These are the excuses which my Brethren offer for the unique constructions which, as has been seen, they have placed upon the Constitution, and for the overturning, as a sequence, a constitutionally and judicially declared public policy of the state. But do those decisions which they are now overruling neither relate to nor affect any rules of property or property rights? Suppose, under their rulings inaugurating the practice at common law, A. sues B. on a note, the consideration, $1,000 or $10,000, amount immaterial, in a county other than where the note was payable and the breach occurred, and recovers judgment, and B. appeals to this court, and suppose further that at the next election, a year hence, there should be a change in the judges, and a majority of the court should then feel that the language of the Constitution and its plain meaning was erroneously changed by substitution, and that the policy declared by the paramount law and a unanimous court in numerous decisions was erroneously overturned by a divided majority, and, under the circumstances, the majority of the court as it would then stand would, in consequence, feel bound and obligated to return to the well-beaten path, reverse the judgment, and dismiss the action, and suppose still further that in the meantime A.'s right to bring an action in the county where the note was made payable had become barred by the statute of limitations, would it or not affect property rights? Doubtless A. would think it would upon finding that his right of recovery was gone, and his money lost. Suppose in like manner a case for the recovery of real estate, or upon contract, or one sounding in tort for damages, where the bar of the statute would become complete before decision rendered by the Supreme Court, would not property rights be affected? Are not all these supposed cases such as may happen-even such as are likely to happen? Is there no danger ahead? And who can say just what rights adjudicated under the former decisions may or may not be affected by the present rulings? Is it not idle to talk about the grave questions and principles involved in this construction of the fundamental law of the state as not affecting and in no way relating to property rights and business affairs? What business man in this commonwealth, may I ask, can hereafter have confidence that the rule of law of today will be the rule of to-morrow? It is well known how timid business is respecting a vacillating court. With such

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vacillation as to important jurisdictional questions, how can any lawyer bring an action with any degree of confidence that it will not ultimately be dismissed and barred? Universally, under circumstances like these herein disclosed, the courts of the land have applied the maxim, "Stare decisis, at non quieta movere,"***659** and have refused to overrule or disturb rulings previously made, which had been, as in this case, followed by the same court until they had ripened into settled law, and this whether they related to practice and jurisdiction and affected property rights indirectly, or whether they related directly to property rights.

We have here the anomalous spectacle in jurisprudence of a divided majority by constitutional construction, by substitution, where there is neither mistake, ambiguity, nor conflict, reversing a series of decisions previously made by a unanimous court, and overturning and setting at naught the very policy respecting venue which the organic law itself declares. The salutary rule of stare decisis, which has always upheld and preserved the dignity of courts, the stability of their decisions, the respect in which the people have been wont to hold high judicial tribunals, and the confidence which the populace has always maintained in the unwavering character of the rules of law declared by them, has been cast to the air. The rules of construction which through the centuries have supported and kept inviolate every constitution, every fundamental law, have, it appears, ceased to perform their functions, and it seems as though the time had come in the affairs of state when the servant may say to the master, "My will, not thine, be done."Even if it could be shown-a thing which, in my judgment, has not yet been shown-that the previous decisions were decided erroneously, would it not be better to permit the principles by them declared to stand, and refer the subject to the Legislature for submission, as provided by the Constitution, than to again plunge the important questions into uncertainty and confusion? Nothing in the affairs of men is so much to be dreaded as the uncertainty of a law. It has always been the policy of the highest courts and greatest jurists of our country to refuse to disturb a rule of law which had been established by a series of their decisions. Mr. Chief Justice Marshall, one of the world's greatest judges, when a similar question under a statute was before the court, said: "If this were a new question, the court might decide otherwise; but the decision of the court in cases which have heretofore been before it has been expressed upon the point, and the bill must be dismissed for want of jurisdiction." Jackson v. Ashton, 8 Pet. 148, 8 L. Ed. 898. Greater must be the reason for such a decision, as that world renowned jurist announced, when the question is one which has previously been settled by the Constitution as well as by judicial decision. Mr. Justice McCARTY says, however, the Konold Case was "fruitful of much confusion and uncertainty in the bringing of actions"; but what occasion there is for such an assertion it is difficult to comprehend, for certainly every lawyer of any practical skill whatever can readily ascertain where to bring the action in any case similar to the one referred to, and that the decision in the Konold Case has had the indorsement of able lawyers has been frequently evidenced in this court. On numerous occasions have talented men in the profession stood before us and admitted that the place of trial, under our Constitution, was jurisdictional, and that the point could be raised at any time. In the White Case, when the Chief Justice and a district judge, as a majority sitting in that case, for the first time questioned the principles announced in the Konold Case, an able firm of lawyers became so earnest and zealous in maintaining the principles and doctrine declared in the latter case that they employed language which this court adjudged impertinent, and then struck the petition for rehearing, in which the language occurred, from the files. It is true the petition was afterwards, upon the request of counsel to be permitted to eliminate all objectionable matter, reinstated, but only upon condition that such language be eliminated. All these things tend to show that the profession does not regard the rulings in the Konold Case in the light in which does my learned Brother.

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I have thus in a feeble way, though at length, expressed my views respecting the grave questions involved in the cases under consideration, as dictated by conscience and duty. For the reasons hereinbefore appearing, I must withhold my concurrence to the construction which my Brethren have placed upon the Constitution.

Although I concurred in the result in the White Case, I am now, upon more mature reflection, of the opinion that all the material points involved therein were erroneously decided, and that the petition for rehearing should be granted.

In this case of Gibbs v. Gibbs I also concur in the judgment. In such a case as this the right to sue is statutory. The Legislature may grant or withhold such right without committing any violation to the Constitution. Having granted it, it requires no great stretch of the imagination to apply the principles announced in the Konold Case, and which were not departed from in Deseret Irrigation Co. v. McIntyre, 16 Utah, 398, 52 Pac. 628, and permit the wife to apply for a divorce in the county of her residence, the only place where she has a remedy. In that place, among her friends and neighbors, where she is known, is where she received the injury. There is where she was humiliated and the family relations were destroyed, and not in some other place where she probably and never been and was unknown. She is not suing to punish the culprit for his criminal act-the state alone having power to do that in the county where the act was committed-but to rid herself of one who, if her allegations be true, is no longer worthy of her love and respect, and who had degraded himself in the eyes of all ***660** respectable people, and violated the laws of God and man. In such case the courts will not refuse a remedy to redress the wrong.

In the case of Fields v. Daisy Gold Mining Co. I also concur in the judgment.
Utah 1903.
Gibbs v. Gibbs
26 Utah 382, 73 P. 641

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67 S.Ct. 839
330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055

Supreme Court of the United States
GULF OIL CORPORATION
v.
GILBERT.
No. 93.

Argued Dec. 18, 19, 1946.
Decided March 10, 1947.

Action by Cornelius Gilbert, doing business under the firm name and style of Gilbert Storage & Transfer Company against Gulf Oil Corporation for damages allegedly resulting from negligence of the defendant. A judgment dismissing the action on the ground of forum non conveniens, 62 F.Supp. 291, was reversed by the Circuit Court of Appeals, 153 F.2d 883, and the defendant brings certiorari.

Judgment of Circuit Court of Appeals reversed.

Mr. Justice REED, Mr. Justice BURTON, Mr. Justice BLACK and Mr. Justice RUTLEDGE, dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

West Headnotes

[1] Federal Courts 170B ⇐45

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk45 k. Forum Non Conveniens. Most Cited Cases
(Formerly 106k260, 106k260.4)
The doctrine of forum non conveniens does not apply if there is either an absence of jurisdiction or a mistake of venue.

[2] Federal Courts 170B ⇐45

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk45 k. Forum Non Conveniens. Most Cited Cases
(Formerly 106k260, 106k260.4)
The doctrine of forum non conveniens presupposes at least two forums in which the defendant is amenable to process and furnishes criteria for a choice between them.

[3] Federal Courts 170B ⇐45

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk45 k. Forum Non Conveniens. Most Cited Cases
(Formerly 106k260, 106k260.4)
The doctrine of "forum non conveniens" is that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.

[4] Federal Courts 170B ⇐65

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk65 k. Procedure as to Abstention; Reserving or Retaining Jurisdiction. Most Cited Cases
(Formerly 106k260, 106k260.4)
In determining whether the doctrine of forum non conveniens should be applied, the court should consider the private interests of the litigant, relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance of willing witnesses, possibility of view of premises, if appropriate, relative advantages and obstacles to a fair

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trial and all other practical problems that make the trial of a case easy, expeditious and inexpensive, as well as the enforcibility of any judgment obtained, but unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

[5] Federal Courts 170B ⚿65

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk65 k. Procedure as to Abstention; Reserving or Retaining Jurisdiction. Most Cited Cases
(Formerly 106k260, 106k260.4)
In determining whether the doctrine of forum non conveniens should be applied, the court should also consider factors of public interest, such as relative administrative difficulties, burden of jury duty and appropriateness of forum for particular questions involved.

[6] Federal Courts 170B ⚿45

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk45 k. Forum Non Conveniens. Most Cited Cases
(Formerly 106k260, 106k260.4)
That action by Virginia citizen against Pennsylvania corporation doing business in both Virginia and New York for negligence resulting in destruction of warehouse and contents in Virginia involved $400,000 and that plaintiff's attorney, who was employed by insurance companies interested, lived in New York, did not require that District Court sitting in New York retain jurisdiction of action based solely on diversity of citizenship.

[7] Federal Civil Procedure 170A ⚿1741

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1741 k. In General. Most Cited Cases
On motion to dismiss on ground of forum non conveniens, whether offer of litigant opposing motion to see that witnesses from without the jurisdiction are present at the trial should be accepted rests in the sound discretion of the trial court.

[8] Federal Courts 170B ⚿45

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk45 k. Forum Non Conveniens. Most Cited Cases
(Formerly 106k260, 106k260.4)
Where action in Federal Court sitting in New York was by a citizen of Virginia against a Pennsylvania corporation doing business in both Virginia and New York for damages for negligence resulting in destruction of warehouse and its contents in Virginia, and 350 persons living in Virginia had goods stored when warehouse was destroyed, and defendant desired to implead alleged independent contractor residing in Virginia, and jurisdiction of the Federal Court in New York depended solely on diversity of citizenship, the court did not abuse its discretion in refusing jurisdiction on the ground of "forum non conveniens."

****840 *502** Messrs. Bernard A. Golding and Archie D. Gray, both of Houston, Tex., for petitioner.
Mr. Max J. Gwertzman, of New York City, for respondent.

Mr. Justice JACKSON delivered the opinion of the Court.
The questions are whether the United States District Court has inherent power to dismiss a suit pursuant to the doctrine of forum non conveniens and, if so, whether that power was abused in this case.

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The respondent-plaintiff brought this action in the Southern District of New York, but resides at Lynchburg, Virginia, where he operated a public warehouse. He alleges that the petitioner-defendant, in violation of the ordinances of Lynchburg, so carelessly handled a delivery of gasoline to his warehouse tanks and pumps as to cause ***503** an explosion and fire which consumed the warehouse building to his damage of $41,889.10, destroyed merchandise and fixtures to his damage of $3,602.40, caused injury to his business and profits of $20,038.27, and burned the property of customers in his custody under warehousing agreements to the extent of $300,000. He asks judgment of $365,529.77 with costs and disbursements, and interest from the date of fire. The action clearly is one in tort.

The petitioner-defendant is a corporation organized under the laws of Pennsylvania, qualified to do business in both Virginia and New York, and it has designated officials of each state as agents to receive service of process. When sued in New York, the defendant, invoking the doctrine of forum non conveniens, claimed that the appropriate place for trial is Virginia where the plaintiff lives and defendant does business, where all events in litigation took place, where most of the witnesses reside, and where both state and federal courts are available to plaintiff and are able to obtain jurisdiction of the defendant.

The case, on its merits, involves no federal question and was brought in the United States District Court solely because of diversity in citizenship of the parties. Because of the character of its jurisdiction and the holdings of and under Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, the District Court considered that the law of New York as to forum non conveniens applied and that it required the case to be left to Virginia courts.[FN1]It therefore dismissed.

FN1 Gilbert v. Gulf Oil Corp., D.C., 62 F.Supp. 291.

The Circuit Court of Appeals disagreed as to the applicability of New York law, took a restrictive view of the application of the entire doctrine in federal courts and, one judge dissenting, reversed.[FN2]The case is here on certiorari. 328 U.S. 830, 66 S.Ct. 1123.

FN2 Gilbert v. Gulf Oil Corp., 2 Cir., 153 F.2d 883.

***504** I.

[1] It is conceded that the venue statutes of the United States permitted the ****841** plaintiff to commence his action in the Southern District of New York and empower that court to entertain it.[FN3]But that does not settle the question whether it must do so. Indeed the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue.

FN3 See 28 U.S.C. s 112, 28 U.S.C.A. s 112; Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd., 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed. 167, 128 A.L.R. 1437.

This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances. As formulated by Mr. Justice Brandeis the rule is: 'Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.' Canada Malting Co., Ltd., v. Paterson Steamships, Ltd., 285 U.S. 413 422, 423, 52 S.Ct. 413, 415, 76 L.Ed. 837.

We later expressly said that a state court 'may in appropriate cases apply the doctrine of forum non

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conveniens.' Broderick v. Rosner, 294 U.S. 629, 643, 55 S.Ct. 589, 592, 79 l.Ed. 1100, 100 A.L.R. 1133; Williams v. State of North Carolina, 317 U.S. 287, 294, n. 5, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273. Even where federal rights binding on state courts under the Constitution are sought to be adjudged, this Court has sustained state courts in a refusal to entertain a litigation between a nonresident and a foreign corporation or between two foreign corporations. Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747; ***505**Anglo-American Provision Co. v. Davis Provision Co. No. 1, 191 U.S. 373, 24 S.Ct. 92, 48 L.Ed. 225. It has held the use of an inappropriate forum in one case an unconstitutional burden on interstate commerce. Davis v. Farmers' Co-operative Equity Co., 262 U.S. 312, 43 S.Ct. 556, 67 L.Ed. 996. On substantially forum non conveniens grounds we have required federal courts to relinquish decision of cases within their jurisdiction where the court would have to participate in the administrative policy of a state. Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U.S. 570, 61 S.Ct. 343, 85 L.Ed. 358; Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424; but cf. Meredith v. Winter Haven, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9. And most recently we decided Williams v. Green Bay & Western R. Co., 326 U.S. 549, 66 S.Ct. 284, in which the Court, without questioning the validity of the doctrine held it had been applied in that case without justification.[FN4]

> FN4 The doctrine did not originate in federal but in state courts. This Court in recognizing and approving it by name has never indicated that it was rejecting application of the doctrine to law actions which had been an integral and necessary part of evolution of the doctrine. And cf. Slater v. Mexican National R. Co., 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed. 900. Wherever it is applied in courts of other jurisdictions, its application does not depend on whether the action is at law, Collard v. Beach, 93 App.Div. 339, 87 N.Y.S. 884; Murnan v. Wabash Ry. Co., 246 N.Y. 244, 158 N.E. 508, 54 A.L.R. 1522; Jackson & Sons v. Lumbermen's Mutual Casualty Co., 86 N.H. 341, 168 A. 895; or in equity, Langfelder v. Universal Laboratories, 293 N.Y. 200, 56 N.E.2d 550, 155 A.L.R. 1226; Egbert v. Short, 1907, 2 Ch. 250. See footnote 1 Koster v. (American) Lumbermens Mutual Casualty Co., 330 U.S. 518, 67 S.Ct. 828.

It is true that in cases under the Federal Employers' Liability Act, 45 U.S.C.A. s 51 et seq., we have held that plaintiff's choice of a forum cannot be defeated on the basis of forum non conveniens. But this was because the special venue act under which those cases are brought was believed to require it. Baltimore & Ohio R. Co. v. Kepner, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28, 136 A.L.R. 1222; ****842**Miles v. Illinois Central R. Co., 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129, 146 A.L.R. 1104. Those decisions do not purport to modify the doctrine as to other cases governed by the general venue statutes.

***506** [2] But the court below says that 'The Kepner case * * * warned against refusal of jurisdiction in a particular case controlled by congressional act; here the only difference is that congressional act, plus judicial interpretation (under the Neirbo case), spells out the result.' 153 F.2d at page 885. The Federal Employers' Liability Act, however, which controlled decision in the Kepner case, specifically provides where venue may be had in any suit on a cause of action arising under that statute. What the court below refers to as 'congressional act, plus judicial interpretation,' is the general statute of venue in diversity suits, plus our decision that it gives the defendant 'a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election,' Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd., 308 U.S. 165, 168, 60 S.Ct. 153, 154, 84 L.Ed. 167, 128 A.L.R. 1437. The Federal Employers' Liability Act, as interpreted by Kepner, increases the number of places where the

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defendant may be sued and makes him accept the plaintiff's choice. The Neirbo case is only a declaration that if the defendant, by filing consent to be sued, waives its privilege to be sued at its place of residence, it may be sued in the federal courts at the place where it has consented to be sued. But the general venue statute plus the Neirbo interpretation do not add up to a declaration that the court must respect the choice of the plaintiff, no matter what the type of suit or issues involved. The two taken together mean only that the defendant may consent to be sued, and it is proper for the federal court to take jurisdiction, not that the plaintiff's choice cannot be questioned. The defendant's consent to be sued extends only to give the court jurisdiction of the person; it assumes that the court, having the parties before it, will apply all the applicable law, including, in those cases where it is appropriate, its discretionary judgment as to whether the suit should be entertained. In all cases in which the doctrine of forum non conveniens comes into ***507** play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.

II.

[3] The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.

Many of the states have met misuse of venue by investing courts with a discretion to change the place of trial on various grounds, such as the convenience of witnesses and the ends of justice.[FN5]The federal law contains no such express criteria to guide the district court in exercising its power. But the problem is a very old one affecting the administration of the courts as well as the rights of litigants, and both in England and in this country the common law worked out techniques and criteria for dealing with it.[FN6]

FN5 See Foster, Place of Trial-Interstate Application of Intrastate Methods of Adjustment, 44 Harv.L.Rev. 41, 47, 62.

FN6 See Logan v. Bank of Scotland, (1906) 1 K.B. 141; cf. La Socie te du Gaz de Paris v. La Socie te Anonyme de Navigation 'Les Armateurs Francais.' (1926) Sess.Cas. (H.L.) 13. Collard v. Beach, 93 App.Div. 339, 87 N.Y.S. 884; Jackson & Sons v. Lumbermen's Mutual Casualty Co., 86 N.H. 341, 168 A. 895; see Pietraroia v. New Jersey & Hudson R.R. & Ferry Co., 197 N.Y. 434, 91 N.E. 120; Great Western Railway Co. of Canada v. Miller, 19 Mich. 305.

****843 *508** Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.FN7

FN7 See Dainow, The Inappropriate Forum, 29 Ill.L.Rev. 867, 889.

[4] If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibil-

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ity of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.[FN8]But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

FN8 See Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col.L.Rev. 1.

[5] Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community ***509** which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

The law of New York as to the discretion of a court to apply the doctrine of forum non conveniens, and as to the standards that guide discretion is, so far as here involved, the same as the federal rule. Murnan v. Wabash Ry. Co., 246 N.Y. 244, 158 N.E. 508, 54 A.L.R. 1522; Wedemann v. United States Trust Co. of New York, 258 N.Y. 315, 179 N.E. 712, 79 A.L.R. 1320; see Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223, 32 A.L.R. 1. It would not be profitable, therefore, to pursue inquiry as to the source from which our rule must flow.

III.

Turning to the question whether this is one of those rather rare cases where the doctrine should be applied, we look first to the interests of the litigants.

The plaintiff himself is not a resident of New York, nor did any event connected with the case take place there, nor does any witness with the possible exception of experts live there. No one connected with that side of the case save counsel for the plaintiff resides there, and he has candidly told us that he was retained by insurance companies interested presumably because of subrogation. His affidavits and argument are devoted to controvering claims as to defendant's inconvenience rather than to showing that the present forum serves any convenience ***510** of his own, with one exception. The only justification for trial in New York advanced here is one rejected by the district court and is set forth in the brief as follows: 'This Court can readily realize that an action of this type, involving as it does a claim for damages in an amount close to $400,000, ****844** is one which may stagger the imagination of a local jury which is surely unaccustomed to dealing with amounts of such a nature. Furthermore, removed from Lynchburg, the respondent will have an opportunity to try this case free from local influences and preconceived notions which make it difficult to procure a jury which has no previous knowledge of any of the facts herein.'

[6] This unproven premise that jurors of New York live on terms of intimacy with $400,000 transactions is not an assumption we easily make. Nor can we assume that a jury from Lynchburg and vicinity would be 'staggered' by contemplating the value of a warehouse building that stood in their region, or of merchandise and fixtures such as were used there, nor are they likely to be staggered by the value of chattels which the people of that neighbor-

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hood put in storage. It is a strange argument on behalf of a Virginia plaintiff that the community which gave him patronage to make his business valuable is not capable of furnishing jurors who know the value of the goods they store, the building they are stored in, or the business their patronage creates. And there is no specification of any local influence, other than accurate knowledge of local conditiions, that would make a fair trial improbable. The net of this is that we cannot say the District Court was bound to entertain a provincial fear of the provincialism of a Virginia jury. That leaves the Virginia plaintiff without even a suggested reason for transporting this suit to New York.

***511** [7] Defendant points out that not only the plaintiff, but every person who participated in the acts charged to be negligent, resides in or near Lynchburg. It also claims a need to interplead an alleged independent contractor which made the delivery of the gasoline and which is a Virginia corporation domiciled in Lynchburg, that it cannot interplead in New York. There also are approximately 350 persons residing in and around Lynchburg who stored with plaintiff the goods for the damage to which he seeks to recover. The extent to which they have left the community since the fire and the number of them who will actually be needed is in dispute. The complaint alleges that defendant's conduct violated Lynchburg ordinances. Conditions are said to require proof by firemen and by many others. The learned and experienced trial judge was not unaware that litigants generally manage to try their cases with fewer witnesses than they predict in such motions as this. But he was justified in concluding that this trial is likely to be long and to involve calling many witnesses, and that Lynchburg, some 400 miles from New York, is the source of all proofs for either side with possible exception of experts. Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants. Nor is it necessarily cured by the statement of plaintiff's counsel that he will see to getting many of the witnesses to the trial and that some of them 'would be delighted to come to New York to testify.'There may be circumstances where such a proposal should be given weight. In others the offer may not turn out to be as generous as defendant or court might suppose it to be. Such matters are for the District Court to decide in exercise of a sound discretion.

The court likewise could well have concluded that the task of the trial court would be simplified by trial in Virginia.***512** If trial was in a state court, it could apply its own law to events occurring there. If in federal court by reason of diversity of citizenship, the court would apply the law of its own state in which it is likely to be experienced. The course of adjudication in New York federal court might be beset with conflict of laws problems all avoided if the case is litigated in Virginia where it arose.

[8] We are convinced that the District Court did not exceed its powers or the bounds of its discretion in dismissing plaintiff's complaint and remitting him to the courts of his own community. The Circuit Court of Appeals took too restrictive a ****845** view of the doctrine as approved by this Court. Its judgment is reversed.

Reversed.

Mr. Justice REED and Mr. Justice BURTON dissent. They do not set out the factual reasons for their dissent since the Court's affirmance of Koster v. (American) Lumbermens Mutual casualty Co., 330 U.S. 518, 67 S.Ct. 828, would control.

Mr. Justice BLACK (dissenting).

The defendant corporation is organized under the laws of Pennsylvania, but is qualified to do business and maintains an office in New York. Plaintiff is an individual residing and doing business in Virginia. The accident in which plaintiff alleges to have been damaged occurred in Lynchburg, Virginia. Plaintiff brought this action in the Federal District Court in New York. Section 11 of the Judiciary Act of 1789, 1 Stat. 78, carried over into the Judi-

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cial Code, s 24, 28 U.S.C. s 41(1), 28 U.S.C.A. s 41(1), confers jurisdiction upon federal district courts of all actions at law between citizens of different states. The Court does not suggest that the federal district court in New York lacks jurisdiction under this statute or that the venue was improper in this case. 28 U.S.C. s 112, 28 U.S.C.A. s 112. Cf. ***513**Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed. 167, 128 A.L.R. 1437. But it holds that a district court may abdicate its jurisdiction when a defendant shows to the satisfaction of a district court that it would be more convenient and less vexatious for the defendant if the trial were held in another jurisdiction. Neither the venue statute nor the statute which has governed jurisdiction since 1789 contains any indication or implication that a federal district court, once satisfied that jurisdiction and venue requirements have been met, may decline to exercise its jurisdiction. Except in relation to the exercise of the extraordinary admiralty and equity powers of district courts, this Court has never before held contrary to the general principle that 'the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.' Hyde v. Stone, 20 How. 170, 175, 15 L.Ed. 874, quoted with approval in Chicot County v. Sherwood, 148 U.S. 529, 534, 13 S.Ct. 695, 697, 37 L.Ed. 546. See also Dennick v. Railroad Co., 103 U.S. 11, 26 L.Ed. 439; Baltimore & O.R. Co. v. Kepner, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28, 136 A.L.R. 1222; Evey v. Mexican Cent. R. Co., 5 Cir., 81 F. 294.[FN1] Never until today has this Court held, in actions for money damages for violations of common law or statutory rights, that a district court can abdicate its statutory duty to exercise its jurisdiction for the alleged convenience of the defendant to a lawsuit. Compare Slater v. Mexican National R. Co., 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed. 900.

FN1 In Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1, 58, 32 S.Ct. 169, 178, 56 L.Ed. 327, 38 L.R.A.,N.S., 44, it was stated that: 'The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication.'Cf. Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377, 388, 49 S.Ct. 355, 356, 73 L.Ed. 747.

For reasons peculiar to the special problems of admiralty and to the extraordinary remedies of equity, the courts exercising admiralty and equity powers have been permitted***514** at times to decline to exercise their jurisdiction. Canada Malting Co. v. Paterson S.S. Co., 285 U.S. 413, 52 S.Ct. 413, 76 L.Ed. 837; Rogers v. Guaranty Trust Co., 288 U.S. 123, 53 S.Ct. 295, 77 L.Ed. 652, 89 A.L.R. 720; cf. Williams v. Green Bay & W.R. Co., 326 U.S. 549, 66 S.Ct. 284. This exception is rooted in the kind of relief which these courts grant and the kinds of problems which they solve. See Meredith v. Winter Haven, 320 U.S. 228, 235, 64 S.Ct. 7, 11, 88 L.Ed. 9; Burford v. Sun Oil Co., 319 U.S. 315, 333 n. 29, 63 S.Ct. 1098, 1107, 87 L.Ed. 1424. Courts of equity developed to afford relief where ****846** a money judgment in the common law courts provided no adequate remedy for an injured person.FN2From the beginning of equitable jurisdiction up to now, the chancery courts have generally granted or withheld their special remedies at their discretion; and 'courts of admiralty * * * act upon enlarged principles of equity.' O'Brien v. Miller, 168 U.S. 287, 297, 18 S.Ct. 140, 144, 42 L.Ed. 469. But this Court has, on many occasions, severely restricted the discretion of district courts to decline to grant even the extraordinary equitable remedies.Meredith v. Winter Haven, supra, and cases there cited, 320 U.S. at pages 234, 235, 64 S.Ct. at page 11, 88 L.Ed. 9. Previously federal courts have not generally been allowed the broad and indefinite discretion to dispose even of equity cases solely on a trial court's judgment of the relative convenience of the forum for the parties themselves. For a major factor in these equity decisions has been the relative ability of the forum to shape

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and execute its equitable remedy. Cf. Rogers v. Guaranty Trust Co., supra.

FN2 Although the distinction between actions at law and suits in equity in federal courts has been abolished by the adoption of the single form of civil action, Rule 2, F.R.C.P., 28 U.S.C.A. following section 723c, see 1 Moore, Federal Practice (1938) c. 2, there remains to federal courts the same discretion, no more and no less, in the exercise of special equitable remedies as existed before the adoption of the federal rules. Neither the rules, the statutes, tradition, nor practical considerations justify application of equitable discretion to actions for money judgments based on common law or statutory rights.

***515** No such discretionary authority to decide a case, however, has, before today, been vested in federal courts in actions for money judgments deriving from statutes or the common law.FN3To engraft the doctrine of forum non conveniens upon the statutes fixing jurisdiction and proper venue in the district courts in such actions, seems to me to be far more than the mere filling in of the interstices of those statutes.[FN4]

FN3 This Court, whose jurisdiction is primarily appellate, has held that it need not exercise its constitutionally granted original jurisdiction even at common law where there is another suitable forum. State of Georgia v. Pennsylvania R. Co., 324 U.S. 439, 464, 465, 65 S.Ct. 716, 729, 89 L.Ed. 1051. But the Constitution, not Congress, fixes this Court's jurisdiction. And it was this Court's duty to interpret its constitutional jurisdiction. It is the duty of Congress to fix the jurisdiction of the district courts by statute. It did so. It is not the duty of this Court to amend that statute.

FN4'I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.'Holmes, J., dissenting in Southern Pacific Co. v. Jensen, 244 U.S. 205, 218, 221, 37 S.Ct. 524, (530), 531, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas. 1917E, 900. See also dissenting opinion, State Tax Commission v. Aldrich, 316 U.S. 174, 185, 202, n. 23, 62 S.Ct. 1008, 1013, 1021, 86 L.Ed. 1358, 139 A.L.R. 1436, and authorities there collected.

It may be that a statute should be passed authorizing the federal district courts to decline to try so-called common law cases according to the convenience of the parties. But whether there should be such a statute, and determination of its scope and the safeguards which should surround it, are, in my judgment, questions of policy which Congress should decide. There are strong arguments presented by the Court in its opinion why federal courts exercising their common law jurisdiction should have the discretionary powers which equity courts have always possessed in dispensing equitable relief. I think equally strong arguments could be advanced to show that they should not. For any individual or corporate defendant who does part of his business in states other than the one in which he ***516** is sued will almost invariably be put to some inconvenience to defend himself. It will be a poorly represented multistate defendant who cannot produce substantial evidence and good reasons fitting the rule now adopted by this Court tending to establish that the forum of action against him is most inconvenient. The Court's new rule will thus clutter the very threshold of the federal courts with a preliminary trial of fact concerning****847** the relative convenience of forums. The preliminary disposition of this factual question will, I believe, produce the very kind of uncertainty, confusion, and hardship which stalled and handicapped persons seeking compensation for maritime injuries following this Court's decision in Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A. 1918C, 451, Ann.Cas. 1917E, 900. The broad and

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indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible. Yet plaintiffs will be asked 'to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership. As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere.' Davis v. Department of Labor & Industries, 317 U.S. 249, 254, 63 S.Ct. 225, 228, 87 L.Ed. 246.

This very case illustrates the hazards of delay. It must be begun anew in another forum after the District Court, the Circuit Court of Appeals, and now this Court, have has their time-consuming say as to the relative convenience of the forum in which the plaintiff chose to seek redress. Whether the statute of limitations has run ***517** against the plaintiff, we do not know. The convenience which the individual defendant will enjoy from the Court's new rule of forum non conveniens in law actions may be thought to justify its inherent delays, uncertainties, administrative complications and hardships. But in any event, Congress has not yet said so; and I do not think that this Court should, 150 years after the passage of the Judiciary Act, fill in what it thinks is a deficiency in the deliberate policy which Congress adopted.[FN5] Whether the doctrine of forum non conveniens is good or bad, I should wait for Congress to adopt it.

> FN5 The very law review articles which are relied upon to document this theory of a federal rule of forum non conveniens reveal that judicial adoption of this theory without a new act of Congress would be an unwarranted judicial innovation. Foster, Place of Trial-Interstate Application of Intrastate Methods of Adjustment, 44 Harv.L.Rev. 41, 52; Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col.L.Rev. 1, 18. For Instance, it is stated that 'No matter how little dispute there is as to the desirability of such legislation, there is comparatively little chance of overcoming legislative inertia and securing its passage unless some accident happens to focus attention upon it. The best hope is that the courts will feel free to take appropriate action without specific legislation authorizing them to do so.' Foster, supra at 52.

Mr. Justice RUTLEDGE joins in this opinion.

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Gulf Oil Corp. v. Gilbert
330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055

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EXHIBIT H

Supreme Court of the United States
HELICOPTEROS NACIONALES DE COLOMBIA, S.A., Petitioner,
v.
Elizabeth **HALL** et al.
No. 82-1127.

Argued Nov. 8, 1983.
Decided April 24, 1984.

Wrongful death action was instituted in a Texas state court against a Colombian corporation and others. Denying Colombian corporation's motion to dismiss actions for lack of in personam jurisdiction over it, the District Court, Harris County, Wyatt H. Heard, J., entered judgment against corporation on a jury verdict in favor of plaintiffs. Corporation appealed. The Texas Court of Civil Appeals, 616 S.W.2d 247, reversed and dismissed case for lack of jurisdiction, and plaintiffs appealed. The Texas Supreme Court, 638 S.W.2d 870, reversed. Certiorari was granted. The Supreme Court, Justice Blackmun, held that Colombian corporation's contacts with Texas, which consisted of one trip to Texas by corporation's chief executive officer for purpose of negotiating transportation services contract, acceptance of checks drawn on Texas bank, and purchases of helicopters and equipment from Texas manufacturer and related training trips, were insufficient to satisfy requirements of due process clause of the Fourteenth Amendment and hence to allow Texas court to assert in personam jurisdiction over corporation in wrongful death action.

Texas Supreme Court judgment reversed.

Justice Brennan dissented and filed an opinion.

West Headnotes

[1] Federal Courts 170B 71

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk71 k. Territorial Limitations and Venue in General. Most Cited Cases
(Formerly 170Bk76)
Lack of residential or other contacts with forum state of itself does not defeat otherwise proper jurisdiction.

[2] Constitutional Law 92 3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))
Due process clause of the Fourteenth Amendment operates to limit the power of a state to assert in personam jurisdiction over a nonresident defendant. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 3965(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases
(Formerly 92k305(6))
Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 3965(5)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances

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92k3965(5) k. Services and Service Providers. Most Cited Cases
(Formerly 92k305(6))
Colombian corporation's contacts with Texas, which consisted of one trip to Texas by corporation's chief executive officer for purpose of negotiating transportation services contract, acceptance of checks drawn on Texas bank, and purchases of helicopters and equipment from Texas manufacturer and related training trips, were insufficient to satisfy requirements of due process clause of the Fourteenth Amendment and hence to allow Texas court to assert in personam jurisdiction over corporation in wrongful death action. U.S.C.A. Const.Amend. 14.

[5] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
(Formerly 170Bk76)
Unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum state to justify an assertion of jurisdiction. U.S.C.A. Const.Amend. 14.

[6] Federal Courts 170B ⚿84

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk84 k. Miscellaneous Particular Activities. Most Cited Cases
Mere purchases in forum state, even if occurring at regular intervals, are not enough to warrant state's assertion of in personam jurisdiction over nonresident corporation in cause of action not related to those purchase transactions. U.S.C.A. Const.Amend. 14.

Syllabus [FNa1]

FNa1. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Petitioner, a Colombian corporation, entered into a contract to provide helicopter transportation for a Peruvian consortium, the alter ego of a joint venture that had its headquarters in Houston, Tex., during the consortium's construction of a pipeline in Peru for a Peruvian state-owned oil company. Petitioner has no place of business in Texas and never has been licensed to do business there. Its only contacts with the State consisted of sending its chief executive officer to Houston to negotiate the contract with the consortium, accepting into its New York bank account checks drawn by the consortium on a Texas bank, purchasing helicopters, equipment, and training services from a Texas manufacturer, and sending personnel to that manufacturer's facilities for training. After a helicopter owned by petitioner crashed in Peru, resulting in the death of respondents' decedents-United States citizens who were employed by the consortium-respondents instituted wrongful-death actions in a Texas state court against the consortium, the Texas manufacturer, and petitioner. Denying petitioner's motion to dismiss the actions for lack of in personam jurisdiction over it, the trial court entered judgment against petitioner on a jury verdict in favor of respondents. The Texas Court of Civil Appeals reversed, holding that in personam jurisdiction over petitioner was lacking, but in turn was reversed by the Texas Supreme Court.

Held: Petitioner's contacts with Texas were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment and hence to allow the Texas court to assert in personam jurisdiction over petitioner. The one trip to Houston by petitioner's chief executive officer for the purpose of negotiating the transportation services contract cannot be regarded as a contact of a "continuous and systematic" nature, and thus cannot support an assertion of general jurisdiction. Similarly, petitioner's acceptance of checks drawn on a Texas bank is of negligible significance for purposes of determining whether petitioner had sufficient contacts in Texas. Nor were petitioner's purchases of helicopters and equipment from the Texas manufacturer and the related training trips a sufficient

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basis for the Texas court's assertion of jurisdiction. Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372. Mere purchases, even if occurring at regular intervals, are not enough to warrant *409 a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to the purchases. And the fact that petitioner sent personnel to Texas for training in connection with the purchases did not enhance the nature of petitioner's contacts with Texas. Pp. 1872-1874.

638 S.W.2d 870 (Tex.1982), reversed.

Thomas J. Whalen argued the cause for petitioner. With him on the briefs were *Austin P. Magner, Cynthia J. Larsen, James E. Ingram,* and *Barry A. Chasnoff.*

George E. Pletcher argued the cause and filed a brief for respondents.*

* *Robert L. Stern, Stephen M. Shapiro, William H. Crabtree,* and *Edward P. Good* filed a brief for the Motor Vehicle Manufacturers Association as *amicus curiae* urging reversal.

Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller, Kathryn A. Oberly, Michael F. Hertz, and *Howard S. Scher* filed a brief for the United States as *amicus curiae.*

Justice BLACKMUN delivered the opinion of the Court.

We granted certiorari in this case, 460 U.S. 1021, 103 S.Ct. 1270, 75 L.Ed.2d 493 (1983), to decide whether the Supreme Court of Texas correctly ruled that the contacts of a foreign corporation with the State of Texas were sufficient to allow a Texas state court to assert jurisdiction over the corporation in a cause of action not **1870 arising out of or related to the corporation's activities within the State.

I

Petitioner Helicopteros Nacionales de Colombia, S.A. (Helicol), is a Colombian corporation with its principal place of business in the city of Bogota in that country. It is engaged in the business of providing helicopter transportation for oil and construction companies in South America. On *410 January 26, 1976, a helicopter owned by Helicol crashed in Peru. Four United States citizens were among those who lost their lives in the accident. Respondents are the survivors and representatives of the four decedents.

At the time of the crash, respondents' decedents were employed by Consorcio, a Peruvian consortium, and were working on a pipeline in Peru. Consorcio is the alter ego of a joint venture named Williams-Sedco-Horn (WSH).[FN1] The venture had its headquarters in Houston, Tex. Consorcio had been formed to enable the venturers to enter into a contract with Petro Peru, the Peruvian state-owned oil company. Consorcio was to construct a pipeline for Petro Peru running from the interior of Peru westward to the Pacific Ocean. Peruvian law forbade construction of the pipeline by any non-Peruvian entity.

> FN1. The participants in the joint venture were Williams International Sudamericana, Ltd., a Delaware corporation; Sedco Construction Corporation, a Texas corporation; and Horn International, Inc., a Texas corporation.

Consorcio/WSH [FN2] needed helicopters to move personnel, materials, and equipment into and out of the construction area. In 1974, upon request of Consorcio/WSH, the chief executive officer of Helicol, Francisco Restrepo, flew to the United States and conferred in Houston with representatives of the three joint venturers. At that meeting, there was a discussion of prices, availability, working conditions, fuel, supplies, and housing. Restrepo represented that Helicol could have the first helicopter on the job in 15 days. The Consorcio/WSH representatives decided to accept the contract proposed by Restrepo. Helicol began performing before the agreement was formally signed in Peru on November 11, 1974.[FN3] The contract was written in Spanish on *411 official government stationery and provided that the residence of all the parties would be Lima, Peru. It further stated that controversies arising out of the contract would be submitted to the jurisdiction of Peruvian courts. In addition, it provided that Consorcio/WSH would make payments to Helicol's account with the Bank of America in New York City. App. 12a.

> FN2. Throughout the record in this case the entity is referred to both as Consorcio and as WSH. We refer to it hereinafter as Consorcio/WSH.

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FN3. Respondents acknowledge that the contract was executed in Peru and not in the United States. Tr. of Oral Arg. 22-23. See App. 79a; Brief for Respondents 3.

Aside from the negotiation session in Houston between Restrepo and the representatives of Consorcio/WSH, Helicol had other contacts with Texas. During the years 1970-1977, it purchased helicopters (approximately 80% of its fleet), spare parts, and accessories for more than $4 million from Bell Helicopter Company in Fort Worth. In that period, Helicol sent prospective pilots to Fort Worth for training and to ferry the aircraft to South America. It also sent management and maintenance personnel to visit Bell Helicopter in Fort Worth during the same period in order to receive "plant familiarization" and for technical consultation. Helicol received into its New York City and Panama City, Fla., bank accounts over $5 million in payments from Consorcio/WSH drawn upon First City National Bank of Houston.

[1] Beyond the foregoing, there have been no other business contacts between Helicol and the State of Texas. Helicol never has been authorized to do business in Texas and never has had an agent for the **1871 service of process within the State. It never has performed helicopter operations in Texas or sold any product that reached Texas, never solicited business in Texas, never signed any contract in Texas, never had any employee based there, and never recruited an employee in Texas. In addition, Helicol never has owned real or personal property in Texas and never has maintained an office or establishment there. Helicol has maintained no records in Texas and has no shareholders in that State.[FN4] None of the *412 respondents or their decedents were domiciled in Texas, Tr. of Oral Arg. 17, 18,[FN5] but all of the decedents were hired in Houston by Consorcio/WSH to work on the Petro Peru pipeline project.

FN4. The Colombian national airline, Aerovias Nacionales de Colombia, owns approximately 94% of Helicol's capital stock. The remainder is held by Aerovias Corporacion de Viajes and four South American individuals. See Brief for Petitioner 2, n. 2.

FN5. Respondents' lack of residential or other contacts with Texas of itself does not defeat otherwise proper jurisdiction. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780, 104 S.Ct. 1473, 1481, 79 L.Ed.2d 790 (1984); Calder v. Jones, 465 U.S. 783, 788, 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804 (1984). We mention respondents' lack of contacts merely to show that nothing in the nature of the relationship between respondents and Helicol could possibly enhance Helicol's contacts with Texas. The harm suffered by respondents did not occur in Texas. Nor is it alleged that any negligence on the part of Helicol took place in Texas.

Respondents instituted wrongful-death actions in the District Court of Harris County, Tex., against Consorcio/WSH, Bell Helicopter Company, and Helicol. Helicol filed special appearances and moved to dismiss the actions for lack of in personam jurisdiction over it. The motion was denied. After a consolidated jury trial, judgment was entered against Helicol on a jury verdict of $1,141,200 in favor of respondents.[FN6] App. 174a.

FN6. Defendants Consorcio/WSH and Bell Helicopter Company were granted directed verdicts with respect to respondents' claims against them. Bell Helicopter was granted a directed verdict on Helicol's cross-claim against it. App. 167a. Consorcio/WSH, as cross-plaintiff in a claim against Helicol, obtained a judgment in the amount of $70,000. Id., at 174a.

The Texas Court of Civil Appeals, Houston, First District, reversed the judgment of the District Court, holding that in personam jurisdiction over Helicol was lacking. 616 S.W.2d 247 (Tex.1981). The Supreme Court of Texas, with three justices dissenting, initially affirmed the judgment of the Court of Civil Appeals. App. to Pet. for Cert. 46a-62a. Seven months later, however, on motion for rehearing, the court withdrew its prior opinions and, again with three justices dissenting, reversed the judgment of the intermediate court. 638 S.W.2d 870 (Tex.1982). In ruling that the Texas courts had *413 in personam jurisdiction, the Texas Supreme Court

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first held that the State's long-arm statute reaches as far as the Due Process Clause of the Fourteenth Amendment permits. Id., at 872.[FN7] Thus, the only question remaining **1872 for the court to decide was whether it was consistent with the Due Process Clause for Texas courts to assert in personam jurisdiction over Helicol. Ibid.

FN7. The State's long-arm statute is Tex.Rev.Civ.Stat.Ann., Art. 2031b (Vernon 1964 and Supp.1982-1983). It reads in relevant part:
"Sec. 3. Any foreign corporation ... that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation ... of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation ... is a party or is to be made a party.
"Sec. 4. For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation ... shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. The act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside of Texas shall be deemed doing business in this State."The last sentence of § 4 was added by 1979 Tex.Gen.Laws, ch. 245, § 1, and became effective August 27, 1979.
The Supreme Court of Texas in its principal opinion relied upon rulings in U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (Tex.1977); Hoppenfeld v. Crook, 498 S.W.2d 52 (Tex.Civ.App.1973); and O'Brien v. Lanpar Co., 399 S.W.2d 340 (Tex.1966). It is not within our province, of course, to determine whether the Texas Supreme Court correctly interpreted the State's long-arm statute. We therefore accept that court's holding that the limits of the Texas statute are coextensive with those of the Due Process Clause.

II

[2][3] The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert in personam *414 jurisdiction over a nonresident defendant. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1878). Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940). When a controversy is related to or "arises out of" a defendant's contacts with the forum, the Court has said that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of in personam jurisdiction. Shaffer v. Heitner, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977).[FN8]

FN8. It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising "specific jurisdiction" over the defendant. See Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv.L.Rev. 1121, 1144-1164 (1966).

Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State,[FN9] due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952); see

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Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779-780, 104 S.Ct. 1473, 1480-1481, 79 L.Ed.2d 790 (1984). In Perkins, the Court addressed a situation in which state courts had asserted general jurisdiction over a defendant foreign corporation. During the Japanese*415 occupation of the Philippine Islands, the president and general manager of a Philippine mining corporation maintained an office in Ohio from which he conducted activities on behalf of the company. He kept company files and held directors' meetings in the office, carried on correspondence relating to the business, distributed salary checks drawn on two active Ohio bank accounts, engaged an Ohio bank to act as transfer agent, and supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines. In short, the foreign corporation, through its president, "ha[d] been carrying on in Ohio a continuous and systematic, but limited, part of its general business," and the exercise of general jurisdiction over the Philippine corporation by an Ohio court was "reasonable and just." 342 U.S., at 438, 445, 72 S.Ct., at 414, 418.

> FN9. When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising "general jurisdiction" over the defendant. See Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 S.Ct.Rev. 77, 80-81; Von Mehren & Trautman, 79 Harv.L.Rev., at 1136-1144; Calder v. Jones, 465 U.S., at 786, 104 S.Ct., at 1485.

[4] All parties to the present case concede that respondents' claims against Helicol did not "arise out of," and are not related to, Helicol's activities within Texas.[FN10] We thus must *416 explore the nature **1873 of Helicol's contacts with the State of Texas to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in Perkins. We hold that they do not.

> FN10. See Brief for Respondents 14; Tr. of Oral Arg. 26-27, 30-31. Because the parties have not argued any relationship between the cause of action and Helicol's contacts with the State of Texas, we, contrary to the dissent's implication, post, at 1875, assert no "view" with respect to that issue.
>
> The dissent suggests that we have erred in drawing no distinction between controversies that "relate to" a defendant's contacts with a forum and those that "arise out of" such contacts. Post, at 1875. This criticism is somewhat puzzling, for the dissent goes on to urge that, for purposes of determining the constitutional validity of an assertion of specific jurisdiction, there really should be no distinction between the two. Post, at 1879.
>
> We do not address the validity or consequences of such a distinction because the issue has not been presented in this case. Respondents have made no argument that their cause of action either arose out of or is related to Helicol's contacts with the State of Texas. Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists. Nor do we reach the question whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.

It is undisputed that Helicol does not have a place of business in Texas and never has been licensed to do business in the State. Basically, Helicol's contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from Bell Helicopter for substantial sums; and sending personnel to Bell's facilities in Fort Worth for training.

[5] The one trip to Houston by Helicol's chief executive officer for the purpose of negotiating the transportation-services contract with Consorcio/WSH

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cannot be described or regarded as a contact of a "continuous and systematic" nature, as Perkins described it, see also International Shoe Co. v. Washington, 326 U.S., at 320, 66 S.Ct., at 160, and thus cannot support an assertion of in personam jurisdiction over Helicol by a Texas court. Similarly, Helicol's acceptance from Consorcio/WSH of checks drawn on a Texas bank is of negligible significance for purposes of determining whether Helicol had sufficient contacts in Texas. There is no indication that Helicol ever requested that the checks be drawn on a Texas bank or that there was any negotiation between Helicol and Consorcio/WSH with respect to the location or identity of the bank on which checks would be drawn. Common sense and everyday experience suggest that, absent unusual circumstances,[FN11] the bank on which a check is drawn is generally of little ***417** consequence to the payee and is a matter left to the discretion of the drawer. Such unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction. See Kulko v. California Superior Court, 436 U.S. 84, 93, 98 S.Ct. 1690, 1697, 56 L.Ed.2d 132 (1978) (arbitrary to subject one parent to suit in any State where other parent chooses to spend time while having custody of child pursuant to separation agreement); Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State"); see also Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 Va.L.Rev. 85, 99 (1983).

> FN11. For example, if the financial health and continued ability of the bank to honor the draft are questionable, the payee might request that the check be drawn on an account at some other institution.

The Texas Supreme Court focused on the purchases and the related training trips in ****1874** finding contacts sufficient to support an assertion of jurisdiction. We do not agree with that assessment, for the Court's opinion in Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372 (1923) (Brandeis, J., for a unanimous tribunal), makes clear that purchases and related trips, standing alone, are not a sufficient basis for a State's assertion of jurisdiction.

The defendant in Rosenberg was a small retailer in Tulsa, Okla., who dealt in men's clothing and furnishings. It never had applied for a license to do business in New York, nor had it at any time authorized suit to be brought against it there. It never had an established place of business in New York and never regularly carried on business in that State. Its only connection with New York was that it purchased from New York wholesalers a large portion of the merchandise sold in its Tulsa store. The purchases sometimes were made by correspondence and sometimes through visits to New York by an officer of the defendant. The Court concluded: "Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of [New York]." Id., at 518, 43 S.Ct., at 171.

[6]***418** This Court in International Shoe acknowledged and did not repudiate its holding in Rosenberg.See 326 U.S., at 318, 66 S.Ct., at 159.In accordance with Rosenberg, we hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.[FN12]Nor can we conclude that the fact that Helicol sent personnel into Texas for training in connection with the purchase of helicopters and equipment in that State in any way enhanced the nature of Helicol's contacts with Texas. The training was a part of the package of goods and services purchased by Helicol from Bell Helicopter. The brief presence of Helicol employees in Texas for the purpose of attending the training sessions is no more a significant contact than were the trips to New York made by the buyer for the retail store in Rosenberg.See also Kulko v. California Superior Court, 436 U.S., at 93, 98 S.Ct., at 1697 (basing California jurisdiction on 3-day and 1-day stopovers in that State "would make a mockery of" due process limitations on assertion of personal jurisdiction).

> FN12. This Court in International Shoe cited Rosenberg for the proposition that "the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to

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> confer upon the state authority to enforce it." 326 U.S., at 318, 66 S.Ct., at 159.Arguably, therefore, Rosenberg also stands for the proposition that mere purchases are not a sufficient basis for either general or specific jurisdiction. Because the case before us is one in which there has been an assertion of general jurisdiction over a foreign defendant, we need not decide the continuing validity of Rosenberg with respect to an assertion of specific jurisdiction, i.e., where the cause of action arises out of or relates to the purchases by the defendant in the forum State.

III

We hold that Helicol's contacts with the State of Texas were insufficient to satisfy the requirements of the Due Process***419** Clause of the Fourteenth Amendment.[FN13]Accordingly, we reverse the judgment of the Supreme Court of Texas.

> FN13. As an alternative to traditional minimum-contacts analysis, respondents suggest that the Court hold that the State of Texas had personal jurisdiction over Helicol under a doctrine of "jurisdiction by necessity." See Shaffer v. Heitner, 433 U.S. 186, 211, n. 37, 97 S.Ct. 2569, 2583, n. 37, 53 L.Ed.2d 683 (1977). We conclude, however, that respondents failed to carry their burden of showing that all three defendants could not be sued together in a single forum. It is not clear from the record, for example, whether suit could have been brought against all three defendants in either Colombia or Peru. We decline to consider adoption of a doctrine of jurisdiction by necessity-a potentially far-reaching modification of existing law-in the absence of a more complete record.

It is so ordered.

****1875** Justice BRENNAN, dissenting.
Decisions applying the Due Process Clause of the Fourteenth Amendment to determine whether a State may constitutionally assert in personam jurisdiction over a particular defendant for a particular cause of action most often turn on a weighing of facts. See, e.g., Kulko v. California Superior Court, 436 U.S. 84, 92, 98 S.Ct. 1690, 1697, 56 L.Ed.2d 132 (1978); id., at 101-102, 98 S.Ct., at 1701-1702 (BRENNAN, J., dissenting). To a large extent, today's decision follows the usual pattern. Based on essentially undisputed facts, the Court concludes that petitioner Helicol's contacts with the State of Texas were insufficient to allow the Texas state courts constitutionally to assert "general jurisdiction" over all claims filed against this foreign corporation. Although my independent weighing of the facts leads me to a different conclusion, see infra, at 1877, the Court's holding on this issue is neither implausible nor unexpected.

What is troubling about the Court's opinion, however, are the implications that might be drawn from the way in which the Court approaches the constitutional issue it addresses. First, the Court limits its discussion to an assertion of general jurisdiction of the Texas courts because, in its view, the ***420** underlying cause of action does "not aris[e] out of or relat[e] to the corporation's activities within the State."Ante, at 1870. Then, the Court relies on a 1923 decision in Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372, without considering whether that case retains any validity after our more recent pronouncements concerning the permissible reach of a State's jurisdiction. By posing and deciding the question presented in this manner, I fear that the Court is saying more than it realizes about constitutional limitations on the potential reach of in personam jurisdiction. In particular, by relying on a precedent whose premises have long been discarded, and by refusing to consider any distinction between controversies that "relate to" a defendant's contacts with the forum and causes of action that "arise out of" such contacts, the Court may be placing severe limitations on the type and amount of contacts that will satisfy the constitutional minimum.

In contrast, I believe that the undisputed contacts in this case between petitioner Helicol and the State of Texas are sufficiently important, and sufficiently related to the underlying cause of action, to make it fair and reasonable for the State to assert personal jurisdiction over Helicol for the wrongful-death actions filed by the respondents. Given that Helicol has purposefully availed itself of the benefits and obligations of the forum, and given the direct

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relationship between the underlying cause of action and Helicol's contacts with the forum, maintenance of this suit in the Texas courts "does not offend [the] '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) (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940)), that are the touchstone of jurisdictional analysis under the Due Process Clause. I therefore dissent.

I

The Court expressly limits its decision in this case to "an assertion of general jurisdiction over a foreign defendant."***421** Ante, at 1874, n. 12. See ante, at 1873, and n. 10. Having framed the question in this way, the Court is obliged to address our prior holdings in Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), and Rosenberg Bros. & Co. v. Curtis Brown Co., supra.In Perkins, the Court considered a State's assertion of general jurisdiction over a foreign corporation that "ha[d] been carrying on ... a continuous and systematic, but limited, part of its general business" in the forum. 342 U.S., at 438, 72 S.Ct., at 414.Under the circumstances of that case, we held that such contacts were constitutionally sufficient "to make it reasonable and just to subject the corporation ****1876** to the jurisdiction" of that State. Id., at 445, 72 S.Ct., at 418 (citing International Shoe, supra, 326 U.S., at 317-320, 66 S.Ct., at 158-160). Nothing in Perkins suggests, however, that such "continuous and systematic" contacts are a necessary minimum before a State may constitutionally assert general jurisdiction over a foreign corporation.

The Court therefore looks for guidance to our 1923 decision in Rosenberg, supra, which until today was of dubious validity given the subsequent expansion of personal jurisdiction that began with International Shoe, supra, in 1945. In Rosenberg, the Court held that a company's purchases within a State, even when combined with related trips to the State by company officials, would not allow the courts of that State to assert general jurisdiction over all claims against the nonresident corporate defendant making those purchases.[FN1]***422** Reasoning by analogy, the Court in this case concludes that Helicol's contacts with the State of Texas are no more significant than the purchases made by the defendant in Rosenberg. The Court makes no attempt, however, to ascertain whether the narrow view of in personam jurisdiction adopted by the Court in Rosenberg comports with "the fundamental transformation of our national economy" that has occurred since 1923. McGee v. International Life Ins. Co., 355 U.S. 220, 222-223, 78 S.Ct. 199, 200-201, 2 L.Ed.2d 223 (1957). See also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292-293, 100 S.Ct. 559, 564-565, 62 L.Ed.2d 490 (1980); id., at 308-309, 100 S.Ct., at 585-586 (BRENNAN, J., dissenting); Hanson v. Denckla, 357 U.S. 235, 250-251, 78 S.Ct. 1228, 1237-1238, 2 L.Ed.2d 1283 (1958); id., at 260, 78 S.Ct., at 1243 (Black, J., dissenting). This failure, in my view, is fatal to the Court's analysis.

> FN1. The Court leaves open the question whether the decision in Rosenberg was intended to address any constitutional limits on an assertion of "specific jurisdiction." Ante, at 1874, n. 12 (citing International Shoe, 326 U.S., at 318, 66 S.Ct., at 159). If anything is clear from Justice Brandeis' opinion for the Court in Rosenberg, however, it is that the Court was concerned only with general jurisdiction over the corporate defendant. See 260 U.S., at 517, 43 S.Ct., at 171 ("The sole question for decision is whether ... defendant was doing business within the State of New York in such manner and to such extent as to warrant the inference that it was present there"); id., at 518, 43 S.Ct., at 171 (the corporation's contacts with the forum "would not warrant the inference that the corporation was present within the jurisdiction of the State"); ante, at 1874. The Court's resuscitation of Rosenberg, therefore, should have no bearing upon any forum's assertion of jurisdiction over claims that arise out of or relate to a defendant's contacts with the State.

The vast expansion of our national economy during the past several decades has provided the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause. By broadening the type and amount of business opportunities available to participants in interstate and foreign commerce, our economy has increased the frequency with which foreign corporations

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actively pursue commercial transactions throughout the various States. In turn, it has become both necessary and, in my view, desirable to allow the States more leeway in bringing the activities of these nonresident corporations within the scope of their respective jurisdictions.

This is neither a unique nor a novel idea. As the Court first noted in 1957:

"[M]any commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the ***423** same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." McGee, supra, at 222-223, 78 S.Ct., at 200-201.

See also World-Wide Volkswagen, supra, 444 U.S., at 293, 100 S.Ct., at 565 (reaffirming that "[t]he historical developments noted in McGee... have only accelerated in the generation since that case was decided"****1877**); Hanson v. Denckla, supra, 357 U.S., at 250-251, 78 S.Ct., at 1237-1238.

Moreover, this "trend ... toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents," McGee, supra, 355 U.S., at 222, 78 S.Ct., at 200, is entirely consistent with the "traditional notions of fair play and substantial justice," International Shoe, 326 U.S., at 316, 66 S.Ct., at 158, that control our inquiry under the Due Process Clause. As active participants in interstate and foreign commerce take advantage of the economic benefits and opportunities offered by the various States, it is only fair and reasonable to subject them to the obligations that may be imposed by those jurisdictions. And chief among the obligations that a nonresident corporation should expect to fulfill is amenability to suit in any forum that is significantly affected by the corporation's commercial activities.

As a foreign corporation that has actively and purposefully engaged in numerous and frequent commercial transactions in the State of Texas, Helicol clearly falls within the category of nonresident defendants that may be subject to that forum's general jurisdiction. Helicol not only purchased helicopters and other equipment in the State for many years, but also sent pilots and management personnel into Texas to be trained in the use of this equipment and to consult with the seller on technical matters.[FN2] Moreover, negotiations for the ***424** contract under which Helicol provided transportation services to the joint venture that employed the respondents' decedents also took place in the State of Texas. Taken together, these contacts demonstrate that Helicol obtained numerous benefits from its transaction of business in Texas. In turn, it is eminently fair and reasonable to expect Helicol to face the obligations that attach to its participation in such commercial transactions. Accordingly, on the basis of continuous commercial contacts with the forum, I would conclude that the Due Process Clause allows the State of Texas to assert general jurisdiction over petitioner Helicol.

FN2. Although the Court takes note of these contacts, it concludes that they did not "enhanc[e] the nature of Helicol's contacts with Texas [[[because the] training was a part of the package of goods and services purchased by Helicol."Ante, at 1874. Presumably, the Court's statement simply recognizes that participation in today's interdependent markets often necessitates the use of complicated purchase contracts that provide for numerous contacts between representatives of the buyer and seller, as well as training for related personnel. Ironically, however, while relying on these modern-day realities to denigrate the significance of Helicol's contacts with the forum, the Court refuses to acknowledge that these same realities require a concomitant expansion in a forum's jurisdictional reach. See supra, at 1876 - 1877. As a result, when deciding that the balance in this case must be struck against jurisdiction, the Court loses sight of the ultimate inquiry: whether it is fair and reasonable to subject a nonresident corporate defendant to the jurisdiction of a State when that defendant has purposefully availed itself of the benefits and obligations of that particular forum. Cf. Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958).

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II

The Court also fails to distinguish the legal principles that controlled our prior decisions in Perkins and Rosenberg. In particular, the contacts between petitioner Helicol and the State of Texas, unlike the contacts between the defendant and the forum in each of those cases, are significantly related to the cause of action alleged in the original suit filed by the respondents. Accordingly, in my view, it is both fair and reasonable for the Texas courts to assert specific jurisdiction over Helicol in this case.

By asserting that the present case does not implicate the specific jurisdiction of the Texas courts, see ante, at 1872-1873, and nn. 10 and 12, the Court necessarily removes its decision ***425** from the reality of the actual facts presented for our consideration.[FN3] Moreover, the Court refuses to consider****1878** any distinction between contacts that are "related to" the underlying cause of action and contacts that "give rise" to the underlying cause of action. In my view, however, there is a substantial difference between these two standards for asserting specific jurisdiction. Thus, although I agree that the respondents' cause of action did not formally "arise out of" specific activities initiated by Helicol in the State of Texas, I believe that the wrongful-death claim filed by the respondents is significantly related to the undisputed contacts between Helicol and the forum. On that basis, I would conclude that the Due Process Clause allows the Texas courts to assert specific jurisdiction over this particular action.

> FN3. Nor do I agree with the Court that the respondents have conceded that their claims are not related to Helicol's activities within the State of Texas. Although parts of their written and oral arguments before the Court proceed on the assumption that no such relationship exists, other portions suggest just the opposite:
> "If it is the concern of the Solicitor General [appearing for the United States as amicus curiae] that a holding for Respondents here will cause foreign companies to refrain from purchasing in the United States for fear of exposure to general jurisdiction on unrelated causes of action, such concern is not well founded.
> "Respondents' cause is not dependent on a ruling that mere purchases in a state, together with incidental training for operating and maintaining the merchandise purchased can constitute the ties, contacts and relations necessary to justify jurisdiction over an unrelated cause of action. However, regular purchases and training coupled with other contacts, ties and relations may form the basis for jurisdiction."Brief for Respondents 13-14. Thus, while the respondents' position before this Court is admittedly less than clear, I believe it is preferable to address the specific jurisdiction of the Texas courts because Helicol's contacts with Texas are in fact related to the underlying cause of action.

The wrongful-death actions filed by the respondents were premised on a fatal helicopter crash that occurred in Peru. Helicol was joined as a defendant in the lawsuits because it provided transportation services, including the particular helicopter and pilot involved in the crash, to the joint venture ***426** that employed the decedents. Specifically, the respondent Hall claimed in her original complaint that "Helicol is ... legally responsible for its own negligence through its pilot employee."App. 6a. Viewed in light of these allegations, the contacts between Helicol and the State of Texas are directly and significantly related to the underlying claim filed by the respondents. The negotiations that took place in Texas led to the contract in which Helicol agreed to provide the precise transportation services that were being used at the time of the crash. Moreover, the helicopter involved in the crash was purchased by Helicol in Texas, and the pilot whose negligence was alleged to have caused the crash was actually trained in Texas. See Tr. of Oral Arg. 5, 22. This is simply not a case, therefore, in which a state court has asserted jurisdiction over a nonresident defendant on the basis of wholly unrelated contacts with the forum. Rather, the contacts between Helicol and the forum are directly related to the negligence that was alleged in the respondent Hall's original complaint.[FN4] Because Helicol should have expected to be amenable to suit in the Texas courts for claims directly related to these contacts, it is fair and reasonable to allow the assertion of jurisdiction in this case.

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FN4. The jury specifically found that "the pilot failed to keep the helicopter under proper control," that "the helicopter was flown into a treetop fog condition, whereby the vision of the pilot was impaired," that "such flying was negligence," and that "such negligence ... was a proximate cause of the crash."See App. 167a-168a. On the basis of these findings, Helicol was ordered to pay over $1 million in damages to the respondents.

Despite this substantial relationship between the contacts and the cause of action, the Court declines to consider whether the courts of Texas may assert specific jurisdiction over this suit. Apparently, this simply reflects a narrow interpretation of the question presented for review. See ante, at 1873, n. 10. It is nonetheless possible that the Court's opinion may be read to imply that the specific jurisdiction of the Texas courts is inapplicable because the cause of action *427 did not formally "arise out of" the contacts between Helicol and the forum. In my view, however, such a rule would place unjustifiable limits on the **1879 bases under which Texas may assert its jurisdictional power.[FN5]

FN5. Compare Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv.L.Rev. 1121, 1144-1163 (1966), with Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 S.Ct.Rev. 77, 80-88. See also Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 Va.L.Rev. 85, 100-101, and n. 66 (1983).

Limiting the specific jurisdiction of a forum to cases in which the cause of action formally arose out of the defendant's contacts with the State would subject constitutional standards under the Due Process Clause to the vagaries of the substantive law or pleading requirements of each State. For example, the complaint filed against Helicol in this case alleged negligence based on pilot error. Even though the pilot was trained in Texas, the Court assumes that the Texas courts may not assert jurisdiction over the suit because the cause of action "did not 'arise out of,' and [is] not related to," that training. See ante, at 1872. If, however, the applicable substantive law required that negligent training of the pilot was a necessary element of a cause of action for pilot error, or if the respondents had simply added an allegation of negligence in the training provided for the Helicol pilot, then presumably the Court would concede that the specific jurisdiction of the Texas courts was applicable.

Our interpretation of the Due Process Clause has never been so dependent upon the applicable substantive law or the State's formal pleading requirements. At least since International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the principal focus when determining whether a forum may constitutionally assert jurisdiction over a nonresident defendant has been on fairness and reasonableness to the defendant. To this extent, a court's specific jurisdiction should be applicable whenever the cause of action arises out of or relates to the contacts between the defendant and the forum. It is eminently*428 fair and reasonable, in my view, to subject a defendant to suit in a forum with which it has significant contacts directly related to the underlying cause of action. Because Helicol's contacts with the State of Texas meet this standard, I would affirm the judgment of the Supreme Court of Texas.

U.S.,1984
Helicopteros Nacionales de Colombia, S.A. v. Hall
466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404

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EXHIBIT I

C

United States District Court, D. New Jersey.
Richard HOFFER, Plaintiff,
v.
INFOSPACE.COM, INC., and Naveen Jain, Defendants.
No. Civ.A. 99-5881 (AJL).

June 29, 2000.

Employee brought action against former employer, raising claims for damages for breach of contract, misrepresentation, fraud, breach of the covenant of good faith and fair dealing and promissory estoppel. Upon employer's motion to dismiss or transfer, the District Court, Lechner, J., held that: (1) forum selection clause in employment agreement, which called for venue in Washington, was enforceable; (2) venue was proper in Western District of Washington, rather than District of New Jersey; and (3) even if venue was proper in District of New Jersey where employee resided, transfer to Western District of Washington for convenience of parties and witnesses was warranted.

Motion to transfer granted.

West Headnotes

[1] Federal Courts 170B 412.1

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk412 Contracts; Sales
170Bk412.1 k. In General. Most Cited Cases
In diversity action, construction of a contract is usually a matter of state, not federal, common law.

[2] Federal Courts 170B 409.1

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk409 Conflict of Laws
170Bk409.1 k. In General. Most Cited Cases
Federal court sitting in diversity must utilize the choice of law rules of the forum state.

[3] Contracts 95 127(4)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court
95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases
Under both New Jersey and Washington law, forum selection clauses will not be given effect if they are the result of fraud or coercive bargaining power, or if enforcement of the clause would be seriously inconvenient for the trial.

[4] Contracts 95 127(4)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court
95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases
Under New Jersey law, forum selection clauses should be enforced unless the party objecting to enforcement establishes that it would be the result of fraud or overreaching, enforcement would violate a strong public policy of the forum, or that enforcement would in the particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable.

[5] Contracts 95 127(4)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of

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Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court
95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases
Forum selection clause in employment agreement, which called for venue in Washington, was enforceable under New Jersey law; employee failed to show that clause was product of fraud or coercion on behalf, that enforcement of clause would violate important state or federal public policies, or that enforcement of clause would be unreasonable and seriously inconvenient such that he would be effectively deprived of his day in court.

[6] Contracts 95 ⚷127(4)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court
95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases
Under New Jersey law, fraud and overreaching are grounds for setting aside a forum selection clause only if it is determined that the inclusion of the forum selection clause in the contract was the product of deception and, or, coercion; it is insufficient to allege that one was induced generally to enter into the contract itself as a result of fraud.

[7] Federal Courts 170B ⚷87.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk87 District Where Claim Arose
170Bk87.5 k. In General. Most Cited Cases
(Formerly 170Bk87)
In determining where a substantial part of the events or omissions giving rise to a claim arises for venue purposes in diversity action, three factors are relevant: (1) the place of injury; (2) the weight of contacts; and (3) whether a substantial part of the events or omissions giving rise to the claim occurred in the district. 28 U.S.C.A. § 1391.

[8] Federal Courts 170B ⚷89

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk87 District Where Claim Arose
170Bk89 k. Contracts and Breach Thereof. Most Cited Cases
Venue for breach of employment contract suit was proper in Western District of Washington, rather than District of New Jersey since overwhelming contacts and events giving rise to the litigation occurred in the Western District of Washington; central negotiations concerning the terms of employment took place at employer's Washington headquarters, employment agreement was executed in Washington, and alleged breach and decision to terminate employee and deny his exercise of stock options occurred in Washington. 28 U.S.C.A. § 1391(a).

[9] Federal Courts 170B ⚷109

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk106 Determination in Particular Transferable Actions
170Bk109 k. Contracts; Insurance; Sales. Most Cited Cases
Even if venue for breach of employment contract suit was proper in District of New Jersey where employee resided, transfer to Western District of Washington for convenience of parties and witnesses was warranted; Western District of Washington was a proper venue since overwhelming contacts and events giving rise to the litigation occurred there, forum selection clause was valid and called for venue in Washington, location of witnesses and the documentary evidence favored Washington, and there was a strong likelihood that Washington law applied to a majority, if not all, of the issues. 28 U.S.C.A. § 1404(a).

[10] Federal Courts 170B ⚷101

170B Federal Courts
170BII Venue

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170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases
There are three factors to consider when determining whether to transfer a matter: (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice. 28 U.S.C.A. § 1404(a).

[11] Federal Courts 170B 101

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases
Decision to transfer for convenience of parties and witnesses must incorporate all relevant factors to determine whether on balance the litigation will more conveniently proceed and the interests of justice be better served by transfer to a different forum. 28 U.S.C.A. § 1404(a).

[12] Federal Courts 170B 144

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)4 Proceedings and Effect of Change
170Bk144 k. Presumptions and Burden of Proof. Most Cited Cases
Moving party has the burden of persuasion on a motion to transfer for convenience of parties and witnesses; burden is not on plaintiff to show the proposed alternative forum is inadequate, rather, burden is on the moving party to show the proposed alternative forum is not only adequate, but also more appropriate than the present forum. 28 U.S.C.A. § 1404(a).

[13] Federal Courts 170B 143

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)4 Proceedings and Effect of Change
170Bk143 k. Affidavits and Evidence in General. Most Cited Cases
On motion to transfer for convenience of parties and witnesses, inquiry into the interests of the parties may be resolved by an examination of the affidavits submitted by the parties. 28 U.S.C.A. § 1404(a).

[14] Federal Courts 170B 101

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In General; Convenience and Interest of Justice. Most Cited Cases

Federal Courts 170B 105

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk105 k. Plaintiff's Choice of Forum; Forum Shopping. Most Cited Cases
Choice of forum by a plaintiff is a "paramount concern" in deciding a motion to transfer for convenience of parties and witnesses; unless the balance is strongly tipped in favor of the defendant, the plaintiff's choice of forum should not be disturbed. 28 U.S.C.A. § 1404(a).

*558 Robert Novack,Mary L. Moore, Kenneth J. Cesta, Edwards & Angell, LLP, Short Hill, NJ, for plaintiff.
Thomas F. Campion, Drinker Biddle & Shanley LLP, Florham Park, NJ, Harry H. Schneider, Jr., Perkins Coie LLP, Seattle, WA, for defendants.

OPINION

LECHNER, District Judge.
This is an action brought by plaintiff, Robert Hoffer ("Hoffer"), against defendants InfoSpace.com, Inc. ("Infospace") and Naveen Jain ("Jain") (collectively, the "Defendants"). On 15 December 1999, Hoffer filed a complaint (the "Complaint") that alleges, *inter alia,* a claim for damages for breach of contract,

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misrepresentation, fraud, breach of the covenant of good faith and fair dealing and promissory estoppel. *See* Complaint, ¶¶ 1, 22-44. Hoffer further alleges the instant matter is within the jurisdiction of this court pursuant to 28 U.S.C. § 1332, *see id.*, ¶ 2, and venue is properly laid in this District pursuant to 28 U.S.C. § 1391(a) ("Section 1391(a)"). *See id.* On 31 January 2000, the Defendants filed an answer and counter claims (the "Answer/Counterclaims"). In particular, the Defendants allege Hoffer breached the terms of a loan agreement with Infospace, misappropriated trade secrets and breached a confidential relationship with his employer, Infospace. *See* Answer/Counterclaims, ¶¶ 60-66.

Currently pending is a motion, filed by the Defendants, to dismiss the action, pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure for improper venue based on a forum selection clause (the "Forum Selection Clause") contained in an employee non-disclosure agreement (the "NDA") entered into by Hoffer and Infospace. In the alternative, the Defendants request that the court transfer the action (the "Motion to Transfer") [FN1] to the United States District Court for the Western District of Washington (the "Western District of Washington") to cure a defect in venue, pursuant to 28 U.S.C. § 1406 ("Section 1406") and, or, for the convenience of the parties and witnesses, pursuant to 28 U.S.C. § 1404(a) ("Section 1404(a)").

FN1. In support of the Motion to Transfer, the Defendants submitted: a Brief in support of Defendants' Motion to Dismiss or, Alternatively, to Transfer Venue (the "Moving Brief"), affidavit of Anu Jain (the "A. Jain Aff."), affidavit of Naveen Jain (the "N. Jain Aff."), affidavit of Brent Snyder (the "Snyder Aff."), Defendants' Reply Brief in support of Motion to Dismiss or, Alternatively, Transfer Venue (the "Reply Brief") and an affidavit of Joseph M. McMillan (the "McMillan Aff.").

In opposition to the Motion to Transfer, Hoffer submitted: Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss or, Alternatively, Transfer Venue (the "Opp. Brief"), affidavit of G. Kent Plunkett (the "Plunkett Aff."), affidavit of Timothy Kay (the "Kay Aff.") and an affidavit of Mary L. Moore (the "Moore Aff.").

For the reasons set out below, the Motion to Transfer is granted; the action is transferred for all purposes to the United States District Court for the Western District of Washington.

Background

A. *Parties*

Hoffer currently resides at One East Elbrook Drive in Allendale, New Jersey. *See* Complaint, ¶ 3. It appears Hoffer has been engaged in the business of licensing "yellow and white pages data" and syndicated services to internet, software, database, telecommunications and media firms. *Id.*, ¶ 7. Hoffer alleges he began working for Infospace in or around the "late Spring of 1996 on a consulting basis." *Id.*, ¶ 11.

Jain is the President and Chief Executive Officer of Infospace and resides in the State of Washington. *Id.*, ¶ 4.*See also* Answer/Counterclaims, ¶¶ 4-5. Infospace is a Delaware corporation with its principal place of business located in Redmond, Washington. *Id.*, ¶ 5.*See also* Answer/Counterclaims, ¶¶ 4-5. Infospace was founded in or around March 1996. *Id.*, ¶ 6. Hoffer alleges Infospace is a provider of internet services. *Id.* Hoffer further alleges Infospace provides these services through its yellow pages, white pages and e-mail directories. *Id.*

B. *Facts*

As mentioned, Hoffer alleges the Defendants breached the terms of an employment agreement and, in addition, have prevented Hoffer from exercising certain stock options given to him in an employment agreement, dated 25 June 1996 (the "25 June 1996 Employment Agreement"). *See id.*, ¶ 19.

Prior to March of 1996, it appears Hoffer was the general manager of the "electronic/interactive" media division of a firm known as Database America Companies, Inc. ("DAC"), located in Montvale, New Jersey. *See id.*, ¶ 7. As mentioned, Hoffer was engaged in the business of licensing yellow and white pages data and syndicated services to internet,

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software, database, telecommunications and media firms. *See id.*

In or around March 1996, Hoffer alleges Jain approached him in New Jersey and had various discussions and meetings with Hoffer, in an attempt to solicit Hoffer to join him in a "new business venture" [FN2]*See* ****560*** *id.*, ¶ 8. It is alleged that the "new business venture" later became known as Infospace. *See id.* Hoffer alleges Jain indicated that because the "new business venture" was a start-up, he could not pay Hoffer a salary that was commensurate with what Hoffer was earning at DAC. *See id.* It is alleged, however, that Jain represented that Hoffer "would share in the venture through the issuance of common stock. Jain further represented ... that he ... was wealthy from his prior employment with Microsoft and as such, Jain wouldn't need to take a salary and that Jain would also be compensated in the form of the issuance of stock." *Id.* ¶ 10.

> FN2. This characterization of the initial meeting between Hoffer and Jain is in contrast to the deposition testimony of Hoffer. According to his deposition testimony, it appears Hoffer met Jain in conjunction with his performing due diligence for DAC regarding a business venture proposed by Jain to DAC, not Hoffer. *See* Hoffer Dep. at 22:14-23, attached as Ex. A to the Snyder Aff. (Q: "What was the context in which you met [Jain]?" Hoffer: "I was there to evaluate Naveen Jain's business experience, essentially for due diligence *on behalf of [DAC].*D" Q: "Perhaps you can give me a little bit more background. Did Mr. Jain approach [DAC]?" Hoffer: "Mr. Jain approached [DAC] to do or *enter into a business relationship with [DAC].*") (emphasis added).
>
> Indeed, Jain and Hoffer had no other contact in New Jersey and did not begin discussing the possibility of Hoffer coming over to Infospace until later in 1996 when the parties contacted one another via telephone and e-mail. *See id.* at 24:9-15 (Q: "And what was your follow-up after the meeting?" Hoffer: "Naveen Jain called me on the telephone at [DAC].... In fact, after meeting Naveen Jain, his calls to me were constant during my business day.").

In or around the late Spring of 1996, Hoffer began working with Jain on a consulting basis. *See id.*, ¶ 11. Hoffer alleges he agreed to work with Jain to build an internet directory services company. *See id.*, ¶ 12. For his part, Hoffer alleges he created a sales presentation for "co-branding" services as well as a revenue model for the business. *See id.* Hoffer further alleges he introduced Jain to several clients including "Playboy, the New York Times, The Wall Street Journal, Infoseek, Web TV, Advanced Internet and Riddler/Interactive Imagination." *Id.*, ¶ 13. In addition, Hoffer alleges he "demonstrated to Jain a directory service application capable of supporting high traffic query and response into very large databases via HTTP."*Id.*, ¶ 14. Hoffer alleges he introduced Jain to Timothy Day, a software developer, capable of engineering the software necessary to operate the directory services that Infospace was to provide to its customers. *Id.*, ¶ 15.

Hoffer alleges he left DAC and officially joined Infospace based on the representation of Jain that Hoffer would be a 50% partner with Jain. *See id.*, ¶ 16. Hoffer specifically alleges he "quit [DAC] in New Jersey and joined Infospace at its new offices in Redmond, Washington." *Id.* Upon arrival at Infospace, Hoffer alleges Jain "unilaterally reduced" his prior employment offer of a 50% partnership interest in Infospace and, instead, presented Hoffer with various employment proposals. *See id.*, ¶ 17.

On or about 1 June 1996, Hoffer alleges Jain forwarded to him a "letter agreement" that provided that Hoffer would be paid $50,000 and granted the option to buy up to 300,000 shares of stock at $.10 per share. *See id.*, ¶ 17. As a result of this new employment proposal, it is alleged that Hoffer and Jain entered into negotiations concerning an acceptable employment arrangement. *See id.* It appears that on 25 June 1996,[FN3] Jain provided Hoffer with an employment agreement (see 25 June 1996 Employment Agreement), by which Jain granted Hoffer, in part, the right to the immediate purchase of up to 75,000 shares of stock at $1.00 per share.

> FN3. It is undisputed that Hoffer and Jain

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> executed the 25 June 1996 Employment Agreement and the NDA on 25 June 1996. It appears, however, the parties backdated these documents to 14 June 1996 to reflect to actual date of acceptance by Hoffer of the employment offer extended to him by the Defendants. *See* Hoffer Dep. at 14:16-19, attached as Ex. B to the McMillan Aff. (Hoffer: "I signed th[e] document[s] on June the 25th and backdated it June 14th of 1996, when I accepted the offer of employment at Infospace Corporation.").

Hoffer alleges the 25 June 1996 Employment Agreement was executed by Jain and accepted by Hoffer. *See id.* Thereafter, Hoffer alleges he began working as an Infospace employee for a period of approximately four months. *See id.*, ¶ 18. Hoffer, however, alleges Jain fired him over the telephone during a business trip. *See id.*

***561** Upon information and belief, Hoffer alleges that Jain has "engaged in a pattern and practice of soliciting the involvement and employment of key personnel of competing business by promising them senior management positions and lucrative compensation packages ... and then terminating the employee and reneging on his promises and agreements." *Id.*, ¶ 20.

In count one of the Complaint, Hoffer alleges Infospace breached the 25 June 1996 Employment Agreement. *See id.*, ¶ 23. Hoffer, moreover, alleges he has performed the terms of the 25 June 1995 Employment Agreement and completed all conditions necessary to entitle him to exercise the options contained in the 26 June 1996 Employment Agreement. *See id.*

In count two of the Complaint, Hoffer alleges the Defendants "breached the covenant of good faith and fair dealing implied in every contract." *Id.*, ¶¶ 26-27.

In count three and count four of the Complaint Hoffer alleges the Defendants committed fraud and made negligent misrepresentations in that they misrepresented "material facts inducing [Hoffer] to terminate his employment with [DAC] and to accept an employment position with Infospace and to provide infospace with [Hoffer's] contacts and industry knowledge." *Id.*, ¶ 29. Hoffer specifically alleges that based on the representations of Jain concerning "founders equity," he introduced the Defendants to various business contacts that are today part of the Infospace network. *See id.* Hoffer further alleges he introduced the Defendants to "technical people who were able to develop the database engineering tools that are used in creating the directory service and products provided by Infospace...."*Id.*

In addition, Hoffer alleges that based on the representations of Jain, he left his position at DAC and joined Infospace in Redmond, Washington, "where he was provided with paperwork which was different than the representations that have been made by Jain to induce Hoffer to leave his prior employment." *Id.*, ¶ 30. *See also id.*, 35-36.

Finally, in count five of the Complaint, Hoffer alleges the Defendants are estopped from denying the terms of the 25 June 1996 Employment Agreement because Hoffer reasonably relied on the misrepresentations and inducements made by the Defendants. *See id.*, ¶¶ 40-44.

Discussion

A. *The Forum Selection Clause*

As mentioned, the Motion to Transfer is based, in part, on the Forum Selection Clause contained in the NDA negotiated and signed by Hoffer and Infospace in Redmond, Washington. *See* Moving Brief at 4-5, 8-14; Reply Brief at 2-9. The Defendants argued that as a result of the employment negotiations between Hoffer and Jain (which took place exclusively in Redmond, Washington) Infospace drafted, and Hoffer signed the 25 June 1996 Employment Agreement and the NDA at Infospace headquarters. *See* Moving Brief at 5. The Defendants specifically argued that the Forum Selection Clause "requires that actions arising out of [Hoffer's] employment with Infospace be filed in state court in King County, Washington or in the United States District Court for the Western District of Washington." *Id.* at 8. The Forum Selection Clause stated, in relevant part, that the parties agreed

> that this agreement shall be governed for all purposes by the laws of the State of Washington as

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> such law applies to contracts to be performed within Washington ... and that venue for any action arising out of this Agreement shall be properly laid in King county, Washington or in the Federal District Court of the Western District of Washington....

NDA, ¶ 14, attached as Ex. B to the A. Jain Aff. In sum, the Defendants argued that the Forum Selection Clause is valid. They contend that it should be enforced because Hoffer cannot meet his burden of *clearly* establishing that such enforcement ***562** would be "unreasonable and unjust, or that the [Forum Selection Clause] was invalid for such reasons as fraud or overreaching." Moving Brief at 10 (citations omitted). *See also* Reply Brief at 6-10.

[1] The Circuit has noted that the construction of a contract is usually a matter of State, not Federal, common law. *See* Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd., 181 F.3d 435, 441 (3d Cir.1999); Danka Funding v. Page, Scrantom, Sprouse, Tucker & Ford, 21 F.Supp.2d 465, 474 (D.N.J.1998) (citing General Engineering Corp. v. Martin Marietta, 783 F.2d 352, 356 (3d Cir.1986)). Accordingly, the initial step in the instant matter is to determine which State law to apply when considering whether the Forum Selection Clause is an enforceable part of the employment agreement entered into between the parties. *See* Danka Funding, 21 F.Supp.2d at 469.

[2] The language of the Forum Selection Clause itself, therefore, is not authority for what law to apply. Rather, a Federal court sitting in diversity must utilize the choice of law rules of the forum State-New Jersey. *See* Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 96 S.Ct. 167, 46 L.Ed.2d 3 (1975); Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *On* Air Ent. Corp. v. Nat'l. Indem. Co, 210 F.3d 146, 149 (3d Cir.2000); Assicurazioni Generali v. Clover, 195 F.3d 161, 164 (3d Cir.1999) (stating that "[D]istrict [C]ourt in ... diversity action [is] obligated to apply the forum's ... choice of law rules in resolving the parties' dispute...."); Robeson Indus. Corp. v. Hartford Acc. & Indem. Corp., 178 F.3d 160, 164 (3d Cir.1999) (same); Danka Funding, 21 F.Supp.2d at 469.

New Jersey courts implement the "governmental-interest" approach to choice of law questions, which requires application of the law of the State with the greatest interest in resolving the particular issue raised by the underlying litigation. *See On* Air Ent., 210 F.3d at 149; Robeson, 178 F.3d at 164; Gantes v. Kason Corp., 145 N.J. 478, 484-493, 679 A.2d 106 (1996). *Cf.* Pfizer, Inc. v. Employers Ins. of Wausau, 154 N.J. 187, 712 A.2d 634 (1998); HM Holdings, Inc. v. Aetna Cas. & Sur. Co., 154 N.J. 208, 712 A.2d 645 (1998) (decided concurrently with *Pfizer*); Unisys Corp. v. Insurance Co. of N. Am., 154 N.J. 217, 712 A.2d 649 (1998) (same); Gilbert Spruance Co. v. Pennsylvania Mfrs.' Ass'n Ins. Co., 134 N.J. 96, 629 A.2d 885, (1993).

"The initial prong of the governmental-interest analysis entails an inquiry into whether there is an actual conflict between the laws of the respective states, a determination that is made on an issue-by-issue basis." Gantes, 145 N.J. at 484-493, 679 A.2d 106. In the absence of an actual conflict, the law of the forum State-in this case, New Jersey-is applied. *See On* Air Ent., 210 F.3d at 149; Danka Funding, 21 F.Supp.2d at 469 (citing Schreiber v. Camm, 848 F.Supp. 1170, 1174 (D.N.J.1994)).

[3] In the instant matter, no actual conflict exists with respect to the standard for consent to forum selection clauses in contracts; the courts of New Jersey and Washington are in accord with the law as set out by the United States Supreme Court in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972),[FN4] and its progeny. *Compare* Copelco Capital Inc. v. Shapiro, 331 N.J.Super. 1, 4, 750 A.2d 773 (App.Div.2000) (stating that "forum selection clauses are generally enforced in New Jersey." "Nevertheless, such provisions will not be given effect if they are the result of 'fraud or coercive bargaining power,' " or if enforcement of the clause would "be seriously inconvenient for the trial."); ***563***Caspi v. Microsoft Network*, 323 N.J.Super. 118, 122, 732 A.2d 528 (App.Div.1999); Shelter Systems v. Lanni Builders, 263 N.J.Super. 373, 375, 622 A.2d 1345 (App.Div.1993)*with* In re Matter of Kronenberg Family Trust, 2000 WL 17178, 1 (Wash.App.Div. 10 Jan. 2000) (unpublished) (observing that "Washington will enforce a forum selection clause unless it is unreasonable and unjust."); Voicelink Data Services, Inc. v. Datapulse, Inc., 86 Wash.App. 613, 618, 937 P.2d 1158 (1997) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n. 14, 105

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S.Ct. 2174, 85 L.Ed.2d 528 (1985)).

> FN4. In *M/S Bremen,* the Supreme Court, pursuant to Admiralty jurisdiction, held that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." *Id.*, 407 U.S. 1, 10, 92 S.Ct. 1907, 32 L.Ed.2d 513 (internal quotations omitted).

[4] Analysis of the Forum Selection Clause, therefore, is necessarily predicated on the "M/S Bremen standard" as applied by this Circuit. *See Danka Funding,* 21 F.Supp2d. at 470 (stating that "[t]his [c]ourt will therefore apply M/S Bremen standard as it has been applied in New Jersey and this Circuit, occasionally looking to the United States Supreme Court for guidance."). The Circuit, in accordance with the "M/S Bremen standard," deems forum selection clauses presumptively valid. *See Reynolds Pub., Inc. v. Graphics Financial Group, Ltd.*, 938 F.Supp. 256, 263 (D.N.J. 1996). In this regard, the Circuit directs that forum selection clauses should be enforced unless the party objecting to enforcement establishes that "it would be the result of fraud or overreaching, enforcement would violate a strong public policy of the forum, or that enforcement would in the particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable." *Id.*, at 263. *See also Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1297-98 (3d Cir.1996); *Danka Funding,* 21 F.Supp.2d. at 470.

[5] The arguments set forth by Hoffer, in support of his contention that the Forum Selection Clause is unreasonable and, therefore, unenforceable, are without merit. For example, Hoffer argued, in part, that the presumptive validity of the Forum Selection Clause is overcome because it was the "result of fraud or overreaching[,] ... that enforcement would violate a strong public policy of the forum[,] or ... that enforcement would in the particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable." Opp. Brief at 22.

1. *Fraud, Overreaching and, or, Undue Influence*

Hoffer argued that the Forum Selection Clause is invalid because "Jain fraudulently misrepresented that he and Hoffer would be partners with equal numbers of Infospace shares, thereby inducing Hoffer to resign from his position at [DAC]." [FN5] *Id.* at 23.

> FN5. In further support of the contention that the Forum Selection Clause was the product of "fraud or overreaching," Hoffer argued that the Defendants engaged in a "pattern and practice of defrauding industry competitors into joining Infospace with false promises of stock options and employment...." Opp. Brief at 23.
>
> Hoffer, however, failed to provide any facts, much more case law, indicating how the relationship between the Defendants and individuals wholly unrelated to this litigation bare on whether the Forum Selection Clause was arrived at through either "fraud or overreaching;" or on the ultimate issue in dispute-whether the Defendants breached the employment agreement entered into by Jain and Hoffer.

[6] While it is true that a forum selection clause may be set aside if it is the product of fraud or overreaching, *see Danka Funding,* 21 F.Supp.2d at 470, this is so *only* where the "inclusion of that clause in the contract was the product of fraud or coercion." *Id.* (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n. 14, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). In other words, fraud and overreaching are grounds for setting aside a forum selection clause only if it is determined that the inclusion of the forum selection clause in the contract was the product of deception and, or, coercion. It is insufficient, therefore,***564** "to allege that one was induced generally to enter into the contract itself as a result of fraud." *Nat'l Micrographics Sys. v. Canon U.S.A.*, 825 F.Supp. 671, 675 (D.N.J.1993).

In the instant matter, however, Hoffer merely argued that the Defendants, in an initial employment discussion, "fraudulently misrepresented that [Jain] and Hoffer would be partners with equal numbers of Infospace shares...." Opp. Brief at 23. Significantly, Hoffer did not argue that the inclusion of the Forum Selection Clause in the NDA was a result of either

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fraud, deception and, or, coercion on the part of the Defendants. *See* Danka Funding, 21 F.Supp2d. at 470; *Nat'l Micrographics Sys.*, 825 F.Supp. at 675.

Even assuming arguendo that Hoffer argued the inclusion of the Forum Selection Clause in the NDA resulted from fraud or coercion, there are simply no facts to support such a conclusion. For example, the Complaint does not mention, much more allege, that the Forum Selection Clause, or even the NDA or the 25 June 1996 Employment Agreement, was the product of fraud or coercion. *See* Complaint, ¶¶ 16-18. To the contrary, Hoffer alleges that

> [o]n or about June 1, 1996 Jain provided [him] with a proposed letter agreement that provided, in pertinent part, that [he] was to be paid an annual salary of $50,000 and granted [him] the option to buy up to 300,000 shares of stock at $.10 per share.
>
> Thereafter, *negotiations between Jain and Hoffer ensued.* Jain then provided Hoffer with a letter agreement dated as of June 25, 1996 that granted Hoffer the immediate right to purchase up to 75,000 shares of stock at $1.00 per share. *The June 25, 1996 Agreement was executed by Naveen Jain, as President of Infospace and accepted by Hoffer.* Thereafter, Hoffer worked as an employee for Infospace for a period of approximately 4 months....

Id., ¶¶ 17-18 (emphasis added). Hoffer similarly characterized the employment "negotiations" that took place in Redmond, Washington in "Plaintiff's Answers and Responses to Defendants' First Set of Interrogatories and Request for the Production of Documents" (the "Answers and Responses"), attached as Ex. B to the Snyder Aff. For example, Hoffer specifically stated:

> Thereafter, negotiations between Jain and Hoffer ensued. On or about June 14, 1996 during a meeting at Infospace's offices in Redmond, Washington, Jain provided Hoffer with an employment agreement ... that granted Hoffer immediate right to purchase up to 75,000 shares of stock at $1.00 per share (the "Agreement"). *The Agreement memorialized the terms of Hoffer's employment with Infospace, and was executed by Jain as President of Infospace and by Hoffer on June 14, 1996, and witnessed by Timothy Kay.*
>
> * * * * * *
>
> Thereafter, on or about June 14, 1996, Jain promised Hoffer employment pursuant to the terms of the ... Agreement-*which terms Hoffer accepted....*

Answers and Responses, Answers to Interrogatory No. 2 & 15, attached as Ex. B to the Snyder Aff. (emphasis added).

The deposition testimony of Hoffer, moreover, appears to undermine any assertion that either the 25 June 1996 Employment Agreement, the NDA, or the Forum Selection Clause was executed as a result of fraud or coercion on behalf of the Defendants.

> Q: Okay. My question was, did you sign [the 25 June 1996 Employment Agreement]?
>
> Hoffer: Yes, I did. I signed this document on June the 25th and backdated it June the 14th of 1996, when I accepted the offer of employment at Infospace Corporation.
>
> Q: Fair enough. And that is your signature on page two; correct?
>
> ***565** Hoffer: Yes, that is my signature, as well as Anu Jain's signature.
>
> Q: Right, and under your signature is your name. Did you write that, or did someone else; do you know? Is that your-writing?
>
> Hoffer: Yes, this is my writing. I believe I signed this document after I signed the employment agreement on the same exact date. In fact, I'm quite sure it was after I had signed the employment agreement for Infospace.
>
> Q: Okay. When you signed those two documents, did you expect and intend that Infospace would abide by them?
>
> Hoffer: When I signed these two documents, did I expect that Infospace would abide by the terms and conditions of those documents? Yes, Sir, I did.

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> Q: All right. And you're not changing your mind about what the deal was; it's set forth in [the 25 June 1996 Employment Agreement and the NDA], right?
>
> Hoffer: The arrangements between myself and Infospace are embodied in this letter [the 25 June 1996 Employment Agreement] and in this agreement [the NDA]. I signed th[e][NDA] after I singed th[e] [25 June 1996 Employment Agreement].

Hoffer Dep. at 14:14-19; 15:1-7, 17-25; 134:21-25; 135:1.

As mentioned, the Forum Selection Clause stated, in relevant part, that

> this agreement shall be governed for all purposes by the laws of the State of Washington as such law applies to contracts to be performed within Washington ... and that venue for any action arising out of this Agreement shall be properly laid in King county, Washington or in the Federal District Court of the Western District of Washington....

NDA, ¶ 14, attached as Ex. B to the A. Jain Aff.

It appears, therefore, that the plainly stated Forum Selection Clause was not the product of fraud or coercion on behalf of the Defendants. *See* *M/S Bremen*, 407 U.S. at 12 n. 14, 92 S.Ct. 1907 (holding that there was no evidence of fraud or undue bargaining power where "[t]he forum selection clause could hardly be ignored [because] [i]t is the final sentence of the agreement, immediately preceding the date and the parties' signatures."); *BABN Technologies Corp. v. Bruno*, 25 F.Supp.2d 593, 595-96 (E.D.Pa.1998) (holding that a forum selection clause is not a product of fraud where it is "written in plain English and is located in uniform type directly above [the party's] signature line in the agreement."). Accordingly, it does not appear fraud and overreaching are grounds on which Hoffer can challenge the validity of the Forum Selection Clause.

2. *State and Federal Public Policy*

Hoffer argued that the enforcement of the Forum Selection Clause would "violate important [S]tate and [F]ederal public policies." Opp. Brief at 23. Hoffer specifically argued that enforcement in this matter would run counter to the policy of "discouraging [D]efendants' tactic of delaying their venue motion until the [sic] after the [c]ourt has invested its case management resources and discovery is complete." *Id.* (internal citations omitted). Hoffer also argued that "New Jersey has a strong interest in vindicating the rights of New Jersey residents such as Hoffer who are victims of fraud perpetrated by out-of-state defendants." *Id.* Again, it appears the arguments put forth by Hoffer are without merit.

The conclusory assertion of Hoffer that enforcement of the Forum Selection Clause would frustrate the public policy of discouraging defendants from delaying a venue motion until after a court has invested its case management resources and discovery is simply unfounded. For example, Hoffer failed to provide any factual support for this general proposition. Indeed, it is unclear how such a policy could be implicated, much more frustrated, given the present posture of this matter.

***566** As the Defendants correctly observe, they have been neither dilatory or misleading in filing the Motion to Transfer. *See* Reply Brief at 8. As mentioned, the Defendants timely filed the Answer/Counterclaims in response to the Complaint on 31 January 2000. Seventeen days after Hoffer served his Answer and Responses to interrogatories, moreover, the Defendants served Hoffer with their moving papers in support of the Motion to Transfer (just three months after filing the Answer/Counterclaims). *Six weeks later,* Hoffer responded by serving on the Defendants his opposition to the Motion to Transfer.

In addition, the reliance, by Hoffer, on a single citation to an unreported case from the United States District Court for the District of Delaware is unpersuasive. *See* Opp. Brief at 23 (citing *Mobilificio San Giacomo S.p.A. v. Stoffi, et al.*, 1998 WL 125534 (D.De.29 Jan.1998)). In denying a motion to dismiss based on a *newly presented* forum selection clause argument, the court observed that "the defendants did not diligently press their forum selection clause position." *Id.* at *6. "Rather, they waited eight months into the litigation.... By this point in time, defendants had filed four motions to

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dismiss, participated in extensive discovery, and sought a preliminary injunction. As a result, both the parties and the court have invested substantial resources and time in this action." *Id.*

By contrast, in the instant matter the Motion to Transfer was the first significant motion filed by the Defendants. Furthermore, the Motion to Transfer was promptly served on Hoffer. Accordingly, *Giacomo* is factually inapposite to the instant matter.

Hoffer further argued that "New Jersey has a strong interest in vindicating the rights of New Jersey residents such as Hoffer who are victims of fraud perpetrated by out-of-state defendants." Opp. Brief at 24. This argument, however, does not fit the facts of this litigation. As mentioned, Hoffer "negotiated" the ultimate terms of his employment agreement in Redmond, Washington. He signed the 25 June 1996 Employment Agreement and the NDA at Infospace headquarters located in Redmond, Washington. In addition, the primary issue in dispute-whether Infospace breached the 25 June 1996 Employment Agreement-is centered on events which occurred *exclusively* in Redmond, Washington. In addition, this Circuit has observed that any deference afforded the choice of forum of a plaintiff "is inappropriate where the plaintiff has already freely contractually chosen an appropriate venue." *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir.1995). The arguments presented by Hoffer concerning public policy, therefore, lack any basis in fact.

3. *"Seriously" Inconvenient Forum*

Hoffer argued that enforcement of the Forum Selection Clause "would be unreasonable and seriously inconvenient such that [he] 'would be effectively deprived of [his] day in court.' " [FN6] Opp. Brief at 24 (quoting *Danka Funding*, 21 F.Supp.2d. at 470-473). In support of this argument, Hoffer stated that "most of [his] key witnesses ... have agreed to appear at trial in New Jersey but not in Washington." *Id.* at 25.

> FN6. It does not appear that the Western District of Washington is a "seriously inconvenient" forum for Hoffer himself. It is undisputed Hoffer traveled to Washington to negotiate the terms of his employment contract with Jain. *See* Complaint, ¶ 17. Hoffer also traveled to Washington on at least on other occasion for business related to Infospace. *See* A. Jain Aff., ¶ 6. In addition, Hoffer stated in an e-mail transmission to Jain that he was considering relocating to Washington as a result of his future employment with Infospace. *See* 13 June 1996 e-mail transmission, attached as Ex. A to the Jain Aff.

Although Hoffer argued that his "key witnesses" are New Jersey residents, subject only to the subpoena power of New Jersey, and that some witnesses have ***567** agreed to "appear at trial in New Jersey but not in Washington,"*id.*, Hoffer has failed to submit the requisite affidavits concerning the testimony of these purported "key witnesses." *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 529, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988) (stating that inquiry of court concerning interests of parties in a transfer motion should be based on a review of affidavits); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 44 (3d Cir.1988) (same); *Tischio v. Bontex, Inc.*, 16 F.Supp.2d 511, 520 (D.N.J.1998) (same); *Rappoport v. Steven Spielberg, Inc.*, 16 F.Supp.2d. 481, 499 (D.N.J.1998) (same); *Ricoh Co. Ltd. v. Honeywell, Inc.*, 817 F.Supp. 473, 480 (D.N.J.1993) (same).

Hoffer did submit affidavits concerning the "availability," or apparent lack thereof, of two witnesses, namely Kay and Kent Plunkett ("Plunkett"). *See* Kay Aff.; Plunkett Aff. These affidavits, however, provide little, if any, support for the "serious inconvenience" argument asserted by Hoffer. In addition, the statements contained therein appear to be nonsensical.

For example, it appears Kay resides in Santa Clara County, California. *see* Kay Aff., ¶¶ 1-2. Kay stated: "I frequently travel to the Newark/New York City area for business purposes. It would cause little disruption to my schedule to appear at the trial in Newark, New Jersey...."*Id.*Kay, a west coast resident however, also stated: "In the event that the venue of this action is transferred to Seattle, Washington, I would be extremely inconvenient [sic] for me to appear at the trial, due to the length of the trip involved...."*Id.*, ¶ 3. Irrespective of the facts that Kay is a former Infospace employee who has previously visited Infospace headquarters in Redmond,

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Washington and that he is the brother-in-law of Hoffer, *see* Kay Dep. at 68:15-20; 80:6-7, these statements concerning inconvenience defy logic. Furthermore, neither Kay nor Hoffer even attempt to (nor does it appear they could) reconcile the bizarre assertion that Kay, a California resident, would be more inconvenienced by traveling to Washington State than to New Jersey.

Plunkett is also a former Infospace employee who currently resides in Boston, Massachusetts. *See* Plunkett Aff., ¶ 1. Plunkett stated: "Although I am a resident of Boston, Massachusetts, it is my intention to appear voluntarily as a witness at the trial in Newark...."*Id.*, ¶ 2. Plunkett also stated that he is "unwilling" to appear in Washington. *Id.*, ¶ 3. It appears Plunkett is beyond the limits of the subpoena power of the courts located in either New Jersey or Washington.

Because the affidavit of Plunkett does not indicate, or describe, the relevancy of this "key witness's" testimony, it is unclear whether his apparent refusal to appear at trial in Washington would deprive Hoffer of his day in court. Indeed, at his deposition, Plunkett testified that he never met Hoffer prior to the institution of an unrelated lawsuit. *See* Plunkett Dep. at 18:1-9 (Q: "Did you have an occasion to meet [ ] Hoffer along with ... Jain at any time?" Plunkett: "No. I've-I think I might have had a conversation with him where there were many people on a conference call, but other than that, I had never spoken with [ ] Hoffer and had never met him, actually, until his deposition in my case, it was the first time I ever shook his hand.").

Hoffer, therefore, has failed to demonstrate how the enforcement of the Forum Selection Clause in the instant matter would prove to be "unreasonable and seriously inconvenient such that '[he] would be effectively deprived of [his] day in court.' " Opp. Brief at 24 (quoting *Danka Funding*, 21 F.Supp.2d at 470-473).

As discussed above, a forum selection clause is "prima facie valid and should be enforced." *See M/S Bremen*, 407 U.S. at 10, 92 S.Ct. 1907; *Danka Funding*, 21 F.Supp.2d at 470. It appears Hoffer has failed to meet his burden because he has not proved that enforcement of the Forum Selection Clause would be "unreasonable ***568** under the circumstances." [FN7] *See id.* Pursuant to the valid Forum Selection Clause in the NDA, therefore, venue is only "properly laid in King county, Washington or in the Federal District Court of the Western District of Washington." NDA, ¶ 14, attached as Ex. B to the A. Jain Aff.

FN7. In addition to the arguments address above, Hoffer also argued that the instant litigation is not governed by the Forum Selection Clause contained in the NDA because the issues presented only concern the 25 June 1996 Employment Agreement, a document Hoffer contended is wholly separate from, and independent of, the NDA. *See* Opp. Brief at 18-21.

Upon review of the pleadings, papers and documents filed with the court and submitted in support of the Motion to Transfer, it appears this argument is without merit. For example, the deposition testimony of Hoffer reveals that both the 25 June 1996 Employment Agreement and the NDA were signed virtually simultaneously while Hoffer was at Infospace headquarters in Redmond, Washington. *See e.g.* Hoffer Dep. at 15:3-7, 17-25. Hoffer, moreover, described his employment agreement with Infospace as being comprised of both the 25 June 1996 Employment Agreement and the NDA. *See* Answers and Responses at Answer No. 2-4, 15, attached as Ex. B to the Snyder Aff. In sum, not only is it nonsensical to argue that an employee non-disclosure agreement derives meaning from itself and is wholly independent of an employment agreement, it is disingenuous in the instant matter based on the facts presented.

B. *Improper Venue/Transfer Pursuant to 28 U.S.C. § 1406(a)*

The venue in which a defendant may be sued in Federal court is restricted by statute. As mentioned, the instant action is brought pursuant to diversity jurisdiction, 28 U.S.C. § 1332. *See* Complaint, ¶ 2. In diversity actions, venue is governed by 28 U.S.C.

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§ 1391(a) ("Section 1391(a)"). Section 1391(a) provides:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a). For purposes of Section 1391(a), "a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." *See*28 U.S.C. § 1391(c). *See also Jumara,* 55 F.3d at 879; *Doran v. Credit Bureau Associates,* 2000 WL 288326, at *2 (E.D.Pa.17 March 2000).

[7] In Federal court, venue questions are governed, in part, by 28 U.S.C. § 1406 ("Section 1406"). Section 1406 provides for the transfer (in the interest of justice) or dismissal of a case laying venue in the wrong division or District. *See*28 U.S.C. § 1406(a).*See also Carteret Savings Bank v. Shushan,* 919 F.2d 225, 227 (3d Cir.1990). "In determining where a substantial part of the events or omissions giving rise to a claim arises for purposes of Section 1391, three factors are relevant: (1) the place of injury; (2) the 'weight of contacts;' and (3) whether a substantial part of the events or omissions giving rise to the claim occurred in the [D]istrict." *Tischio,* 16 F.Supp.2d at 516 (citing *Eason v. Linden Avionics, Inc.,* 706 F.Supp. 311, 329 (D.N.J.1989)).

[8] In opposition to the Motion to Transfer, Hoffer argued that "a substantial number of events and omission giving rise to [his] claims occurred in New Jersey." Opp. Brief at 27. In an attempt to defeat the overwhelming number of contacts with the Western District of Washington in the instant matter, Hoffer argued, in part: "The fact that the employment agreement was signed in Washington is a single event in an ongoing course of fraudulent conduct that primarily***569** occurred in New Jersey or by telephone and e-mail communications to Hoffer in New Jersey." *Id.* at 29. Hoffer, however, has failed to provide the court with any tangible evidence (deposition testimony and, or, affidavits or otherwise) supporting these assertions.

Despite the tortured spin Hoffer places on the instant matter, it appears venue was improperly laid in this District. *See*28 U.S.C. § 1391(a). By contrast, venue is proper in the Western District of Washington. As discussed in detail above, the driving issue in this litigation is the alleged breach of the 25 June 1996 Employment Agreement by the Defendants. Indeed, the substantial events, if not all of the events, giving rise to the primary claim, and the other claims, arising out of this matter transpired in Redmond, Washington.

For example, contrary to the arguments of Hoffer, the central negotiations concerning the terms of his employment with Infospace took place at Infospace headquarters in Redmond, Washington. *See* Complaint, ¶¶ 17-18; Hoffer Dep. at 14:16-19, attached as Ex. B to the McMillan Aff. It is undisputed that the 25 June 1996 Employment Agreement and the NDA were executed in Redmond, Washington. *See id.* In addition, the alleged breach and decision to terminate Hoffer and deny his exercise of stock options occurred in Redmond, Washington. *See* Complaint, ¶ 18; Hoffer Dep. at 18:6-12, attached as Ex. A to the Snyder Aff. Jain, moreover, resides in Washington. *See id.,* ¶ 4. Infospace, likewise has its principal place of business in Redmond, Washington and importantly, does not maintain any offices in New Jersey. *See id.,* ¶ 5. Furthermore, Hoffer made at least two separate trips to Washington in connection with his employment with Infospace. *See* Hoffer Corporate Amex Bill, attached as Ex. C to the A. Jain Aff.

Accordingly, upon review of the relevant facts regarding the determination of whether venue is appropriately laid, it appears that the overwhelming contacts and events giving rise to this litigation occurred in the Western District of Washington. *See Carteret Savings Bank,* 919 F.2d at 227; *Tischio,* 16 F.Supp.2d at 516. The instant matter, therefore, is also appropriately transferred, pursuant to Section 1406(a), to the United States District Court for the Western District of Washington. *See*28 U.S.C. §

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1406(a).

C. *Transfer Pursuant to 28 U.S.C. § 1404(a)*

[9] The Defendants argued that assuming arguendo that Hoffer could establish that this District is a proper venue for the instant matter, "this action should be transferred to the United States District Court for the Western District of Washington pursuant to 28 U.S.C. § 1404(a) [('Section 1404(a)')]." Moving Brief at 21. *See also* Reply Brief at 13-15.

By contrast, Hoffer argued the his "choice of a New Jersey forum is ... entitled to deference and is presumptively correct." Opp. Brief at 33. Again, Hoffer also argued that "the parties respective claims substantially arose from events and omissions that occurred in New Jersey." *Id.* at 33, 39. In addition, Hoffer argued that a majority of witnesses are only available in New Jersey. *See id.* at 37. Finally, Hoffer argued that the relevant documents in this case are not voluminous and that they fit "neatly within a single redwell." *Id.* at 38. As mentioned, Hoffer did not submit affidavits concerning the relevant factors pertaining to a transfer motion.

1. *Standard of Review under Section 1404(a)*

Section 1404(a) authorizes a District Court to transfer a case to any other district where venue is proper "[f]or the convenience of the parties and witnesses, in the interests of justice...."**57028 U.S.C. § 1404(a).[FN8] The purpose of Section 1404(a) is to avoid the waste of time, energy and money and, in addition, to safeguard litigants, witnesses and the public against avoidable inconvenience and expense. *See Lexecon Inc., et al. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 33, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998); *Jumara*, 55 F.3d at 879; *In re Emerson Radio Corp.*, 52 F.3d 50, 55 (3d Cir.1995); *SmithKline Beecham Corp. v. Geneva Pharmaceuticals, Inc.*, 2000 WL 217642 at 1 (E.D.Pa.11 Feb.2000); *Westcode, Inc. v. RBE Electronics, Inc.*, 2000 WL 124566 at 7 (E.D.Pa. Feb.2, 2000); *Ricoh Co. Ltd. v. Honeywell, Inc.*, 817 F.Supp. 473 (D.N.J.1993); *American Tel. & Tel. Co. v. MCI Communications Corp.*, 736 F.Supp. 1294, 1305 (D.N.J.1990).

FN8. Section 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.
>
> 28 U.S.C. § 1404(a).

[10] There are three factors to consider when determining whether to transfer a matter-(1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice. *See*28 U.S.C. § 1404(a); *Jumara*, 55 F.3d at 879; *Geneva Pharmaceuticals, Inc.*, 2000 WL 217642, at *1; *Larami Ltd. v. Yes Entertainment Corp.*, 244 B.R. 56, 60-61 (D.N.J.2000); *RBE Electronics*, 2000 WL 124566 at 7; *Hudson United Bank v. Chase Manhattan Bank of Conn., NA*, 832 F.Supp. 881, 887 (D.N.J.1993), *aff'd*, 43 F.3d 843 (3d Cir.1994); *Honeywell*, 817 F.Supp. at 479. The transfer analysis is not limited, however, to these factors.

[11] The decision to transfer must incorporate "all relevant factors to determine whether on balance the litigation [will] more conveniently proceed and the interests of justice be better served by transfer to a different forum." *Geneva Pharmaceuticals, Inc.*, 2000 WL 217642, at *1 (quoting *Jumara*, 55 F.3d at 879) (citation omitted); *Yes! Entertainment*, 244 B.R. at 60-61; *Tischio*, 16 F.Supp.2d at 519; *Rappoport v. Steven Spielberg, Inc.*, 16 F.Supp.2d 481, 498 (D.N.J.1998); *Hudson United Bank*, 832 F.Supp. at 888.

As mentioned, the alternative forum proposed by the Defendants in the instant action is the Western District of Washington. *See* Moving Brief at 21-31; Reply Brief at 13-15. As a preliminary matter, it must be determined whether the proposed transferee venue is one in which the case "might have been brought." *See*28 U.S.C. § 1404(a); *Jumara*, 55 F.3d at 879; *In re Emerson Radio Corp.*, 52 F.3d at 55; *RBE Electronics*, 2000 WL 124566 at 7; *AT & T*, 736 F.Supp. at 1305.

a. *The Instant Matter Could Have Been Brought In The Western District Of Washington*

As discussed, it appears the Western District of

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Washington is a proper venue for the instant matter. For example, the central negotiations concerning the terms of the employment of Hoffer by Infospace took place at Infospace headquarters in Redmond, Washington. *See* Complaint, ¶¶ 17-18; Hoffer Dep. at 14:16-19, attached as Ex. B to the McMillan Aff. It is undisputed that the 25 June 1996 Employment Agreement and the NDA were executed in Redmond, Washington. *See id.* In addition, the alleged breach and decision to terminate Hoffer and deny his exercise of stock options occurred in Redmond, Washington. *See* Complaint, ¶ 18; Hoffer Dep. at 18:6-12, attached as Ex. A to the Snyder Aff. Jain, moreover, resides in Washington. *See id.*, ¶ 4. Infospace, likewise has its principal place of business in Redmond, Washington and importantly, does not maintain any offices in New Jersey. *See id.*, ¶ 5. Furthermore, Hoffer made at least two separate trips to Washington in connection with his employment with Infospace. *See* Hoffer Corporate Amex Bill, attached as Ex. C to the A. Jain Aff.

***571** In addition, because it appears the Forum Selection Clause is valid, *see* Section A, *supra,* the Forum Selection Clause is entitled to "*substantial consideration* [in the Section 1404(a) analysis] and makes deference to plaintiff's choice of forum inappropriate." *Jumara,* 55 F.3d at 880 (emphasis added).

Based upon the foregoing, it appears pursuant to Section 1391(a)(1) and Section 1391(a)(2) the instant action "might have been brought" in the proposed transferee forum, the Western District of Washington. *See*28 U.S.C. § 1404(a).

A defendant seeking a transfer must also establish that an adequate alternative forum exists for the dispute. *See Williams v. Monroe Emergency Physicians, P.C.,* 1999 WL 124398, at *1 (E.D.Pa.10 Feb.1999) (citing *Lacey v. Cessna Aircraft Company,* 862 F.2d 38, 43 (3d Cir.1988)) (hereinafter "*Lacey I*"); *O'Laughlin v. Consolidated Rail Corp.,* 1999 WL 124393, at *1 (E.D.Pa. 9 Feb. 1999) (same); *Tischio,* 16 F.Supp.2d at 519. "Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction," unless "the remedy offered by the other forum is clearly unsatisfactory." *Bhatnagar v. Surrendra Overseas Ltd., et al.,* 52 F.3d 1220, 1227 (3d Cir.1995) (quoting *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254 n. 22, 102 S.Ct. 252, 70 L.Ed.2d 419,*reh'g denied,* 455 U.S. 928, 102 S.Ct. 1296, 71 L.Ed.2d 474 (1982)).

As mentioned, Jain is a citizen and resident of Washington State and Infospace is a corporation with its principal place of business located in Redmond, Washington. *See* Complaint, ¶¶ 4-5. The Defendants, therefore, are amenable to process in Washington. *See*28 U.S.C. § 1391(a)(1), (c). Because the proposed forum offers a satisfactory remedy for the parties, the Western District of Washington is an adequate alternative forum. *See Bhatnagar,* 52 F.3d at 1227.

b. *Private and Public Interests*

Transfer analysis under Section 1404(a) is a flexible and individualized analysis and must be made on the unique facts presented in each case. *See Piper,* 454 U.S. at 249-250, 102 S.Ct. 252; *RBE Electronics,* 2000 WL 124566, at *7 (citing *Stewart Org., Inc. v. Ricoh Corp.,* 487 U.S. 22, 29-30, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988)); *Lacey I,* 862 F.2d at 43; *Tischio,* 16 F.Supp.2d at 511. A determination that transfer to another jurisdiction is appropriate represents an " 'exercise[ ] of structured discretion by trial judges appraising the practical inconveniences posed to the litigants and the court should a particular action be litigated in one forum rather than another.' " *Lawrence v. Xerox Corp.,* 56 F.Supp.2d 442, 449 (D.N.J.1999) (quoting *Honeywell,* 817 F.Supp. at 479) (quoting *Lony v. E.I. Du Pont de Nemours & Co.,* 886 F.2d 628, 632 (3d Cir.1989) (hereinafter "*Lony I* ")). There is no rigid rule governing the determination by a court; " '[e]ach case turns on its facts.' " *Lacey I,* 862 F.2d at 43 (quoting *Piper,* 454 U.S. at 255-56, 102 S.Ct. 252); *Tischio,* 16 F.Supp.2d at 519; *Rappoport,* 16 F.Supp.2d at 498. Added to these factors are the "interests of justice" and the impact on judicial administration of maintaining related actions in separate fora. *See Jumara,* 55 F.3d at 879; *Tischio,* 16 F.Supp.2d at 519; *Rappoport,* 16 F.Supp.2d at 498; *Honeywell,* 817 F.Supp. at 479.

In *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), the Court listed various factors which should be considered when deciding if a certain action should be transferred.[FN9] These factors***572** fall into two broad categories. The first

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category includes factors relating to the "private interests" of the parties in the context of the litigation. The types of private interests may include the choice of forum of the plaintiff, the ease of access to sources of proof, availability of compulsory process over unwilling witnesses, the cost of attendance of willing witnesses, obstacles to a fair trial and the possibility of a jury view of the premises. *See* Gulf Oil, 330 U.S. at 508, 67 S.Ct. 839; *Geneva Pharmaceuticals, Inc.*, 2000 WL 217642, at *1; *Smithkline Beecham Corp. v. Apotex Corp., Apotex, Inc.*, 2000 WL 15074, at *2 (E.D.Pa. 4 Jan. 2000); *Harbuck v. Aramco, Inc., et al.*, 1999 WL 999431, at *8 (E.D.Pa.21 Oct.1999). Other private interests may include the preference of the defendant, whether the claim arose elsewhere, and the location of books and records. *See Jumara*, 55 F.3d at 879.

FN9. *Gulf Oil* involved a motion to dismiss under the doctrine of *forum non conveniens.* Courts routinely look to the Gulf Oil factors for guidance on Section 1404(a) motions. *See Xerox*, 56 F.Supp.2d at 450; *NCR Credit Corp. v. Ye Seekers Horizon, Inc.*, 17 F.Supp.2d 317, 320 (D.N.J.1998); *Tischio*, 16 F.Supp.2d at 519 n. 9; *Honeywell*, 817 F.Supp. at 479 n. 16. As well, Third Circuit decisions such as *Lony I, Lony v. E.I. DuPont de Nemours & Co.*, 935 F.2d 604, 609 (3d Cir.1991) (hereinafter "*Lony II*") and *Lacey I*, which involve motions to dismiss under the doctrine of *forum non conveniens*, are relevant to a motion to transfer under Section 1404(a).

District Courts have broader discretion to transfer an action under Section 1404(a), than to dismiss under the common law doctrine of *forum non conveniens. See Norwood v. Kirkpatrick*, 349 U.S. 29, 32, 75 S.Ct. 544, 99 L.Ed. 789 (1955); *Joint Stock Soc. Trade House of Descendants of Peter Smirnoff, Official Purveyor to the Imperial Court v. Heublein, Inc.*, 936 F.Supp. 177, 191 (D.Del.1996) (citation omitted); *Ruccolo v. BDP, Int'l, Inc.*, No. 95-2300, 1996 WL 735575, at 17 & n. 9 (D.N.J. 25 Mar. 1996); *cf. Lacey v. Cessna Aircraft Co.*, 932 F.2d 170 (3d Cir.), *reh'g denied en banc* (3d Cir.1991) ("*Lacey II*"), *Mediterranean Golf, Inc. v. Hirsh*, 783 F.Supp. 835, 840-41 (D.N.J.1991).

The second category consists of the "public interest" in the administration of courts and the adjudication of cases. Public interests include court congestion and other administrative difficulties, placing the burden of jury duty on those having the closest ties to the action, the local interest in having a matter adjudicated at home and the familiarity of the forum court with the applicable law. *See* Gulf Oil, 330 U.S. at 508-09, 67 S.Ct. 839 *Jumara*, 55 F.3d at 879; *Geneva Pharmaceuticals, Inc.*, 2000 WL 217642, at *1; *Apotex*, 2000 WL 15074, at *2; *Aramco*, 1999 WL 999431, at *8; *Tischio*, 16 F.Supp.2d at 520; *Rappoport*, 16 F.Supp.2d at 498-99; *Honeywell*, 817 F.Supp. at 480; *AT & T*, 736 F.Supp. at 1307.

[12] The moving party has the burden of persuasion on a motion to transfer. *See Jumara*, 55 F.3d at 879; *Lony II*, 935 F.2d at 609; *Lony I*, 886 F.2d at 633; *Lacey I*, 862 F.2d at 44; *Geneva Pharmaceuticals, Inc.*, 2000 WL 217642, at *1; *Yes! Entertainment*, 244 B.R. at 61; *Apotex*, 2000 WL 15074, at *2; *Tischio*, 16 F.Supp.2d at 520; *Rappoport*, 16 F.Supp.2d at 499; *Tranor v. Brown*, 913 F.Supp. 388, 391 (E.D.Pa.1996); *Honeywell*, 817 F.Supp. at 480. The burden is not on the plaintiff to show the proposed alternative forum is inadequate. *See Lacey I*, 862 F.2d at 44; *Xerox*, 56 F.Supp.2d at 451; *Tischio*, 16 F.Supp.2d at 520; *Rappoport*, 16 F.Supp.2d at 499; *Honeywell*, 817 F.Supp. at 480. Rather, the burden is on the moving party to show the proposed alternative forum is not only adequate, but also more appropriate than the present forum. *See Jumara*, 55 F.3d at 879; *Lacey I*, 862 F.2d at 43-44; *Xerox*, 56 F.Supp.2d at 451; *Tischio*, 16 F.Supp.2d at 520; *Rappoport*, 16 F.Supp.2d at 499; *Honeywell*, 817 F.Supp. at 480.

In making its determination, a " '[D]istrict [C]ourt is required to develop adequate facts to support its decision and to articulate specific reasons for its conclusion that transfer to another venue is appropriate.' " *Xerox*, 56 F.Supp.2d at 451 (quoting *Tischio*, 16 F.Supp.2d at 520 (quoting *Lacey I*, 862 F.2d at 39)). *See also Hudson United Bank*, 832 F.Supp. at 888; *Honeywell*, 817 F.Supp. at 480. The moving party must submit sufficient information

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in the record to facilitate the appropriate analysis and to meet its burden of persuasion. *See* ***573***Xerox*, 56 F.Supp.2d at 451; *Honeywell*, 817 F.Supp. at 480. *See also Piper*, 454 U.S. at 258, 102 S.Ct. 252; *Rappoport*, 16 F.Supp.2d at 499. This inquiry does not, however, necessarily require extensive investigation. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 529, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988); *Xerox*, 56 F.Supp.2d at 451; *Tischio* 16 F.Supp.2d at 520; *Rappoport*, 16 F.Supp.2d at 499.

[13] The inquiry into the interests of the parties may be resolved by an examination of the affidavits submitted by the parties. *See Van Cauwenberghe*, 486 U.S. at 529, 108 S.Ct. 1945; *Lacey I*, 862 F.2d at 44; *Tischio* 16 F.Supp.2d at 520; *Rappoport*, 16 F.Supp.2d at 499; *Honeywell*, 817 F.Supp. at 480. From that basis, the contentions of the parties and the relevant private and public interests must be considered and balanced. *See Xerox*, 56 F.Supp.2d at 451; *Lacey I*, 862 F.2d at 45; *Tischio*, 16 F.Supp.2d at 520; *Hudson United Bank*, 832 F.Supp. at 888. As mentioned, in support of the Motion to Transfer, the Defendants submitted four affidavits concerning central events giving rise to this litigation and the relevant evidence and documents relevant to the resolution of this matter. *See* A. Jain Aff.; Snyder Aff.; McMillan Aff. and the N. Jain Aff. As also discussed, *see* Section A, Hoffer submitted two affidavits in opposition to the instant matter. *See* Kay Aff.; Plunkett Aff.

1. *The Private Interests*

The primary private interests in the instant action are the choice of forum by the parties and the convenience of the available districts with regard to sources of proof, namely, the witnesses and documentary evidence.

a. *Choice of Forum*

[14] In this Circuit, the choice of forum by a plaintiff is a "paramount concern" in deciding a Section 1404(a) motion to transfer venue. *See Lony I*, 886 F.2d at 633; *Lacey I*, 862 F.2d at 45-46; *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir.), *cert. denied*, 401 U.S. 910, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971); *Xerox* 56 F.Supp.2d at 452; *Danka Funding*, 21 F.Supp.2d at 474-75; *Tischio*, 16 F.Supp.2d at 521 (quoting *Honeywell*, 817 F.Supp. at 480); *Rappoport*, 16 F.Supp.2d at 499. *See also Shore Slurry Seal, Inc. v. CMI Corp.*, 964 F.Supp. 152, 156 (D.N.J.1997) (stating choice of proper forum by plaintiff is "paramount consideration" in transfer analysis); *Newcomb v. Daniels, Saltz, Mongeluzzi & Barrett, Ltd.*, 847 F.Supp. 1244, 1246 (D.N.J.1994) (stating choice of forum by plaintiff is accorded "significant weight"). The choice of forum is "entitled to greater deference" when a plaintiff chooses his home forum. *See Xerox*, 56 F.Supp.2d at 452 (quoting *Tischio*, 16 F.Supp.2d at 521 (quoting *Honeywell*, 817 F.Supp. at 480)). *See also Piper*, 454 U.S. at 255-56, 102 S.Ct. 252; *Lony I*, 886 F.2d at 633-34; *Lacey I*, 862 F.2d at 45; *Rappoport*, 16 F.Supp.2d at 499.

Indeed, "unless the balance is strongly tipped in favor of the defendant, the plaintiff's choice of forum should not be disturbed." *Xerox*, 56 F.Supp.2d at 452; *Honeywell*, 817 F.Supp. at 480. *See also Lony II*, 935 F.2d at 609; *Lacey I*, 862 F.2d at 44. If otherwise correct, the choice of forum by a plaintiff is considered to be presumptively correct. *See Lacey I*, 862 F.2d at 45; *Xerox*, 56 F.Supp.2d at 452; *Tischio*, 16 F.Supp.2d at 521; *Rappoport*, 16 F.Supp.2d at 499; *Hudson United Bank*, 832 F.Supp. at 888; *Honeywell*, 817 F.Supp. at 480; *Mediterranean Golf*, 783 F.Supp. at 842. This presumption, however, is not dispositive. *See Xerox*, 56 F.Supp.2d at 452, n. 6 (quoting *Tischio*, 16 F.Supp.2d at 521). *See also Lony I*, 886 F.2d at 634; *Lacey I*, 862 F.2d at 45-46; *AT & T*, 736 F.Supp. at 1306.

The choice of forum by a plaintiff is simply a preference; it is not a right. *See Xerox*, 56 F.Supp.2d at 452, n. 6; *Tischio*, 16 F.Supp.2d at 521; *Honeywell*, 817 F.Supp. at 480; *AT & T*, 736 F.Supp. at 1306. The choice of forum is not the only ***574** factor to be considered in a Section 1404(a) transfer analysis. *See Jumara*, 55 F.3d at 880 (considering other factors); *Lony I*, 886 F.2d at 634; *Xerox*, 56 F.Supp.2d at 452, n. 6; *Honeywell*, 817 F.Supp. at 480; *AT & T*, 736 F.Supp. at 1306. Indeed, in certain circumstances, the choice of forum by a plaintiff is afforded less weight. *See Xerox*, 56 F.Supp.2d at 452, n. 6.

"Within this framework, a forum selection clause is treated as a manifestation of the parties' preference as to a convenient forum. Hence, within the framework

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of [Section] 1404, Congress encompasse[d] consideration of the parties' private expression of their venue preferences." *Jumara*, 55 F.3d at 880 (citing *Stewart*, 487 U.S. at 29-30, 108 S.Ct. 2239).

As mentioned, "[a]lthough the parties' agreement as to the most proper forum should not receive dispositive weight, it is entitled to substantial consideration." *Id.* (citations omitted). "Thus, while courts normally defer to a plaintiff's choice of forum, such deference is inappropriate where the plaintiff has already freely contractually chosen an appropriate venue." *Id.* As a result, the Circuit has determined that "[w]here the forum selection clause is valid ... the plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum." *Id. Cf. Danka Funding*, 21 F.Supp.2d at 475 (indicating that "plaintiff's choice, however, is entitled to less deference where the operative facts of a lawsuit occurred outside the forum selected by plaintiff."); *Tischio*, 16 F.Supp.2d at 521 (stating that deference is curbed where "the choice of forum ... has little connection with the operative facts of the lawsuit."); *Newcomb*, 847 F.Supp. at 1246; *Honeywell*, 817 F.Supp. at 481 (stating "[w]hen the central facts of a lawsuit occur outside the forum state, a plaintiff's selection of that forum is entitled to less deference."). *See also National Micrographics Sys.*, 825 F.Supp. at 681; *AT & T*, 736 F.Supp. at 1306.

As mentioned, Hoffer argued that he "is and at all times relevant to this action has been a New Jersey resident. [His] choice of a New Jersey forum is therefore entitled to deference and is presumptively correct." Opp. Brief at 32-33. In support of this argument, Hoffer again stated that the Forum Selection Clause does not affect the instant matter because the claims arise out of an alleged breach of the 25 June 1996 Employment Agreement and, therefore, are separate and apart from the NDA and the Forum Selection Clause contained therein. *See id.* at 33.

As discussed in detail above, *see* Section A, the Forum Selection clause not only is valid and, therefore, enforceable, but it also governs the instant matter because the 25 June 1996 Employment Agreement and the NDA, together, comprise the terms of employment agreed to by Hoffer and the Defendants. *See eg.* Hoffer Dep. at 15:3-7, 17-25, attached as Ex. B to the McMillan Aff.; Answers and Responses at Answer No. 2-4, 15, attached as Ex. B to the Snyder Aff. Because the Forum Selection Clause in the instant matter is valid and enforceable, the presumption of validity and, or, deference normally afforded to the choice of forum of a plaintiff, therefore, is "inappropriate." [FN10] *See Jumara*, 55 F.3d at 873.

> FN10. Even assuming arguendo that the Forum Selection Clause either did not exist or is not enforceable, because the Defendants have thoroughly established the operative facts for the Section 1404(a) analysis arose in Washington, *see* Section A, B *supra*, the choice of forum by Hoffer would be afforded less deference. *See Lony I*, 886 F.2d at 634; *Danka Funding*, 21 F.Supp.2d at 475; *Tischio*, 16 F.Supp.2d at 521; *Honeywell*, 817 F.Supp. at 481.

b. *Access to Proof*

The second relevant factor under the private interest analysis is the convenience of the available districts concerning the witnesses and the documentary evidence of ***575** both parties.[FN11] As the Supreme Court has stated:

> FN11. Neither Hoffer nor the Defendants submitted factually specific affidavits concerning the convenience of the parties and, or, witnesses. In the instant matter, however, the absence of affidavits concerning these issue does not present a shortcoming in the Motion to Transfer in light of the alternative, and exceedingly overwhelming, circumstances favoring transfer to the Western District of Washington; not to mention it is Hoffer, not the Defendants, who bears the burden of persuasion in a Section 1404(a) transfer motion premised on a valid and enforceable forum selection clause. *See Jumara*, 55 F.3d 873. ("Where the forum selection clause is valid ... the plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum.").

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> As discussed above, *see* Section A, Hoffer submitted two affidavits in support of his opposition to the Motion to Transfer. Importantly, these affidavits fail to enlighten as to the relevancy of the testimony of the affiants. *See* Kay Aff.; Plunkett Aff. Furthermore, neither affidavit appears to be compelling concerning the issue of availability for trial. *See id.*

> To examine 'the relative ease of access to sources of proof' and the availability of witnesses, the [D]istrict [C]ourt must scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of the evidence cited by the parties are critical, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action.
> *Van Cauwenberghe*, 486 U.S. at 528, 108 S.Ct. 1945 (quoting *Gulf Oil*, 330 U.S. at 508, 67 S.Ct. 839). *See Xerox*, 56 F.Supp.2d at 449.

This litigation primarily involves claims for breach of contract and misappropriation of trade secrets. *See* Complaint; Answer/Counterclaims. The issues relating to the alleged breach of the employment agreement between Hoffer and the Defendants and the counterclaim of alleged misappropriation of trade secrets necessarily require analysis of facts, documents and testimony concerning the purpose, implementation and effect of both the 26 June 1996 Employment Agreement and the NDA. As demonstrated by the factually specific declarations submitted by the Defendants, the development of these facts is more easily undertaken in Washington than in New Jersey.

Location of the Relevant Documents

As mentioned, the "relative ease of access to sources of proof" is another private interest District Courts may consider when evaluating a motion to transfer. *See Van Cauwenberghe*, 486 U.S. at 528, 108 S.Ct. 1945 (quoting *Gulf Oil*, 330 U.S. at 508, 67 S.Ct. 839); *Xerox*, 56 F.Supp.2d at 449-452.

In contrast to the assertion of Hoffer that the instant action involves a small amount of documents, *see* Opp. Brief at 37-38, it appears access to documents favors transfer to the Western District of Washington. Indeed, upon review of "Plaintiff's First Request for the Production of Documents" (the "Hoffer Request for Documents"), it appears the litigation of the instant matter will necessary include a voluminous amount of documents. *See* Hoffer Request for Documents, attached as Ex. C to the Snyder Aff. For example, such documents include all communications, proposals, contracts and business agreements pertaining to various Infospace clients. *See id.* In addition, Hoffer has requested various telephone records and all pleadings, briefs, orders, transcripts and documents produced in three previous lawsuits filed against Infospace. *See id.* As mentioned, Infospace has its principal place of business in Redmond, Washington, *see* N. Jain Aff., ¶ 1. It does not maintain any offices in New Jersey. Location of the relevant documents in the instant matter, therefore, favors transfer of this litigation to the Western District of Washington. *See Tischio*, 16 F.Supp2d. at 525-26.

2. *Public Interests*

The public interest factors relevant to a determination of the propriety of transfer include

> ***576** the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having a trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems and conflicts of laws or the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Lony I, 886 F.2d at 640 (quoting *Piper*, 454 U.S. at 241 n. 6, 102 S.Ct. 252). Evaluation of the public interest factors include consideration of "the locus of the alleged culpable conduct ... and the connection of the conduct to plaintiff's chosen forum." *Lacey I*, 862 F.2d at 48 (quoting *Van Cauwenberghe*, 486 U.S. at 529, 108 S.Ct. 1945). *See also Lony II* 935 F.2d at 612. As discussed below, it appears Washington has a greater interest in this litigation than New Jersey.

a. *Local Interests*

As discussed in detail above, *see* Section A, B, it appears the "locus of culpable conduct" occurred

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predominately in Washington. Furthermore, it is undisputed that the 25 June 1996 Employment Agreement and the NDA were negotiated and executed in Redmond, Washington. *See id.* In addition, the alleged breach and decision to terminate Hoffer and deny his exercise of stock options occurred in Redmond, Washington. *See* Complaint, ¶ 18; Hoffer Dep. at 18:6-12, attached as Ex. A to the Snyder Aff. Jain, moreover, resides in Washington. *See id.*, ¶ 4. Infospace, likewise has its principal place of business in Redmond, Washington and, importantly, does not maintain any offices in New Jersey. *See id.*, ¶ 5. Hoffer, moreover, made at least two separate trips to Washington in connection with his employment with Infospace. *See* Hoffer Corporate Amex Bill, attached as Ex. C to the A. Jain Aff.

Because a substantial amount, if not all, of the alleged culpable conduct occurred in Washington, not New Jersey, Washington has a stronger public interest in adjudicating this dispute. *See* Lacey I, 862 F.2d at 48; *Tischio*, 16 F.Supp.2d at 526; *Honeywell*, 817 F.Supp. at 486; *Mediterranean Golf*, 783 F.Supp. at 849-50.

b. *Burden of Jury Duty*

The burden of jury duty "ought not to be imposed upon the people of a community which have no relation to the litigation." *Tischio*, 16 F.Supp.2d at 526 (quoting *Honeywell*, 817 F.Supp. at 486 (quotations omitted). *See Ferens v. John Deere Co.*, 494 U.S. 516, 529-30, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990) (citing *Gulf Oil*, 330 U.S. at 508-09, 67 S.Ct. 839)). In the instant action, "New Jersey jurors should not be burdened with adjudicating a matter concerning decisions and[,] or[,] conduct which occurred predominately outside the State of New Jersey." *Tischio*, 16 F.Supp.2d at 526; *Pain*, 637 F.2d at 792. Accordingly, this factor also weighs in favor of transfer to the Western District of Washington.

c. *Applicable Law*

"An important public interest factor is the desire to have the case tried before judges familiar with the applicable law." *Tischio*, 16 F.Supp.2d at 526. *See Lony I*, 886 F.2d at 642; *Lacey I*, 862 F.2d at 48 (citing *Piper*, 454 U.S. at 251, 102 S.Ct. 252); *Rappoport*, 16 F.Supp.2d at 501; *Hudson United Bank*, 832 F.Supp. at 888. As mentioned, the instant action is predicated, in part, on the alleged breach of the 26 June 1996 Employment Agreement and the NDA. *See* Complaint; Answer/Counterclaims.

"Under New Jersey conflicts-of-law principles, the law of the state that has the most significant connections with the parties and the action applies." *Tischio*, 16 F.Supp.2d at 526 (citing *Gilbert*, 134 N.J. at 102-03, 629 A.2d 885). For the reasons discussed at length above, it appears Washington has the more significant contacts and the greater interest in adjudicating the instant matter. Accordingly, it appears that Washington State law shall apply to litigation arising out of the employment agreement reached between ***577** Hoffer and the Defendants, there is a strong likelihood that Washington law applies to a majority, if not all, of the issues presented in the instant matter. The likely application of Washington law, therefore, further warrants transfer to the Western District of Washington, pursuant to Section 1404(a).

In sum, the transfer of this litigation to the Western District of Washington will promote the interests of justice. As discussed, given the location of the principal place of business of Infospace in Washington, the majority of the relevant facts pertaining to this litigation arose in Washington and the lack of a relative strong nexus between the underlying dispute and New Jersey, the enhanced convenience offered by trial in the Western District of Washington overcomes any argument by Hoffer that New Jersey is the proper forum for the trial of this matter.

Conclusion

For the foregoing reasons, the Motion to Transfer is granted; the action is transferred to the Western District of Washington.

D.N.J.,2000.
Hoffer v. InfoSpace.com, Inc.
102 F.Supp.2d 556

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Supreme Court of the United States
INTERNATIONAL SHOE CO.
v.
STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT COMPENSATION AND PLACEMENT et al.
No. 107.

Decided Dec. 3, 1945.

Proceeding by the State of Washington, Office of Unemployment Compensation and Placement, and E. B. Riley, Commissioner, against the International Shoe Company to recover contributions under the Unemployment Compensation Act. From a judgment of the Supreme Court of Washington, 154 P.2d 801, affirming a judgment in favor of the plaintiff, the defendant appeals under s 237(a) of the Judicial Code, 28 U.S.C.A. s 344(a).

Affirmed.

West Headnotes

[1] Commerce 83 ⇐62.71

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(E) Licenses and Taxes
83k62.70 Taxation in General
83k62.71 k. In General. Most Cited Cases
(Formerly 83k62.70, 83k72)
The Washington Unemployment Compensation Act, as applied to foreign corporation having employees within state, does not impose an unconstitutional burden on interstate commerce. 26 U.S.C.A. Int.Rev.Code, § 1606(a); Rem.Supp.Wash.1941, §§ 9998-103a to 9998-123a.

[2] Commerce 83 ⇐9

83 Commerce
83I Power to Regulate in General
83k2 Constitutional Grant of Power to Congress
83k9 k. Delegation of Power by Congress. Most Cited Cases
Congress, in exercise of commerce power, may authorize states, in specified ways, to regulate interstate commerce or impose burdens upon it.

[3] Constitutional Law 92 ⇐4008

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k4007 Judgment or Other Determination
92k4008 k. In General. Most Cited Cases
(Formerly 92k315)
"Due process of law" requires only that in order to subject a defendant to a judgment in personam, if he be not present within territory of forum, he has certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 ⇐3965(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases
(Formerly 92k305(6), 92k283, 92k305)
The "presence" of a corporation without or within state of its origin for purposes of taxation or maintenance of suits against it in courts of state can be manifested only by activities carried on in corpora-

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tion's behalf by those who are authorized to act for it. U.S.C.A. Const. Amend. 14.

[5] Constitutional Law 92 ⚿3965(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases
(Formerly 92k305(6), 92k305)

The demand that corporation be "present" in state to satisfy due process of law requirement for purpose of maintenance of suit against it in courts of state may be met by such contacts of corporation with the state of forum as make it reasonable, in context of federal system of government, to require corporation to defend the particular suit which is brought there, and an "estimate of inconveniences" which would result to corporation from a trial away from its "home" or principal place of business would be relevant in such connection. U.S.C.A. Const. Amend. 14.

[6] Constitutional Law 92 ⚿3965(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases
(Formerly 92k305(6), 92k305)

"Presence" of foreign corporation in state for purpose of maintenance of suit against it exists when activities of corporation in state of forum have not only been continuous and systematic, but also give rise to liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. U.S.C.A. Const. Amend. 14.

[7] Constitutional Law 92 ⚿3965(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases
(Formerly 92k305(6), 92k305)

The casual presence of corporate agent or even his conduct of single or isolated items of activities in a state in corporation's behalf are not enough to subject corporation to suit on causes of action unconnected with activities there. U.S.C.A. Const. Amend. 14.

[8] Constitutional Law 92 ⚿3965(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases
(Formerly 92k305(6), 92k305)

Although commission of some single act or occasional acts of corporate agent in a state sufficient to impose an obligation on corporation does not confer upon the state authority to enforce obligation, other such acts, because of their nature and quality and circumstances of their commission, may be deemed sufficient to render corporation liable to suit. U.S.C.A. Const. Amend. 14.

[9] Constitutional Law 92 ⚿3965(3)

92 Constitutional Law

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92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases
(Formerly 92k305(6), 92k305, 192k305)
Whether due process of law is satisfied in suit in state court against foreign corporation must depend upon quality and nature of corporation's activity in relation to fair and orderly administration of laws which it was purpose of due process clause to insure. U.S.C.A. Const. Amend. 14.

[10] Constitutional Law 92 ⚿4008

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k4007 Judgment or Other Determination
92k4008 k. In General. Most Cited Cases
(Formerly 92k315)
The due process of law clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which state has no contacts, ties or relations. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 92 ⚿3965(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases
(Formerly 92k305(6), 92k305)
The exercise by foreign corporation of privilege of conducting activities within a state may give rise to obligations, and, so far as those obligations arise out of or are connected with activities within the state, a procedure requiring corporation to respond to a suit brought to enforce such obligations does not offend due process of law clause. U.S.C.A. Const. Amend. 14.

[12] Constitutional Law 92 ⚿3965(4)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(4) k. Manufacture, Distribution, and Sale. Most Cited Cases
(Formerly 92k309(1))
A Delaware shoe corporation having its principal place of business in Missouri and employing from 11 to 13 salesmen residing in state of Washington and regularly engaged therein in soliciting orders and displaying samples, sometimes in permanent display rooms paid for by company, which paid commissions to salesmen totalling more than $31,000 for each year during 4-year period, was "present" and "doing business" in Washington, so as to be amenable to process in proceedings in Washington courts to recover unpaid contributions to state unemployment compensation fund. Rem.Supp.Wash.1941, §§ 9998-103a to 9998-123a; U.S.C.A. Const. Amend. 14.

[13] Constitutional Law 92 ⚿3977(2)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3973 Process or Other Notice
92k3977 Non-Residents
92k3977(2) k. Representatives and Agents. Most Cited Cases
(Formerly 92k309(3))
The service of process within state upon foreign corporation's agent whose activities established corporation's presence in state was sufficient notice of

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the suit. U.S.C.A. Const. Amend. 14.

[14] Constitutional Law 92 ⚿3977(2)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3973 Process or Other Notice
92k3977 Non-Residents
92k3977(2) k. Representatives and Agents. Most Cited Cases
(Formerly 92k309(3))
A proceeding in Washington state courts against foreign corporation to recover unpaid contributions to state unemployment compensation fund based on commissions paid to its salesmen in state was not so unrelated to activities of a salesman soliciting orders in state as to make such salesman an inappropriate vehicle for communicating notice of suit to corporation. Rem.Supp.Wash.1941, ss 9998-103a to 9998-123a; U.S.C.A.Const. Amend. 14.

[15] Constitutional Law 92 ⚿3977(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3973 Process or Other Notice
92k3977 Non-Residents
92k3977(1) k. In General. Most Cited Cases
(Formerly 92k309(2))
The mailing of notice of suit to a foreign corporation by registered mail at its home office was sufficient notice of the suit. U.S.C.A. Const. Amend. 14.

[16] Constitutional Law 92 ⚿4144

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)6 Taxation
92k4144 k. Employment Taxes. Most Cited Cases
(Formerly 92k283)

Taxation 371 ⚿3263

371 Taxation
371V Employment Taxes and Withholding in General
371k3261 Statutory Provisions
371k3263 k. Validity. Most Cited Cases
(Formerly 371k37.3, 371k37)
The Washington Unemployment Compensation Act, when construed as imposing a tax against foreign corporation on privilege of employing salesmen within state measured by percentage of commissions payable to salesmen, is not invalid as violative of "due process of law". Rem.Supp.Wash.1941, §§ 9998-103a to 9998-123a; U.S.C.A.Const. Amend. 14.

****156 *311** Appeal from the Supreme Court of the State of Washington.
Mr. Henry C. Lowenhaupt, of St. Louis Mo., for appellant.
Mr. George W. Wilkins, of Olympia, Wash., for appellees.

Mr. Chief Justice STONE delivered the opinion of the Court.
The questions for decision are (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by state statutes, Washington Unemployment Compensation Act, Washington Revised Statutes, s 9998-103a through s 9998-123a, 1941 Supp., and (2) whether the state can exact those contributions consistently with the due process clause of the Fourteenth Amendment.

The statutes in question set up a comprehensive scheme of unemployment compensation, the costs of which are defrayed by contributions required to be made by employers to a state unemployment compensation fund.***312** The contributions are a specified percentage of the wages payable annually

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by each employer for his employees' services in the state. The assessment and collection of the contributions and the fund are administered by respondents. Section 14(c) of the Act, Wash.Rev.Stat. 1941 Supp., s 9998-114c, authorizes respondent Commissioner to issue an order and notice of assessment of delinquent contributions upon prescribed personal service of the notice upon the employer if found within the state, or, if not so found, by mailing the notice to the employer by registered mail at his last known address. That section also authorizes the Commissioner to collect the assessment by distraint if it is not paid within ten days after service of the notice. By ss 14(e) and 6(b) the order of assessment may be administratively reviewed by an appeal tribunal within the office of unemployment upon petition of the employer, and this determination is by s 6(i) made subject to judicial review on questions of law by the state Superior Court, with further right of appeal in the state Supreme Court as in other civil cases.

In this case notice of assessment for the years in question was personally served upon a sales solicitor employed by appellant in the State of Washington, and a copy of the notice was mailed by registered mail to appellant at its address in St. Louis, Missouri. Appellant appeared specially before the office of unemployment and moved to set aside the order and notice of assessment on the ground that the service upon appellant's salesman was not proper service upon appellant; that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made; and that appellant is not an employer and does not furnish employment within the meaning of the statute.

The motion was heard on evidence and a stipulation of facts by the appeal tribunal which denied the motion ***313** and ruled that respondent Commissioner was entitled to recover the unpaid contributions. That action****157** was affirmed by the Commissioner; both the Superior Court and the Supreme Court affirmed. 154 P.2d 801. Appellant in each of these courts assailed the statute as applied, as a violation of the due process clause of the Fourteenth Amendment, and as imposing a constitutionally prohibited burden on interstate commerce. The cause comes here on appeal under s 237(a) of the Judicial Code, 28 U.S.C. s 344(a), 28 U.S.C.A. s 344(a), appellant assigning as error that the challenged statutes as applied infringe the due process clause of the Fourteenth Amendment and the commerce clause.

The facts as found by the appeal tribunal and accepted by the state Superior Court and Supreme Court, are not in dispute. Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. It maintains places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington.

Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than $31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which ***314** they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant.

The authority of the salesmen is limited to exhibit-

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ing their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections.

The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its courts. But it was also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there. International Harvester Co. v. Kentucky, 234 U.S. 579, 587, 34 S.Ct. 944, 946, 58 L.Ed. 1479; People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 87, 38 S.Ct. 233, 235, 62 L.Ed. 587, Ann.Cas.1918C, 537; Frene v. Louisville Cement Co., 77 U.S.App.D.C. 129, 134 F.2d 511, 516, 146 A.L.R. 926. The court found such additional activities in the salesmen's display of samples sometimes in permanent display rooms, and the salesmen's residence within the state, continued over a period of years, all resulting in a ***315** substantial volume of merchandise regularly shipped by appellant to purchasers within the state. The court also held that the statute as applied did not invade the constitutional power of Congress to regulate interstate commerce and did not impose a prohibited burden on such commerce.

[1][2] Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not detain us. For 53 Stat. 1391, 26 U.S.C. s 1606(a), 26 U.S.C.A. Int.Rev.Code, s 1606(a), provides that 'No person required under a State law to make payments to an unemployment fund shall be ****158** relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce.'It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it. Kentucky Whip & Collar Co. v. Illinois Central R. Co., 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270; Perkins v. Pennsylvania, 314 U.S. 586, 62 S.Ct. 484, 86 L.Ed. 473; Standard Dredging Corp. v. Murphy, 319 U.S. 306, 308, 63 S.Ct. 1067, 1068, 87 L.Ed. 1416; Hooven & Allison v. Evatt, 324 U.S. 652, 679, 65 S.Ct. 870, 883; Southern Pacific Co. v. Arizona, 325 U.S. 761, 769, 65 S.Ct. 1515, 1520.

Appellant also insists that its activities within the state were not sufficient to manifest its 'presence' there and that in its absence the state courts were without jurisdiction, that consequently it was a denial of due process for the state to subject appellant to suit. It refers to those cases in which it was said that the mere solicitation of orders for the purchase of goods within a state, to be accepted without the state and filled by shipment of the purchased goods interstate, does not render the corporation seller amenable to suit within the state. See Green v. Chicago, Burlington & Quincy R. Co., 205 U.S. 530, 533, 27 S.Ct. 595, 596, 51 L.Ed. 916; International Harvester Co. v. Kentucky, supra, 234 U.S. 586, 587, 34 S.Ct. 946, 58 L.Ed. 1479; Philadelphia & Reading R. Co. v. McKibbin, 243 U.S. 264, 268, 37 S.Ct. 280, 61 L.Ed. 710; People's Tobacco Co. v. American Tobacco Co., supra, 246 U.S. 87, 38 S.Ct. 235, 62 L.Ed. 587, Ann.Cas.1918C, 537.***316** And appellant further argues that since it was not present within the state, it

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is a denial of due process to subject it to taxation or other money exaction. It thus denies the power of the state to lay the tax or to subject appellant to a suit for its collection.

[3] Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U.S. 714, 733, 24 L.Ed. 565. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 132 A.L.R. 1357. See Holmes, J., in McDonald v. Mabee, 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608, L.R.A.1917F, 458.Compare Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 316, 319, 63 S.Ct. 602, 604, 606, 87 L.Ed. 777, 145 A.L.R. 1113. See Blackmer v. United States, 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375; Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091; Young v. Masci, 289 U.S. 253, 53 S.Ct. 599, 77 L.Ed. 1158, 88 A.L.R. 170.

[4][5] Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, Klein v. Board of Tax Supervisors, 282 U.S. 19, 24, 51 S.Ct. 15, 16, 75 L.Ed. 140, 73 A.L.R. 679, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are ***317** used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. L. Hand, J., in Hutchinson v. Chase & Gilbert, 2 Cir., 45 F.2d 139, 141. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection. Hutchinson v. Chase & Gilbert, supra, 45 F.2d 141.

****159** [6][7] 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. St. Clair v. Cox, 106 U.S. 350, 355, 1 S.Ct. 354, 359, 27 L.Ed. 222; Connecticut Mutual Life Ins. Co. v. Spratley, 172 U.S. 602, 610, 611, 19 S.Ct. 308, 311, 312, 43 L.Ed. 569; Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U.S. 407, 414, 415, 25 S.Ct. 483, 484, 485, 49 L.Ed. 810; Commercial Mutual Accident Co. v. Davis, 213 U.S. 245, 255, 256, 29 S.Ct. 445, 448, 53 L.Ed. 782;International Harvester Co. v. Kentucky, supra; cf. St. Louis S.W.R. Co. v. Alexander, 227 U.S. 218, 33 S.Ct. 245, 57 L.Ed. 486, Ann.Cas.1915B, 77. Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. St. Clair v. Cox, supra, 106 U.S. 359, 360, 1 S.Ct. 362, 363, 27 L.Ed. 222; Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 21, 27 S.Ct. 236, 240, 51 L.Ed. 345; Frene v. Louisville Cement Co., supra, 77 U.S.App.D.C. 133, 134 F.2d 515, 146 A.L.R. 926, and cases cited. To require the corporation in

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such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

***318** While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, Old Wayne Mut. Life Ass'n v. McDonough, supra;Green v. Chicago, Burlington & Quincy R. Co., supra; Simon v. Southern R. Co., 236 U.S. 115, 35 S.Ct. 255, 59 L.Ed. 492;People's Tobacco Co. v. American Tobacco Co., supra; cf. Davis v. Farmers' Co-operative Equity Co., 262 U.S. 312, 317, 43 S.Ct. 556, 558, 67 L.Ed. 996, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. See Missouri, K. & T.R. Co. v. Reynolds, 255 U.S. 565, 41 S.Ct. 446, 65 L.Ed. 788; Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915; cf. St. Louis S.W.R. Co. v. Alexander, supra.

[8] Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. Cf. Kane v. New Jersey, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222;Hess v. Pawloski, supra;Young v. Masci, supra. True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. Lafayette Insurance Co. v. French, 18 How. 404, 407, 15 L.Ed. 451; St. Clair v. Cox, supra, 106 U.S. 356, 1 S.Ct. 359, 27 L.Ed. 222; Commercial Mutual Accident Co. v. Davis, supra, 213 U.S. 254, 29 S.Ct. 447, 53 L.Ed. 782; State of Washington v. Superior Court, 289 U.S. 361, 364, 365, 53 S.Ct. 624, 626, 627, 77 L.Ed. 1256, 89 A.L.R. 653. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction. Smolik v. Philadelphia & R.C. & I. Co., D.C., 222 F. 148, 151.***319** Henderson, The Position of Foreign Corporations in American Constitutional Law, 94, 95.

[9][10] It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. St. Louis S.W.R. Co. v. Alexander, supra, 227 U.S. 228, ****160**33 S.Ct. 248, 57 L.Ed. 486, Ann.Cas.1915B, 77; International Harvestor Co. v. Kentucky, supra, 234 U.S. 587, 34 S.Ct. 946, 58 L.Ed. 1479. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. Cf. Pennoyer v. Neff, supra; Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140, 43 S.Ct. 293, 67 L.Ed. 573.

[11] But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce

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them can, in most instances, hardly be said to be undue. Compare International Harvester Co. v. Kentucky, supra, with Green v. Chicago, Burlington & Quincy R. Co., supra, and People's Tobacco Co. v. American Tobacco Co., supra. Compare Connecticut Mutual Life Ins. Co. v. Spratley, supra, 172 U.S. 619, 620, 19 S.Ct. 314, 315, 43 L.Ed. 569, and Commercial Mutual Accident Co. v. Davis, supra, with Old Wayne Mut. Life Ass'n v. McDonough, supra. See 29 Columbia Law Review, 187-195.

[12]***320** Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.

[13][14][15] We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's 'presence' there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual. Connecticut Mutual Life Ins. Co. v. Spratley, supra, 172 U.S. 618, 619, 19 S.Ct. 314, 315, 43 L.Ed. 569; Board of Trade v. Hammond Elevator Co., 198 U.S. 424, 437, 438, 25 S.Ct. 740, 743, 744, 49 L.Ed. 1111; Commercial Mutual Accident Co. v. Davis, supra, 213 U.S. 254, 255, 29 S.Ct. 447, 448, 53 L.Ed. 782. Cf. Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 194, 195, 35 S.Ct. 579, 580, 581, 59 L.Ed. 910; see Knowles v. Gaslight & Coke Co., 19 Wall. 58, 61, 22 L.Ed. 70;McDonald v. Mabee, supra;Milliken v. Meyer, supra. Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit. Compare Hess v. Pawloski, supra, with McDonald v. Mabee, supra, 243 U.S. 92, 37 S.Ct. 344, 61 L.Ed. 608, L.R.A.1917F, 458,***321** and Wuchter v. Pizzutti, 276 U.S. 13, 19, 24, 48 S.Ct. 259, 260, 262, 72 L.Ed. 446, 57 A.L.R. 1230; cf. Bequet v. MacCarthy, 2 B. & Ad. 951; Maubourquet v. Wyse, 1 Ir.Rep.C.L. 471. See State of Washington v. Superior Court, supra, 289 U.S. 365, 53 S.Ct. 626, 77 L.Ed. 1256, 89 A.L.R. 653.

[16] Only a word need be said of appellant's liability for the demanded contributions of the state unemployment fund. The Supreme Court of Washington, construing and applying the statute, has held that it imposes a tax on the privilege of employing appellant's salesmen within the state measured by a percentage of the wages, here the commissions payable to the salesmen. This construction we accept for purposes of determining the constitutional validity of the statute. The right to employ labor has been ****161** deemed an appropriate subject of taxation in this country and England, both before and since the adoption of the Constitution. Steward Machine Co. v. Davis, 301 U.S. 548, 579 et seq., 57 S.Ct. 883, 887 et seq., 81 L.Ed. 1279, 109 A.L.R. 1293. And such a tax imposed upon the employer for unemployment benefits is within the constitutional power of the states. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 508 et seq., 57 S.Ct. 868, 871 et seq., 81 L.Ed. 1245, 109 A.L.R. 1327.

Appellant having rendered itself amenable to suit

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upon obligations arising out of the activities of its salesmen in Washington, the state may maintain the present suit in personam to collect the tax laid upon the exercise of the privilege of employing appellant's salesmen within the state. For Washington has made one of those activities, which taken together establish appellant's 'presence' there for purposes of suit, the taxable event by which the state brings appellant within the reach of its taxing power. The state thus has constitutional power to lay the tax and to subject appellant to a suit to recover it. The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax. Equitable Life Assur. Society v. Pennsylvania, 238 U.S. 143, 146, 35 S.Ct. 829, 830, 59 L.Ed. 1239; cf. International Harvester Co. v. Wisconsin Department of Taxation, 322 U.S. 435, 442 et seq., 64 S.Ct. 1060, 1064 et seq., 88 L.Ed. 1373; Hoopeston Canning Co. v. Cullen, supra, 318 U.S. 316-319, 63 S.Ct. 604-606,87 L.Ed. 1722, 145 A.L.R. 113;***322** see General Trading Co. v. State Tax Com., 322 U.S. 335, 349, 64 S.Ct. 1028, 1030, 88 L.Ed. 1309, 1319.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.Mr. Justice BLACK delivered the following opinion.

Congress, pursuant to its constitutional power to regulate commerce, has expressly provided that a State shall not be prohibited from levying the kind of unemployment compensation tax here challenged.26 U.S.C. s 1606, 26 U.S.C.A. Int.Rev.Code, s 1606. We have twice decided that this Congressional consent is an adequate answer to a claim that imposition of the tax violates the Commerce Clause. Perkins v. Pennsylvania, 314 U.S. 586, 62 S.Ct. 484, 86 L.Ed. 473,affirming 342 Pa. 529, 21 A.2d 45; Standard Dredging Corp. v. Murphy, 319 U.S. 306, 308, 63 S.Ct. 1067, 1068, 87 L.Ed. 1416. Two determinations by this Court of an issue so palpably without merit are sufficient. Consequently that part of this appeal which again seeks to raise the question seems so patently frivolous as to make the case a fit candidate for dismissal. Fay v. Crozer, 217 U.S. 455, 30 S.Ct. 568, 54 L.Ed. 837. Nor is the further ground advanced on this appeal, that the State of Washington has denied appellant due process of law, any less devoid of substance. It is my view, therefore, that we should dismiss the appeal as unsubstantial, [FN1] Seaboard Air Line R. Co. v. Watson, 287 U.S. 86, 90, 92, 53 S.Ct. 32, 34, 35, 77 L.Ed. 180, 86 A.L.R. 174; and decline the invitation to formulate broad rules as to the meaning of due process, which here would amount to deciding a constitutional question 'in advance of the necessity for its decision.' Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389, 89 L.Ed. 1725, 1734.

FN1 This Court has on several occasions pointed out the undesirable consequences of a failure to dismiss frivolous appeals. Salinger v. United States, 272 U.S. 542, 544, 47 S.Ct. 173, 174, 71 L.Ed. 398; United Surety Co. v. American Fruit Product Co., 238 U.S. 140, 35 S.Ct. 828, 59 L.Ed. 1238; De Bearn v. Safe Deposit & Trust Co., 233 U.S. 24, 33, 34, 34 S.Ct. 584, 586, 587, 58 L.Ed. 833.

323** Certainly appellant can not in the light of our past decisions meritoriously claim that notice by registered mail and by personal service on its sales solicitors in Washington did not meet the requirements of procedural due process. And the due process clause is not brought in issue any more by appellant's further conceptualistic contention that Washington could not levy a tax or bring suit against the corporation because it did not honor that State with its mystical 'presence.' For it is unthinkable that the vague due process clause was ever intended to prohibit a State from regulating or taxing a business carried on within its boundaries simply because this is done by agents of a corporation organized and having its headquarters elsewhere.*162** To read this into the due process

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clause would in fact result in depriving a State's citizens of due process by taking from the State the power to protect them in their business dealings within its boundaries with representatives of a foreign corporation. Nothing could be more irrational or more designed to defeat the function of our federative system of government. Certainly a State, at the very least, has power to tax and sue those dealing with its citizens within its boundaries, as we have held before. Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 63 S.Ct. 602,87 L.Ed. 1722, 145 A.L.R. 1113. Were the Court to follow this principle, it would provide a workable standard for cases where, as here, no other questions are involved. The Court has not chosen to do so, but instead has engaged in an unnecessary discussion in the course of which it has announced vague Constitutional criteria applied for the first time to the issue before us. It has thus introduced uncertain elements confusing the simple pattern and tending to curtail the exercise of State powers to an extent not justified by the Constitution.

The criteria adopted insofar as they can be identified read as follows: Due process does permit State courts to 'enforce the obligations which appellant has incurred' if ***324** it be found 'reasonable and just according to our traditional conception of fair play and substantial justice.'And this in turn means that we will 'permit' the State to act if upon 'an 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business', we conclude that it is 'reasonable' to subject it to suit in a State where it is doing business.

It is true that this Court did use the terms 'fair play' and 'substantial justice' in explaining the philosophy underlying the holding that it could not be 'due process of law' to render a personal judgment against a defendant without notice to and an opportunity to be heard by him. Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357. In McDonald v. Mabee, 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608, L.R.A.1917F, 458, cited in the Milliken case, Mr. Justice Holmes speaking for the Court warned against judicial curtailment of this opportunity to be heard and referred to such a curtailment as a denial of 'fair play', which even the common law would have deemed 'contrary to natural justice.' And previous cases had indicated that the ancient rule against judgments without notice had stemmed from 'natural justice' concepts. These cases, while giving additional reasons why notice under particular circumstances is inadequate, did not mean thereby that all legislative enactments which this Court might deem to be contrary to natural justice ought to be held invalid under the due process clause. None of the cases purport to support or could support a holding that a State can tax and sue corporations only if its action comports with this Court's notions of 'natural justice.' I should have thought the Tenth Amendment settled that.

I believe that the Federal Constitution leaves to each State, without any 'ifs' or 'buts', a power to tax and to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. Believing that the Constitution gave the States that power, I think it a judicial deprivation to condition its exercise upon this ***325** Court's notion of 'fairplay', however appealing that term may be. Nor can I stretch the meaning of due process so far as to authorize this Court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more 'convenient' for the corporation to be sued somewhere else.

There is a strong emotional appeal in the words 'fair play', 'justice', and 'reasonableness.' But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives. No one, not even those who most feared a democratic government, ever formally proposed that courts should be given power to invalidate legislation under any such elastic standards. Express prohibitions against certain types of legislation are found in the Constitution, and under the

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long settled practice, courts invalidate laws found to conflict with them. This requires interpretation, and interpretation, it is true, may result in extension of the Constitution's purpose. But that is no reason for reading the due process clause so as to restrict a State's power to tax and sue ****163** those whose activities affect persons and businesses within the State, provided proper service can be had. Superimposing the natural justice concept on the Constitution's specific prohibitions could operate as a drastic abridgment of democratic safeguards they embody, such as freedom of speech, press and religion,[FN2] and the right to counsel. This ***326** has already happened. Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595. Compare Feldman v. United States, 322 U.S. 487, 494-503, 64 S.Ct. 1082, 1085-1089, 88 L.Ed. 1408, 154 A.L.R. 982. For application of this natural law concept, whether under the terms 'reasonableness', 'justice', or 'fair play', makes judges the supreme arbiters of the country's laws and practices. Polk Co. v. Glover, 305 U.S. 5, 17-18, 59 S.Ct. 15, 20, 21, 83 L.Ed. 6; Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 600, 62 S.Ct. 736, 750, 86 L.Ed. 1037, note 4. This result, I believe, alters the form of government our Constitution provides. I cannot agree.

> FN2 These First Amendment liberties-freedom of speech, press and religion-provide a graphic illustration of the potential restrictive capacity of a rule under which they are protected at a particular time only because the Court, as then constituted believes them to be a requirement of fundamental justice. Consequently, under the same rule, another Court, with a different belief as to fundamental justice, could at least as against State action, completely or partially withdraw Constitutional protection from these basic freedoms, just as though the First Amendment had never been written.

True, the State's power is here upheld. But the rule announced means that tomorrow's judgment may strike down a State or Federal enactment on the ground that it does not conform to this Court's idea of natural justice. I therefore find myself moved by the same fears that caused Mr. Justice Holmes to say in 1930:

'I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable.' Baldwin v. Missouri, 281 U.S. 586, 595, 50 S.Ct. 436, 439, 74 L.Ed. 1056, 72 A.L.R. 1303.

U.S. 1945.
International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement
326 U.S. 310, 66 S.Ct. 154, 161 A.L.R. 1057, 90 L.Ed. 95

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EXHIBIT J

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552 A.2d 29
314 Md. 521, 552 A.2d 29

Court of Appeals of Maryland.
Cheryl JOHNSON
v.
G.D. SEARLE & COMPANY et al.
Eileen M. FERCH
v.
G.D. SEARLE & COMPANY et al.
No. 19, Sept. Term, 1988.

Jan. 18, 1989.

Women allegedly injured by use of intrauterine contraceptive brought actions against manufacturer for product liability and personal injury. The Circuit Court for Baltimore City, Thomas Ward, J., dismissed actions on ground of forum non conveniens, and injured women appealed. The Court of Appeals issued writ of certiorari on own motion prior to consideration by the Court of Special Appeals. The Court of Appeals, Rodowsky, J., held that Circuit Court abused its discretion by unconditionally dismissing actions on ground of forum non conveniens when statute of limitations had likely run in alternative forum.

Vacated and remanded.

Eldridge, J., filed opinion concurring in part and dissenting in part.

West Headnotes

[1] Federal Courts 170B ⚿45

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk45 k. Forum Non Conveniens. Most Cited Cases
Doctrine of forum non conveniens is applicable to federal courts where only alternative is state court. 28 U.S.C.A. § 1404(a).

[2] Courts 106 ⚿28

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k28 k. Discretion as to Exercise; Forum Non Conveniens. Most Cited Cases
Inasmuch as courts of limited jurisdiction of federal sovereign have inherent power to dismiss by applying common-law forum non conveniens, that power necessarily also lies with state trial courts of general jurisdiction. Code, Courts and Judicial Proceedings, §§ 6-103, 6-104(a).

[3] Courts 106 ⚿28

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k28 k. Discretion as to Exercise; Forum Non Conveniens. Most Cited Cases
In order to apply forum non conveniens analysis, there must be alternative forum which is available for litigation.

[4] Courts 106 ⚿28

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k28 k. Discretion as to Exercise; Forum Non Conveniens. Most Cited Cases
State statutes do not reflect any policy against use of state courts for actions which may have been attracted to state by perceived liberality toward plaintiffs in law of limitations. Code, Courts and Judicial Proceedings, § 6-103(b)(4).

[5] Courts 106 ⚿29

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k29 k. Exercise of Jurisdiction Beyond Territorial Limits. Most Cited Cases

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For purpose of statute permitting dismissal of action which should be heard in another forum if dismissal, which may be conditional, is "in the interest of substantial justice," it is not in interest of substantial justice, and is anomalous, if not disingenuous, to request dismissal of action on ground that it should be heard in another forum when action will likely never be heard in other forum because it is barred by limitations there. Code, Courts and Judicial Proceedings, § 6-104(a).

[6] Courts 106 ⚿28

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k28 k. Discretion as to Exercise; Forum Non Conveniens. Most Cited Cases
Circuit court abused its discretion by unconditionally dismissing product liability and personal injury actions on ground of forum non conveniens when statute of limitations had likely run in alternative forum; circuit court could dismiss on condition that defendants file with circuit court in alternative forum waivers of limitations under law of that state, that plaintiffs file suit in that state within reasonable time to be fixed by court, and that if waivers were finally determined by courts of alternative state to be ineffective, actions could be reinstated where originally brought within time after that final determination to be fixed by circuit court. Code, Courts and Judicial Proceedings, § 6-104(a).

**29 *523 H. Robert Erwin, Jr. (Pretl & Erwin, P.A., both on brief), Baltimore, for appellants.
James L. Shea (Jill E. Rappaport, Terri L. Turner, Venable, Baetjer & Howard, all on brief), Baltimore, for appellees.

**30 Argued before MURPHY, C.J., and ELDRIDGE, COLE, RODOWSKY, McAULIFFE, ADKINS and BLACKWELL, JJ.

RODOWSKY, Judge.
These appeals involve Md.Code (1974, 1984 Repl.Vol.), § 6-104(a) of the Courts and Judicial Proceedings Article (CJ) which provides:

"If a court finds that in the interest of substantial justice an action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions it considers just."

We shall hold that a circuit court abuses its discretion by unconditionally dismissing actions on the ground of forum non conveniens when the statute of limitations has likely run in the alternative for- um.

Presented are two appeals which have been consolidated for briefing and argument. Both cases are product liability, personal injury actions involving an intrauterine contraceptive, the Copper-7 (Cu-7), manufactured and distributed by the appellees, G.D. Searle & Company and Searle Pharmaceuticals, Inc. (collectively, Searle). In each case the plaintiff alleges that her use of the Cu-7 caused pelvic inflammatory disease which eventually required a complete abdominal hysterectomy and bilateral salpingo-oophorectomy. Since March 1971 the United States Food and Drug Administration has classified copper-bearing IUDs, such as the Cu-7, as prescription drugs. The FDA approved the Cu-7 in February 1974 following fourteen months of study.

Appellant, Cheryl Johnson, is a resident of Chicago, Illinois. In 1975 she had acquired her first Cu-7 in Detroit, Michigan. It was removed by her physician in August *524 1978, and in September 1978 a second Cu-7 was prescribed and inserted. Her physician removed this second Cu-7 in January 1980 after Ms. Johnson had developed symptoms. She was treated from time to time at the University of Illinois Hospital where, on October 28, 1980, she underwent the hysterectomy. Ms. Johnson's suit against Searle was filed in the Circuit Court for Baltimore City on July 31, 1987.

Appellant, Eileen Ferch, is also a resident of Illinois. Her physician prescribed and inserted a

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Cu-7 in 1976. Ms. Ferch's symptoms developed in 1978. She was treated at times in 1979 at hospitals in Illinois. She underwent her hysterectomy in October 1979 at a hospital in Parkridge, Illinois. Her action against Searle was filed in the Circuit Court for Baltimore City on August 4, 1987.

The appellee corporations are not incorporated under the laws of Maryland and Searle's principal office is in Skokie, Illinois. Searle maintains no office in Maryland but sells its products in this State through sales representatives. Searle has not questioned Maryland's exercise of in personam jurisdiction over it.[FN1] On the same day that Searle answered the complaints, however, it moved that each be dismissed under CJ § 6-104(a) because each action should be heard in an Illinois forum.

FN1. CJ § 6-103(b) provides in part:

> "A court may exercise personal jurisdiction over a person, who directly or by an agent:
>
> ....
>
> (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State[.]"

In each case the circuit court entered the following judgment:

"Upon consideration of the Motion to Dismiss on the Basis of *Forum Non Conveniens* and the memoranda ***525** and arguments by the parties, it is ... ORDERED that this action is dismissed, with plaintiff to pay costs."

Each plaintiff appealed to the Court of Special Appeals. We issued the writ of certiorari on our own motion prior to consideration of the appeals by the intermediate appellate court.

Restatement (Second) of Conflict of Laws § 84 (1971) describes forum non conveniens as the principle whereby "[a] state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of ****31** the action [,] provided that a more appropriate forum is available to the plaintiff." At the time of the American Revolution the common law of England solved the question of the appropriate place for trial of an action by deciding whether it was local or transitory. Local actions are those based on facts which could have happened only in one place whereas actions based on facts which might have happened anywhere are transitory. "Local actions can be tried only where they arise; transitory actions, in whatever court has jurisdiction over the defendant or his property." Foster, *Place of Trial in Civil Actions,*43 Harv.L.Rev. 1217, 1217 (1930). Professor, and later Judge, Robert Braucher has traced the origins of forum non conveniens to Nineteenth-Century Scotland. Braucher, *The Inconvenient Federal Forum,*60 Harv.L.Rev. 908, 909 (1947). Paxton Blair, a Wall Street lawyer,[FN2] presented the thesis that the doctrine was part of the common law inherent power of American courts which had been applying the principle without using its Latin label. Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,*29 Colum.L.Rev. 1, 2 (1929).

> FN2. Note, *Forum Non Conveniens in the Absence of An Alternative Forum,* 86 Colum.L.Rev. 1000, 1002 & n. 11 (1986).

The United States Supreme Court held that United States District Courts had inherent power to dismiss pursuant to the doctrine in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) and its companion case, ***526***Koster v. Lumbermens Mut. Casualty Co.,* 330 U.S. 518, 67 S.Ct. 828, 91 L.Ed. 1067 (1947). Whether a federal court should "resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute," *Gulf Oil,* 330 U.S. at 507,

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67 S.Ct. at 842, was to be determined by weighing public and private interest factors. "Wisely," courts have not attempted "to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts[.]" *Id.* at 508, 67 S.Ct. at 843. Private interest factors mentioned by the Court included "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses[.]" *Id.* Describing public interest factors the Court said:

"Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

Id. at 508-09, 67 S.Ct. at 843. On appellate review of the dismissal of a complaint on forum non conveniens grounds the test is whether the trial court "exceed[ed] its powers or the bounds of its discretion [.]" *Id.* at 512, 67 S.Ct. at 844.

The importance of common law forum non conveniens in the federal courts was somewhat diminished in the year following *Gulf Oil* by the enactment of present Title 28 U.S.C. § 1404(a) (1982) by Pub.L. No. 80-773, § 1404(a), 62 Stat. 869, 937 (1948). That statute provides that "[f]or the ***527** convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[1] Although the doctrine of forum non conveniens and § 1404(a) have similar conceptual roots, they are not identical.

****32** "The transfer under sec. 1404(a) is not a transfer or a surrender of a case to another judicial system. It is but a change of venue to another courtroom of the same judicial system. Under a sec. 1404(a) transfer, the transferee court is obliged to follow the law of the state that would have been applied if there had been no change of venue. Ehrenzweig and Louisell, [*Jurisdiction in a Nutshell*], p. 17 [(2d ed. 1968)], and *Van Dusen v. Barrack* (1964), 376 U.S. 612, 639, 84 S.Ct. 805 [820], 11 L.Ed.2d 945. Although sec. 1404(a) partakes of some of the elements of *forum non conveniens,* it is a statutory device distinct from that doctrine. *Forum non conveniens* can be applied by federal courts independently of any statutory authorization."

Littmann v. Littmann, 57 Wis.2d 238, 249, 203 N.W.2d 901, 907 (1973). The common law doctrine, however, retains vitality in the federal courts "primarily when the 'more convenient forum' is [that of] a foreign country, rather than another federal district." *Grodinsky v. Fairchild Indus.,* 507 F.Supp. 1245, 1248 (D.Md.1981). The doctrine is also applicable to federal courts where the only alternative forum is a state court. *See Poe v. Marquette Cement Mfg. Co.,* 376 F.Supp. 1054, 1060 (D.Md.1974).

[2] Inasmuch as the courts of limited jurisdiction of the federal sovereign have inherent power to dismiss by applying common law forum non conveniens, that power necessarily also lies with the Maryland trial courts of general jurisdiction, the circuit courts. Thus, CJ § 6-104(a) confirms the existence of an inherent power and makes clear ***528** that it may be applied in relation to the broad standard of "the interest of substantial justice."

Section 6-104(a) was originally enacted as part of the "Long Arm" statute. *See* Acts of 1964, Ch. 95, enacting former Art. 75, § 98; Auerbach, *The "Long Arm" Comes to Maryland,*26 Md.L.Rev. 13

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(1966). The text of CJ § 6-104(a) is in substance, and is nearly verbatim, § 1.05 of the Uniform Interstate and International Procedure Act, 13 U.L.A. 355, 377 (1986) (the Model Act) which was approved by the National Conference of Commissioners on Uniform State Laws, and by the American Bar Association, in 1962. *Cf. Groom v. Margulies,* 257 Md. 691, 702, 265 A.2d 249, 254 (1970) (predecessor of present CJ § 6-103 is based on the Model Act). After *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) had expanded the constitutionally permissible bases for exercising personal jurisdiction, the General Assembly fully occupied the expanded area by enactment of the "Long Arm" statute, and considered it desirable to have a safety valve for those cases in which exercise of the enlarged in personam jurisdiction would not be "in the interest of substantial justice."

Searle contends that the circuit court did not abuse its discretion by dismissing the instant actions because an Illinois court would clearly be the more convenient forum. Both plaintiffs reside there, the medical witnesses respecting plaintiffs' injuries reside there, Searle has its principal office there, and Searle's records relating to the development and testing of the product are there. Applying public interest factors, Searle argues that Illinois has the greater interest in vindicating any rights of its citizens arising out of a tort committed in Illinois and that, because the substantive law of Illinois would govern liability issues, it is more appropriate for an Illinois court to apply that state's law.

Appellants point out that the law firm which represents each of them is based in Baltimore and that the law firm which is defending Searle not only in the instant actions but also in other Cu-7 cases in other states, is also based in Baltimore. Appellants say that FDA records relating to the ***529** testing of the Cu-7 are at the FDA headquarters in Maryland, although Searle disputes how conveniently any information can be obtained from the FDA. Apparently based on experience in other Cu-7 litigation, appellants' counsel submit that the liability aspects of the instant actions have no dominant connection with any particular state. The Cu-7 was tested in a number of states, and the expert witnesses anticipated to testify for one side or the other reside in ****33** various places throughout the United States and are prepared to travel to wherever a Cu-7 case is tried.

The convenience of access by counsel to the forum has not been a factor to which courts have given appreciable weight in deciding whether to dismiss for forum non conveniens. *See Anderson v. Great Lakes Dredge & Dock Co.,* 411 Mich. 619, 309 N.W.2d 539 (1981); *Besse v. Missouri Pacific R.R.,* 721 S.W.2d 740 (Mo.1986), *cert. denied,* 481 U.S. 1016, 107 S.Ct. 1894, 95 L.Ed.2d 501 (1987). If the instant cases involved only the weighing of factors bearing on convenience, without presenting any issue of availability, we assume that it would have been within the discretion of the circuit court unconditionally to dismiss the actions because Illinois was the more convenient forum. But this case is not really about convenience. It is about limitations.

The parties recognize that limitations have probably run against the appellants' claims under Illinois law which allows two years after discovery within which to sue.[FN3] *See* Ill.Ann.Stat. ch. 110, para. 13-213 (Smith-Hurd 1987). The appellants anticipate that a Maryland forum would apply the Maryland statute of limitations, *see Doughty v. Prettyman,* 219 Md. 83, 88, 148 A.2d 438, 440 (1959), which allows three years from discovery. *See Penwalt Corp. v. Nasios,* 314 Md. 433, 550 A.2d 1155 (1988). Appellants submit that the circuit court abused its discretion by dismissing outright, without, as appellants had asked the circuit court to do, conditioning the dismissal on Searle's waiver of ***530** limitations on an action in Illinois. When counsel for Searle was pressed at oral argument in this Court for a position with respect to conditional dismissal, he replied:

FN3. At oral argument in this Court, coun-

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sel for the appellants represented unequivocally that limitations had run in Illinois.

"I have not had a position from my client so I guess my position to your Honor is ... if your ruling is that we must waive limitations in order to go to Illinois, we'll stay here in Maryland. That's the position that I have at this point."
Thus, the issue is whether the circuit court should have conditioned its order.

[3] In order to apply a forum non conveniens analysis there must be an alternative forum which is available for the litigation. Comment c to the Restatement, *supra,* § 84 explains the concept of an available alternative forum, saying:

"The two most important factors look to the court's retention of the case. They are (1) that since it is for the plaintiff to choose the place of suit, his choice of a forum should not be disturbed except for weighty reasons, and (2) that the action will not be dismissed unless a suitable alternative forum is available to the plaintiff. Because of the second factor, the suit will be entertained, no matter how inappropriate the forum may be, if the defendant cannot be subjected to jurisdiction in other states. The same will be true if the plaintiff's cause of action would elsewhere be barred by the statute of limitations, unless the court is willing to accept the defendant's stipulation that he will not raise this defense in the second state."

The comment by the Commissioners on Uniform State Laws to § 1.05 of the Model Act explains that that counterpart to CJ § 6-104(a) was derived from former Wis.Stat.Ann., tit. 25, § 262.19 (West Supp.1962) (now Wis.Stat.Ann. § 801.63 (West 1977)). The comment points out that "[p]ossible conditions for granting the stay suggested in the Wisconsin provision are consent of the parties to suit in the alternative forum and waiver of reliance upon statutes of limitations."

***531** Further, the weight of authority applying common law forum non conveniens utilizes conditional dismissals where limitations might bar relief in the more convenient forum. Judge James R. Miller, Jr. of the United States District Court for the District of Maryland ordered a conditional dismissal in a case brought by and on behalf of Canadian citizens against the Maryland-based manufacturer of an airplane ****34** which had crashed in the Province of Quebec. He said that "[t]o insure that plaintiffs are not left without a remedy, dismissals in cases such as this are customarily conditioned upon the defendant's consent to jurisdiction in the alternative forum and waiver of any statute of limitations defense that has arisen since the commencement of the original action." *Grodinsky,* 507 F.Supp. at 1251.

The custom referred to by Judge Miller is evidenced by cases in which the court which orders a forum non conveniens dismissal does so conditioned on a waiver of the statute of limitations. In some cases the terms of the order limit the condition to limitations which have run following institution of the action in the inconvenient forum. Those terms preserve to the defendant any limitations defense in the convenient forum which was available there prior to suit in the inconvenient forum. *See Farmanfarmaian v. Gulf Oil Corp.,* 437 F.Supp. 910 (S.D.N.Y.1977), *aff'd,* 588 F.2d 880 (2d Cir.1978); *Kelce v. Touche Ross & Co.,* 37 Colo.App. 352, 549 P.2d 415,*rev'd on other grounds,* 192 Colo. 202, 557 P.2d 374 (1976); *MacLeod v. MacLeod,* 383 A.2d 39 (Me.1978). In other cases the order of dismissal is conditioned on a waiver of limitations which is unlimited. *See Wieser v. Missouri Pac. R.R.,* 98 Ill.2d 359, 74 Ill.Dec. 596, 456 N.E.2d 98 (1983); *Ellis v. Outboard Marine Corp.,* 132 Ill.App.3d 532, 87 Ill.Dec. 875, 478 N.E.2d 14 (1985); *McLeod v. Lovelace,* 117 A.D.2d 989, 499 N.Y.S.2d 290 (1986); *Varkonyi v. S.A. Empresa De Viacao Airea Rio Grandense,* 27 A.D.2d 731, 277 N.Y.S.2d 577 (1967), *rev'd on other grounds,* 22 N.Y.2d 333, 292 N.Y.S.2d 670, 239 N.E.2d 542 (1968); ***532***State ex rel. S. Pac. Transp. Co. v. Frost,* 102 N.M. 369, 695 P.2d 1318 (1985).[FN4]

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FN4. *Frost* involved a change of venue within the judicial system of the State of New Mexico. The opinion does not reflect why any waiver of limitations was re- quired.

The opinion of the Appellate Division of the Supreme Court of New York in the *Varkonyi* case reflects that the unlimited conditional waiver which that court ordered was prompted by the possibility that the plaintiff had been lulled into a false sense of security while the action was pending in the inconvenient forum. The remaining cases, cited above, in which the condition was limited, do not indicate that the court considered that the terms of the order marked the extent of the court's power. In all likelihood, the limit on the condition marked the extent of the court's concern over limitations under the facts of the particular case. Similarly, the cited cases in which the condition was unlimited do not reflect a conscious determination to meet a recognized problem involving limitations which may have run in the alternative forum even before the plaintiff filed suit in the inconvenient forum.

The custom referred to by Judge Miller is also illustrated by cases in which the defendant who seeks a forum non conveniens dismissal waives any defense of limitations in the proposed alternative forum in order to remove that obstacle to the availability of the alternative forum and to enhance the argument for dismissal. *See Holmes v. Syntex Laboratories, Inc.,* 156 Cal.App.3d 372, 202 Cal.Rptr. 773 (1984); *Miller v. United Technologies Corp.,* 40 Conn.Supp. 457, 515 A.2d 390 (1986); *Anderson v. Great Lakes Dredge & Dock Co.,* 411 Mich. 619, 309 N.W.2d 539 (1981); *Daugherty v. Inland Tugs Co.,* 240 Pa.Super. 527, 359 A.2d 465 (1976); and *Norman v. Norfolk & W. Ry. Co.,* 228 Pa.Super. 319, 323 A.2d 850 (1974).

Searle forthrightly argues that the instant actions should be unconditionally dismissed because Illinois was the more convenient forum, even if limitations have run in Illinois. The defendant submits that

***533** "appellants want to use their own inaction as a shield, arguing that their self-induced predicament in their home state precludes dismissals of cases filed in this completely inconvenient and improper forum. Maryland's courts should not countenance such an imposition on their jurisdiction."

Brief of Appellees at 30. Searle's argument finds forceful expression in the dissenting opinion of Justice Anderson of the Supreme Court of Mississippi in ****35***Shewbrooks v. A.C. and S., Inc.,* 529 So.2d 557, 574 (Miss.1988). The plaintiff had been attracted to Mississippi by its six-year statute of limitations, after limitations had run in the plaintiff's home state. The judge said:
"[T]he doctrine [that an unlimited waiver of limitations is required] rests on the tacit premise that if a plaintiff allows his action to die in his own state, Mississippi has a positive duty to resuscitate it for him. I know of no such duty, nor can I perceive any sound reasons for declaring it. On the contrary, I think it is high time somebody stood up and made some comments on the emperor's wardrobe. Now I find that at least one of our trial judges has done just that, and has been knocked on the head for his trouble."

Id. at 575.

[4] The Maryland statutes do not reflect any policy against use of the Maryland courts for actions which may have been attracted to this State by a perceived liberality toward plaintiffs in the law of limitations. CJ § 6-103(b)(4) specifically contemplates entertaining actions for tortious injury which occurred outside of Maryland, whether the plaintiff is or is not a Maryland resident. The present statute maintains the same philosophy expressed by one of its legal forbearers, Md.Code (1957, 1966 Repl.Vol.), Art. 23, § 92, dealing with suits against foreign corporations. That statute expressly permitted suits brought by nonresidents on causes of action arising outside of Maryland, subject only to constitutional limitations.[FN5] Following the enactment ***534** of the "Long Arm" statute in 1964, the special provisions for personal jurisdiction over for-

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eign corporations became unnecessary and were repealed by Ch. 532 of the Acts of 1967.

> FN5. Md.Code (1957, 1966 Repl. Vol.), Art. 23, § 92 in part provided:
>
> "(a) Every foreign corporation doing intrastate or interstate or foreign business in this State shall be subject to suit in this State by a resident of this State or a person who has a usual place of business in this State, (1) on any cause of action arising out of such business, and (2) on any cause of action arising outside of this State.
>
> (b) Every foreign corporation doing intrastate or interstate or foreign business in this State shall be subject to suit in this State by a nonresident of this State, (1) on any cause of action arising out of such business, and (2) provided that the bringing of such suit in this State is not an undue burden upon the defendant or upon interstate or foreign commerce, on any cause of action arising outside of this State."

We have also seen above how CJ § 6-104(a) tracks § 1.05 of the Model Act and that the Model Act was inspired by a Wisconsin statute. Of significance here is that the Wisconsin statute contemplated as a condition of dismissal or stay a waiver of limitations limited to those which had run after institution of the action in the Wisconsin court.[FN6] The Model Act and the Maryland statute do not incorporate the Wisconsin limitation; rather, they permit waivers or stays unlimited as to the time when limitations might have run in the alternative forum.

> FN6. Wis.Stat.Ann. § 801.63(1) in relevant part provides:
>
> "If a court of this state, on motion of any party, finds that trial of an action pending before it should as a matter of substantial justice be tried in a forum outside this state, the court may ... enter an order to stay further proceedings on the action in this state. A moving party under this subsection must stipulate consent to suit in the alternative forum and waive right to rely on statutes of limitation which may have run in the alternative forum after commencement of the action in this state."

[5][6] A number of recent forum non conveniens decisions have directly addressed the issue now under consideration. All have held that the prerequisite of an available alternative forum requires that the defendant who moves for dismissal waive limitations which had run in the alternative forum before the action was filed in the inconvenient ***535** forum. Judge Northrop of the United States District Court for the District of Maryland decided the issue in a number of product liability cases involving another IUD, the Dalkon Shield. *In re Dalkon Shield Litigation,* 581 F.Supp. 135 (D.Md.1983). The manufacturer, who was seeking forum non conveniens dismissals, contended that it should not be required to waive any statute of limitations ****36** defenses which existed at the time when any given plaintiff's action was filed in the District of Maryland. The court held that "to the extent an action is barred by the statute of limitations in the proposed alternative forum, then that forum cannot serve as a valid alternative forum for *forum non-conveniens* purposes." *Id.* at 141. In support of its holding the court cited one aspect of the opinion in *Grodinsky,* 507 F.Supp. at 1251, under which the dismissing court would reacquire jurisdiction in the event the defendant's waiver of limitations was ineffective under the Quebec Civil Code. Judge Northrop also relied on *Poe,* 376 F.Supp. 1054, where Judge Harvey refused to dismiss on forum non conveniens grounds for a number of reasons, including, on the authority of *Esso Transp. Co. v. Terminales Maracaibo, C.A.,* 352 F.Supp. 1030 (S.D.N.Y.1972), the defendant's refusal to waive limitations which had run in the alternative forum.

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The holding of *In re Dalkon Shield Litigation* was affirmed, *sub nom. Kontoulas v. A.H. Robins Co.*, 745 F.2d 312 (4th Cir.1984). The Fourth Circuit held that the moving defendant had "not met its heavy burden of showing for *each individual action* that no statute of limitations in the plaintiff's home state render[ed] that state ineligible to serve as an alternative forum." *Id.* at 316.

The District of Columbia Court of Appeals in *Mills v. Aetna Fire Underwriters Ins. Co.*, 511 A.2d 8, 13 (D.C.1986) held that "it is irrelevant that the alternative forum was not available when the plaintiff commenced his action; rather, the policy requires that the alternative forum be ***536** available at the time of dismissal." [FN7] We agree with the reasoning of the court.

> FN7. The District of Columbia court cited *Veba-Chemie A.G. v. M/V Getafix,* 711 F.2d 1243, 1245-49 (5th Cir.1983) and *Schertenleib v. Traum,* 589 F.2d 1156, 1161, 1164 (2d Cir.1978). Those cases deal with the analogous problem of personal jurisdiction over the moving defendant in the alternative forum. *Hoffman v. Blaski,* 363 U.S. 335, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960) had held that a transfer under Title 28 U.S.C. § 1404(a) could not be based on a waiver by the defendant of jurisdictional defects in the proposed transferee forum because that forum would not be one in which the action "might have been brought." The cited cases from the Second and Fifth Circuits emphasize the difference between transfer and forum non conveniens. They hold that jurisdictional availability of the alternative forum is determined as of the time the motion for a forum non conveniens dismissal is decided, and not as of the time suit was instituted in the allegedly inconvenient forum.

"The use of conditional dismissal is available to the trial court as a means of checking forum shopping by plaintiffs who, through their own actions or inactions, render an alternative forum unavailable. Dismissal of a case for *forum non conveniens* on the condition that defendant waive any statute of limitations defense in the alternative forum and that the courts of the alternative forum accept such waiver will channel the litigation to the more appropriate forum while helping to ensure that the alternative forum is, indeed, available to the plaintiff.... Moreover, the device obviates the need for extensive inquiry into the alternative forum's law regarding limitation of actions since, if the courts in the alternative forum refuse to accept the defendant's waiver of all statute of limitations defenses, the plaintiff is still ensured a forum by the conditional nature of the dismissal."
Id. at 14 (citation and footnote omitted).

The Supreme Court of Mississippi has flatly held that "the doctrine of forum non conveniens will never be applied ... to dismiss a case if it is barred elsewhere by a statute of limitations, unless or until the defendant is willing to stipulate that he will waive the statute of limitation defense." *Shewbrooks,* 529 So.2d at 562. That court's research***537** led it to conclude that "[i]n a suit between United States citizens, no court has ever applied the doctrine of forum non conveniens to dismiss a case when there was no other forum available to the plaintiff." *Id.* at 561. Searle has cited no authority to the contrary and our research has disclosed none.

Searle urges that we follow the rationale of *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). ****37** There the Court approved a forum non conveniens dismissal by the Middle District of Pennsylvania because Scotland provided the more appropriate forum for the trial of wrongful death actions arising out of an airplane crash in Scotland. The Third Circuit had reinstated the actions because Scottish law does not recognize strict liability in tort, permits wrongful death actions only when brought by a decedent's relatives, and is not as favorable to plaintiffs concerning damages as the law of Pennsylvania. The Supreme Court concluded that the Third Circuit erred by giv-

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ing significant weight to the unfavorable change in law resulting from the dismissal. Searle would have us hold that the bar of limitations in Illinois is no more significant than the unfavorable differences in law presented in *Piper Aircraft.* The Court in *Piper Aircraft,* however, also pointed out that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight [.]" 454 U.S. at 254, 102 S.Ct. at 265. In the instant cases the absolute bar of limitations would leave the plaintiffs without remedy in Illinois.

In sum, CJ § 6-104(a) controls forum shopping by plaintiffs by permitting the dismissal of "an action [which] should be heard in another forum" if dismissal, which may be conditional, is "in the interest of substantial justice." It is not in the interest of substantial justice, and indeed, it strikes us as anomalous, if not disingenuous, to request dismissal of an action on the ground that it should be heard in another forum when the action will likely never be heard in the other forum because it is barred by limitations there. ***538** Accordingly, we conclude that the circuit court abused its discretion by unconditionally dismissing the instant actions. We shall vacate the judgments below and remand these actions to the Circuit Court for Baltimore City for the entry of an order dismissing the actions. The dismissals shall be on the condition that the defendants file with the circuit court waivers of limitations under the law of Illinois. These waivers shall be approved by the circuit court and filed within a reasonable time to be fixed by the circuit court after opportunity for the plaintiffs to be heard. Absent such waivers, the motions for forum non conveniens dismissal shall be denied. The waivers may be conditioned on the plaintiffs' filing suit in Illinois within a reasonable time to be fixed by the court. The order of dismissal shall further provide that, if the waivers are finally determined by the courts of Illinois to be ineffective, these actions may be reinstituted in the Circuit Court for Baltimore City within a time after that final determination to be fixed by the circuit court.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED AND CASES REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION. COSTS OF THESE APPEALS TO BE PAID BY THE APPELLEES.

ELDRIDGE, Judge, concurring in part and dissenting in part:

I agree with this Court's decision insofar as it vacates the judgments below. Furthermore, I fully concur with the Court's opinion except for part of the final paragraph. I would not at this stage of the case, however, again give the defendants the option of dismissals conditioned upon waivers of limitations under Illinois law. The defendants previously in the circuit court had the opportunity to agree to this option, and they were not interested. At oral argument in this Court, counsel for the defendants made it clear that the defendants would rather "stay in Maryland" than "waive limitations in order to go to Illinois." The Court ***539** correctly states that "this case is not really about convenience. It is about limitations."

As the defendants have taken the position that they will not agree to conditional dismissals, and as there has been enough delay in this matter, I would reverse and remand for trial in the Circuit Court for Baltimore City.

Md.,1989.
Johnson v. G.D. Searle & Co.
314 Md. 521, 552 A.2d 29

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EXHIBIT K

EXHIBIT L

Westlaw

▷

United States Court of Appeals,Sixth Circuit.
LAK, INC., Plaintiff-Appellee,
v.
DEER CREEK ENTERPRISES, Defendant-Appellant.
No. 87-1321.

Argued Dec. 10, 1987.
Decided Sept. 20, 1989.
Rehearing and Rehearing En Banc Denied Nov. 2, 1989.

Action was brought for breach of real estate contract. The United States District Court for the Eastern District of Michigan, Julian Abele Cook, Jr., J., entered judgment on jury verdict for plaintiff, and defendant appealed. The Court of Appeals, David A. Nelson, Circuit Judge, held that, under Michigan long-arm statute, district court lacked personal jurisdiction over Indiana partnership accused of breaching contract to sell Florida real estate to Michigan corporation, absent showing partnership had availed itself of privilege of transacting business in Michigan.

Reversed and remanded.

West Headnotes

[1] Federal Courts 170B ⚿85

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk85 k. Partnerships or Associations, Actions by or Against. Most Cited Cases
Under Michigan long-arm statute, district court lacked personal jurisdiction over Indiana partnership accused of breaching contract to sell Florida real estate to Michigan corporation, absent showing partnership had availed itself of privilege of transacting business in Michigan; corporation initially contacted partnership and, though there were negotiations between parties prior to sale, there was no evidence that partnership had continuing interest in profiting from Michigan market. M.C.L.A. § 600.725.

[2] Federal Courts 170B ⚿76.25

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.25 k. Tort Cases. Most Cited Cases
Where defendant's contacts with forum state are significantly attenuated, it is incumbent upon plaintiff seeking to establish forum state's personal jurisdiction over defendant to show affirmatively that defendant's alleged fraudulent misrepresentations were actually made in forum state.

***1293** Jeffrey G. Heuer, Jaffe, Snider, Raitt & Heuer, Brian G. Shannon, Detroit, Mich., Joel S. Perwin (argued), Miami, Fla., for defendant-appellant.
Gordon S. Gold, Evans & Luptak, D. Michael Kratchman (argued), Detroit, Mich., for plaintiff-appellee.

Before NELSON and BOGGS, Circuit Judges, and EDWARDS, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge.
This is an appeal from a judgment entered by a federal district court in Michigan in an action against an Indiana partnership on a contract for the sale of a valuable tract of land in Florida. The plaintiff is a Michigan corporation, and the federal courts have subject matter jurisdiction under 28 U.S.C. § 1332. The defendant partnership was never present in Michigan, however, it never consented to be sued there, and it has insisted from the outset of the litigation that it never invoked the benefits and protections of Michigan's laws by purposefully availing

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itself of the privilege of transacting business in that state. The first question we must address, therefore-a question that is dispositive of the appeal, as it turns out-is whether the facts established by the plaintiff corporation justified the district court's exercising jurisdiction over the person of the defendant partnership.

The district court concluded (a) that the case came within the terms of Michigan Comp. Laws § 600.725 (the section of Michigan's long-arm statute dealing with "limited" personal jurisdiction over partnerships) and (b) that such personal jurisdiction could be exercised without violating the defendant's rights under the Due Process Clauses of the Fifth and Fourteenth Amendments. A timely motion to dismiss the complaint for want of *in personam* jurisdiction was denied, and the district court ultimately went on to enter a decree ***1294** of specific performance against the defendant.

We believe that the jurisdictional question was decided incorrectly, in light of the particular facts presented here, and we shall reverse the judgment for that reason.

I

The Supreme Court has rejected any resort to "talismanic jurisdictional formulas" for resolving questions of personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485, 105 S.Ct. 2174, 2188, 85 L.Ed.2d 528 (1985). Instead, " 'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.' " *Id.* at 485-486, 105 S.Ct. at 2188-89, quoting *Kulko v. California Superior Court*, 436 U.S. 84, 92, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978). We are therefore prompted to sketch out the facts of the present case in somewhat greater detail than might have been necessary had the case arisen at an earlier stage in the development of our jurisprudence.

Defendant Deer Creek Enterprises is an Indiana general partnership formed by two brothers, Mark and Hart Hasten. Both of the Hastens are residents of Indiana. Their Deer Creek partnership has its principal place of business in Indianapolis, Indiana. Deer Creek transacts no business in Michigan, according to an affidavit signed by Mark Hasten, nor has it ever transacted business in that state. Deer Creek has no real or personal property in Michigan, and there is no contention that it ever designated an agent to accept service of process there.

At the time with which we are concerned in this proceeding, Deer Creek had substantial real estate holdings in Florida. It owned, among other things, a 45-acre tract of land known as the "Cypress parcel." This particular parcel, which is located in a residential area between Boca Raton and Ft. Lauderdale, Florida, was unimproved by any buildings other than a small eight-unit apartment structure. The land had considerable potential for development, it appears.

Deer Creek did not advertise the Cypress parcel for sale, either in Michigan or elsewhere. In November of 1983, however, Deer Creek's Florida representative, Mr. Richard Jerman, received an unsolicited inquiry about a possible purchase of the parcel by Beznos Realty Investment Company, a Michigan limited partnership that was the predecessor in interest of plaintiff LAK, Inc. The property acquisition manager for Beznos Realty, Mr. Al Beke, met with Mr. Jerman in Florida on November 17, 1983. On the following day Mr. Jerman was given a letter of intent, signed by Mr. Beke on behalf of the Beznos organization, proposing to purchase part of the parcel.

Messrs. Beke and Jerman had several subsequent meetings in Florida, and they spoke over the telephone at times when Beke was in Michigan and Jerman in Florida. At no point did Mr. Jerman or any other representative of Deer Creek go into the State of Michigan on business related to this matter.

On two occasions in the latter part of December, 1983, Mr. Harold Beznos, one of the principals of

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Beznos Realty, met in Florida with the Hasten brothers, at the latters' invitation, to discuss the proposed purchase. Mr. Beznos met again with Mark Hasten in Florida on January 4, 1984, and an affidavit subsequently signed by Mr. Beznos says of this meeting that "we continued to negotiate the specifics of a real estate transaction...."

Mr. Beznos returned to his home in Michigan shortly after the January 4 negotiating session, and he had further discussions with Mark Hasten and other representatives of Deer Creek over the telephone.[FN1] In February of 1984-around the ***1295** time of yet another meeting between Messrs. Beznos and Hasten in Florida-Mr. Hasten instructed his lawyer in Indianapolis, Mr. Stephen Backer, to draw up a contract for the sale to Beznos Realty of the entire Cypress parcel.

> FN1. A supplemental affidavit of Mr. Hasten says "we did not negotiate the substantive terms of the Purchase Agreement for the sale of the Cypress parcel in any of the telephone conversations. The substantive terms of the Purchase Agreement were all negotiated in Florida during face-to-face meetings with Harold Beznos." A responsive affidavit of Mr. Beznos says, and other evidence confirms, that certain warranties and other substantive terms of the deal were negotiated by attorneys, rather than by the principals directly. Mr. Beznos also had telephone conversations from Michigan with Mr. Hasten about the purchaser's contractual obligation to secure financing from a third party.

On February 13, 1984, Attorney Backer dispatched a draft purchase agreement by Federal Express to Harold Beznos at the Biltmore Hotel in Phoenix, Arizona. It was subsequently learned that Mr. Beznos had left Phoenix, and on February 15 a second copy was sent to him at a hotel in Beverly Hills, California. (The record suggests that Mr. Beznos traveled extensively, and at various times he communicated with Deer Creek by telephone from Canada, Mexico, Texas, New York, Arizona and California, as well as from Michigan. Some of these calls evidently dealt with the third-party financing that was being arranged by Beznos, and others concerned matters having nothing to do with the Cypress parcel.)

Mr. Beznos gave the draft purchase agreement to his lawyer in Detroit, Mr. Michael Mehr, who promptly placed a telephone call to Attorney Backer in Indianapolis. The two lawyers had a number of conversations over the telephone in the latter part of February, and the agreement went through three additional drafts. Typed copies of these drafts were prepared in Mr. Backer's office in Indianapolis and were mailed to Mr. Mehr's office in Detroit. Unlike their principals, who had met several times in Florida, the lawyers never met face-to-face; all of their communications with one another were conducted by telephone or in writing.

Attorney Mehr's affidavit makes the point that "[n]o agreement to purchase and sell existed between the parties until the matters negotiated by me and Stephen Backer were expressed in the written Purchase Agreement." The affidavit of Mr. Beznos, similarly, says that "[n]o agreement to purchase the Deer Creek parcel existed until the matters set forth in the written Purchase Agreement were finalized." A revised copy of the purchase agreement was signed by Mr. Beznos in Michigan on February 29, 1984, and the document was then sent to Indiana for signature by Mr. Hasten. The purchase agreement was "finalized," in the sense that it became legally binding, only when Mr. Hasten signed it on behalf of Deer Creek. That signing occurred on March 2, 1984, in the State of Indiana.

The purchase agreement, which recited that Deer Creek was an Indiana general partnership, that Beznos Realty was a Michigan partnership, and that the land which formed the subject of the agreement was located in Florida, provided by its terms that the agreement was to be governed by the law of the *situs* state, Florida. (We pause here to note, paren-

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thetically, that the agreement's Florida choice-of-law provision is by no means irrelevant to the question of personal jurisdiction. *Burger King,* 471 U.S. at 481, 105 S.Ct. at 2186. "Nothing in our cases," the Supreme Court has said, "suggests that a choice-of-law provision should be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's laws' for jurisdictional purposes." *Id.* at 482, 105 S.Ct. at 2187 (emphasis omitted). A showing that Deer Creek purposefully availed itself of the benefits and protections of Michigan law is essential to the plaintiff's jurisdictional claim, as we shall see, and this essential showing is not helped by the fact that the parties chose to have the contract governed by the law of Florida, rather than the law of Michigan. The parties having elected to invoke the benefits of Florida law for deciding disputes under the contract, there is obviously much to be said in favor of letting such disputes be resolved in a Florida court.)

The agreement specified a purchase price of $5,501,562.00, to be paid by cash or certified check at the time of closing. It also provided that upon acceptance of the agreement by Deer Creek, Beznos Realty would tender $275,078.10 as earnest money.***1296** The latter sum, it was agreed, would be held until the closing in an account at a designated bank in Indianapolis. (The earnest money, in the form of a check drawn on a Michigan bank, was duly received by the Backer firm in Indiana and was deposited by it in the Indianapolis bank.) The closing was to be held with in 60 days, subject to a conditional right of extension for 30 days; the closing was to take place in the State of Florida.

Beznos Realty retained a right to terminate the agreement and recover the earnest money if it could not obtain a satisfactory loan commitment from the Atlanta and New York offices of Metropolitan Life Insurance Company. (An agreement negotiated by telephone on April 3, 1984, and agreed to by Mark Hasten in writing on May 5, provided for a 30-day extension of the closing date if a loan commitment were received from "any lender;" on April 26, 1984, Beznos Realty signed a loan commitment agreement with Lomas & Nettleton Financial Corporation, a mortgage banker with a regional office in Atlanta and headquarters in Texas.)

The purchase agreement did not require either Deer Creek or Beznos Realty to take any action in the State of Michigan. Neither did it provide for any significant continuing relationship of the sort that the seller's retention of a purchase money mortgage might have entailed, for example. The agreement did, however, give Beznos Realty an option to purchase golf club memberships in a facility in which Deer Creek had an interest. (The golf club was located near the Cypress parcel.) Exercise of this option would also give Beznos Realty a right to obtain social memberships in a nearby tennis club operated by Deer Creek. Under certain circumstances, the memberships in these Florida recreational facilities could be held open for as long as four years.

Deer Creek undertook to convey good, marketable and insurable title to the Cypress property, in fee simple, and obligated itself to provide, in addition to title insurance, a survey meeting the minimum standards of the Florida Board of Land Surveyors. A section of the agreement entitled "Seller Representations and Warranties" set forth a lengthy series of additional vendor's covenants. The first one that is significant here recited that "the Property is currently zoned to permit the construction of 532 units, *and 532 units shall be available to the property in accordance with an appropriate site plan,* as long as Purchaser complies with all appropriate laws and regulations governing the development of the Property." (Emphasis supplied.)

The language set out in italics was appended to the purchase agreement as a footnote. Testimony presented at trial established that the language of the footnote was proposed by Attorney Mehr, in Detroit, and accepted by Attorney Backer, in Indianapolis. Mr. Backer also accepted proposals for the addition of footnotes reciting that both a local improvement association and the municipality in which the property was situated (the City of Deer-

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field Beach, Florida) would approve site plans for 532 housing units. These provisions presumably reflected representations that Deer Creek had made to Beznos Realty directly, but we have not been able to ascertain whether any such representation was made to Beznos Realty in Michigan.

Shortly before the purchase agreement was finalized, according to Mr. Jerman's testimony, the City of Deerfield Beach agreed to an earlier request for allocation of a total of 508 housing units to the Cypress parcel. The zoning itself would have accommodated a substantially higher number, but a 540-unit site plan [FN2] that Beznos Realty's Mr. Beke submitted to Deerfield Beach on April 10, 1984, was rejected by the city because, in the city's words, "the proposed number of units exceeded the 508 unit cap...."

> FN2. The 540-unit plan contemplated the construction of 532 housing units in addition to the eight apartment units already in existence.

The parties disagree as to when and how the 508-unit cap was supposed to be raised, and they disagree as to whether Mr. Beke ***1297** botched the job of persuading the city to raise it. (The district court's final judgment, which was entered on October 31, 1986, ordered defendant Deer Creek to obtain approval for the construction of 532 new units on pain of having the purchase price reduced by $10,188 per unit for each unit short of that number. Deer Creek promptly sought such approval, and later submitted evidence to the district court that on January 27, 1987, the Deerfield Beach City Commission decided to support construction of all of the additional units requested.)

No such decision by the city was forthcoming before the scheduled closing date, which had been extended to May 31, 1984, and the parties could not agree on how much of the purchase price ought to be paid over to Deer Creek at the time of closing. Mr. Beznos testified that he called Mr. Hasten and proposed putting approximately $300,000 of the agreed price in escrow until it was determined whether the total number of units permitted would be 540 or 508. Mr. Hasten rejected this proposal, according to the testimony, insisting that Beznos "take the property as is," with "no reduction of price period...." Hasten maintained that Beznos could get city approval for the additional units after the closing; Beznos was unwilling to pay the full price on the basis of such an assumption.

On May 1, 1984, Attorney Backer sent a letter to Beznos Realty's lawyers in Detroit confirming that "[t]he Hastens will not reduce the purchase price due to the Purchaser's inability to receive approval to construct 532 units on the Cypress Parcel." Beznos Realty then assigned its interest in the purchase agreement to LAK, Inc. Two weeks before the scheduled closing date, LAK filed the present lawsuit in the United States District Court for the Eastern District of Michigan.

In its complaint, LAK asserted that Mr. Backer's letter of May 1 constituted an anticipatory breach of the purchase agreement; the letter, LAK claimed, "repudiate[d] the representations, covenants, and warranties ... that an additional 532 units would be allowed to be erected on the property...." The complaint also alleged that the representations that the 532 units would be available were knowingly false when made. The complaint sought declaratory relief under Florida law, a decree of specific performance compelling transfer of the Cypress parcel at a price dependent on the number of units approved by the City of Deerfield Beach, Florida, and a judgment for money damages, including exemplary and punitive damages.

The plaintiff attempted to effect service on defendant Deer Creek by having a process server hand a summons and a copy of the complaint to Mark Hasten at the Deer Creek office in Indianapolis, Indiana.[FN3] Deer Creek promptly filed a motion to dismiss, contending that Deer Creek "lacks sufficient contact with the State of Michigan for this court to assert *in personam* jurisdiction over defendant consistent with the due process require-

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ments of the United States Constitution." The district court denied the motion to dismiss, and the case eventually went to trial before a jury.

> FN3. Service beyond the territorial limits of Michigan could not be effective, under Rule 4(f), Fed.R.Civ.P., unless extraterritorial service was authorized by the law of the State of Michigan. See Rule 4(c)(2)(C)(i), Fed.R.Civ.P. The Michigan Court Rules that were in effect at the time of the purported service on Deer Creek said that there was no territorial limitation on the range of service upon a person having any of the relations with the state specified in the Michigan long-arm statute, see Mich.Gen.Ct.R. 1963, 105.9, but Michigan courts have routinely granted motions to quash extraterritorial service of process where personal jurisdiction is lacking. See, *e.g., Khalaf v. Bankers & Shippers Ins. Co.,* 62 Mich.App. 678, 233 N.W.2d 696, 697 (1975), *aff'd,* 404 Mich. 134, 273 N.W.2d 811 (1978).

The jury returned a special verdict finding that there had been a material breach of contract and material misrepresentations by Deer Creek, but finding also that the plaintiff had suffered no damage as a result. The jury recommended an award of specific performance without an award of damages. The court accepted this recommendation and entered a decree in conformity with it. After extensive post-trial proceedings, in the course of which the court ***1298** filed a memorandum opinion adhering to its earlier ruling on the jurisdictional issue, the case was brought here by the filing of a timely notice of appeal.

II

In a diversity action such as this, federal courts must look to the law of the forum state to determine the district court's "in personam jurisdictional reach." *Southern Machine Co. v. Mohasco Industries, Inc.,* 401 F.2d 374, 376 n. 2 (6th Cir.1968.) *Cf. American Greetings Corp. v. Cohn,* 839 F.2d 1164, 1167 (6th Cir.1988). Plaintiff LAK chose neither Florida nor Indiana as its forum, of course, but opted instead for Michigan.

Michigan's long-arm statute authorizes the exercise of "general" personal jurisdiction over foreign partnerships on either of two grounds: consent, and "[t]he carrying on of a continuous and systematic part of [the partnership's] general business within the state." Mich.Comp.Laws § 600.721. Neither of these grounds can be invoked in the case at bar; Deer Creek has not consented to be sued in Michigan, and there is no contention that a continuous and systematic part of Deer Creek's general business is carried on there.

A subsequent section of the long-arm statute, Mich. Comp. Laws § 600.725, deals with what Professors von Mehren and Trautman have labeled "specific jurisdiction," or jurisdiction limited to the adjudication of "issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate." Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 Harv.L.Rev. 1121, 1136 (1966). *Cf. Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 n. 8, 104 S.Ct. 1868, 1872 n. 8, 80 L.Ed.2d 404 (1984).

Mich.Comp.Laws § 600.725 provides that Michigan courts may exercise "limited" personal jurisdiction over foreign partnerships where the claim on which judgment is sought is one "arising out of" an act or acts creating any of five designated "relationships." Three of the named relationships (relationships involving in-state property, insurance, and contracts to perform services or furnish materials within the state) have no conceivable application in the present case. The two that might arguably apply are these:

"(1) The transaction of any business within the state.

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(2) The doing or causing of any act to be done, or consequences to occur, in the state resulting in an action for tort."

Generally speaking, at least, "[t]he Michigan statute confers on the state courts the maximum scope of personal jurisdiction permitted by the due process clause of the Fourteenth Amendment." *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1236 (6th Cir.), *cert. denied*, 454 U.S. 893, 102 S.Ct. 388, 70 L.Ed.2d 207 (1981). *Cf. Sifers v. Horen*, 385 Mich. 195, 188 N.W.2d 623 (1971) (Michigan legislature attempted to expand limited personal jurisdiction to the "full potential" allowed by the Federal Constitution.) [FN4]

> FN4. Michigan may have stopped short of the constitutional limit, however, as far as actions for tort are concerned. *Rann v. McInnis*, 789 F.2d 374, 377 (6th Cir.1986), citing *Woodward v. Keenan*, 88 Mich.App. 791, 279 N.W.2d 317 (1979).

The fountainhead of contemporary wisdom on what the United States Constitution permits in this respect is *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). That was an action brought by the State of Washington to collect unpaid contributions to an unemployment compensation fund from a nonresident corporation that had employed 11 to 13 commission salesmen within the state over a four-year period. The defendant corporation exercised direct supervision and control over the salesmen, who both lived and worked in Washington. The men engaged there in a regular and systematic solicitation of orders which, when filled, produced a continuous flow of the corporation's product into the state. The obligation sought to be enforced "arose out of those very activities," which were "systematic and continuous throughout the years in question." *Id.* at 320, 66 S.Ct. at 160. Against this background,***1299** the Supreme Court decided that the defendant's actual presence within the territorial jurisdiction of the state was not a prerequisite to a Washington court's exercise of personal jurisdiction over it: the defendant had "certain minimum contacts with [the territory of the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316, 66 S.Ct. at 158, quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940).

Whether "traditional notions of fair play and substantial justice" would be offended by a Michigan court's exercising personal jurisdiction over defendant Deer Creek on the strength of the largely fortuitous "contacts" that Deer Creek had with the State of Michigan is, no doubt, a debatable question. Clearly, however, Deer Creek's contacts with Michigan bear little resemblance to the far more substantial contacts in which the International Shoe Company engaged, over a period of years, with the State of Washington.

The "traditional jurisprudential premise" was that "the plaintiff should seek out the defendant." Von Mehren & Trautman, *supra*, 79 Harv.L.Rev. at 1148. (Von Mehren and Trautman observe that the traditional bias favoring defendants in this respect "is doubtless fully appropriate as between parties of relatively equal economic power and legal sophistication." *Id.* at 1147.) Traditions can change, however, and by 1957 the Supreme Court was remarking on a clearly discernable trend-a trend that neither began nor ended with the *International Shoe* decision-"toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222, 78 S.Ct. 199, 200, 2 L.Ed.2d 223 (1957).

Less than a year later, on the other hand, the Supreme Court warned that "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on personal jurisdiction of state courts." *Hanson v. Denckla*, 357 U.S. 235, 251, 78 S.Ct. 1228, 1238, 2 L.Ed.2d 1283 (1958). That warning remains fully operative today. The Supreme Court has "never accepted the proposition that state lines are irrelevant for jurisdictional purposes," nor could

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it do so without betraying "the principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 293, 100 S.Ct. 559, 565, 62 L.Ed.2d 490 (1980). *Cf. Denckla,* 357 U.S. at 251, 78 S.Ct. at 1238 (restrictions on state court personal jurisdiction "are a consequence of territorial limitations on the power of the respective States.") It is still incumbent upon the plaintiff to establish the requisite minimum contacts, as a condition to requiring an absent party to defend itself on the plaintiff's turf, and those contacts must still be sufficient to satisfy "traditional notions of fair play and substantial justice."

Even when anchored to the "traditional," of course, notions of what constitutes "fair play and substantial justice" can exhibit a fair amount of diversity. Not surprisingly, perhaps, *International Shoe* has spawned a vast number of judicial opinions-many of which have been cited to us here-in which courts have attempted to give content to these generalized notions in a variety of concrete factual settings.

In the leading case of *Southern Machine Co. v. Mohasco Industries,* 401 F.2d 374,*supra,*-a case which, like this one, involved limited (or "specific") jurisdiction-Judge Celebrezze, drawing on almost a quarter century of post-*International Shoe* caselaw, identified three criteria that must be met before such jurisdiction may be exercised:

"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." *Id.* at 381.

***1300** We have invoked these criteria often in the years since *Mohasco Industries* was decided. See, most recently, *Third National Bank of Nashville v. WEDGE Group, Inc.,* 882 F.2d 1087 (6th Cir.1989). The district court sought to apply the *Mohasco Industries* criteria in analyzing the facts of the present case, and we shall do the same.

III

A

[1] The first criterion-a showing that the defendant has "purposefully availed itself of the privilege of transacting business" in the forum state, thus invoking the benefits and protections of its laws-is "the *sine qua non* for *in personam* jurisdiction." *Mohasco Industries,* 401 F.2d at 381-82. That such a showing is "essential," see *Denckla,* 357 U.S. at 253, 78 S.Ct. at 1239, was re-emphasized by the Supreme Court in *Burger King,* 471 U.S. at 474-75, 105 S.Ct. at 2183-84, and in *Asahi Metal Industry Co., Ltd. v. Superior Court,* 480 U.S. 102, 112, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987). Even in a case where the cause of action arose in the plaintiff's home state, that state may not exercise *in personam* jurisdiction if the defendant has not purposefuly entered into a connection with it "such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen,* 444 U.S. at 297, 100 S.Ct. at 567.

"This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous' or 'attenuated' contacts." *Burger King,* 471 U.S. at 475, 105 S.Ct. at 2183, quoting *Keeton v. Hustler Magazine,* 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984) and *World-Wide Volkswagen,* 444 U.S. at 299, 100 S.Ct. at 568. There is a difference between what *World-Wide Volkswagen* calls a mere "collateral relation to the forum State," 444 U.S. at 299, 100 S.Ct. at 568, and the kind of substantial relationship with the forum state that invokes, by design, "the benefits and protections of its laws." *Denckla,* 357 U.S. at 253, 78 S.Ct. at 1239. An understanding of this difference is important to the proper application of the "purposeful

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availment" test.

The Supreme Court has emphasized, with respect to interstate contractual obligations, that "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King,* 471 U.S. at 473, 105 S.Ct. at 2182. The defendant in the case at bar, it seems to us, did not "reach out" to Michigan for the purpose of creating "continuing relationships and obligations" with any citizen of that state.

Defendant Deer Creek, it will be recalled, did not advertise the Cypress parcel for sale in Michigan or elsewhere.[FN5] Deer Creek had no "program" for seeking out prospective buyers in Michigan. *Cf. Rann v. McInnis,* 789 F.2d at 376. It was Beznos Realty, on the contrary, that reached out to Deer Creek in Florida-and it did so not for the purpose of creating any "continuing relationship" in Michigan, but for the purpose of making a cash purchase of a choice piece of real estate in Florida.

> FN5. The district court thought it significant that "Defendant solicited purchasers nationally," but the record does not disclose any national solicitation. Deer Creek did receive a number of *unsolicited* inquiries and offers, and that circumstance may well have encouraged it to hold firm on its price.

The purchase negotiations that began in Florida ripened into a binding contract only when defendant Deer Creek signed the final agreement back home in Indiana. (The place where the contractual obligation was incurred is a factor that courts often deem important, although it cannot normally be determinative. See, *e.g., Denckla,* 357 U.S. at 251-52, 78 S.Ct. at 1238-39, and *Davis H. Elliott Co. v. Caribbean Utilities Co.,* 513 F.2d 1176, 1181 (6th Cir.1975).) The fact that Beznos Realty may have found it convenient to conduct some of the negotiations at long distance from Michigan is not of controlling significance, in our view. ***1301** The telephone calls and letters on which the plaintiff's claim of jurisdiction primarily depends strike us as precisely the sort of "random," "fortuitous" and "attenuated" contacts that the *Burger King* Court rejected as a basis for haling non-resident defendants into foreign jurisdictions.

A numerical count of the calls and letters has no talismanic significance: "The quality of the contacts as demonstrating purposeful availment is the issue, not their number or their status as pre- or post-agreement communications." *Stuart v. Spademan,* 772 F.2d 1185, 1194 (5th Cir.1985). And the majority of the lawyers' telephone calls between Detroit and Indianapolis, for whatever that datum may be worth, were originated not by the defendant's lawyer, Mr. Backer, but by Mr. Mehr, the lawyer for Beznos Realty.

"The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State." *Helicopteros Nacionales,* 466 U.S. at 417, 104 S.Ct. at 1868, quoting *Denckla,* 357 U.S. at 253, 78 S.Ct. at 1239.[FN6] We are not prepared to hold that when Mr. Mehr placed calls to Mr. Backer in Indiana, the latter was required to hang up the phone if he wished to protect his client against a subsequent finding of "purposeful availment" of the benefits of the laws of whatever state or states the calls happened to come from. Mere awareness that Beznos Realty and its legal counsel were from Michigan clearly was not enough. See *Asahi Metal Industry,* 480 U.S. at 105, 107 S.Ct. at 1029.

> FN6. "The 'substantial connection' [citations omitted] between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*" *Asahi Metal Industry,* 480 U.S. at 112, 107 S.Ct. at 1029 (1987). (Emphasis in original.)

Mr. Backer did, to be sure, originate some calls to

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Mr. Mehr, and he did send three draft contracts to Mr. Mehr in Detroit. (Deer Creek's refusal to adjust the purchase price was also confirmed by letter to Mr. Mehr, but that has little or no significance in this context.) On the facts of this case, however, we do not find these communications sufficient to establish "purposeful availment." *Cf. Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309, 314 (8th Cir.1982) (The use of interstate facilities such as the telephone and the mail is a "secondary or ancillary" factor and "cannot alone provide the 'minimum contacts' required by due process"). See also *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1029 (5th Cir.1983), *cert. denied,* 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 561 (1984) ("As for the exchange of communications [by telex, telephone and letter] between Texas and Alaska in the development of the contract, that in itself is also insufficient to be characterized as purposeful activity invoking the benefits and protections of the forum state's laws"). On the record before us, to borrow from this court's language in *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 931 (6th Cir.1974), there is no reason to suppose that either Mr. Hasten, the general partner, or Mr. Backer, the lawyer, intended to lay himself open to liability "in every state of the union whenever [he made] telephone calls or wrote letters to a customer who [might subsequently claim] that they constitute[d] misrepresentations."

One of the Sixth Circuit decisions most pertinent to the present case on its facts is *Capital Dredge & Dock Corp. v. Midwest Dredging Co.*, 573 F.2d 377 (6th Cir.1978). The plaintiff in *Midwest Dredging,* an Ohio corporation, brought an action in Ohio on a contract with a foreign company under which the plaintiff had "taken back" a subcontract for a dredging project in Illinois. The contract on which suit was filed had been the subject of face-to-face negotiations in Arkansas and Florida, but modifications were negotiated in telephone calls placed by the plaintiff from Ohio, the forum state. The defendant mailed an amended contract to the plaintiff in Ohio, and a vice president of the defendant subsequently traveled to Ohio to obtain the plaintiff's signature on the contract and pick up a check there for $250,000, the initial payment under the agreement.

***1302** Although the final signature was placed on the contract in the forum state at a time when an officer of the defendant corporation was physically present in that state, this court, speaking through Judge Peck, accepted the district court's characterization of the defendant's visit as "a convenience" to the plaintiff. *Id.* at 380. We agreed with the district court that the facts were "simply insufficient to establish long-arm jurisdiction over defendant." *Id.* Almost *a fortiori,* it seems to us, the facts of the present case are insufficient to establish long-arm jurisdiction over defendant Deer Creek-a defendant that never sent its representatives into the forum state, and that did not consummate the contract there.

The *Midwest Dredging* panel took pains to distinguish the facts in that case from the facts in *Mohasco Industries* and *In- Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir.1972). The differences are no less instructive here.

The defendant in *Mohasco Industries* entered into a licensing agreement under which the plaintiff-which had its sole manufacturing plant in Tennessee, the forum state-was authorized to manufacture and sell machine attachments on which the defendant held patent rights. The agreement contemplated "a long continuing relationship" between the parties, and the defendant "retained substantial control over the manufacture and marketing of the attachments...." 401 F.2d at 385. The contract was "not a one-shot affair." *Id.* Because the manufacturing plant was located in Tennessee, that state had "a continuing interest in this continuing relationship, and apparently [the defendant] ha[d] a continuing interest in profiting from the Tennessee market." *Id.* at 385-86.

No such relationship was created by the real estate purchase agreement with which we are concerned

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in the case at bar, and defendant Deer Creek had no "continuing interest in profiting from the [Michigan] market." Plaintiff LAK makes a weak argument that Deer Creek might have been required to provide memberships in the recreational facilities it owned near the Cypress parcel, and the parties could anticipate a continuing relationship as neighbors in Florida. That is a circumstance of no interest to Michigan, however, and it is one that could not reasonably be expected to have any significant impact on the commerce of Michigan. (We note also that if Beznos Realty chose unilaterally to perform work in Michigan on site plans, architectural renderings, and financial studies for the Florida property, that was a happenstance in which defendant Deer Creek had no continuing interest and over which it had no control.)

The *Van Dusen Air* case, like *Mohasco Industries,* involved a contract that contemplated the manufacture of a substantial quantity of goods in the forum state. The defendant company did not do business there directly, but it had a subsidiary in the forum state, and the defendant's officer met with the plaintiff in the city where the subsidiary was located to discuss delivery plans and the operational features of the goods being contracted for. As in *Mohasco,* this court found that the "purposeful action" requirement had been satisfied, in the context of a long-arm statute that spoke of "transacting any business" in the forum state, because "obligations created by the defendant or business operations set in motion by the defendant [had] a realistic impact on the commerce of that state," and the defendant "should have reasonably foreseen that the transaction would have consequences in that state." 466 F.2d at 226, quoting *Mohasco,* 401 F.2d at 382-83. That is not the situation here.

The commerce that was affected by the defendant's "purposeful action" in *Mohasco Industries* and *Van Dusen Air* involved, as we have noted, significant ongoing manufacturing operations within the forum state. (There is some similarity, it would seem, between these ongoing operations and the 20-year franchise relationship that was actively managed from the forum state in *Burger King.* See 471 U.S. at 480, 105 S.Ct. at 2186.) The case at bar involves no comparable operations in Michigan. Because the plaintiff was domiciled in Michigan, to be sure, the claimed injury to its purse might be said to have been ***1303** suffered there-but the *locus* of such a monetary injury is immaterial, as long as the obligation did not arise from "a privilege the defendant exercised in [the forum state]." *Denckla,* 357 U.S. at 252, 78 S.Ct. at 1239. With the benefit of hindsight, moreover, we know-because the jury so found-that the plaintiff in the case at bar suffered no damages as a result of the defendant's breach of duty.

This case is not comparable, we would add, to *Lanier v. American Board of Endodontics,* 843 F.2d 901 (6th Cir.), *cert. denied,* 488 U.S. 926, 109 S.Ct. 310, 102 L.Ed.2d 329 (1988). There, as we observed, the defendant licensing board sought

"to extend its influence and prestige in Michigan as the principal national determiner of special competence for the practice of endodontics. Thus, the real object of the Board's contacts with Michigan is to have ongoing, far-reaching consequences in the Michigan dental services market. These consequences are continuous and substantial, affording jurisdiction...." *Id.* at 911.

There has been no showing that the object of Deer Creek's contacts with Michigan was to have "ongoing," or "far-reaching," or "continuous," or "substantial" consequences in the Michigan real estate market, thereby affording jurisdiction to the Michigan courts.

B

[2] The plaintiff having failed to pass the "purposeful availment" test, we need not dwell on the other criteria of *Mohasco Industries;* each criterion represents an independent requirement, and failure to meet any one of the three means that per-

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sonal jurisdiction may not be invoked. Following the lead of the lower court and the parties, however, we shall touch on the second and third criteria briefly.

We are not persuaded that plaintiff LAK has shown that its cause of action "arose out of" the defendant's activities in Michigan. Essentially, of course, the cause of action arose out of a failure to obtain approval from local authorities in Florida for construction of additional housing units there, after the defendant had warranted, in an Indiana contract negotiated in several different states, that such approval would be forthcoming. If the contract had borne a more substantial relationship to Michigan, it would not have been necessary for the representations it embodied actually to have been made to the plaintiff in Michigan. See *WEDGE Group,* 882 F.2d 1087. Where the defendant's contacts with the forum state are as attenuated as they are here, however, we think it is incumbent on the plaintiff to show affirmatively that the fraudulent misrepresentations were actually made in the forum state. See *Serras v. First Tennessee Bank N.A.,* 875 F.2d 1212 (6th Cir.1989).

The plaintiffs in *Serras* were individual citizens of Michigan who had purchased an out-of-state restaurant on the strength of fraudulent misrepresentations as to its value. The documents consummating the sale were executed in Michigan. Not only had the defendant made its fraudulent misrepresentations in telephone calls initiated by it to the plaintiffs in Michigan, moreover, it had actually sent an agent into the state who continued the fraudulent conduct there in person. On these facts, the *Serras* panel found that there was no constitutional impediment to haling the foreign defendant before a court in Michigan. The panel went out of its way, however, to distinguish the sort of situation with which we are confronted in the case at bar:

"We are not confronted here with a case in which the only alleged contact besides the plaintiffs' Michigan residency, is the defendant's making a telephone call from an out-of-state location to the plaintiffs in Michigan, seeking to solicit the plaintiff to engage in an out-of-state transaction. These facts are not sufficient to support long-arm jurisdiction. *Speckine v. Stanwick Int'l, Inc.,* 503 F.Supp. 1055, 1059 (W.D.Mich.1980). *In the present case, the plaintiffs rely not only on alleged telephone calls but also on an allegation that the defendant actually travelled to Michigan to solicit their business, and actually made fraudulent representations while in* ***1304***Michigan* ."" 875 F.2d at 1217. (Emphasis supplied.)

The *Serras* panel went on to point out, in a passage particularly relevant here, that:

"The alleged fraudulent misrepresentations practiced upon plaintiffs within Michigan, both in the phone calls and during the visit of the Bank's agent, are an *element* of the cause of action itself. We therefore must reject the Bank's feeble argument that, if it had a duty to disclose anything, that duty could have been performed anywhere so that any failure to perform shouldn't be held to establish a Michigan contact. Plaintiffs have averred positive acts of misrepresentation in Michigan." *Id.* at 1218. (Emphasis in original.)

"The burden of establishing jurisdiction is on the plaintiff." *Welsh v. Gibbs,* 631 F.2d 436, 438 (6th Cir.1980), *cert. denied,* 450 U.S. 981 (1981); *WEDGE Group,* 882 F.2d at 1089. For all we can tell from the record in the case at bar, Beznos Realty's people were in Florida when they were told that the city would approve construction of an additional 532 units on the Cypress parcel. It is true that during a telephone conversation with Attorney Backer in Indiana, Mr. Mehr, the Michigan lawyer, proposed putting language to this effect in the contract. There was no showing that any misrepresentations were made in the course of this conversation, however-the district court confessed itself "without knowledge of the precise content of the conversation"-and as both Mr. Mehr and Mr. Beznos have acknowledged, the contract became binding only when it was signed in Indianapolis. On these facts, we do not believe that the plaintiff has sustained its

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burden of showing that its cause of action arose out of "positive acts of misrepresentation in Michigan." *Serras,* 875 F.2d at 1218.

C

Finally, notwithstanding the perhaps unreasonable length this opinion has already reached,[FN7] we add a word about "reasonableness."

> FN7. If it suggests nothing else, this case may suggest that there is a downside, as well as an upside, to the judicially imposed requirement that each and every question of personal jurisdiction over a non-resident defendant be decided "on its own facts," *American Greetings Corp. v. Cohn,* 839 F.2d 1164, 1169 (6th Cir.1988), with counsel and court sifting through each new complex of facts in search of "contacts" demonstrating that the plaintiff's choice of a forum does or does not accord with the notions of "reasonableness" and "fair play" reflected in a vast number of fact-specific judicial opinions. More sharply defined standards might well reduce miscalculations on the part of lawyers who, not surprisingly, normally seek a home court advantage if they think they see some chance of getting it-and it is not inconceivable that clearer standards might lead to more expeditious and efficient resolution of those jurisdictional questions that counsel choose to fight out in court. In this particular case, diligent lawyers have favored us with several hundred case citations; scholarship that comprehensive carries obvious costs, both in time and in money.

In *Pickens v. Hess,* 573 F.2d 380 (6th Cir.1978), we affirmed a district court finding that it would not be reasonable for a Tennessee court to exercise jurisdiction in a dispute arising out of a contract for the construction of a house in Arkansas, notwithstanding that the plaintiff builder was from Tennessee and notwithstanding that the defendant's architect was also from Tennessee and had dealt directly with the plaintiff builder in that state with regard to the contract. In the case at bar the district court attempted to distinguish *Pickens* on the following grounds:

"Unlike the defendant in *Pickens,* the involvement of Deer Creek in this transaction is substantial enough to make it reasonable for this Court to assume jurisdiction over the parties. This forum has a vested interest in the outcome of this matter, particularly because Plaintiff and at least one Michigan banking institution are involved."

This attempt to distinguish *Pickens* is not persuasive, in our view. If Tennessee had no vested interest in the outcome of the Tennessee builder's dispute with a foreign owner over a contract for the construction of a house in Arkansas, we are something of a loss to see why Michigan should be thought to have a vested interest ***1305** in the outcome of a Michigan company's dispute with a foreign owner over a contract for the sale of a tract of land in Florida. That a Michigan plaintiff happens to be involved in the transaction is hardly enough: "If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot." *Burger King,* 471 U.S. at 478, 105 S.Ct. at 2185.

If the Michigan bank on which Beznos Realty drew its $275,000 check for the earnest money was somehow "involved" in this transaction, moreover, the involvement is entitled to no consideration. See *Helicopteros Nacionales,* 466 U.S. at 416-17, 104 S.Ct. at 1872-73:

"Common sense and everyday experience suggest that, absent unusual circumstances, the bank on which a check is drawn is generally of little consequence to the payee and is a matter left to the discretion of the drawer. Such unilateral activity of another party or a third person is not an appropriate

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consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." (Footnote and citations omitted.)

Plaintiff LAK suggests that it would be reasonable for the Michigan courts to exercise jurisdiction here because defendant Deer Creek was a "sophisticated business entity" that "stood to profit handsomely" from its transaction with the Michigan company. But the case law is quite clear that when the world beats a path to the door of one who has a better mousetrap for sale, the mousetrap seller, even if "sophisticated," does not automatically subject himself to suit in every part of the world from which mousetrap buyers chance to come. And when the buyer of the mousetrap is no less sophisticated than the seller, the buyer can hardly claim surprise at being told that jurisdiction over the seller's person is not dependent on the buyer's domicile.

The judgment of the district court is REVERSED, and the case is REMANDED with instructions that it be dismissed for want of personal jurisdiction.

C.A.6 (Mich.),1989.
LAK, Inc. v. Deer Creek Enterprises
885 F.2d 1293

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C
Only the Westlaw citation is currently available.
United States District Court,E.D. Missouri, Eastern Division.
Michael LAYTON, Plaintiff,
v.
E-DISTRIBUTIONS, INC., Kenneth R. Adams, individually and in his capacity as an agent of E-Distributions, Inc., and Vice-President of Imaging Technologies Services, Inc., Carter Pope, individually and in his capacity as an agent of E-Distributions, Inc. and President of Imaging Technologies Services, Inc., and Imaging Technologies Services, Inc., Defendants.
No. 4:04 CV 1238 DDN.

March 17, 2005.

Lawrence L. Pratt, St. Louis, MO, for Plaintiff.
Kathi L. Chestnut, St. Louis, MO, for Defendants.

MEMORANDUM

NOCE, Magistrate J.
***1** This action is before the court on the motion of defendants E-Distributions, Inc. (wholly owned subsidiary of Imaging Technologies Services), [FN1] Imaging Technologies Services, Inc. (ITS), Carter Pope (President of ITS), and Kenneth Adams (Vice-President of ITS) to dismiss, or in the alternative to transfer venue. (Doc. 6.)

FN1. E-Distributions was dissolved August 16, 2004, and is no longer a business entity. (Doc. 6, Ex. Al.)

Plaintiff Michael Layton commenced this action in this court on the basis of 28 U.S.C. § 1332 (diversity of citizenship). (Doc. 1.) The parties [FN2] have consented to the exercise of plenary authority by the undersigned United States Magistrate Judge pursuant to 28 U.S .C. § 636(c).

FN2. On March 11, 2005, District Judge E. Richard Webber dismissed without prejudice plaintiff's claims against defendant John Doe for failure to secure service of process as required by Federal Rule of Civil Procedure 4(m). All other parties have filed written consents to magistrate judge authority under 28 U.S.C. § 636(c).

In the instant four count complaint, Layton alleges four claims: Count I-breach of contract; Count II-fraudulent misrepresentation; Count III-conspiracy; and Count IV-tortious interference with a business relationship.(*Id.* at 6-11.)

More specifically, Layton alleges he was contacted by Adams, in September 1999, to become the Vice-President of E-Distributions. (Doc. 1 at 3 & Doc. 11 at 2.) Layton and Adams (on behalf of E-Distributions and ITS) signed an Executive Employment Agreement with Layton's employment to begin on October 1, 1999 and continue for a term of one year. (Doc. 1, Ex. A.) Layton further alleges that his employment with E-Distributions was to continue for successive one year terms, unless he received 30 days written notice, prior to the end of the current term. (*Id.* at 4.) Should E-Distributions exercise its option to not renew Layton's contract, he is entitled to certain compensation, as detailed in the employment agreement. (*Id.*) Pursuant to the agreement, Layton further alleges he is entitled to sales commissions and, should E-Distributions be sold or merged, Layton also is entitled to a percentage of the proceeds. (*Id.*)

Layton alleges that on October 18, 2000, he received written notice terminating his contract. (*Id.* at 5.) Layton alleges that, upon his request, defendants refused to pay his outstanding base salary and sales commissions.(*Id.*) Moreover, Layton alleges he was refused his portion of proceeds from the sale or merger of E-Distributions. (*Id.*)

Motion to Dismiss

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Defendants have moved to dismiss arguing a lack of personal jurisdiction over the corporate entities and individual defendants. (Doc. 6.) Specifically, defendants contend they are all Georgia residents, they in no way committed acts enumerated under the Missouri Long Arm Statute (Mo.Rev.Stat. § 506.500), and they lack sufficient minimum contacts with Missouri in order for this court to assert personal jurisdiction satisfying due process.

Concurrent with the case at bar, defendant ITS, on behalf of itself and former subsidiary E-Distributions, filed a complaint against Layton in the United States District Court for the Northern District of Georgia. (Doc. 11, Ex. 6.) ITS alleges misappropriation of corporate opportunities, tortious interference with business relations, usurping corporate opportunities, tortious interference with contract, misappropriation of corporate services and resources, and breach of contract. (*Id.* at 8-16.)

***2** While it is true that the plaintiff bears the ultimate burden of proof on [the] issue [of jurisdiction], jurisdiction need not be proved by a preponderance of the evidence until trial or until the court holds an evidentiary hearing. *Cutco Ind. v. Naughton,* 806 F.2d 361, 365 (2d Cir.1986). To defeat a motion to dismiss for lack of personal jurisdiction, the nonmoving party need only make a prima facie showing of jurisdiction. *Watlow Elec. Mfg. v. Patch Rubber Co.,* 838 F.2d 999, 1000 (8th Cir.1988); *Falkirk Min. Co. v. Japan Steel Works, Ltd.,* 906 F.2d 369, 373 (8th Cir.1990). If the district court does not hold a hearing and instead relies on pleadings and affidavits, ... the court must look at the facts in the light most favorable to the nonmoving party, *Watlow Elec. Mfg.,* 838 F.2d at 1000, and resolve all factual conflicts in favor of that party. *Nieman v. Rudolf Wolff & Co., Ltd.,* 619 F.2d 1189, 1190 (7th Cir.), *cert. denied,* 449 U.S. 920, 101 S.Ct. 319, 66 L.Ed.2d 148 (1980).

Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1387 (8th Cir.1991); *Lakin v. Prudential Secs., Inc.,* 348 F.3d 704, 706 (8th Cir.2003) ("We review ... whether appellants have presented a prima facie case of personal jurisdiction, viewing the evidence in the light most favorable to the appellants and resolving all factual conflicts in their favor."); *Efco Corp. v. Aluma Sys. USA, Inc.,* 983 F.Supp. 816, 819 (S.D.Iowa, 1997).

Missouri Long Arm Statute

"In a diversity action, a federal court may assume jurisdiction over nonresident defendants only to the extent permitted by the long-arm statute of the forum state, and by the due process clause of the Fourteenth Amendment." *Burlington Indus., Inc. v. Maples Indus., Inc.,* 97 F.3d 1100, 1102 (8th Cir.1996).

The Missouri long arm statute provides, in relevant part:

1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts:

(1) The transaction of any business within this state;

(2) The making of any contract within this state;

(3) The commission of a tortious act within this state;

....

3. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

Mo.Rev.Stat. § 506.500 (2003).
The Missouri Supreme Court has declared that when the Missouri legislature enacted the long-arm statute, its "ultimate objective was to extend the

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jurisdiction of the courts of this state over nonresident defendants to that extent permissible under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States." *State v. Pinnell,* 454 S.W.2d 889, 892 (Mo.1970) (en banc). Accordingly, Missouri courts have interpreted the statute broadly to cover those cases where the Due Process Clause permits the assertion of personal jurisdiction.

***3** *Clune v. Alimak AB,* 233 F.3d 538, 541 (8th Cir.2000); *Fairbanks Morse Pump Corp. v. Abba Parts, Inc.,* 862 F.2d 717, 718-19 (8th Cir.1988) ("Jurisdiction under the Missouri Long-Arm Act involves a two-part analysis. First, does the activity of the defendant fall within the ambit of the state statute and, second, does the assertion of jurisdiction violate federal due process?").

Minimum Contacts Under the Due Process Clause

The principles of personal jurisdiction under the Due Process Clause are well established. Jurisdiction is appropriate only where a defendant has sufficient "minimum contacts" with the forum state that are more than random, fortuitous, or attenuated, such that summoning the defendant would not offend traditional notions of fair play and substantial justice. *DigiTel,* 89 F.3d at 522 (citing *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945); and *Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). The central question is whether a defendant has purposefully availed itself of the privilege of conducting activities in the forum state and should, therefore, reasonably anticipate being haled into court there. *Burger King,* 471 U.S. at 475, 105 S.Ct. 2174, 85 L.Ed.2d 528; *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Minimum contacts must exist either at the time the cause of action arose, the time the suit is filed, or within a reasonable period of time immediately prior to the filing of the lawsuit. *Clune v. Alimak* AB, 233 F.3d 538, 544 n. 8 (8th Cir.2000).

With these principles in mind, [the court] look[s] at five distinct factors: (1) the nature and quality of the defendant's contacts with the forum state; (2) the quantity of contacts; (3) the relationship between the cause of action and the contacts; (4) the forum state's interest in providing a forum for its residents; and (5) the convenience of the parties. *Digi-Tel,* 89 F.3d at 522-23. The first three factors are closely related and are of primary importance, while the last two factors are secondary. *Id.* at 523.

Pecoraro v. Sky Ranch for Boys, Inc., 340 F.3d 558, 561-62 (8th Cir.2003); *Burlington Indus., Inc. V. Maples Indus.,* Inc., 97 F.3d 1100, 1102 (8th Cir.1996).

Kenneth R. Adams and Carter Pope

As the basis for jurisdiction over the individual defendants, Layton alleges that Adams contacted him in St. Louis for employment, Adams and Layton negotiated an employment agreement, which Adams forwarded to Layton in St. Louis, and Adams and Pope committed tortious acts in St. Louis, including fraudulent misrepresentation, conspiracy, and tortious interference with a business relationship.

In order to establish jurisdiction under the Long Arm Statute for the commission of a tortious act within the state of Missouri, the "plaintiff must make a prima facie showing that the tort has been committed."*Inst. Food Mktg. Assoc., Ltd. v. Golden State Strawberries, Inc.,* 747 F.2d 448, 453 (8th Cir.1984); *Dotzler v. Perot,* 899 F.Supp. 416, 422 (E.D.Mo.1995) ("Plaintiffs must make a prima facie showing that the defendant has in fact committed the tort alleged in the complaint."); *Hanline v. Sinclair Global Brokerage Corp.,* 652 F.Supp. 1457, 1459 (W.D.Mo.1987); *State ex rel. William Ranni v. Hartenbach,* 742 S.W.2d 134, 139 (Mo.1987) ("A party relying on a defendant's com-

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mission of a tort within this state to invoke long arm jurisdiction must make a prima facie showing of the validity of his claim."). Missouri courts have broadly interpreted the "within the state of Missouri" provision "to apply to extra-territorial acts that have consequences in the forum." *Nelson v. R. Greenspan & Co., Inc.*, 613 F.Supp. 342, 345 (E.D.Mo.1985); *see also Vanliner Ins. Co. v. All Risk Serv., Ltd.*, 990 F.Supp. 1145, 1150 (E.D.Mo.1997) ("Under Missouri law, commission of a tortious extraterritorial act having consequences in Missouri is sufficient to invoke tortious long-arm jurisdiction.").

***4** While Layton attempts to allege the elements of the torts in question, he does not allege any facts, in either his complaint or supporting affidavit, sufficient to support his assertions that Adams and Pope engaged in fraudulent misrepresentation, conspiracy, or tortious interference with a business relationship. *See Dotzler,* 899 F.Supp. at 423 ("Though plaintiffs are not required to establish personal jurisdiction by a preponderance of the evidence at this stage of the proceeding, they must provide some evidence to support their allegations.").

Regarding the conspiracy count, plaintiff proffers no facts or circumstances to support a prima facie case of conspiracy between Adams and Pope, as the Vice-President and President (respectively) of ITS (and the now dissolved E-Distributions), and ITS as an entity. As a general rule, an organization cannot conspire with its employees. *See Mika v. Cent. Bank of Kansas City,* 112 S.W.3d 82, 94 (Mo.App.2003). An exception to this general rule exists when employees have a truly independent stake in achieving the object of the conspiracy. *Id.* In this case, Layton proffers no facts to suggest any independent stake on the part of Adams and Pope.

With respect to the count for tortious interference with a business relationship, "there can be no liability for tortious interference with a business expectancy against the individual defendant, ..." absent "allegations in [Layton's] petition [or] evidence showing that [Adams and Pope] used improper means, acted in bad faith, acted out of self-interest, or acted outside the scope of his authority, such that he would be subjected to individual liability." *Jurisprudence Wireless Communications, Inc. v. CyberTel Corp.*, 26 S.W.3d 300, 303 (Mo.App.2000). Layton has produced no factual support sufficient to exhibit a prima facie case of tortious interference with a business relationship.

To make a claim for fraudulent misrepresentation, Layton must show 1) a false, material representation; 2) the speaker's knowledge of its falsity or his ignorance of its truth; 3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; 4) the hearer's ignorance of the falsity of the representation; 5) the hearer's reliance on its truth; 6) the hearer's right to rely thereon; and 7) the hearer's consequent and proximately caused damages.

Mprove v. KLT Telecomm., Inc., 135 S.W.3d 481, 489 (Mo.App.2004)."In addition, all averments of fraud must state with particularity the circumstances-i.e., the facts-constituting the fraud." *Heitman v. Brown Group, Inc.*, 638 S.W.2d 316, 319 (Mo.App.1982). Neither the complaint nor the supporting affidavit provides a factual basis to support or infer that Adams or Pope intended to not honor the contract at the time the parties entered into the agreement.

Assuming, *arguendo,* that Layton sufficiently pleaded the commission of tortious acts to satisfy the Long Arm Statute, the exercise of personal jurisdiction over Adams and Pope does not comport with due process. The court must look closely at the nature and quality of the defendants' contacts with the forum state, the quantity of contacts, and the relationship between the cause of action and the contacts, with some consideration given to the forum state's interest in providing a forum for its residents, and the convenience of the parties. *Pecoraro,* 340 F.3d at 561-62.

***5** Adams and Pope are Georgia citizens and residents, and have never resided in, or been citizens of,

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Missouri. There is no indication from the record that either Adams or Pope traveled to Saint Louis to do business, beyond Pope's visit to St. Louis in 1999 for the potential purchase of a Missouri business (the purchase did not take place). Moreover, neither party owns any real estate or business in Missouri.

With respect to the employment agreement, neither defendant traveled to Missouri to negotiate the agreement; only a few telephone or facsimile communications occurred between the parties, each in his respective state of residence. *Scullin Steel Co. V. Nat'l Ry. Utilization Corp.,* 676 F.2d 309, 314 (8th Cir.1982) ("The use of interstate facilities (telephone, the mail) ... cannot alone provide the 'minimum contacts' required by due process."). Furthermore, Adams and Pope state, and Layton does not contest, that Layton was in Georgia when the employment offer was made and when he was given a draft employment agreement.

Reviewing all available facts and circumstances, this court cannot conclude that Adams's and Pope's contacts with Missouri were such that they purposely availed themselves of the rights and privileges of Missouri, whereby they should reasonably have anticipated being haled into court in Missouri. *See Digi-Tel Holdings, Inc. v. Proteg Telecomm., Ltd.,* 89 F.3d 519, 522 (8th Cir.1996); *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

Accordingly, the court does not have personal jurisdiction over defendants Adams and Pope.

E-Distributions and ITS

In support of personal jurisdiction, Layton argues that defendants solicited him in Missouri for employment, he executed the employment agreement in Missouri, the agreement was to be performed in Missouri, E-Distributions's intention was for him to solicit business in Missouri, and defendants have entered into contracts with Missouri businesses. (Doc. 11 at 1-7.)

In his declaration in support of defendants' motion to dismiss, Pope,[FN3] as President of ITS, states that "ITS is a corporation organized and existing under the laws of the State of Georgia, and has its sole office in the State of Georgia."Pope further states that ITS has never been registered to conduct business in Missouri, has no agent in Missouri for service of process, and owns no real property in Missouri. Moreover, Pope declares that he was the President of E-Distributions in October 1999, and E-Distributions was formerly dissolved as of August 16, 2004. Pope states that E-Distributions "has not been registered to do business in the State of Missouri; has not had any registered agent for the service of process in Missouri; and has not owned any real estate in the State of Missouri."(Doc. 6, Ex. A.)

FN3. The declaration of Adams is not discussed, as it does not differ from Pope's declaration in any material respect.

Pope contends that ITS develops all products and technology at its offices in Georgia. Orders are placed when potential customers contact ITS. ITS ships and bills its products from Georgia. ITS has four clients for whom it occasionally ships materials to Missouri; those clients are located in Georgia and California. All shipments are F.O.B. ITS dock in Georgia. (*Id.* at 2.)

***6** Pope states he met Layton in 1996, when Layton approached the then owner of ITS (Graphic Industries) about purchasing the company Layton worked for, D2000. Pope, Adams, and additional Graphic Industries' personnel met with Layton, in Georgia, regarding the potential sale and opportunities for Layton in the purchased company. The sale never took place. (*Id.*)

Pope states that in 1999 Layton approached ITS and met with Pope in Georgia regarding employment opportunities. Pope states that Layton went to Georgia on an additional occasion, and at that time

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he was offered employment and was presented with a draft copy of the employment agreement. Pope contends he made no trips to St. Louis to arrange or negotiate the employment agreement, and that negotiations for the agreement took place in Georgia, and possibly by telephone and/or facsimile. The agreement itself was drafted in Georgia, Pope executed the agreement in Georgia, the decision to terminate Layton was made in Georgia, by Adams and Pope, and the termination letter was drafted and mailed from Georgia. (*Id.*)

Pope further states that Layton commuted to Georgia during his employment with E-Distributions, and he was asked to change his residence to Georgia. Moreover, Layton was not required to maintain his residence in Missouri to perform his job, and that doing so was his personal choice. While employed with E-Distributions, "Layton did not secure any business in Missouri."(*Id.*)

In his affidavit, Layton declares he was contacted by Adams in August of 1999 regarding possible employment with ITS. Layton then traveled to Georgia to discuss employment opportunities. At that time, he states that Adams and Pope told him "their intention was for him to conduct sales and client development from [his] location in St. Louis, Missouri, to a potential client base nationwide on behalf of [ITS]." Shortly thereafter, Layton was sent an employment agreement, which he executed and mailed to Adams. (Doc. 11, Ex. 1.)

Layton states he solicited customers by telephone and personal visits, on behalf of E-Distributions, in Missouri and nationwide. He further states that E-Distributions and ITS have contracted for services with Hardee's Corporation, which maintains its marketing headquarters in Missouri. During his employment, Layton states he maintained no offices outside Missouri, and he never agreed or intended to maintain an office anywhere outside of Missouri. Layton states that Pope and Adams specifically told him of their intention for him to work as an employee of E-Distributions and ITS from Missouri, and that it was their intention for Layton to solicit "business in general in St. Louis, Missouri by whatever means, including, but not limited to, telephone calls and personal visits to potential customers."(*Id.* at 2.)

The court first notes that defendants' assertion that this court cannot maintain personal jurisdiction over E-Distributions, because it is a dissolved business entity, is misguided. *See*4A Charles Alan Wright & Arthur R. Miller, Federal. Practice and Procedure § 1069.1 (3d ed. 2002) ("The dissolution of a corporation ... is ineffective to protect it against service of process in an action involving acts committed by that company prior to its dissolution."). It appears service was effected on Lawrence M. Gold, the registered agent for E-Distributions in Atlanta, Georgia. (Doc. 7.)

*7 With respect to jurisdiction based on the commission of a tortious act in Missouri, the court adverts to its analysis above regarding Pope and Adams. Layton has proffered no facts or circumstances sufficient to show the commission of a tort as a basis for personal jurisdiction.

The court similarly finds defendants did not transact business within Missouri. In their declarations, both Pope and Adams note the corporations occasionally ship materials F.O.B. the ITS dock to Missouri for four clients, based in Georgia or California. In response, Layton provides no information as to any additional extent to which defendants are involved in the shipment of materials to Missouri, and he does not dispute the fact that he secured no business in Missouri. Layton alleges that defendants conducted business in Missouri, and cites specifically to the Hardee's Corporation having its marketing headquarters in Missouri. Beyond this statement, Layton provides no evidence or facts to deduce to what extent defendants contacted or did business with the Missouri division of Hardee's corporation, and provides no evidence or inference that defendants' business with Hardee's, or any other isolated shipments to Missouri as directed by additional parties, gives rise to this cause of action. *Scullin Steel,* 676 F.2d at 311 (citing *Aaron Ferer*

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& Sons Co. v. Diversified Metals Corp., 564 F.2d 1211, 1215 (8th Cir.1977) ("Once jurisdiction has been controverted or denied, (the plaintiff has) the burden of proving such facts.")); *State ex rel. Metal Serv. Ctr. Of Ga., Inc. V. Gaertner,* 677 S.W.2d 325, 327 (Mo.1984) ("The [transacting of] business may consist of a single transaction, if that is the transaction sued upon.").

While Layton does not directly address or assert the making of a contract in Missouri as a basis for jurisdiction, the facts and circumstances surrounding this case warrant brief discussion of this issue. Layton alleges that the employment agreement was mailed to him in Missouri, and he executed the agreement in Missouri. Thus, Layton could argue that the final act creating his employment contract occurred upon his signature, in Missouri. However, precedent requires something more to satisfy due process. *Carithers Stores, Inc. v. Fifty Assocs.,* 568 F.Supp. 307, 309 (E.D.Mo.1983) (quoting *Iowa Elec. Light & Power Co. v. Atlas Corp.,* 603 F.2d at 1303, n. 3 ("In *Iowa Elec. Light & Power Co. v. Atlas Corp.,...* the Eighth Circuit held that the mere entering into a contract with a forum resident does not provide the requisite contacts to satisfy due process. The court held that '[t]o assess compliance with due process ... the minimum contacts relied upon must be between the defendant and the forum state, not simply between the defendant and a resident of the forum state." ')) (internal citations omitted).

The court concludes Layton has not established sufficient minimum contacts under the Due Process clause. In order to determine the sufficiency of any contacts, the court looks at "(1) the nature and quality of the defendant's contacts with the forum state; (2) the quantity of contacts; (3) the relationship between the cause of action and the contacts; (4) the forum state's interest in providing a forum for its residents; and (5) the convenience of the parties." *Digi-Tel,* 89 F.3d at 522-23.

***8** With respect to the nature, quality, and quantity of contacts, Layton alleges that it was the defendants' intent to have him work from Missouri and to solicit business in Missouri. Defendants contend, and Layton does not gainsay, that Layton's residence in Missouri was not a requirement under the employment contract, but his choice; that he was asked to relocate to Georgia; and that Layton's sales area was nationwide and not specifically targeted to Missouri. No proffered facts suggest that defendants intended that Layton work in Missouri to direct their activities at Missouri (beyond Missouri being his residence at the time of contract).*See Principal Residential Mortgage, Inc. v. Mac-Clair Mortgage Corp.,* 336 F.Supp.2d 922, 928 (S.D.Iowa 2004) (recognizing defendant must purposely avail itself of the privilege of conducting activities in the forum state for the purposes of minimum contacts jurisdiction); *Lucachick v. NDS Ams., Inc.,* 169 F.Supp.2d 1103, 1108 (D.Minn.2001) ("[T]he contacts between NDS and Minnesota were neither purposeful nor meaningful. Lucachick's residence in state was voluntary."). The record indicates that Layton chose to live in the forum state, and such residence does not, of itself, provide a sufficient basis to support minimum contacts.

Moreover, no suggested facts indicate that defendants had any contacts with Missouri beyond an occasional F.O.B. shipment for clients residing outside Missouri, that defendants do business with Hardee's Corporation, which has its marketing headquarters in the state, and that there were occasional telephone, facsimile, or mail communications during contract negotiation. These contacts are not sufficient to support due process. *See Bell Paper Box, Inc. v. Trans W. Polymers, Inc.,* 53 F.3d 920, 923 (8th Cir.1995); *Scullin Steel,* 676 F.2d at 314 ("The use of interstate facilities (telephone, the mail), the making of payments in the forum state, and the provision for delivery within the forum state are secondary or ancillary factors and cannot alone provide the "minimum contacts" required by due process.").

Layton points to language in a non-compete provision of the contract at issue, stating Layton's

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"territory" is "the area where Employee is responsible for performing Services for the Company"-"Missouri and Georgia." (Doc. 11, Attach. Executive Employment Agreement, at 4 & Ex. B.) This contractual provision by itself is not a sufficiently substantial minimum contact. The record indicates that Layton had a nationwide territory and that he lived in Missouri while working for E-Distributions.

Defendants have never been registered to do business in Missouri, have no property in Missouri, have no registered agents in Missouri, have never traveled to Missouri for corporate business, and there is no real showing they had any other contacts with the State of Missouri. Layton's affidavit provides uncertain allegations, but no facts to suggest continued minimum contacts to establish jurisdiction. *See Charles Schmitt & Co. v. Gran Prix Auto Wholesalers, Inc.,* 616 F.Supp. 1191, 1194 (E.D.Mo.1985) (finding insufficient an affidavit failing to allege particular facts with respect to alleged contacts).

***9** Similarly, the relationship between the asserted contacts and plaintiff's causes of action does not support a finding of personal jurisdiction. Defendants' asserted contacts with the Hardee's Corporation are unrelated to plaintiff's claims. Moreover, the contacts which established the contract between the parties, while related to plaintiff's claims, are not, as discussed previously, legally sufficient to establish jurisdiction.

Regarding Missouri's interest in the litigation and the convenience of the parties, there is no question Missouri has an interest in resolving the disputes of its citizens. However, Georgia has an equal interest in resolving the disputes of its citizens. Moreover, the instant litigants are currently parties to a suit pending in the United States District Court for the Northern District of Georgia. The interest of the forum state and party convenience are secondary concerns. *Scullin Steel,* 676 F.2d at 313 n. 4 ("The last two factors [interest of the forum state and convenience of the parties] are of secondary importance and not determinative."). This, coupled with pending litigation in Georgia and the equal convenience and interest of Georgia as a forum state, does not persuade this court that Missouri is the appropriate forum.

For these reasons, defendants' motion to dismiss is sustained. An appropriate order shall issue here- with.

ORDER

In accordance with the Memorandum issued herewith,

IT IS HEREBY ORDERED that the motion of defendants to dismiss (Doc. 6) is sustained. Plaintiff's claims against defendants are dismissed without prejudice.

E.D.Mo.,2005.
Layton v. E-Distributions, Inc.
Not Reported in F.Supp.2d, 2005 WL 928613 (E.D.Mo.)

END OF DOCUMENT

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C

United States District Court,D. Minnesota.
Phillip LUCACHICK, Plaintiff,
v.
NDS AMERICAS, INC., Defendant.
No. 00-2404MJD/JGL.

May 2, 2001.

Former employee brought action in state court to recover stock options from employer, alleging breach of contract and fraud. Employer removed action to federal court. Employer moved for dismissal for lack of personal jurisdiction.The District Court, Davis, J., held that: (1) employer did not have sufficient contacts with Minnesota, precluding exercise of specific personal jurisdiction in District of Minnesota, and (2) employer did not have continuous and systematic contacts with Minnesota.

Motion granted.

West Headnotes

[1] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
When a defendant challenges personal jurisdiction, the burden is on the plaintiff to prove the minimum contacts necessary to satisfy due process.

[2] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
At the pre-trial stage, to prove minimum contacts necessary for personal jurisdiction, plaintiff need only make a prima facie showing of sufficient Minnesota-related activities of defendant through the complaint and supporting evidence, which will be taken as true. U.S.C.A. Const.Amend. 14; M.S.A. § 543.19.

[3] Courts 106 ⚿12(2.1)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.1) k. In General. Most Cited Cases
The Minnesota legislature intended the state long-arm statute to have the maximum extraterritorial effect allowed under the due process clause of the federal constitution. U.S.C.A. Const.Amend. 14; M.S.A. § 543.19.

[4] Constitutional Law 92 ⚿3965(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases
(Formerly 92k305(5))

Federal Courts 170B ⚿77.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk77.5 k. In General. Most Cited Cases

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(Formerly 170Bk77)
Since Minnesota's long-arm statute has such broad extraterritorial effect, determination as to the propriety of exercise of personal jurisdiction by federal district court in Minnesota over Delaware corporation collapsed into the single question of whether exercise of personal jurisdiction comported with due process. U.S.C.A. Const.Amend. 14; M.S.A. § 543.19.

[5] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))
The due process clause requires that there are minimum contacts between the defendant and the forum state before the forum state may exercise jurisdiction over the defendant. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Courts 106 ⚿12(2.5)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.5) k. Contacts with Forum State. Most Cited Cases
Under Minnesota law, the minimum contacts requirement for personal jurisdiction to exist will be satisfied if the defendant's conduct and connection with the forum state is such that the defendant should reasonably anticipate being haled into the forum state's court; furthermore, the maintenance of the suit in the forum state must not offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amend. 14; M.S.A. § 543.19.

[7] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))
Factors to determine if a defendant's minimum contacts reconcile with federal due process requirements are: (1) the quantity of contacts within forum state, (2) nature and quality of contacts, (3) source and connection of the cause of action with these contacts, (4) interest of the state providing forum, and (5) convenience of the parties. U.S.C.A. Const.Amend. 14.

[8] Federal Courts 170B ⚿79

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk79 k. Corporate Activities and Contacts Within District; Doing Business in General. Most Cited Cases
Corporate employer did not have sufficient contacts with Minnesota to permit exercise of specific personal jurisdiction in federal district court in Minnesota, in employee's breach of contract action against employer, even though employee resided in Minnesota, some negotiations concerning employment contract took place over telephone with employee in Minnesota, and employer had ongoing

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business dealings with two corporations located in Minnesota, where employee's residence was personal choice, most contract negotiations, including those concerning employee's stock options, basis of employee's breach of contract action, took place in California, and job required employee to report to California, and conduct business outside of Minnesota. U.S.C.A. Const.Amend. 14; M.S.A. § 543.19.

[9] Federal Courts 170B ⚿76.30

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.30 k. Contract Cases. Most Cited Cases
Whether an employment contract is sufficient to confer personal jurisdiction requires an evaluation of the real object of the business transaction; what must be contemplated is the future course of dealing between the parties. U.S.C.A. Const.Amend. 14.

[10] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
General jurisdiction arises where the defendant's contacts with the forum are continuous and systematic and would allow suit against the defendant even if the contacts are not related to the suit.

[11] Federal Courts 170B ⚿79

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk79 k. Corporate Activities and Contacts Within District; Doing Business in General. Most Cited Cases
California corporation did not have continuous and systematic contacts with Minnesota, precluding finding of general personal jurisdiction over California corporation; although two Minnesota companies used California corporation's products in Minnesota, original contracts were made elsewhere, and most ongoing business between the companies and corporation took place outside of Minnesota. U.S.C.A. Const.Amend. 14; M.S.A. § 543.19.

[12] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
The critical factor in analyzing the nature and quality of defendant's contacts with forum state for purpose of personal jurisdiction is a determination of whether the contacts of defendant with forum state constituted voluntary, affirmative, economic activity of substance. U.S.C.A. Const.Amend. 14; M.S.A. § 543.19.

[13] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
In a contract dispute, a finding of specific personal jurisdiction requires a substantial connection between the contract breach and the state. U.S.C.A. Const.Amend. 14; M.S.A. § 543.19.

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*1105 Brian N. Toder,Chestnut & Cambronne, P.A., Minneapolis, MN, on behalf of Plaintiff.
Denis E. Grande, MacKall, Crounse & Moore, P.L.C., Minneapolis, MN, on behalf of Defendant.

MEMORANDUM OPINION AND ORDER

DAVIS, District Judge.
This matter is before the Court on Defendant's motion to dismiss for lack of personal jurisdiction under Fed.R.Civ.P. 12(b)(2), or in the alternative to transfer venue to the Southern District of California. Plaintiff Lucachick filed suit in Minnesota State District Court, alleging breach of contract and fraud. Defendant NDS Americas, Inc. ("NDS") removed the suit to this Court on the basis of diversity jurisdiction. Based on a review of all the files, records, and proceedings herein, the Court finds that it lacks personal jurisdiction over Defendant, and therefore Defendant's motion to dismiss is GRANTED.

Background

In 1999, Plaintiff Phillip Lucachick interviewed, both by telephone and in person in California, for employment with NDS, a Delaware corporation with its principle place of business in California. NDS provides systems and services for the secure distribution of entertainment and information over digital media and the Internet to televisions and personal computers. NDS hired Lucachick in the summer of 1999, as a regional sales manager in Minnesota.

According to Plaintiff, during employment negotiations, he told NDS he would only accept an employment offer if it included stock options. NDS's subsequent written offer of employment contained the following provision, "You will also be eligible to receive 10,000 units of future NDS options upon program implementation." Ex. 1, Rudolph Decl. Lucachick also signed an At-Will Employment Agreement.

NDS terminated Lucachick in February, 2000. After his termination, he asked NDS for the stock options discussed in the employment offer. NDS told him that his stock options had not vested, according to the Executive Share Option Scheme. Lucachick then sued in Minnesota State District Court, alleging breach of contract and fraud. NDS removed the case to this court, and now moves for dismissal based on lack of personal jurisdiction.

Argument

[1][2] When a defendant challenges jurisdiction, the burden is on the plaintiff to prove the minimum contacts necessary to satisfy due process. *See Hardrives, Inc. v. City of LaCrosse, Wisconsin,* 307 Minn. 290, 240 N.W.2d 814, 816 (1976); *Newhard, Cook & Co. v. Inspired Life Centers, Inc.,* 895 F.2d 1226, 1228 (8th Cir.1990). "At the pretrial stage, however, the plaintiff need only make a prima facie showing of sufficient Minnesota-related*1106 activities through the complaint and supporting evidence, which will be taken as true." *Hardrives,* 240 N.W.2d at 816. For the purpose of this motion, this court must take Plaintiffs' allegations as true. *See Dakota Industries, Inc. v. Dakota Sportswear, Inc.,* 946 F.2d 1384, 1387 (8th Cir.1991).

Federal courts have been instructed to use a two-step inquiry when determining if jurisdiction exists over a non-resident party: "(1) whether the facts presented satisfy the forum state's long-arm statute, and (2) whether the non-resident has minimum contacts with the forum state, so that the court's exercise of jurisdiction would be fair and in accordance with due process." *Soo Line R. Co. v. Hawker Siddeley Canada, Inc.,* 950 F.2d 526, 528 (8th Cir.1991).

[3][4] Minnesota's long-arm statute will be satisfied if a corporation "[t]ransacts any business within the state, or ... [c]ommits any act in Minnesota causing injury or property damage in Minnesota, or ... [c]ommits any act outside Minnesota causing injury

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or property damage in Minnesota...." Minn.Stat. § 543.19. The Minnesota Legislature intended the state long-arm statute to "have the maximum extra-territorial effect allowed under the due process clause of the federal constitution." *Rostad v. On-Deck, Inc.,* 372 N.W.2d 717, 719 (Minn.1985), *cert. denied,* 474 U.S. 1006, 106 S.Ct. 528, 88 L.Ed.2d 460 (1985). Since Minnesota's long-arm statute has such broad extraterritorial effect, the determination as to the propriety of this court's exercise of personal jurisdiction over NDS "collapses into the single question of whether exercise of personal jurisdiction comports with due process." *Bell Paper Box, Inc. v. U.S. Kids, Inc.,* 22 F.3d 816, 818 (8th Cir.1994).

[5][6] The due process clause requires that there are "minimum contacts" between the defendant and the forum state before the forum state may exercise jurisdiction over the defendant. *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). The "minimum contacts" requirement will be satisfied if the defendant's conduct and connection with the forum state is such that the defendant should reasonably anticipate being haled into the forum state's court. *See id.* at 291, 100 S.Ct. 559. Furthermore, the maintenance of the suit in the forum state must not offend traditional notions of fair play and substantial justice. *See International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (citations omitted).

[7] The United States Court of Appeals for the Eighth Circuit applies a five factor test to determine if a defendant's minimum contacts reconcile with federal due process requirements. Those factors are: (1) The quantity of contacts within the forum state, (2) the nature and quality of contacts, (3) the source and connection of the cause of action with these contacts, (4) the interest of the state providing a forum, and (5) the convenience of the parties. *See Mountaire Feeds, Inc. v. Argo Impex, S.A.,* 677 F.2d 651, 654 (8th Cir.1982). The courts must not mechanically apply these factors, for it has been held that the last two factors are to be considered, but are not determinative. *See Soo Line,* 950 F.2d at 529,*quoting Aaron Ferer & Sons v. American Compressed Steel,* 564 F.2d 1206, 1210 n. 5 (8th Cir.1977).

1. *Quantity of Contacts*

[8] Lucachick argues that NDS has contacts with Minnesota in the form of his employment contract, and ongoing contractual dealings with two corporations that have ties to Minnesota. Plaintiff contends first that the existence of the employment contract between him and Defendant is enough to confer jurisdiction. ***1107** Entering into this contract is by itself insufficient grounds upon which to predicate the exercise of this Court's jurisdiction. *See Mountaire Feeds,* 677 F.2d at 655. Nor is the fact that some of the negotiations were conducted over the telephone, with Lucachick in Minnesota and NDS in California, enough to confer jurisdiction. *See Stangel v. Rucker,* 398 N.W.2d 602, 605 (Minn.Ct.App.1986)(holding that telephone conversation did not confer personal jurisdiction over non-resident in a fraud claim, where plaintiff initiated the call).

[9] Lucachick argues that the contract was being performed in Minnesota, and therefore any alleged breach took place in Minnesota and this confers jurisdiction. Whether Lucachick's employment is sufficient to confer jurisdiction requires an evaluation of the "real object of the business transaction." *Hoopeston Canning Co. v. Cullen,* 318 U.S. 313, 317, 63 S.Ct. 602, 87 L.Ed. 777 (1943). What must be contemplated is the future course of dealing between the parties. *See Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 479, 105 S.Ct. 2174, 85 L.Ed.2d 528(1985)(evaluating prior negotiations, contemplated future consequences, terms of the contract and the parties' actual course of dealing in determining whether minimum contacts were established).

Lucachick argues that his involvement in the sale of

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$200,000 worth of services to DigitalXpress, L.L.C. ("DXP") in 1999 by itself shows that he was expected to do at least some of his work in Minnesota. NDS counters this by pointing out that this sale occurred soon after Lucachick started working, and had been "in the works" for some time prior to his start date. *See* Rubin Decl. at ¶ 5; Lucachick Aff. at ¶¶ 7-10. Lucachick does not provide any further evidence that he conducted work in Minnesota or was expected to do so.

The Court is not convinced by Plaintiff's argument. Lucachick's residence was the only connection between the employment contract and Minnesota. He does not dispute Defendant's assertions that his residence in Minnesota was a personal choice and not a requirement of the contract. *See* Rudolph Decl. at ¶ 10. Most of the contract negotiations and final signing took place in California. The job description required Plaintiff to report to NDS's headquarters in California, and to create business contacts with companies located outside of Minnesota. As to the one time Y2K upgrade sale to DXP, the affidavits presented by Plaintiff do not establish that he played a critical role in the sale. *See* Wright Aff. at ¶¶ 4,5; Combs Aff. at ¶¶ 4, 5. The alleged breach therefore does not support a finding of jurisdiction.

[10][11] Lucachick also claims that NDS's ongoing contractual relationships with two corporations that do business in Minnesota, the aforementioned DXP and United States Satellite Broadcasting (USSB), are enough to confer general jurisdiction. General jurisdiction arises where the defendant's contacts with the forum are "continuous and systematic" and would allow suit against the defendant even if the contacts are not related to the suit. *See Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 416, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

DXP, a subsidiary of Boeing, provides satellite delivered digital services. From approximately 1995 to 2000, NDS supplied DXP with distribution systems and services. DXP maintains an office and technical uplink site in Minneapolis, both of which received services from NDS. NDS contends that the provision of these services do not constitute a purposeful contact with Minnesota because the contract negotiations and monitoring took place at Boeing's corporate headquarters in Washington.

***1108** Lucachick also testified to his personal knowledge of the ongoing relationship between NDS and a Minnesota facility owned by USSB.[FN1] He states that USSB constructed a broadcast center in Oakdale, Minnesota in 1993. As part of its delivery of television signals to the entire continental United States via transponders on a high powered satellite, USSB maintained redundant conditional access uplink system servers provided by NDS. These servers were purchased from NDS, and installed by NDS personnel in 1994. NDS received monthly fees for the use of its technology, including upgrades to hardware and software (over $10 million from 1994-present). Lucachick states that USSB developed its business "in cooperation with" DirecTV, a Delaware corporation with its principle place of business in California. From 1994-1999, USSB paid monthly fees for the use of NDS technology, through DirecTV, which managed the contract with NDS. DirecTV bought out USSB in 1999.

> FN1. Plaintiff was employed by USSB from 1987-1999, first as a Senior Project Engineer and later as Director of Systems Integration.

The Court finds that neither of these relationships rise to the level of "systematic and continuous" contacts with Minnesota, because while those companies may have used the NDS products in Minnesota, the original contracts were made elsewhere. The specific contacts described by Lucachick (the 1994 installation of equipment in Oakdale, the 1999 meetings) were isolated incidents. Nor were they "systematic," because DXP is a subsidiary of Boeing which merely happens to have a Minnesota facility, and DirecTV decided to install the equipment in Minnesota after purchasing it from NDS. Any contacts between NDS and USSB, which was loc-

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ated in Minnesota, were conducted through DirecTV, which was located in California. Any contacts between NDS and DXP's Minnesota operation were conducted through DXP's headquarters in Seattle. The Court finds that these contacts are tenuous and not sufficiently numerous or sustained to support jurisdiction.

2. *Nature and Quality of Contacts*

[12] The critical factor in this portion of the analysis is a determination of whether the contacts of NDS with Minnesota constituted "voluntary, affirmative, economic activity of substance," *Zumbro, Inc. v. California Natural Products,* 861 F.Supp. 773, 780 (D.Minn.1994). As discussed *supra,* the contacts between NDS and Minnesota were neither purposeful nor meaningful. Lucachick's residence in state was voluntary. While NDS employees had sporadic contact with Minnesota-based facilities, these do not rise to the level of "affirmative economic activity of substance." *Id.*

3. *Source and Connection of Cause of Action with Contacts*

[13] In a contract dispute, a finding of specific jurisdiction requires a substantial connection between the contract breach and the state. *See Dent-Air, Inc. v. Beech Mountain Air Service, Inc.,* 332 N.W.2d 904, 907 (Minn.1983). NDS points to a lack of alleged relationship between the failure to grant stock options and Minnesota. The Court has already determined, *see supra,* that Lucachick's employment contract was not to be performed in-state, so to the extent that Plaintiff's complaint rests on a breach of the employment contract, there is only marginal contact with Minnesota. Further, all conversations concerning stock options, the basis of the suit, were conducted either on the telephone or in California. The NDS stock ***1109** option plan is administered out of London, England, where the Directors of NDS Group plc (the parent corporation of NDS) are based. The "general jurisdiction" contacts alleged by Lucachick all occurred before the option scheme was adopted or Lucachick was hired by NDS.

4. *Interest of Minnesota and Convenience of the Parties*

Lucachick argues that Minnesota has an interest in protecting its citizens. While this may be true, California has an equally strong interest given the residency of the defendants. Furthermore, the resolution of this conflict requires the interpretation of the employment contract, which was negotiated and signed in California, and the NDS employment stock option plan, which affects mostly California residents. Given that forum state interest and the convenience of the parties are secondary concerns in this analysis, it is the opinion of the Court that this factor does not weigh in favor of maintaining this action in Minnesota.

Accordingly, the Court finds that Defendants are not subject to the *in personam* jurisdiction of the United States District Court, District of Minnesota. **IT IS HEREBY ORDERED** that:

1. Defendant's Motion to Dismiss is Granted.

Let judgment be entered.

D.Minn.,2001.
Lucachick v. NDS Americas, Inc.
169 F.Supp.2d 1103

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EXHIBIT M

▷

United States Court of Appeals,Ninth Circuit.
William J. McGLINCHY; Dan-De Products Corporation, a California corporation, Plaintiffs-Appellants,
v.
SHELL CHEMICAL CO.; Shell International Chemical Company, Ltd.; Pecten Chemicals, Inc.; Shell Oil Company; Royal Dutch Shell; Shell International Trading Co.; United States Brass Corp.; Qest Plumbing Products; Plastic Pipe Fittings Association, Defendants-Appellees.
No. 86-2619.

Argued and Submitted Dec. 16, 1987.
Decided April 22, 1988.
As Amended on Denial of Rehearing and Rehearing En Banc July 11, 1988.

Action was brought against chemical company and its affiliates for antitrust violations, breach of contract and related torts. The United States District Court for the Northern District of California, Samuel Conti, J., granted summary judgment in favor of certain defendants, denied motion to amend complaint, granted judgment on pleadings for failure to state antitrust claim, dismissed antitrust claim for lack of subject matter jurisdiction and dismissed claims against chemical company for lack of personal jurisdiction and appeal was taken. The Court of Appeals, Beezer, Circuit Judge, held that: (1) trial court did not abuse its discretion in excluding expert witnesses' studies and testimony; (2) complaint failed to sufficiently state antitrust claim; and (3) district court lacked personal jurisdiction over London-based firm.

Affirmed.

West Headnotes

[1] Evidence 157 ⇐531

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k530 Damages
157k531 k. In General. Most Cited Cases
Trial court did not abuse its discretion in excluding experts' damages studies and future damages testimony in action brought by former representatives hired to promote and sell chemical companies pipe resin for breach of contract and tortious interference with contract and business opportunities; studies and testimony were flawed and their probative value was substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading jury. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[2] Torts 379 ⇐262

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)4 Evidence
379k260 Weight and Sufficiency
379k262 k. Business Relations or Economic Advantage, in General. Most Cited Cases
(Formerly 379k27)

Torts 379 ⇐263

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)4 Evidence
379k260 Weight and Sufficiency
379k263 k. Contracts in General. Most Cited Cases
(Formerly 379k27)
In absence of another study besides those the district court properly excluded from evidence, or possibility that former representatives hired by chemical company to promote sale of chemical company's pipe resin could rehabilitate defective study, no evidence existed from which it could be reasonably concluded that former representatives actually

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suffered damages caused by chemical company in action for breach of contract and tortious interference with contracts and business opportunities.

[3] Federal Civil Procedure 170A ⚷824

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak824 k. Time for Amendment in General. Most Cited Cases
Undue delay is one valid reason for district court to deny party leave to amend. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[4] Federal Civil Procedure 170A ⚷834

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak834 k. Injustice or Prejudice. Most Cited Cases
Prejudice is valid reason for district court to deny party leave to amend. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[5] Federal Civil Procedure 170A ⚷851

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak851 k. Form and Sufficiency of Amendment. Most Cited Cases
Repeated failures to cure deficiencies by amendments previously allowed is valid reason for district to deny party leave to amend. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[6] Federal Civil Procedure 170A ⚷841

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak839 Complaint
170Ak841 k. New Cause of Action in General. Most Cited Cases
District court did not abuse its discretion in denying former representatives commissioned to promote sale of chemical company's pipe resin leave to amend complaint against chemical company to add causes of action for fraud and negligent misrepresentation due to representatives' undue delay, prejudice to chemical company as result of delay and representatives repeated failures to cure deficiencies by amendments previously allowed. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[7] Antitrust and Trade Regulation 29T ⚷560

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(D) Illegal Restraints or Other Misconduct
29Tk560 k. In General. Most Cited Cases
(Formerly 265k28(7.1))

Antitrust and Trade Regulation 29T ⚷963(2)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties
29Tk963 Injury to Business or Prop- erty
29Tk963(2) k. Causation. Most Cited Cases
(Formerly 265k28(7.2))
To establish violation under § 1 of Sherman Act, plaintiff must demonstrate agreement, conspiracy, or combination among two or more persons or distinct business entities, which is intended to harm or unreasonably restrain competition and which actually causes injury to competition, beyond impact on claimant, within field of commerce in which claimant is engaged. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

[8] Antitrust and Trade Regulation 29T ⚷534

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General

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29TVI(A) In General
29Tk532 Judicially Created Tests of Legality
29Tk534 k. Per Se. Most Cited Cases
(Formerly 265k12(1.10))

Antitrust and Trade Regulation 29T ⚿535

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(A) In General
29Tk532 Judicially Created Tests of Legality
29Tk535 k. Rule of Reason. Most Cited Cases
(Formerly 265k12(1.10))

Antitrust and Trade Regulation 29T ⚿560

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(D) Illegal Restraints or Other Misconduct
29Tk560 k. In General. Most Cited Cases
(Formerly 265k12(1.10))
Sherman Act's prohibition against concerted activity in restraint of trade is analyzed under either "per se" rule applicable to practices that are presumptively illegal, such as horizontal and vertical pricing, horizontal market division, group boycotts and concerted refusal to deals and tie-in sales, or "rule of reason" which requires fact finder to decide whether under all circumstances of case restrictive practices imposes unreasonable restraint on competition. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

[9] Antitrust and Trade Regulation 29T ⚿713

29T Antitrust and Trade Regulation
29TVIII Attempts to Monopolize
29TVIII(A) In General
29Tk712 Elements in General
29Tk713 k. In General. Most Cited Cases
(Formerly 265k28(7.2), 265k28(7.1))

Antitrust and Trade Regulation 29T ⚿715

29T Antitrust and Trade Regulation
29TVIII Attempts to Monopolize
29TVIII(A) In General
29Tk712 Elements in General
29Tk715 k. Intent. Most Cited Cases
(Formerly 265k28(7.2))

Antitrust and Trade Regulation 29T ⚿963(2)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties
29Tk963 Injury to Business or Prop- erty
29Tk963(2) k. Causation. Most Cited Cases
(Formerly 265k28(7.1))
To establish violation of § 2 of Sherman Act for attempt to monopolize, plaintiff must demonstrate specific intent to control prices or destroy competition, predatory or anticompetitive conduct directed toward accomplishing purpose, dangerous probability of success and causal antitrust injury. Sherman Anti-Trust Act, § 2, as amended, 15 U.S.C.A. § 2.

[10] Federal Courts 170B ⚿18

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction
170Bk18 k. Validity or Substantiality of Federal Claims and Disposition Thereof. Most Cited Cases
If federal claim is dismissed before trial, any pendent state matters usually should be dismissed as well.

[11] Antitrust and Trade Regulation 29T ⚿ 972(5)

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29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk972 Pleading
29Tk972(2) Complaint
29Tk972(5) k. Injury to Business or Property. Most Cited Cases
(Formerly 265k28(6.7))
Allegations of former representatives commissioned to promote and sell chemical company's pipe resin that actions between chemical company and their overseas affiliates were taken for purpose of eliminating representatives as sellers of pipe resin and pipe resin related products did not allege antitrust injury to competition as required to state claim against chemical company under §§ 1 and 2 of the Sherman Act; complaint did not allege injury to competitive market for resin and merely alleged individual injury. Sherman Anti-Trust Act, §§ 1, 2, as amended, 15 U.S.C.A. §§ 1, 2.

[12] Antitrust and Trade Regulation 29T ⚿ 551

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(B) Cartels, Combinations, Contracts, and Conspiracies in General
29Tk549 Territorial Agreements
29Tk551 k. Vertical. Most Cited Cases
(Formerly 265k12(1.2))
Elimination of single competitor, without more, does not prove anticompetitive effect. Sherman Anti-Trust Act, §§ 1, 2, as amended, 15 U.S.C.A. §§ 1, 2.

[13] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Existence of subject matter jurisdiction presents question of law reviewable de novo.

[14] Commerce 83 ⚿62.10(2)

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(C) Monopolies and Trade Regulation
83k62.10 Monopolies and Anti-Trust Laws in General
83k62.10(2) k. Particular Products or Lines of Commerce. Most Cited Cases
(Formerly 83k62.11)
Antitrust claims of former representatives commissioned to promote sale of chemical company's pipe resin related only to foreign commerce without requisite domestic anticompetitive effect, so that district court lacked subject matter jurisdiction over Sherman Act claim; former representatives alleged that their agreement with chemical company involved promotion and solicitation of orders for pipe resin in Hong Kong, India, Indonesia, Malaysia, the Philippines, Singapore, Taiwan, and Thailand, and that chemical companies alleged concerted and unilateral refusal to deal in various foreign markets resulted in termination of their agreement with chemical company. Sherman Anti-Trust Act, § 7, as amended, 15 U.S.C.A. § 6a; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[15] Federal Courts 170B ⚿76.30

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.30 k. Contract Cases. Most Cited Cases

Federal Courts 170B ⚿94

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk94 k. Pleading Venue. Most Cited

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Cases
Former representatives commissioned to promote and sell chemical company's pipe resin failed to state claim that London-based firm affiliated with chemical company purposely availed itself of California laws, and thus district court lacked personal jurisdiction over London-based firm in action for breach of contract and tort; London based firm never conducted any substantial or continuous and systematic activities in California and mere fact that contract between London-based firm and representatives was signed in California was insufficient to constitute act of "purposely availing."

***804** Lawrence L. Curtice, Himelstein, Savinar, Petrocelli and Curtice, Patrick H. Fabian and Richard G. Krenz, Fabian, Graham and Englese, San Francisco, Cal., for plaintiffs-appellants.
Raymond V. McCord, Shell Oil Co., Los Angeles, Cal., James J. Garrett, Richard G. Seeborg, Thomas Reilly, Morrison & Foerster, San Francisco, Cal., for Shell Oil Co., Shell Chemical Co. and Pecten Chemicals, Inc.
Jan T. Chilton, Severson, Werson, Berke & Melchior, San Francisco, Cal., for U.S. Brass Corp.
Max R. Shulman, Robert N. Feltoon, Cravath, Swaine & Moore, David A. Barrett, Duker & Barrett, New York City, David M. Heilbron, McCutchen, Doyle, Brown and Enersen, San Francisco, Cal., for Shell Intern. Chemical Co. Ltd., defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before CHOY, GOODWIN and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:
Appellants William McGlinchy and Dan-de Products Corporation filed claims against various defendants for antitrust violations, breach of contract, and related torts. They appeal from the district ***805** court's (1) grant of summary judgment in favor of certain defendants; (2) denial of appellants' motion to amend their complaint; (3) grant of judgment on the pleadings for failure to state an antitrust claim concerning the polybutylene market; (4) dismissal of the antitrust claims for lack of subject matter jurisdiction; and (5) dismissal of the claims against Shell International Chemical Company for lack of personal jurisdiction. We affirm.

I

In 1977 Shell Chemical Company purchased all the patents, rights, and commercial production facilities for polybutylene (PB) from Whetco Company. PB resin is used to manufacture various products, including piping designed to carry water.

In 1978 William McGlinchy entered into an oral agreement with Shell Chemical to promote the sale of PB pipe grade resin in Southeast Asia. On January 25, 1979, Dan-de Products Corporation, owned and operated by McGlinchy, entered into a written contract with Shell Chemical for the same purpose. The written contract designated Dan-de as Shell Chemical's representative for the promotion and solicitation of orders for PB pipe resin in designated countries throughout Southeast Asia. The contract expressly provided that it would remain in force for one year, ending December 31, 1979, with year-to-year renewal subject to termination at year-end upon 30 days prior notice. The written contract was extended in May 1979 to include Saudi Arabia.

On April 6, 1981 McGlinchy entered into a written contract with Shell Chemical to promote PB resin in South America. In June 1980 Dan-de and Shell International Chemical Company (SICC) entered into a similar written contract covering sale and promotion of PB resin in Africa and the Middle East.

On November 5, 1982 Shell Chemical notified McGlinchy and Dan-de in writing that the contract for promotion and sale of PB resin in Southeast Asia and Saudi Arabia would be terminated. The contract remained in force through December 31,

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1982, and Shell Chemical continued to pay Dan-de commissions on actual sales through the end of 1983 as the contract required. The contract between Shell Chemical and McGlinchy covering PB resin sales and promotion in South America and the contract between SICC and Dan-de covering Middle Eastern and African PB resin sales were also terminated in 1982 by Shell Chemical and SICC, respectively, pursuant to the terms of those contracts.

In February 1984 McGlinchy and Dan-de (collectively, appellants) instituted this action against Shell Oil Company, Shell Chemical Co. and Pecten Chemicals, Inc. (collectively, Shell Oil defendants), SICC, and other Shell-related entities. The original complaint alleged federal and state antitrust violations, as well as breach of contract and related torts. Appellants filed a first amended complaint on May 29, 1984.

SICC subsequently moved to dismiss for lack of personal jurisdiction, failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction pursuant to 15 U.S.C. § 6a. Shell Oil defendants joined in the motion to dismiss for lack of subject matter jurisdiction. On November 30, 1984, the district court granted SICC's motion to dismiss for lack of personal jurisdiction and further granted the motion to dismiss joined by Shell Oil defendants for lack of subject matter jurisdiction under section 6a.

Appellants next moved for leave to file a second amended complaint to add several manufacturers of PB pipe fittings as defendants and to add new antitrust claims relating to the promotion and sale of such fittings. On March 1, 1985 the district court denied appellants' motion to file a second amended complaint but allowed them to add four causes of action against newly named PB pipe fitting defendants. Appellants then filed an amended first amended complaint (AFA complaint) against the Shell Oil defendants and the PB pipe fitting defendants.[FN1]

FN1. Appellants added Wallace Murray Corp. (along with its divisions U.S. Brass Corp. and Qest Plumbing Products), Vanguard Plastics, Inc. and Wrightway Mfg. Co., which all manufacture, produce, and sell insert fittings used with PB pipe systems. Appellants also added Plastic Pipe Fittings Association, which promotes, markets, and sells plastic pipe.

***806** Shell Oil defendants moved for judgment on the pleadings with respect to the federal and state antitrust claims relating to PB pipe fittings. The PB pipe fitting defendants joined in the motion, which the district court granted on June 7, 1985.

Subsequently the district court denied motions brought by Shell Oil defendants for summary judgment on appellants' breach of contract claim and for judgment on the pleadings on the remaining claims.

In December 1985 appellants again attempted to amend their complaint to add claims for relief against Shell Oil defendants for fraud and negligent interference with contract. On February 7, 1986 the district court denied the motion and subsequently set the case for trial in May 1986.

After all the parties had taken the depositions of each side's damages experts and discovery had closed, Shell Oil defendants moved the court to exclude the testimony of appellants' damages experts and to enter judgment against appellants for failure to offer a competent theory proving the fact or amount of damages. The district court granted Shell Oil defendants' motion on May 31, 1986, and entered judgment in their favor on June 5, 1986. Appellants' motion for reconsideration was subsequently denied, and appellants timely appealed.

II

The final proceedings in the district court dealt with appellants' only remaining claims: Shell Oil defendants' breaches of contract (including promissory estoppel and quasi-contract) and Shell Oil defendants' "tortious interference" with appellants' contracts

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and business opportunities. Appellants contend that the district court erred in excluding damages studies prepared by appellants' expert witnesses as well as the future testimony of those expert witnesses. Appellants also contend that the district court erred in granting summary judgment in favor of Shell Oil defendants for appellant's failure to show a genuine issue about damages. We affirm both the exclusion of evidence and the grant of summary judgment.

A

We review a district court's evidentiary decisions for an abuse of discretion. *Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309, 1315 (9th Cir.1986); *United States v. Solomon*, 753 F.2d 1522, 1524 (9th Cir.1985) (expert witnesses).

[1] The district court did not abuse its discretion in granting the Shell Oil defendants' motion to exclude the experts' damages studies and future testimony. The studies did not meet the standard that, in the context of a motion for summary judgment, an expert must demonstrate his competence or back up his opinion with specific facts. *Compare Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir.1985) (per curiam) (weighing Fed.R.Civ.P. 56(e) and Fed.R.Evid. 705) *with United States v. Various Slot Machines on Guam*, 658 F.2d 697, 700 (9th Cir.1981). Both the studies and testimony were properly excluded because any probative value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed.R.Evid. 403. *See Solomon*, 753 F.2d at 1525.

Appellants' final list of witnesses designated Stephen Jizmagian as an expert witness on damages. As his deposition shows, appellants asked Jizmagian to forecast future lost profits to the McGlinchy companies after a change in relations between the McGlinchys and Shell. On the one hand, Jizmagian stated that he quantified in dollar terms the effect of the act or acts by Shell Oil Company, and that he attributed all of the future lost profits to acts of Shell Oil Company. On the other hand, Jizmagian acknowledged that he did not relate the loss to specific acts and, indeed, could not recall any specific acts by Shell Oil defendants. He added that the cause of the decline in sales theoretically could have been anything. Given this inconsistency, Jizmagian's report and testimony would pose a great danger of confusing the fact and cause of damages with the amount of damages.

***807** Even as a "before and after" assessment of appellants' damages from a hypothetical injury, Jizmagian's study was hopelessly flawed. He did not confirm that relevant market conditions were the same before and after the time the injury was alleged to have occurred. *See Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1206-07 (9th Cir.1975), *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976).

Worse, appellants' causes of action specify that Shell Oil defendants breached obligations and tortiously interfered with appellants' contracts and business opportunities involving particular product lines and in particular overseas countries and territories. Jizmagian, however, compiled his report and was prepared to testify on the basis of the appellants' gross sales. He stated that he did not know which of appellants' product lines had declined in sales, or in which geographic areas-even as between the United States and the rest of the world. Jizmagian's report and testimony would pose a great danger of misleading a jury into believing that appellants' losses associated with a decline in gross sales were the amount of damages to appellants from "lost profits" in particular product lines and territories.

Jizmagian's speculation about the amount of appellants' "lost profits" has no basis in the record. His study rests on unsupported assumptions and ignores distinctions crucial to arriving at a valid conclusion. *See Various Slot Machines on Guam*, 658 F.2d at 700 (quoting *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C.Cir.1977)). The district court did not abuse its discretion in excluding

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Jizmagian's study and future testimony.

Appellants alternately named William McGlinchy as an expert witness and as a witness on damages, but never as an expert witness on damages. The parties, nevertheless, treated William McGlinchy as an expert witness on damages in Southeast Asia. The district court evaluated William McGlinchy as an expert witness on those damages.

In making his study William McGlinchy's method was to forecast polybutylene resin sales, apply a given commission rate, and subtract out expenses to arrive at the net profits appellants would have earned but for the loss of their contract. The study's value depends heavily on the accuracy of the sales forecast. To forecast sales through 1987, William McGlinchy said that he "took the 838,000 pounds for 1982 actual sales and applied the 41 percent [compound annual] growth figure." He asserted that he based the 41 percent growth rate on local economic data, country by country in Southeast Asia, dating from the 1970's.

Yet William McGlinchy later acknowledged that in fact he first divined a total sales figure for 1987, then plugged in a compound growth rate-41 percent-that would work backward to the 1982 actual sales figure. Although the study stated that companies he had been associated with had enjoyed growth rates of 41 percent and 83 percent, the study gave no indication of how he estimated a total sales figure for 1987. Lacking any sound foundation, the study would mislead a jury into believing that damages had grown exponentially over the relevant period.

Other aspects of the study would have the same effect. For instance, the study assumed that expenses would stay at $60,000 per year for nine years through 1991. When asked how he had arrived at the $60,000 per year figure, William McGlinchy replied, "I believe I arrived at it from experience plus inflation." The flat figure, however, could reflect neither experience nor inflation. William McGlinchy did not otherwise document the figure. Indeed, he documented little of the basis for his conclusions. His speculation about the amount of appellants' damages has scant basis in the record. His study rests on unsupported assumptions and unsound extrapolation. *See Various Slot Machines on Guam,* 658 F.2d at 700 (quoting *Merit Motors, Inc.,* 569 F.2d at 672-73). The district court did not abuse its discretion in excluding William McGlinchy's study and future testimony.

***808** B

[2] After excluding the experts' studies and testimony, the district court granted Shell Oil defendants' motion for summary judgment. A summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We review a grant of summary judgment de novo, viewing the evidence in a light most favorable to the non-moving party. *Dolphin Tours v. Pacifico Creative Serv.,* 773 F.2d 1506, 1509 (9th Cir.1985).

The district court properly granted summary judgment in favor of Shell Oil defendants. In *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), a majority consisting of five justices said, "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* 106 S.Ct. at 2552-53.

Before the district court granted summary judgment, appellants did not make a showing sufficient to establish the amount, causation, or fact of damages. The only evidence about amount of damages consisted in the studies of Jizmagian and William McGlinchy, previously excluded by the district

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court. The only other mention appellants made of damages was in listing William and Don McGlinchy as lay witnesses who would testify on damages. Appellants made no showing at all about causation or fact of damages.

After the district court granted summary judgment, Jizmagian, William McGlinchy, and Don McGlinchy made declarations about damages in connection with appellants' motion for reconsideration of summary judgment. These declarations added nothing to the pleadings, depositions, and other papers that the appellants already had filed.

Appellants seek comfort from the concurring opinion in *Celotex* by Justice White, who also joined the majority opinion. They argue that naming a witness to support a claim defeats summary judgment unless the movant somehow shows that the named witness's possible testimony raises no genuine issue of material fact. *Cf. id.* at 2555-56 (White, J., concurring).

Even under this standard the district court properly granted summary judgment to Shell Oil defendants. The district court had excluded the damages studies by William McGlinchy and Jizmagian. Appellants named William McGlinchy and Don McGlinchy as lay witnesses on damages. In his deposition William McGlinchy, a plaintiff in this case, acknowledged that the damages studies by himself and Jizmagian were the only ones prepared for the lawsuit; William McGlinchy specified that he generated his own study without contribution from Don McGlinchy.

Some sort of study estimating the amount of damages was essential to appellants' case. As this court said in *Dolphin Tours,* the plaintiffs "must provide evidence such that the jury is not left to 'speculation or guesswork' in determining the amount of damages to award." 773 F.2d at 1509-10. Summary judgment is appropriate where appellants have no expert witnesses or designated documents providing competent evidence from which a jury could fairly estimate damages. *Rickards v. Canine Eye Registration Found., Inc.,* 704 F.2d 1449, 1452 (9th Cir.) (antitrust case), *cert. denied,* 464 U.S. 994, 104 S.Ct. 488, 78 L.Ed.2d 683 (1983).

In the absence of another study besides those that the district court had properly excluded, or the possibility that Don McGlinchy could rehabilitate William McGlinchy's defective study, appellants could make no showing about the amount of damages. By eliminating these possibilities, Shell Oil defendants made their showing that the named witnesses' possible testimony would raise no genuine issue of material fact about the amount of damages ***809** appellants had sustained. *Cf. Celotex,* 106 S.Ct. at 2555-56 (White, J., concurring).

Once Shell Oil defendants made this showing, the burden was on appellants to come forward with specific facts showing there was a genuine issue for trial. Fed.R.Civ.P. 56(e); *see Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Appellants did not meet this burden; they produced no evidence at all to contradict Shell Oil defendants' showing, or even to enable contradictory inferences. *See British Airways Bd. v. Boeing Co.,* 585 F.2d 946, 951 (9th Cir.1978), *cert. denied,* 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979). The declarations appellants submitted when seeking reconsideration of summary judgment merely restated the pleadings; as the Court pointed out in *Celotex,* 106 S.Ct. at 2554, Federal Rule 56(e) does not allow a party to oppose summary judgment on the pleadings themselves.

Unlike in *Wool v. Tandem Computers Inc.,* 818 F.2d 1433, 1438 (9th Cir.1987), in this case appellants submitted no specific facts on which a finder of fact could reasonably conclude that appellants actually suffered damages, caused by Shell Oil defendants, in any quantifiable amount. The district court properly granted summary judgment in favor of Shell Oil defendants.

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III

Appellants contend that the district court erred in denying appellants leave to amend their complaint to add causes of action for fraud and negligent misrepresentation. We affirm the district court's denial of leave to amend.

Federal Rule of Civil Procedure 15(a) states that leave to amend "shall be freely given when justice so requires." Bearing that standard in mind, we review a district court's denial of a motion for leave to amend for an abuse of discretion. Unless we have a definite and firm conviction that the district court committed a clear error of judgment, we will not disturb the district court's decision. *California Arch. Bldg. Prod. v. Franciscan Ceramics,* 818 F.2d 1466, 1472 (9th Cir.1987), *cert. denied,* 484 U.S. 1006, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988).

[3] "[U]ndue delay" is one valid reason for a district court to deny a party leave to amend. *Id.* at 1472 (citing *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962)). Appellants claim that they only became aware of claims for fraud and negligent interference with contract after engaging in discovery in May 1985. Appellants should have been aware of a claim for negligent interference when they filed their original complaint, which included a claim for tortious interference. In any case, appellants did not give notice of their intention to amend their complaint until the middle of December, at least six months after they had become aware of the new claims. Discovery originally was scheduled to end on November 15, 1985, and a trial date was set for December 2, 1985. Appellants waited until the original trial date had been vacated to attempt to amend their complaint. This delay was undue.

[4] "[P]rejudice" is another valid reason for a district court to deny a party leave to amend. *Id.* at 1472 (citing *Foman,* 371 U.S. at 182, 83 S.Ct. at 230). Appellants contend that Shell Oil defendants would have suffered no prejudice because discovery already had covered all the issues presented by the new claims for fraud and negligent interference with contract. As Shell Oil defendants point out, if appellants' contention were true their delay in seeking leave to amend would be even more inexcusable. In fact the new claims, especially fraud, would have required additional discovery on a wide range of new issues; that discovery likely would have included new depositions by Shell Oil defendants' employees. The new claims would have required additional research and rewriting of trial briefs. The resulting delay and expense would have prejudiced Shell Oil defendants, who were entitled to rely on a timely close of discovery and a near-term trial date.

[5][6] Repeated failure to cure deficiencies by amendments previously allowed is ***810** another valid reason for a district court to deny a party leave to amend. *Foman,* 371 U.S. at 182, 83 S.Ct. at 230. In February 1984 appellants filed their complaint. In May 1984 they filed a first amended complaint. In early 1985 they filed an amended first amended complaint. Appellants had ample opportunity to add new claims to their complaint.

The district court did not abuse its discretion in denying appellants leave to amend their complaint in February 1986; justice did not require otherwise.

IV

With respect to their antitrust claims concerning the PB market, the appellants appeal a judgment on the pleadings in favor of Shell Oil defendants and defendant U.S. Brass Corp., a manufacturer of insert pipe fittings. Because appellants' complaint does not sufficiently state a claim upon which relief can be granted, we affirm the district court's order.

A

We review de novo a dismissal by judgment on the pleadings under Rule 12(c). *Gearhart v. Thorne,* 768 F.2d 1072, 1073 (9th Cir.1985). All allegations of fact by the party opposing the motion are accep-

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ted as true. *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir.1984). A dismissal on the pleadings for failure to state a claim is proper only if "the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1368, at 690 (1969)); *see also General Cinema Corp. v. Buena Vista Distrib.*, 681 F.2d 594, 597 (9th Cir.1982).

In this case Rule 12(c) was used to raise the defense of failure to state a claim. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir.1980). As a result, the motion for judgment on the pleadings faces the same test as a motion under Rule 12(b)(6): this court may affirm the district court's dismissal "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984); *see also Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Newman v. Universal Pictures*, 813 F.2d 1519, 1521-22 (9th Cir.1987). Not only must the court accept all material allegations in the complaint as true, but the complaint must be construed, and all doubts resolved, in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986); *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 834-35 (9th Cir.1980). Nonetheless, conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim. *McCarthy v. Mayo*, 827 F.2d 1310, 1317 (9th Cir.1987).

B

In their AFA complaint appellants sued under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2,[FN2] as well as under the California Business and Professional Code, §§ 16700-16760 (California Cartwright Act). Because the district court concluded that appellants had inadequately pleaded antitrust injury to maintain a claim under the Sherman and California Cartwright Acts, the district court granted the defendants' motion for judgment on the pleadings for failure to state a claim.

> FN2. Section 1 of the Sherman Antitrust Act provides, in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Section 2 of the Sherman Antitrust Act provides, in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2.

Appellants contend that their complaint stated sufficient facts to preclude judgment on the pleadings on their federal and state antitrust claims relating to the PB pipe fitting market. Shell Oil defendants maintain that appellants have insufficiently ***811** pleaded antitrust standing or antitrust injury. Defendant U.S. Brass Corp. also argues that the district court properly granted judgment on the pleadings because the complaint pleaded no antitrust injury and did not adequately allege the elements of an antitrust claim.

[7][8] To establish a section 1 violation under the Sherman Act, a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e., "antitrust injury"). *See Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir.1987); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir.1983); *Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1332 (9th Cir.), *cert.*

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denied, 479 U.S. 851, 107 S.Ct. 180, 92 L.Ed.2d 115 (1986); *Cascade Cabinet Co. v. Western Cabinet & Millwork,* 710 F.2d 1366, 1373 (9th Cir.1983).[FN3]

> FN3. The Sherman Act's prohibition against concerted activity in restraint of trade is analyzed under either the "per se" rule or the "rule of reason." The per se analysis is applied to practices that are presumptively illegal, such as (1) horizontal and vertical price-fixing; (2) horizontal market division; (3) group boycotts and concerted refusals to deal; and (4) tie-in sales. *See Cascade Cabinet Co.,* 710 F.2d at 1370. The rule of reason requires " 'the fact-finder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.' " *Id.* (quoting *Arizona v. Maricopa County Medical Soc'y,* 457 U.S. 332, 343, 102 S.Ct. 2466, 2472, 73 L.Ed.2d 48 (1982)). In this case, no *per se* antitrust violation is alleged; rule of reason analysis is appropriate.

[9] To establish a section 2 violation for an attempt to monopolize, a plaintiff must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury. *Supermarket of Homes v. San Fernando Valley Bd.,* 786 F.2d 1400, 1405 (9th Cir.1986); *Rickards,* 783 F.2d at 1335.

[10] A fair and liberal construction of the complaint demonstrates that appellants failed to allege the requisite antitrust injury to competition that is required under both sections 1 and 2 of the Sherman Act.[FN4] The Sherman Act itself speaks of "restraint[s] of trade or commerce,"15 U.S.C. § 1, and attempted monopolization of "trade or commerce," 15 U.S.C. § 2, not individual competitors in a market. The alleged violation must cause injury to competition beyond the impact on the claimant under section 1, and must destroy competition and cause antitrust injury under section 2. To state an antitrust claim, therefore, appellants must allege "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent.... The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) (emphasis in original). The antitrust laws ***812** were enacted for "the protection of *competition,* not *competitors.*" *Brown Shoe Co. v. United States,* 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962) (emphasis in original).

> FN4. The district court also dismissed appellants' state law claim under the California Cartwright Act, Cal.Bus. & Prof Code §§ 16700-16760. If a federal claim is dismissed before trial, any pendent state matters usually should be dismissed as well. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); *Filco v. Amana Refrigeration, Inc.,* 709 F.2d 1257, 1268 (9th Cir.), *cert. dismissed,* 464 U.S. 956, 104 S.Ct. 385, 78 L.Ed.2d 331 (1983). In this case, however, appellants base their state law claim on the same facts on which they base their Sherman Act claims. We have recognized that Cartwright Act claims raise basically the same issues as do Sherman Act claims. *Filco,* 709 F.2d at 1268 (citing *Milton v. Hudson Sales Corp.,* 152 Cal.App.2d 418, 439-41, 313 P.2d 936, 950 (1957)). California state courts follow federal cases in deciding claims under the Cartwright Act. *See Marin County Bd. of Realtors, Inc. v. Palsson,* 16 Cal.3d 920, 925, 130 Cal.Rptr. 1, 3, 549 P.2d 833, 835 (1976); *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.,* 4 Cal.3d 842, 852, 94 Cal.Rptr. 785, 791, 484 P.2d 953, 959

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(1971); *see also Filco,* 709 F.2d at 1268. As a result, our conclusion with regard to the Sherman Act claims applies with equal force to appellants' Cartwright Act claims. Accordingly, we also affirm the district court's grant of judgment on the pleadings on the state antitrust claims.

[11] In their AFA complaint appellants mechanically assert that the alleged violations of the antitrust laws "have had and continue to have a substantial effect on interstate and foreign trade and commerce." Appellants later specifically identify the relevant market by alleging: "For the purposes of the antitrust claims alleged herein, PB is the relevant market for determining the anti-competitive effects of the defendant's actions." Nowhere in their AFA complaint, however, do appellants allege injury to the competitive market for PB. Instead, they allege that the actions between Shell Oil defendants and their overseas affiliates "were taken for the purpose of eliminating McGlinchy and Dan-de as representatives of Shell Chemical and as sellers of PB and PB-related products, and for the financial benefit of defendant Shell Chemical and the parties acting in concert with such defendant." Thus appellants fail to state an antitrust claim based on defendants' conduct with respect to PB and PB-related products. It is injury to the market or to competition in general, not merely injury to individuals or individual firms that is significant. *Ralph C. Wilson Indus. v. Chronicle Broadcasting Co.,* 794 F.2d 1359, 1363 (9th Cir.1986); *Fine v. Barry and Enright Prods.,* 731 F.2d 1394, 1399 (9th Cir.), *cert. denied,* 469 U.S. 881, 105 S.Ct. 248, 83 L.Ed.2d 186 (1984).

Appellants also allege that Shell Oil defendants and other defendant manufacturers of PB insert pipe fittings "engaged in a conspiracy and a systematic pattern and practice to eliminate flare fittings from the marketplace, particularly the flare fittings sold by plaintiffs." [FN5] Appellants allege that the "[c]o-conspirators and said defendants are in violation of the Sherman Act due to their attempt to monopolize the market for fittings for PB plumbing pipe and by wrongfully attempting to eliminate the flare fittings sold by plaintiffs." Finally, appellants allege that Shell Oil defendants, in concert with defendants who compete with the appellants in the PB fittings market, "have engaged in a conspiracy to eliminate plaintiffs from the domestic fittings market, and also have seriously undermined plaintiffs' position in the foreign market, resulting in an unreasonable restraint of trade."

FN5. In the AFA complaint the appellants stated that Dan-de "was and is now engaged in the domestic and overseas business of selling, marketing and promoting polybutylene pipe [and] producing and selling flare-type pipe fittings."

These allegations focus on defendants' conduct with respect to flare fittings. In their brief appellants argue that they alleged injury in the pipe fittings market, rather than the PB market. As appellants are forced to concede, however, the AFA complaint plainly alleges that "PB is the relevant market for determining the anticompetitive effect of defendant's actions." [FN6]

FN6. Appellants acknowledge that they failed to include an allegation that the relevant market was the pipe fittings market. Such an allegation was included in the proposed second amended complaint, which was disallowed by the district court. Because we hold that the district court properly exercised its discretion in not allowing appellants to amend their complaint, we are limited to considering what appears on the AFA complaint in reviewing the judgment on the pleadings for failure to state a claim.

[12] In addition, appellants' allegations amount to an assertion that appellants' own fittings business has been injured by the defendants' conduct. Even if appellants claim a substantial loss to their flare fitting business within the broader PB market,

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"economic injury to a competitor does not equal injury to competition." *Cascade Cabinet Co.*, 710 F.2d at 1373. The elimination of a single competitor, without more, does not prove anticompetitive effect. *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir.1979), *cert. denied,* 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980). As we have stated:

Proof that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of the rule of reason case. It is the impact upon competitive conditions in a ***813** definable market which distinguishes the antitrust violation from the ordinary business tort.

Id. Appellants' failure to allege injury to competition is a proper ground for dismissal by judgment on the pleadings. *See Seattle Totems Hockey Club v. National Hockey League,* 783 F.2d 1347, 1350 (9th Cir.), *cert. denied,* 479 U.S. 932, 107 S.Ct. 405, 93 L.Ed.2d 357 (1986).

Because appellants can prove no set of facts consistent with their complaint that would entitle them to relief under the antitrust laws, appellants have not sufficiently stated an antitrust claim relating to the PB market.

V

Appellants appeal the district court's dismissal of their Sherman Act claims-alleging concerted and unilateral refusal to deal in various foreign markets-against SICC and the Shell Oil defendants. Because appellants pleaded only injury to customers or potential customers located in Southeast Asia and to plaintiffs themselves, we affirm the district court's holding that 15 U.S.C. § 6a precluded subject matter jurisdiction.[FN7]

FN7. The district court also dismissed appellants' California Cartwright Act claims for failure to state a claim under Rule 12(b)(6). We review such dismissals de novo. *Fort Vancouver Plywood Co. v. United States,* 747 F.2d 547, 552 (9th Cir.1984). Appellants have failed to allege conduct that involves intrastate commerce, *see, e.g., R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal.App.3d 653, 657, 666, 112 Cal.Rptr. 585, 587, 594 (1974); instead the state antitrust claims relate only to foreign commerce and fail to allege the requisite antitrust injury. We thus affirm the district court's order dismissing the California Cartwright Act claim for failure to state a claim.

[13] The existence of subject matter jurisdiction presents a question of law reviewable de novo. *See Peter Starr Prod. Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1442 (9th Cir.1986).

[14] Appellants argue that their antitrust claims do not relate exclusively to foreign commerce and that their allegations meet the requirements of section 6a. Moreover, they contend that their complaint has alleged injury to competition in the United States in the relevant market.

SICC responds that appellants have not met the requirements of subsections 1(A) and 1(B) by showing that any effect on United States commerce was "direct, substantial, and reasonably foreseeable." 15 U.S.C. § 6a. In addition, SICC maintains that appellants have not sufficiently alleged an antitrust violation as required by subsection 2 of section 6(a). Shell Oil defendants argue that because all of the purportedly illegal conduct by defendants lacks the requisite domestic effect, the district court properly dismissed the antitrust claims alleging concerted and unilateral refusal to deal in various foreign markets for lack of subject matter jurisdiction under section 6a.

Section 6a was added by the Foreign Trade Antitrust Improvements Act of 1982, Pub.L. No. 97-290, 96 Stat. 1246. It provides:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than im-

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port trade or import commerce) with foreign nations unless-

(1) such conduct has a direct, substantial, and reasonably foreseeable effect-

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a.[FN8] There is little case law interpreting this section. In ***814***Eurim- Pharm GmbH v. Pfizer, Inc.*, 593 F.Supp. 1102 (S.D.N.Y.1984), the district court granted defendants' motion to dismiss for lack of subject matter jurisdiction because the plaintiff had failed to establish that defendants' alleged conduct resulted in an anticompetitive effect on United States domestic or import commerce. *Id.* at 1107. The court reasoned that section 6a"was intended to exempt from United States antitrust law conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities operating abroad." *Id.* at 1106.

> FN8. Prior to enactment of section 6a, the extraterritorial reach of the antitrust laws was governed in this circuit by a tripartite test: (1) the effect or intended effect on the foreign commerce of the United States; (2) the type and magnitude of the alleged illegal behavior; and (3) the appropriateness of exercising extraterritorial jurisdiction in light of considerations of international comity and fairness. *Timberlane Lumber Co. v. Bank of America,* 549 F.2d 597, 613, 615 (9th Cir.1976)(*Timberlane I*). Upon remand of *Timberlane I,* the district court applied the tripartite test. *See Timberlane Lumber Co. v. Bank of America,* 574 F.Supp. 1453, 1463-67 (N.D.Cal.1983), *aff'd,* 749 F.2d 1378 (9th Cir.1984), *cert. denied,* 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985)(*Timberlane II*). On subsequent appeal, this Court reviewed the district court's analysis under the *Timberlane I* standard without mentioning section 6a. *See Timberlane II,* 749 F.2d at 1383-86. Other circuits had expressly rejected the *Timberlane I* test. *See, e.g., National Bank of Canada v. International Card Ass'n,* 666 F.2d 6, 8-9 (2d Cir.1981) (holding that there must be an appreciable anti-competitive effect on this country's commerce of a type sufficient to justify assertion of jurisdiction); *see also Liamuiga Tours v. Travel Impressions, Ltd.,* 617 F.Supp. 920, 923 (E.D.N.Y.1985).
>
> In an effort to provide a single standard for the issue of extraterritorial application of the Sherman Act, Congress enacted section 6a. *See O.N.E. Shipping v. Flota Mercante Grancolombiana,* 830 F.2d 449, 451 (2d Cir.1987), *petition for cert. filed,* Feb. 8, 1988; *The ' In' Porters, S.A. v. Hanes Printables, Inc.,* 663 F.Supp. 494, 497-98 (M.D.N.C.1987). Despite the peculiar procedural history of *Timberlane* -section 6a was enacted between the remand and subsequent appeal-we are bound to apply section 6a.
>
> We note that in passing the Foreign Trade Antitrust Improvements Act, Congress did not change the ability of the courts to exercise principles of international comity. *See*H.R.Rep. 686, 97th

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Cong., 2d Sess. 13 (1982), U.S.Code Cong. & Admin.News 1982, p. 2431; *see also Laker Airways v. Sabena, Belgian World Airways*, 731 F.2d 909, 946 n. 137 (D.C.Cir.1984); *McElderry v. Cathay Pacific Airways*, 678 F.Supp. 1071, 1077, 1988-1 Trade Cas. (CCH) ¶ 67,878, at 57,389, (S.D.N.Y. Feb. 3, 1988); *O.N.E. Shipping*, 830 F.2d at 451-54.

In *Liamuiga Tours v. Travel Impressions, Ltd.*, 617 F.Supp. 920 (E.D.N.Y.1985), the district court dismissed a plaintiff's antitrust claim under section 6a because there was "no jurisdictional nexus" for the court to decide the claim under the Sherman Act. *Id.* at 925. The court reasoned that section 6a's legislative history demonstrated that "the effect required for jurisdictional nexus must be an anticompetitive effect in the domestic market." *Id.* at 924.

In *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494 (M.D.N.C.1987), the district court dismissed an antitrust claim because the foreign company plaintiff failed to meet the jurisdictional requirements of section 6a. *Id.* at 501. The court reasoned that section 6a"establishes three requirements that an antitrust plaintiff, other than a domestic importer, must prove to establish subject matter jurisdiction: (1) the defendant's conduct must have a direct, substantial, and reasonably foreseeable effect on (2) *plaintiff's* continuing ability to export (3) *from the United States.*" *Id.* at 500 (emphasis in original; footnote omitted). The court concluded that the foreign company plaintiff failed to establish that it was within the class of injured United States exporters. *Id.*

In *McElderry v. Cathay Pacific Airways*, 678 F.Supp. 1071, 1077, 1988-1 Trade. Cas. (CCH) ¶ 67,878, at 57,387. (S.D.N.Y. Feb. 3, 1988), the district court dismissed plaintiff's antitrust claims "for failure to meet the requirements of [section 6a]." *Id.* at 57,388, 678 F.Supp. at 1077. The court reasoned that under section 6a federal courts do not have jurisdiction under the Sherman Act unless there is a direct, substantial, and reasonably foreseeable anticompetitive effect on United States commerce, regardless of whether there was anticompetitive conduct in the United States. *Id.* at 57,388-89, 678 F.Supp. at 1077.

***815** In their first amended complaint appellants alleged that their agreement with Shell Chemical involved "the promotion and solicitation of orders for PB resin in Hong Kong, India, Indonesia, Malaysia, the Philippines, Singapore, Taiwan, and Thailand," including attempts "to locate, develop and to promote local manufacturers or extruders of PB pipe in South East Asia." Because appellants challenge conduct in their antitrust claim that involves trade or commerce (other than import trade or import commerce) with foreign nations, they must satisfy either subsection (1)(A) or (1)(B), and subsection 2 of section 6a.

Appellants draw our attention to their allegations that "Dan-de was and is now engaged in the domestic and overseas business of selling and promoting pipe," and that the defendants' conspiracy resulted "in the termination of plaintiffs' agreement with Shell Chemical to be its exclusive representative in the sale, promotion, and distribution of PB resin and products in South East Asia and other areas."

As to subsection (1)(A), appellants have failed to allege that the defendants' conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce or import trade. 15 U.S.C. § 6a(1)(A). As to subsection (1)(B), appellants have not sufficiently alleged a direct, substantial, and reasonably foreseeable effect on export trade or commerce. 15 U.S.C. § 6a(1)(B). Indeed, in their first amended complaint appellants never maintained that they were exporters.

Finally, appellants have failed to allege an antitrust claim under subsection 2 of section 6a. Appellants must allege antitrust injury to the market or to competition in general, not merely injury to individuals or individual firms. *See Ralph C. Wilson Indus.*, 794 F.2d at 1363; *Fine*, 731 F.2d at 1399. Appel-

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lants' first amended complaint only alleges injury to themselves, rather than to the relevant market.

After a careful review of the first amended complaint, we conclude that appellants' claims relate only to foreign commerce without the requisite domestic anticompetitive effect. The district court properly dismissed the antitrust claims concerning refusal to deal in foreign trade and commerce on the ground that the court lacked subject matter jurisdiction.

VI

Appellants argue that the district court improperly dismissed contract and tort claims against SICC for lack of personal jurisdiction. The district court found that it did not have personal jurisdiction over SICC, a nonresident, London-based firm, because appellants failed to demonstrate either "pervasive activities" by SICC in California or "minimum contacts" linking SICC to California. We affirm the district court's dismissal of the AFA complaint against SICC for lack of personal jurisdiction.

Appellants also argue that the district court erred in denying them leave to amend defects in the AFA complaint. The district court found that appellants' proposed Second Amended Complaint failed to cure defects in the AFA complaint. We affirm the district court's denial of leave to amend the AFA by the proposed Second Amended Complaint.

A

We review dismissal of the complaint against SICC de novo. *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir.1986).

[15] Appellants argue that SICC conducted "pervasive activities" in California, thereby subjecting SICC to personal jurisdiction in that state. The district court found that SICC's activities were not sufficiently pervasive to subject it to personal jurisdiction under the "pervasive activities" test. As set out in *Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1287 (9th Cir.1977), this test requires an allegation that "the nonresident ['s] ... activities within the [forum] state are 'substantial' or 'continuous and systematic.' "

At no point have appellants alleged facts which would support a prima facie case for personal jurisdiction based on "substantial" or "continuous and systematic" activities in ***816** California. SICC has never maintained offices, qualified to do business, or regularly solicited business in California. SICC has never assigned agents or employees to work regularly in California, has never owned, used, or possessed real property in California, and has never contracted to supply goods or services in Califor- nia.

SICC has never conducted any "substantial" or "continuous and systematic" activities in California. Thus SICC has not conducted "pervasive activities" in California.

Alternatively, appellants argue that they alleged sufficient "minimum contacts" in the AFA complaint to establish personal jurisdiction over SICC. We apply three criteria to determine whether sufficient "minimum contacts" exist to establish personal jurisdiction: "(1) the nonresident defendant must perform some act by which he purposefully avails himself of the benefits and protections of the forum's laws; (2) the plaintiff's claim must arise out of or result from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable." *Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395, 397 (9th Cir.1983); *see also Data Disc*, 557 F.2d at 1287.

Appellants allege that because the contract between SICC and appellants was signed by appellants in California, SICC "purposely availed" itself of the benefits and protections of California laws. The district court considered this allegation insufficient to constitute an SICC "act" of "purposefully availing." We agree.

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Four reasons explain why appellants' execution of the contract in California is insufficient to meet the "purposefully availing" part of the "minimum contacts" test.

First, the contract was negotiated in England. Because "the substance of the relationship was formed" in England, the formality of signing the contract in California cannot establish jurisdiction. *R.E. Sanders & Co. v. Lincoln-Richardson Enters., Inc.*, 108 Cal.App.3d 71, 80, 166 Cal.Rptr. 269, 273-74 (1980) (quoting *Lakeside Ridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596, 604 (7th Cir.1979), *cert. denied*, 445 U.S. 907, 100 S.Ct. 1087, 63 L.Ed.2d 325 (1980).

Second, the contract makes no reference to California or to the United States, either as appellants' place of residence or as a forum for dispute settlement.

Third, no authorized agents of SICC were alleged to have performed or executed any portion of the contract in California. The parties conducted contract execution and termination by international mail. Such contacts are insufficient to constitute an act purposefully availing SICC of California laws. *See Interdyne Co. v. SYS Computer Corp.*, 31 Cal.App.3d 508, 107 Cal.Rptr. 499, 501 (1973).

Fourth, even paired with appellants' alleged acts of inviting SICC to use and to observe California facilities and expertise, appellants' allegations fail to state a prima facie case. It is well settled that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958).[FN9]

> FN9. More recently, the Supreme Court has held that "an individual's contract with an out-of-state party *alone* [cannot] automatically establish sufficient minimum contacts" to support personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 105 S.Ct. 2174, 2185, 85 L.Ed.2d 528 (1985) (emphasis in original).

Appellants' invitation to SICC to avail itself of appellants' California facilities constitutes unilateral activity. In the absence of contractual obligations by SICC, such as sale of goods or services to California residents or a deliberate presence in California, such activity is insufficient to satisfy part one of the "minimum contacts" test. Similarly, appellants' statement that they "performed 90% of [their] activities in the Bay Area," even if accurate, describes only unilateral activity. Again, such activity fails to create personal jurisdiction over SICC.

Thus appellants' complaint fails to state that SICC "purposefully availed" itself of California's laws. As we stated in *Republic Int'l Corp. v. Amco Eng'rs, Inc.*, 516 F.2d 161 (9th Cir.1975), " '[a plaintiff's] performance***817** in California cannot give jurisdiction over ... [a nonresident defendant]; it is [a defendant's] activity that must provide the basis for jurisdiction.' " *Id.* at 167 (citation omitted). *See also Hanson*, 357 U.S. at 253, 78 S.Ct. at 1239. Here the complete absence of activity by SICC in California bars personal jurisdiction over SICC.

Appellants suggest that a different result is compelled by our recent holding in *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392 (9th Cir.1986). In *Haisten*, we stated:

[R]ecent Supreme Court cases indicate that modification of our three-prong test is appropriate. In particular, within the rubric of 'purposeful availment' the Court has allowed the exercise of jurisdiction over a defendant whose only 'contact' with the forum state is the 'purposeful direction' of a *foreign* act having *effect* in the forum state.

Id. at 1397 (emphasis in original) (quoting *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984)).

SICC's contractual obligations were to be carried

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out expressly in countries other than the United States. The contract makes no reference to California, to appellants' residence in California, or to any reliance on appellants' facilities in California. Appellants nevertheless allege that SICC's contractual obligations constitute a "foreign act purposefully direct[ed]" to have an "effect" in California.

This argument is specious. While the contract was indeed a "foreign act," it was not "purposefully direct[ed]" to have any "effect" in California. In *Haisten,* the insurance agreement "explicitly concerned the indemnification of *California* physicians against liability solely under *California* malpractice law. Thus, the effect in California was not only foreseeable, it was contemplated and bargained for." *Id.* In *Calder,* which we cited in *Haisten,* the Supreme Court considered a libel claim by a plaintiff who defendant knew to reside in California. The *Calder* court noted that defendants "knew that the brunt of that injury would be felt by [the plaintiff] in the State in which the National Enquirer [owned by defendant] has its largest circulation." More specifically, the *Calder* court pointed to the fact that the defendant's "intentional, and allegedly tortious, actions were *expressly aimed at California.*" *Calder,* 465 U.S. at 789, 104 S.Ct. at 1487 (emphasis added).

The facts of this case are significantly different. The relevant contract does not name California, expressly or by implication. The contract does not name the United States. It does name twenty-one other countries. There are no terms in the contract which would indicate that SICC contemplated an effect in California, much less that any such effect should be considered a material term of agreement. The contract was "purposefully directed" at activities in nations other than the United States; appellants concede this when they recite their "willingness and ability" to "travel anywhere, anytime and any place ... to expand the market for [SICC's product]."

Finally, unlike in *Calder* or *Haisten,* in this case personal jurisdiction is sought on a contract claim, not on a tort claim. Appellants have failed to allege sufficient facts, including a tortious act or effect, to establish personal jurisdiction over their tort claims.

Appellants do not allege an "act ... purposefully availing" SICC of the forum's laws, or a "foreign act ... purposefully directed ..." at an "effect" in California; hence appellants fail to satisfy part one of the "minimum contacts" test. Having established that appellants did not allege sufficient facts to support personal jurisdiction under either the "pervasive activities" test or under part one of the "minimum contacts" test, we need not consider whether appellants have satisfied parts two and three of the "minimum contacts" test.[FN10] ***818** The district court properly dismissed appellants' complaint against SICC for lack of personal jurisdiction.

> FN10. Ordinarily, if part one of the "minimum contacts" test is satisfied, we proceed to part two, which requires that appellants' claim "arise out of or result from the defendant's forum-related activities," *Raffaele,* 707 F.2d at 397, and part three, which requires that the exercise of jurisdiction be "reasonable." *Id.; Data Disc,* 557 F.2d at 1287. Personal jurisdiction is established, under the "minimum contacts" test, only if all three parts of this test are satisfied.

B

We review denial of leave to amend a complaint for abuse of discretion. *Halet v. Wend Inv. Co.,* 672 F.2d 1305, 1310 (9th Cir.1982). The deficiencies in the AFA complaint are not cured by new facts or allegations presented by appellants in the proposed Second Amended Complaint. Accordingly, the district court did not abuse its discretion in denying leave to amend by means of the Second Amended Complaint. *Id.*

VII

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The district court did not abuse its discretion in excluding the expert witnesses' studies and testimony and properly granted summary judgment in favor of Shell Oil defendants on appellants' contract theory and tortious interference claims. The district court did not abuse its discretion in denying appellants leave to amend their complaint to include claims for fraud and negligent interference with contract.

Because appellants failed to state sufficiently an antitrust claim upon which relief can be granted, the district court properly granted judgment on the pleadings in favor of Shell Oil and PB pipe fitting defendants. The district court also properly dismissed appellants' Sherman Act claims against SICC and Shell Oil defendants relating to various foreign markets. Appellants' complaint does not satisfy the requirements of 15 U.S.C. § 6a, thereby depriving the district court of subject matter jurisdiction.

The district court properly dismissed appellants' AFA complaint against SICC for lack of personal jurisdiction and did not abuse its discretion in denying appellants leave to amend.

AFFIRMED.

C.A.9 (Cal.),1988.
McGlinchy v. Shell Chemical Co.
845 F.2d 802, 1988-1 Trade Cases P 67,973, 25 Fed. R. Evid. Serv. 813

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70 S.Ct. 652
339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865

Supreme Court of the United States
MULLANE
v.
CENTRAL HANOVER BANK & TRUST CO. et al.
No. 378.

Argued and Submitted Feb. 8, 1950.
Decided April 24, 1950.

Proceeding by the Central Hanover Bank and Trust Company, as trustee, etc., for judicial settlement of its accounts as trustee of a common trust fund established under the New York Banking Law, wherein Kenneth J. Mullane was appointed special guardian and attorney for certain persons known or unknown not otherwise appearing. The Court of Appeals of the State of New York, 299 N.Y. 697, 87 N.E.2d 73, answered certified questions and affirmed an order of the Supreme Court, Appellate Division, 275 App.Div. 769, 88 N.Y.S.2d 907, which affirmed a decree of the Surrogate's Court accepting the accounts. The special guardian appealed. The Supreme Court, in an opinion by Mr. Justice Jackson, held that statutory notice by newspaper publication setting forth merely the name and address of the trust company, name and date of establishment of the common trust fund, and a list of all participating estates, trusts or funds was sufficient as to beneficiaries whose interests or whereabouts could not with due diligence be ascertained and as to those whose interests were conjectural or future or did not in the due course of business come to the knowledge of the trustee, but that the notice was insufficient with respect to known present beneficiaries of a known place of residence and did not satisfy the requirements of due process of law.

Judgment reversed.

Mr. Justice Burton dissented.

West Headnotes

[1] Federal Courts 170B ⚿504.1

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk504 Nature of Decisions or Questions Involved
170Bk504.1 k. In General. Most Cited Cases
(Formerly 170Bk504, 106k394(1))
Common trust fund legislation is addressed to a problem appropriate for state action.

[2] Banks and Banking 52 ⚿315(1)

52 Banks and Banking
52VI Loan, Trust, and Investment Companies
52k315 Functions and Dealings
52k315(1) k. In General. Most Cited Cases
In New York, a final decree accepting the accounts of the trustee of a common trust fund established under the New York Banking Law wholly terminates and seals every right which beneficiaries would otherwise have against the trust company either as trustee of the common fund or as trustee of any individual trust for improper management of the common trust fund during the period covered by the accounting. Banking Law N.Y., §§ 1 et seq., 100-c.

[3] Federal Courts 170B ⚿504.1

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk504 Nature of Decisions or Questions Involved
170Bk504.1 k. In General. Most Cited Cases
(Formerly 170Bk504, 106k394(1))
The interest of each state in providing means to close trusts that exist by the grace of its laws and

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are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interest of all claimants, resident or non-resident, provided its procedure accords full opportunity to hear and be heard. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 ⚿3912

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and Timing of Deprivation; Pre- or Post-Deprivation Remedies. Most Cited Cases
(Formerly 92k251.6, 92k309(1))
Under provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty or property without "due process of law", quoted words require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 ⚿4089

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4087 Wills, Trusts, Probate, Inheritance, and Dower
92k4089 k. Proceedings. Most Cited Cases
(Formerly 92k309(1))
A proceeding on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law may cut off rights of beneficiaries to have the trustee answer for negligent or illegal impairment of their interests, and may subject their interests to diminution by allowance of fees and expenses to one who in their name but without their knowledge may conduct a fruitless or uncompensatory contest, and hence notice and hearing must measure up to the standards of due process of law. Banking Law N.Y., §§ 1 et seq., 100-c; U.S.C.A. Const.Amend. 14.

[6] Constitutional Law 92 ⚿3975

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3973 Process or Other Notice
92k3975 k. Form and Adequacy. Most Cited Cases
(Formerly 92k309(1))
Personal service of written notice within the jurisdiction is adequate notice in any type of proceeding under the requirement of due process of law. U.S.C.A. Const.Amend. 14.

[7] Constitutional Law 92 ⚿3879

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3879 k. In General. Most Cited Cases
(Formerly 92k251.6, 92k305)
A fundamental requisite of due process of law is the opportunity to be heard. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law 92 ⚿3881

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3881 k. Notice. Most Cited Cases
(Formerly 92k251.6, 92k309(1))
A fundamental requirement of due process of law in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to

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present their objections; and the notice must be of such nature that it reasonably conveys the required information, and must afford a reasonable time for those interested to make their appearance; but if, with due regard for practicalities and peculiarities of the case, those conditions are reasonably met, the constitutional requirements are satisfied. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law 92 ⚿3881

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3881 k. Notice. Most Cited Cases
(Formerly 92k309(2))

In providing for publication or other means of constructive notice satisfying the requirements of due process of law in any proceeding, a state may indulge the assumption that one who has left tangible property in the state either has abandoned it or has left some caretaker under duty to let him know that it is being jeopardized. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law 92 ⚿3881

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3881 k. Notice. Most Cited Cases
(Formerly 92k309(2))

In the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 92 ⚿4089

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4087 Wills, Trusts, Probate, Inheritance, and Dower
92k4089 k. Proceedings. Most Cited Cases
(Formerly 92k309(2))

In a proceeding for judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law, statutory notice by newspaper publication setting forth merely the name and address of the trust company, the name and date of establishment of the common trust fund, and a list of all participating estates, trusts or funds was sufficient as to those beneficiaries whose interests or whereabouts could not with due diligence be ascertained, and as to those beneficiaries whose interests were either conjectural or future or those beneficiaries who, although they could be discovered upon investigation, did not in due course of business come to the knowledge of the common trustee, and such notice satisfied the requirements of due process of law. Banking Law N.Y. §§ 1 et seq., 100-c, subds. 9, 12; U.S.C.A. Const.Amend. 14.

[12] Constitutional Law 92 ⚿3881

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3881 k. Notice. Most Cited Cases
(Formerly 92k251.6, 92k309(1))

Exceptions in the name of necessity do not abrogate the rule that, within limits of practicability, notice must be such as is reasonably calculated to reach interested parties to afford them due process of law. U.S.C.A. Const.Amend. 14.

[13] Constitutional Law 92 ⚿4089

92 Constitutional Law
92XXVII Due Process

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92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4087 Wills, Trusts, Probate, Inheritance, and Dower
92k4089 k. Proceedings. Most Cited Cases
(Formerly 92k309(1))
In a proceeding on judicial settlement of accounts by the trustee of a common trust fund established under New York Banking Law, notice reasonably certain to reach those beneficiaries most interested in objecting was required to satisfy the requirements of due process of law. Banking Law N.Y. § 1 et seq.; U.S.C.A. Const.Amend. 14.

[14] Constitutional Law 92 ⚿4089

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4087 Wills, Trusts, Probate, Inheritance, and Dower
92k4089 k. Proceedings. Most Cited Cases
(Formerly 92k309(2))
In a proceeding on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law, as to known present beneficiaries of known place of residence, statutory notice by newspaper publication setting forth merely the name and address of the trust company, the name and date of establishment of the common trust fund, and a list of all participating estates, trusts or funds was insufficient, and did not satisfy the requirements of due process of law. Banking Law N.Y. §§ 1 et seq., 100-c, subds. 9, 12; U.S.C.A. Const.Amend. 14.

****653 *307** Mr. Kenneth J. Mullane, New York City, for appellants.
****654** Mr. Albert B. Maginnes, New York City, for appellee, Central Hanover Bank and Trust Co.
Mr. James N. Vaughan, New York City, for appellee, James N. Vaughan, Guardian et al.

Mr. Justice JACKSON delivered the opinion of the Court.
This controversy questions the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law, Consol.Laws, c. 2. The New York Court of Appeals considered and overruled objections that the statutory notice contravenes requirements of the Fourteenth Amendment and that by allowance of the account beneficiaries were deprived of property without due process of law. 299 N.Y. 697, 87 N.E.2d 73. The case is here on appeal under 28 U.S.C. s 1257, 28 U.S.C.A. s 1257.

[1] Common trust fund legislation is addressed to a problem appropriate for state action. Mounting overheads have made administration of small trusts undesirable to corporate trustees. In order that donors and testators of moderately sized trusts may not be denied the service of corporate fiduciaries, the District of Columbia and some ***308** thirty states other than New York have permitted pooling small trust estates into one fund for investment administration.[FN*] The income, capital gains, losses and expenses of the collective trust are shared by the constituent trusts in proportion to their contribution. By this plan, diversification of risk and economy of management can be extended to those whose capital standing alone would not obtain such advantage.

FN* Ala.Code Ann., 1940, Cum.Supp.1947, tit. 58, ss 88 to 103, as amended, Laws 1949, Act 262; Ariz.Code Ann., 1939, Cum.Supp.1949, ss 51-1101 to 51-1104; Ark.Stat.Ann.1947, ss 58-110 to 58-112; Cal.Bank.Code Ann., Deering 1949, s 1564; Colo.Stat.Ann., 1935, Cum.Supp.1947, c. 18, ss 173 to 178; Conn.Gen.Stat.1949 Rev., s 5805; Del.Rev.Code, 1935, s 4401, as amended, Laws 1943, c. 171, Laws 1947, c. 268; (D.C.) Pub.Law No. 416, 81st Cong., 1st

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Sess., c. 767, Oct. 27, 1949, 63 Stat. 938; Fla.Stat., 1941, ss 655.29 to 655.34, F.S.A.; Ga.Code Ann., 1937, Cum.Supp.1947, ss 109-601 to 109-622; Idaho Code Ann., 1949, Cum.Supp.1949, ss 68-701 to 68-703; Ill.Rev.Stat., 1949, c. 16 1/2, ss 57 to 63; Ind.Stat.Ann., Burns 1950, ss 18-2009 to 18-2014; Ky.Rev.Stat., 1948, s 287.230; La.Gen.Stat.Ann., 1939, s 9850.64, Act No. 81 of 1938, s 64; Md.Ann.Code Gen.Laws, 1939, Cum.Supp.1947, art. 11, s 62A; Mass.Ann.Laws, 1933, Cum.Supp.1949, c. 203A; Mich.Stat.Ann., 1943, Cum.Supp.1949, ss 23.1141 to 23.1153, Comp.Laws 1948, ss 555.101-555.113; Minn.Stat., 1945, s 48.84, as amended, Laws 1947, c. 234, M.S.A.; N.J.S.A., 1939, Cum.Supp.1949, ss 17:9A-36 to 17:9A-46; N.C.Gen.Stat., 1943, ss 36-47 to 36-52; Ohio Gen.Code Ann. (Page's 1946), Cum.Supp.1949, ss 715 to 720, 722; Okla.Stat.1941, Cum.Supp.1949, tit. 60, s 162; Pa.Stat.Ann., 1939, Cum.Supp.1949, tit. 7, ss 819-1109 to 819-1109d; So.Dak.Laws 1941, c. 20; Vernon's Tex.Rev.Civ.Stat.Ann., 1939, Cum.Supp.1949, art. 7425b-48; Vt. Stat., 1947 Rev., s 8873; Va.Code Ann., 1950, ss 6-569 to 6-576; Wash.Rev.Stat.Ann., Supp.1943, ss 3388 to 3388-6; W.Va.Code Ann., 1949, s 4219 (1) et seq.; Wisc.Stat., 1947, s 223.055.

Statutory authorization for the establishment of such common trust funds is provided in the New York Banking Law, s 100-c, c. 687, L.1937, as amended by c. 602, L.1943 and c. 158, L.1944. Under this Act a trust company may, with approval of the State Banking Board, establish a common fund and, within prescribed limits, ***309** invest therein the assets of an unlimited number of estates, trusts or other funds of which it is trustee. Each participating trust shares ratably in the common fund, but exclusive management and control is in the trust company as trustee, and neither a fiduciary nor any beneficiary of a participating trust is deemed to have ownership in any particular asset or investment of this common fund. The trust company must keep fund assets separate from its own, and in its fiduciary capacity may not deal with itself ****655** or any affiliate. Provisions are made for accountings twelve to fifteen months after the establishment of a fund and triennially thereafter. The decree in each such judicial settlement of accounts is made binding and conclusive as to any matter set forth in the account upon everyone having any interest in the common fund or in any participating estate, trust or fund.

In January, 1946, Central Hanover Bank and Trust Company established a common trust fund in accordance with these provisions, and in March, 1947, it petitioned the Surrogate's Court for settlement of its first account as common trustee. During the accounting period a total of 113 trusts, approximately half inter vivos and half testamentary, participated in the common trust fund, the gross capital of which was nearly three million dollars. The record does not show the number or residence of the beneficiaries, but they were many and it is clear that some of them were not residents of the State of New York.

The only notice given beneficiaries of this specific application was by publication in a local newspaper in strict compliance with the minimum requirements of N.Y. Banking Law s 100-c(12): 'After filing such petition (for judicial settlement of its account) the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week ***310** for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of

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any such estate, trust or fund.'Thus the only notice required, and the only one given, was by newspaper publication setting forth merely the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds.

At the time the first investment in the common fund was made on behalf of each participating estate, however, the trust company, pursuant to the requirements of s 100-c(9), had notified by mail each person of full age and sound mind whose name and address was then known to it and who was 'entitled to share in the income therefrom * * * (or) * * * who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice.'Included in the notice was a copy of those provisions of the Act relating to the sending of the notice itself and to the judicial settlement of common trust fund accounts.

Upon the filing of the petition for the settlement of accounts, appellant was, by order of the court pursuant to s 100-c(12), appointed special guardian and attorney for all persons known or unknown not otherwise appearing who had or might thereafter have any interest in the income of the common trust fund; and appellee Vaughan was appointed to represent those similarly interested in the principal. There were no other appearances on behalf of any one interested in either interest or principal.

***311** Appellant appeared specially, objecting that notice and the statutory provisions for notice to beneficiaries were inadequate to afford due process under the Fourteenth Amendment, and therefore that the court was without jurisdiction to render a final and binding decree. Appellant's objections were entertained and overruled, the Surrogate holding that the notice required and given was sufficient. 75 N.Y.S.2d 397. A final decree accepting the accounts has been entered, affirmed by the Appellate Division of the Supreme Court, In re Central Hanover Bank & Trust Co., 275 App.Div. 769, 88 N.Y.S.2d 907, and by the Court of Appeals of the State of New York, 299 N.Y. 697, 87 N.E.2d 73.

[2] The effect of this decree, as held below, is to settle 'all questions respecting ****656** the management of the common fund.'We understand that every right which beneficiaries would otherwise have against the trust company, either as trustee of the common fund or as trustee of any individual trust, for improper management of the common trust fund during the period covered by the accounting is sealed and wholly terminated by the decree. See Matter of Hoaglund's Estate, 194 Misc. 803, 811-812, 74 N.Y.S.2d 156, 164,affirmed 272 App.Div. 1040, 74 N.Y.S.2d 911,affirmed 297 N.Y. 920, 79 N.E.2d 746; Matter of Bank of New York, 189 Misc. 459, 470, 67 N.Y.S.2d 444, 453; Matter of Security Trust Co. of Rochester, 189 Misc. 748, 760, 70 N.Y.S.2d 260, 271; Matter of Continental Bank & Trust Co., 189 Misc. 795, 797, 67 N.Y.S.2d 806, 807-808.

We are met at the outset with a challenge to the power of the State-the right of its courts to adjudicate at all as against those beneficiaries who reside without the State of New York. It is contended that the proceeding is one in personam in that the decree affects neither title to nor possession of any res, but adjudges only personal rights of the beneficiaries to surcharge their trustee for negligence or breach of trust. Accordingly, it is said, under the strict doctrine of Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, the Surrogate ***312** is without jurisdiction as to nonresidents upon whom personal service of process was not made.

Distinctions between actions in rem and those in personam are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own. Buckland and McNair, Roman Law and Common Law, 66; Burdick, Principles of Roman Law and Their Relation to Modern Law, 298. The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its dis-

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tinctions, while new forms of proceedings have confused the old procedural classification. American courts have sometimes classed certain actions as in rem because personal service of process was not required, and at other times have held personal service of process not required because the action was in rem. See cases collected in Freeman on Judgments, ss 1517 et seq. (5th ed.).

[3] Judicial proceedings to settle fiduciary accounts have been sometimes termed in rem, or more indefinitely quasi in rem, or more vaguely still, 'in the nature of a proceeding in rem.' It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both in rem and in personam. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding ***313** upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

[4] Quite different from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice****657** and opportunity for hearing appropriate to the nature of the case.

[5] In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

[6] Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which ***314** would place impossible or impractical obstacles in the way could not be justified.

[7] Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances

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been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.

[8] An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357; Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363; Priest v. Board of Trustees of Town of Las Vegas, 232 U.S. 604, 34 S.Ct. 443, 58 L.Ed. 751; Roller v. Holly, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520. The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly, supra, and cf. Goodrich v. Ferris, 214 U.S. 71, 29 S.Ct. 580, 53 L.Ed. 914. But if with due regard for the practicalities and peculiarities of the case these conditions ***315** are reasonably met the constitutional requirements are satisfied.'The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' American Land Co. v. Zeiss, 219 U.S. 47, 67, 31 S.Ct. 200, 207, 55 L.Ed. 82, and see Blinn v. Nelson, 222 U.S. 1, 7, 32 S.Ct. 1, 2, 56 L.Ed. 65, Ann.Cas.1913B, 555.

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091, with ****658**Wuchter v. Pizzutti, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446, 57 A.L.R. 1230, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.

***316** [9] Nor is publication here reinforced by steps likely to attract the parties' attention to the proceeding. It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning. The ways or an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has

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left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, cf. Anderson National Bank v. Luckett, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692, 151 A.L.R. 824; Security Savings Bank v. California, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301, 31 A.L.R. 391, or that he has left some caretaker under a duty to let him know that it is being jeopardized. Ballard v. Hunter, 204 U.S. 241, 27 S.Ct. 261, 51 L.Ed. 461; Huling v. Kaw Valley Ry. & Imp. Co., 130 U.S. 559, 9 S.Ct. 603, 32 L.Ed. 1045. As phrased long ago by Chief Justice Marshall in The Mary, 9 Cranch 126, 144, 3 L.Ed. 678,'It is the part of common prudence for all those who have any interest in (a thing), to guard that interest by persons who are in a situation to protect it.'

In the case before us there is, of course, no abandonment. On the other hand these beneficiaries do have a resident fiduciary as caretaker of their interest in this property. But it is their caretaker who in the accounting becomes their adversary. Their trustee is released from giving notice of jeopardy, and no one else is expected to do so. Not even the special guardian is required or apparently expected to communicate with his ward and client, and, of course, if such a duty were merely transferred***317** from the trustee to the guardian, economy would not be served and more likely the cost would be increased.

[10] This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. Cunnius v. Reading School District, 198 U.S. 458, 25 S.Ct. 721, 49 L.Ed. 1125, 3 Ann.Cas. 1121; ****659**Blinn v. Nelson, 222 U.S. 1, 32 S.Ct. 1, 56 L.Ed. 65, Ann.Cas.1913B, 555; and see Jacob v. Roberts, 223 U.S. 261, 32 S.Ct. 303, 56 L.Ed. 429.

[11] Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.

Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee. Whatever searches might be required in another situation under ordinary standards of diligence, in view of the character of the proceedings and the nature of the interests here involved we think them unnecessary. We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral; and we have no doubt that such impracticable and extended searches are not required in the ***318** name of due process. The expense of keeping informed from day to day of substitutions among even current income beneficiaries and presumptive remaindermen, to say nothing of the far greater number of contingent beneficiaries, would impose a severe burden on the plan, and would likely dissipate its advantages. These are practical matters in which we should be reluctant to disturb the judgment of the state authorities.

Accordingly we overrule appellant's constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee.

[12] As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the

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name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses. Cf. Wuchter v. Pizzutti, supra. Certainly sending them a copy of the statute months and perhaps years in advance does not answer this purpose. The trustee periodically remits their income to them, and we think that they might reasonably expect that with or apart from their remittances word might come to them personally that steps were being taken affecting their interests.

[13] We need not weigh contentions that a requirement of personal service of citation on even the large number of known resident or nonresident beneficiaries would, by ***319** reasons of delay if not of expense, seriously interfere with the proper administration of the fund. Of course personal service even without the jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it might lack. However, no such service is required under the circumstances. This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any ****660** objections sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable.'Now and then an extraordinary case may turn up, but constitutional law, like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt, justice will be done.' Blinn v. Nelson, supra, 222 U.S. at page 7, 32 S.Ct. at page 2, 56 L.Ed. 65, Ann.Cas.1913B, 555.

[14] The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.

In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with ***320** less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, 'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' McDonald v. Mabee, 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608, L.R.A.1917F, 458.

We hold the notice of judicial settlement of accounts required by the New York Banking Law s 100-c(12) is incompatible with the requirements of

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the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. Accordingly the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

Mr. Justice BURTON, dissenting.

These common trusts are available only when the instruments creating the participating trusts permit participation in the common fund. Whether or not further notice to beneficiaries should supplement the notice and representation here provided is properly within the discretion of the State. The Federal Constitution does not require it here.

U.S. 1950.
Mullane v. Central Hanover Bank & Trust Co.
339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865

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EXHIBIT N

EXHIBIT O

EXHIBIT P

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United States District Court,N.D. Indiana,Fort Wayne Division.
PATTON ELECTRIC COMPANY, INC., Plaintiff,
v.
RAMPART AIR, INC., and Connelly/Osth & Co., Defendants.
Civ. No. F 90-177.

Sept. 30, 1991.

Plaintiff corporation brought action against defendant corporations seeking declaratory judgment that it had right to compete with competitor without interference from defendants. Plaintiff filed amended complaint seeking damages for fraud in inducement of contract and rescission of contract. Defendants moved to dismiss and for summary judgment. The District Court, William C. Lee, J., held that: (1) plaintiff purposefully misused Declaratory Judgment Act, and therefore suit would be dismissed for forum shopping; (2) district court did not have either specific or general jurisdiction over defendant; and (3) defendants adequately defended themselves against plaintiff's amended complaint.

Motion for summary judgment granted; motion to dismiss granted.

West Headnotes

[1] Limitation of Actions 241 ⚿127(12)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k127 Amendment of Pleadings
241k127(11) Amendment Introducing New Cause of Action
241k127(12) k. Nature of Action in General. Most Cited Cases
Plaintiff corporation's amended complaint for actual and punitive damages arising from defendant corporations' alleged fraud in inducement of contract did not arise out of same conduct, transaction, or occurrence as original complaint, and thus did not relate back to original complaint, which sought declaratory judgment that plaintiff corporation could issue brochures comparing plaintiff's fans with competitor's fans without interference from defendant corporations, and therefore only original complaint could be considered in determining whether plaintiff corporation purposefully misused Declaratory Judgment Act. Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.; 28 U.S.C.A. §§ 2201, 2202.

[2] Federal Civil Procedure 170A ⚿1741

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1741 k. In General. Most Cited Cases
Plaintiff corporation purposefully misused Declaratory Judgment Act, and therefore plaintiff corporation's suit would be dismissed for forum shopping, where plaintiff corporation had copy of defendant corporations' complaint which they intended to file in different district court if plaintiff corporation did not respond to their demands, plaintiff corporation filed declaratory judgment action three days before defendants filed their action, and plaintiff's action was not proper declaratory judgment action because damage had already accrued to defendants and early adjudication of plaintiff's rights was not necessary. 28 U.S.C.A. §§ 2201, 2202.

[3] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
When defendant raises lack of personal jurisdiction

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in motion to dismiss, burden is on plaintiff to demonstrate basis for forum court's exercise of personal jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[4] Federal Courts 170B ⚿417

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk417 k. Federal Jurisdiction. Most Cited Cases
In diversity cases, district court has jurisdiction over nonresident defendant only if state court would have jurisdiction. 28 U.S.C.A. § 1332.

[5] Constitutional Law 92 ⚿3963

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3963 k. Personal Jurisdiction in General. Most Cited Cases
(Formerly 92k305(4.1), 92k305(4))

Courts 106 ⚿12(2.1)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.1) k. In General. Most Cited Cases
(Formerly 106k12(2))
Indiana rule controlling personal jurisdiction is intended to extend personal jurisdiction to extent allowed by due process. Ind.Trial Procedure Rules 4.4, 4.4(A); U.S.C.A. Const.Amend. 14.

[6] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Before district court can exercise personal jurisdiction it must determine that minimum contacts exists between forum state and nonresident defendant, which comport with due process. U.S.C.A. Const.Amend. 14.

[7] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
In determining whether it has personal jurisdiction, district court must determine whether it is reasonable, due to nonresident defendant's conduct in connection with forum state, for nonresident defendant to anticipate being haled into court in forum state.

[8] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
In determining whether it has personal jurisdiction, district court must determine whether nonresident defendant purposely availed himself or itself of privilege of conducting activities within forum state.

[9] Federal Courts 170B ⚿76.5

170B Federal Courts

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170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
In determining whether district court has personal jurisdiction, test for minimum contacts is flexible and necessarily dependent upon facts of each case with particular attention being given to nature and quality of contacts.

[10] Federal Courts 170B 76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases

Federal Courts 170B 76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
District court may exercise jurisdiction over nonresident defendants if court has either specific or general jurisdiction over defendants; specific jurisdiction exists when defendant's contacts with forum are related to controversy and those contacts reach minimum threshold.

[11] Federal Courts 170B 76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
If controversy does not arise out of nonresident defendant's contacts with forum, court may exercise general jurisdiction over defendant if defendant has continuous and systematic contacts with forum, even though those contacts have no relation to underlying controversy.

[12] Federal Courts 170B 76.30

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.30 k. Contract Cases. Most Cited Cases
United States District Court for the Northern District of Indiana did not have either specific or general jurisdiction over nonresident defendant, where defendant had extremely limited contacts with Indiana prior to signing contracts with Indiana corporation at issue in litigation, these contacts were not related to present controversy, and defendant had no contact with Indiana subsequent to signing of contract. Ind.Trial Procedure Rules 4.4, 4.4(A); U.S.C.A. Const.Amend. 14.

[13] Federal Courts 170B 76.30

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.30 k. Contract Cases. Most Cited Cases
Texas was appropriate forum for resolving contract dispute, not Indiana, where burden on defendant would be great, Indiana had little interest in adjudicating dispute, which arose in Texas and was controlled by Texas law, plaintiff's interest in obtaining convenient and effective relief was minimal, controversy could most efficiently be resolved in Texas, and social policy of thwarting plaintiff's at-

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tempt to engage in forum shopping favored Texas.

[14] Federal Civil Procedure 170A ⚿2416

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(B) By Default
170AXVII(B)1 In General
170Ak2416 k. Defenses and Objections. Most Cited Cases
Defendants adequately defended themselves against plaintiff's amended complaint, for purposes of default judgment rule, even though defendants' motions to dismiss were directed to plaintiff's original complaint, not amended complaint, where plaintiff's amended complaint suffered from same deficiencies addressed in defendants' motions to dismiss. Fed.Rules Civ.Proc.Rule 55(a), 28 U.S.C.A.

***705** Donald F. Strutz,J. Frank Kimbrough, Thomas L. Wooding, Wilks & Kimbrough, Fort Wayne, Ind., for plaintiff.
John W. Havins, Houston, Tex., for defendants.

ORDER

WILLIAM C. LEE, District Judge.
This matter is before the court on Defendants Rampart Air and Connelly/Osth & Co.'s [FN1] motion to dismiss under Rule 12(b)(6) and on Defendant Rampart Air's motion to dismiss under Rule 12(b)(2) of the Federal Rules of Civil Procedure. Also before the court is plaintiff's motion for default judgment under Rule 55(a).

> FN1. In the filings to the court, Connelly/Osth is often referred to as Connolly/Osth. In this order, the court adopts the spelling that is on the complaint: Connelly/Osth.

Factual Background

In September 1988, Rampart Air, Inc., a Texas corporation, and Patton Electric Company, Inc., an Indiana corporation, entered into a series of agreements in connection with Patton's purchase of certain of Rampart's assets. These agreements included***706** an Asset Purchase Agreement, a License Agreement, and a Sales Representative Agreement. A feature of the asset purchase transaction was Patton's agreement to pay ten percent commission in connection with sales of fans to W.W. Grainger & Co. and several other companies that were on Rampart's customer list. This ten percent commission was to be divided between Rampart and Connelly/Osth & Co., Rampart's sales agent, with Rampart receiving a six and one-half percent commission and Connelly/Osth receiving a three and one-half percent commission. However, as a result of Patton's direct competition with some of W.W. Grainger's fans, W.W. Grainger canceled purchase orders that it had previously placed and refused to place any additional orders with Patton.

Rampart Air and Connelly/Osth, by attorney John W. Havins, corresponded with Patton Electric on July 11, 1990 and informed Patton that Rampart Air and Connelly/Osth had lost commissions in the amount of at least $250,000. Havins demanded that Patton compensate his clients for the lost commissions or his clients would file a lawsuit in Texas against Patton. Throughout the month of August, 1990 the parties engaged in settlement negotiations. After not hearing from Mr. Strutz, Patton's attorney, for some time, but believing that Patton was still pursuing settlement negotiations, Mr. Havins telephoned Mr. Strutz on September 20, 1990 to inquire whether Patton had made a decision regarding settlement. Mr. Strutz advised Mr. Havins that Patton did not wish to settle and that Patton did not want to be sued in Texas. Mr. Strutz concluded by stating that Patton intended to file a declaratory action in federal court. Mr. Strutz failed to advise Mr. Havins that Patton had already filed its declaratory judgment action in this court on September 18, 1990. After learning that Patton did not intend to settle this dispute, Rampart and Connelly/Osth filed suit against Patton in the 215th District Court of Harris County, Texas on September 21, 1990.

On September 18, 1990 Patton filed with this court

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a "Complaint for Declaratory Judgment and Damages" against the defendants. In this complaint Patton claims that there is no provision in either the Asset Purchase Agreement or the Sales Representative Agreement prohibiting plaintiff from continuing to compete with W.W. Grainger Co., or with any of the other prospective customers to which defendants Rampart Air and Connelly/Osth anticipated selling products to pursuant to the Sales Representative Agreement. Patton further claims that defendants' threatened litigation in Texas is a spurious complaint contrived by the defendants to compel Patton to pay the defendants $449,550. In its prayer for relief, Patton seeks "a Declaratory Judgment in favor of the plaintiff against these defendants" and an "award of damages including attorneys fees, with punitive damages for defendants threatening to bring this spurious litigation in Harris County, Texas, in an amount to be determined by the Court...."

On October 29, 1990 defendants filed their motions to dismiss. On December 17, 1990, Patton filed an amended complaint entitled "First Amended Complaint for Damages for Fraud in the Inducement of a Contract, For Damages for Attempted Extortion by Use of the U.S. Mail, For Recision of a Contract/or Declaratory Judgment". Also on December 17, 1990 Patton filed its opposition to the defendants' 12(b)(6) motion to dismiss.

On February 7, 1991 the court held a hearing on defendants' motions to dismiss and ordered the attorneys to file further briefs addressing the issues raised by the motions including the issue of whether Patton's amended complaint "relates back" to the filing of Patton's original complaint.

Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6)

In their Rule 12(b)(6) motion to dismiss,[FN2] defendants have asked the court to dismiss ***707** the plaintiff's complaint because plaintiff has purposefully misused the Declaratory Judgment Act to gain a tactical advantage for itself. Defendants claim that plaintiff filed its declaratory judgment action in anticipation of defendants filing a lawsuit in Texas against plaintiff. Defendants assert that by misusing the Declaratory Judgment Act, plaintiff has deprived the defendants of the right to choose the forum in which to pursue their claims against plaintiff.

> FN2. In briefing this motion, both parties have submitted matters outside of the pleadings, which the court has considered. Pursuant to Rule 12(b) the court will treat the motion to dismiss as one for summary judgment under Rule 56. By order dated September 12, 1991, this court gave the parties reasonable opportunity to present any additional materials in support or opposition of the summary judgment motion. On September 23, 1991 defendants filed an affidavit of Thomas W. Burch, III and an affidavit of John W. Havins. These affidavits and attached exhibits verify the factual sequence of events leading up to the filing of this anticipatory action and of the parallel proceeding in Texas. On September 20, 1991, plaintiff filed an additional memorandum concerning all pending motions, in which it outlined its earlier arguments, but plaintiff did not submit any further evidentiary materials.

In opposition, Patton argues that its suit against defendants has not been brought solely to obtain a declaratory judgment but that the main thrust of Patton's original complaint filed on September 18, 1990 was to recover actual and punitive damages for defendants' attempted extortion of $449,550 from plaintiff. Patton further argues that its First Amended Complaint includes a request for actual and punitive damages arising from defendants' alleged fraud in the inducement and alleged rescission of contract.

Patton's filing of an amended complaint raises the issue of whether that amended complaint "relates back" to the date of the filing of the original com-

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plaint. Rule 15(c) provides in pertinent part:

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Defendants claim that Patton is not entitled to the benefit of the relation back doctrine because the conduct, transaction or occurrence forming the basis of the claim asserted in Patton's amended pleading was not set forth in the original pleading. Specifically, defendants argue that Patton's original complaint does not give the defendants fair notice that damage claims exist.

Patton claims that its First Amended Complaint does relate back to the filing date of its original complaint because the same transaction/occurrence is involved; specifically, the representations prior to, and the performance under, the Asset Purchase Agreement and the Sales Representative Agreement.

[1] A review of the plaintiff's original complaint and amended complaint reveals that the original complaint is centered around the parties' Asset Purchase Agreement and plaintiff's professed right to issue brochures comparing plaintiff's fans with W.W. Grainger's fans without being haled into a Texas court and forced to defend against a suit brought by Rampart and Connelly/Osth. The amended complaint, however, concerns the defendants' alleged representations to Patton which allegedly induced Patton to enter into the agreement and incur expenses for special packaging, etc. Although Patton's original complaint includes statements that defendants' threatened Texas litigation is "spurious" and "contrived", these statements are clearly made only in support of Patton's request for a declaratory judgment and not in support of a substantive claim that would give rise to damages. It is clear to this court that the claims in the amended complaint do not arise out of the same conduct, transaction, or occurrence set forth in the original complaint. In any event, if Patton does in fact have substantive causes of action arising out of the transaction in which the Asset Purchase Agreement and the Sales Representative Agreement were entered into, Patton will be able to assert these claims as counter-claims in the Texas action. *See*Fed.R.Civ.Pro. 13; *Associated Mills, Inc. v. Regina Co., Inc.*, 675 F.Supp. 446 (N.D.Ill.1987). In their brief filed March 22, 1991, defendants***708** have informed the court that Patton has filed counterclaims in the Texas case that mirror its claims set forth in the First Amended Complaint.

[2] Confining the inquiry to the plaintiff's original complaint, the question before the court is whether plaintiff has purposefully misused the Declaratory Judgment Act which would require the court to dismiss plaintiff's suit for forum shopping. As the Seventh Circuit Court of Appeals held in *Tempco Electric Heater Corp. v. Omega Engineering, Inc.*, 819 F.2d 746, 749 (7th Cir.1987), the mere fact that a plaintiff filed its declaratory judgment action first does not give it a "right" to choose a forum. At this point it is appropriate to note recent developments of the parallel suit in Texas, which was brought by the defendants in this action against Patton Electric. On August 14, 1991, the Fifth Circuit Court of Appeals vacated the district court's dismissal of the Texas suit. The Fifth Circuit remanded the case to the district court to determine whether the plaintiff in this action filed the anticipatory declaratory action here for purposes of forum shopping. The Fifth Circuit concluded that if Patton filed this suit as an anticipatory declaratory action for purposes of forum shopping, such an act would nullify the first-to-file rule:

Importantly, we have declined to follow the first-to-file rule where, as here, the first-filed action is initiated in an apparent attempt to pre-empt anticipated litigation and deprive a party of its choice of forum. For example, in *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 n. 3 (5th Cir.1983), noting that "[a]nticipatory suits are dis-

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favored because they are an aspect of forum-shopping," we affirmed the dismissal of a declaratory judgment suit filed approximately three weeks before the institution of a suit in another state. There, as here, the first suit was filed while, at least ostensibly, the parties were working together to determine their respective positions regarding the dispute at hand. The principle of avoiding anticipatory lawsuits is especially strong where, as here, the first-filed suit is one for declaratory judgment. "[A] proper factor to consider in dismissing a declaratory judgment is whether the suit was filed in anticipation of another and therefore was being used for the purpose of forum-shopping." *Pacific Employers Ins. Co. v. M/V CAPTAIN W.D. CARGILL,* 751 F.2d 801, 804 (5th Cir.), *cert. denied,* 474 U.S. 909, 106 S.Ct. 279, 88 L.Ed.2d 244 (1985) (citing *Mission Ins.,* 706 F.2d at 602 & n. 3; *Ven-Fuel, Inc. v. Dep't of the Treasury,* 673 F.2d 1194, 1195 (11th Cir.1982)).

Rampart Air, Inc. v. Patton Electric, Inc., No. 91-2312, slip op. at 4-5 (5th Cir. Aug. 14, 1991) [942 F.2d 786 (table)] (per curiam).

Since the Fifth Circuit vacated the district court's dismissal of the Texas suit, there is currently a parallel case pending in the Texas federal court. This court will not allow Patton to prevent defendants from litigating in the forum of their choice simply because Patton won the race to the courthouse by three days. Any other result would create disincentives to responsible litigation. As Judge Lasker of the District Court for the Southern District of New York wisely noted:

As federal court calendars become increasingly burdened, attorneys should exercise a correspondingly increased responsibility to attempt to resolve disputes without using limited judicial resources to decide issues which might, by responsible discussions between reasonable people, be settled out of court. Potential plaintiffs should be encouraged to attempt settlement discussions (in good faith and with dispatch) prior to filing lawsuits without fear that the defendant will be permitted to take advantage of the opportunity to institute litigation in a district of its own choosing before plaintiff files an already drafted complaint. (Citations omitted).

Columbia Pictures Industries, Inc. v. Schneider, 435 F.Supp. 742, 747-48 (S.D.N.Y.1977).

Additionally, it appears to the court that Patton's suit is probably not a proper declaratory***709** judgment action in any event. The Declaratory Judgment Act was designed to "avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued." *Cunningham Bros., Inc. v. Bail,* 407 F.2d 1165, 1168 (7th Cir.1969); *Casad Ry. Services, Inc. v. Union Pacific R. Co.,* 659 F.Supp. 123, 126 (N.D.Ind.1987). In this case, the damage had already accrued to Rampart and Connelly/Osth as Patton's acts had, at least allegedly, resulted in W.W. Grainger's cancellation of purchase orders. Also, Patton did not need to file this action in order to obtain an early adjudication of its rights; Rampart and Connelly/Osth were prepared to file suit immediately if negotiations proved to be unfruitful. Patton was fully aware of the defendants' intentions as it had asked for and received a copy of defendants' complaint which they intended to file in Harris County, Texas if Patton did not respond to defendants' demands.

Furthermore, as will be discussed below, there is a substantial question whether this court has jurisdiction over all of these defendants while it is clear that the federal district court in Texas has personal jurisdiction over all the parties to this litigation and Texas is the more appropriate forum for resolution of these claims.

Consequently, for all of the above reasons, this court will not adhere to the first-to-file rule and will grant summary judgment in favor of the defendants.

Rampart's Motion to Dismiss Pursuant to Rule 12(b)(2)

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[3] In its Rule 12(b)(2) motion to dismiss Rampart claims that it is a Texas corporation that has had extremely limited contacts with the State of Indiana and those limited contacts did not give rise to the action which is pending in this court. When a defendant raises lack of personal jurisdiction in a motion to dismiss, the burden is on the plaintiff to demonstrate a basis for the forum court's exercise of personal jurisdiction.[FN3]

> FN3. On October 29, 1990, defendant Rampart Air, Inc. filed a motion to dismiss pursuant to Rule 12(b)(2). The brief in support of this motion discusses Rampart's lack of contacts with Indiana. The motion and brief do not purport to be asserting that this court does not have personal jurisdiction over defendant Connelly/Osth. Nonetheless, in its response brief, filed March 7, 1991, plaintiff treats Rampart's motion to dismiss as if it was filed on behalf of both defendants and plaintiff argues that this court has jurisdiction over both defendants. However, since only one defendant, Rampart, filed a Rule 12(b)(2) motion to dismiss, and defendant Connelly/Osth has never stated that it intended to adopt Rampart's motion, the court will proceed as if personal jurisdiction over defendant Connelly/Osth has not been questioned. It would be unfair to expect plaintiff to bear the burden of proving a basis for personal jurisdiction over Connelly/Osth if Connelly/Osth has never raised the issue of lack of personal jurisdiction.

[4][5] In its complaint Patton alleges diversity jurisdiction under 28 U.S.C. § 1332. In diversity cases, this court has jurisdiction over a non-resident defendant, such as Rampart, only if an Indiana court would have jurisdiction. *Scott Turnock v. Cope,* 816 F.2d 332, 334 (7th Cir.1987); *Lakeside Bridge & Steel v. Mountain State Construction Co., Inc.,* 597 F.2d 596 (7th Cir.1979); *Casad Ry. Services, Inc. v. Union Pacific R. Co.,* 659 F.Supp. 123 (N.D.Ind.1987). Indiana Rules of Procedure, Trial Rule 4.4, controls the issue of whether a federal court has personal jurisdiction over a non-resident defendant. The pertinent portion of Trial Rule 4.4 states:

(A) ... Any person or organization that is a nonresident of this state, ... submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or his agent:

(1) doing any business in this state;

* * * * * *

(4) having supplied or contracted to supply services rendered or to be rendered or goods or materials furnished or to be furnished in this state.

Trial Rule 4.4(A) is applicable to federal courts located in Indiana when the federal courts are sitting in diversity. This rule is ***710** intended to extend personal jurisdiction to the extent allowed by due process. *Nu-Way Systems v. Belmont Marketing,* 635 F.2d 617 (7th Cir.1980).

[6][7] Due process requires that a trial court acquire personal jurisdiction over a non-resident defendant before it renders a judgment against that defendant. *Kulko v. California Superior Court,* 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978). Before a court can exercise personal jurisdiction it must determine that "minimum contacts" exist between the foreign state and the non-resident defendant, which comport with due process. *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). Minimum contacts exist when maintenance of the suit in question "does not offend 'traditional notions of fair play and substantial justice' "*Id.* quoting *Milliken v. Meyer,* 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940). A district court must determine whether it is reasonable, due to the non-resident defendant's conduct in connection with the forum state, for the non-resident defendant to anticipate being haled into court in the forum state. *World Wide Volkswagen Corp v.*

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Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Due process requires that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

[8][9] The court must also determine whether the non-resident defendant purposely availed himself or itself of the privilege of conducting activities within the forum state. *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). The test for minimum contacts is flexible and necessarily dependent upon the facts of each case with particular attention being given to the nature and quality of the contacts. *Lakeside,* 597 F.2d at 596.

In *Burger King,* the Supreme Court determined that the factors to be considered when determining whether the exercise of personal jurisdiction comports with "fair play and substantive justice" include: (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the states in furthering substantive social policies.

[10][11] This court may exercise jurisdiction over non-resident defendants if the court has either specific or general jurisdiction over the defendants. Specific jurisdiction exists when the defendant's contacts with the forum are related to the controversy and those contacts reach a "minimum" threshold. *International Shoe Co. v. Washington,* 66 S.Ct. at 158. If the controversy does not arise out of the defendant's contacts with the forum, the court may exercise general jurisdiction if the defendant has "continuous and systematic" contacts with the forum, even though those contacts have no relation to the underlying controversy. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

Specific jurisdiction requires only a minimum of contacts, but also requires the controversy to be "related" in some way to the defendant's contact with the forum. General jurisdiction requires a greater amount of contacts, but permits the court to include in its analysis contacts that have absolutely no relationship to the underlying dispute.

Rampart argues that it is a Texas corporation and that it would place a tremendous burden on the company and its representatives if they were forced to travel to Indiana to defend this action and that, moreover, it would reward Patton for its deceptive misuse of the federal Declaratory Judgment Act. In response, Patton insists that its First Amended Complaint clearly establishes Rampart's "minimum contacts" with Indiana. Patton lists the following contacts:

(1) The Agreements in question were made with an Indiana corporation, whose offices and manufacturing facilities are located in New Haven, Indiana.

***711** (2) The Sales Representative Agreement clearly contemplates a continuing course of business by Defendants to supply services to and make money from Plaintiff in Indiana.

(3) As to Defendants' purported sales orders from W.W. Grainger, performance by Plaintiff in Indiana was not only contemplated, but in fact occurred and as a result, Plaintiff suffered out-of-pocket damages in Indiana.

(4) There were continued representations of Rampart and Connelly/Osth to Plaintiff in Indiana that the Grainger purchase orders would soon be forthcoming.

(5) On January 5, 1989, there was a visit by Connelly/Osth, on Rampart's behalf, to Indiana; specifically, Connelly/Osth came to Plaintiff's manufacturing facilities in New Haven, Indiana, accompanied by an engineer from Grainger, to discuss the packaging design for Grainger's forthcoming or- ders.

Rampart, however, claims that the facts before this

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court are as follows:

(1) In September 1988, Harold J. Hertenstein and James Cich, President of Patton Electric, Inc., traveled to Houston, Texas for the purpose of negotiating, and did negotiate, the terms and conditions for the Asset Purchase Agreement, the License Agreement and the Sales Representative Agreement.

(2) The parties executed the Asset Purchase Agreement, the License Agreement and the Sales Representative Agreement in Houston, Texas.

(3) Plaintiff claims that fraudulent misrepresentations were made during the negotiations in Houston, Texas.

(4) Plaintiff retained a Houston, Texas law firm to draft the agreements and to represent its interests in connection with the purchase of assets from Rampart.

(5) Article VII, Section 7.6 of the Asset Purchase Agreement provides that the Asset Purchase Agreement will be governed by and construed in accordance with the substantive laws of the State of Texas.

(6) Prior to September 1988 Rampart Air, Inc. had only sporadic contacts with the State of Indiana, and these contacts were limited to filling purchase orders.

(7) Since September 1988 Rampart Air, Inc. has not had any contact with the State of Indiana.

(8) Rampart Air, Inc. does not own either realty or personalty that is situated in the State of Indiana.

Plaintiff has submitted a supplemental brief, with affidavits, in which it claims it has demonstrated that Rampart had sufficient "minimum contacts" with Indiana. Plaintiff directs the court to the following facts:

(1) Although the Asset Purchase Agreement was executed in Texas, the parties intended that the equipment purchased from Rampart be moved to and installed in Patton's manufacturing facility in New Haven, Indiana and the equipment was in fact installed in Indiana.

(2) Although the Sales Representative Agreement was executed in Texas, the parties intended that any fans, ordered through Rampart by W.W. Grainger Co., or other Rampart customers, would be produced at Patton's manufacturing facility in New Haven, Indiana and the fans were in fact produced in Indiana.

(3) During the month of August 1988, after plaintiff's purchase of the assets of Rampart, Rampart sent its plant manager, Jimmy Gawlik, to New Haven, Indiana as a representative of Rampart for the express purpose of instructing the plaintiff in the setting up of its purchased equipment, and to obtain cost reductions in the operation of the equipment for the manufacture of the fan models which plaintiff had purchased from Rampart to be used in filling W.W. Grainger Co.'s orders.

(4) Rampart also sent two of its technicians, Orville Mallory and Donald Phillips, to assist in the assembly of the equipment necessary for the manufacture of the fans for W.W. Grainger Co., who spent three weeks in Patton's plant in New Haven, Indiana.

(5) During the month of December, 1988, Terry Connelly of defendant Connelly/Osth, called Harold Hertenstein, General*712 Manager Industrial Division of Patton Electric, for the purpose of setting up an appointment to bring a representative of W.W. Grainger Co. to New Haven, Indiana. On January 5, 1989 Terry Connelly arrived in New Haven with J. Wente, engineer for W.W. Grainger Co. who met all day with Hertenstein and Paul Glowacki, a Patton engineer, and worked on the customized packaging arrangements needed to accommodate the shipment of fans to W.W. Grainger Co.

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(6) Thereafter, long distance telephone conferences continued frequently between Hertenstein in New Haven, Indiana and Charles B. Swank and Patrick Huffstutter in Houston, Texas in the furtherance of preparation of the fans to be shipped to W.W. Grainger in March 1989.

Defendants have also submitted a supplemental brief in which they clarify plaintiff's statements regarding "minimum contacts" as follows:
(1) After Patton purchased the assets of Rampart, Jimmy Gawlick, Orville Mallory and Donald Phillips did spend time at Patton's facility to assist Patton, but did so at the request and expense of Patton. During the time that these individuals were working at Patton's facility, they were doing so as consultants to Patton and not as employees or representatives of Rampart.

(2) At the time Terry Connelly visited Patton's facility in December 1988, he was acting as the agent of Connelly/Osth.

[12] A complete review of the record indicates that this court does not have either specific or general jurisdiction over Rampart. Rampart had extremely limited contact with Indiana prior to September 1988 and these contacts were not related to the present controversy. Rampart has had no contact with Indiana since September 1988. Likewise, Rampart has never had "continuous and systematic" contact with Indiana such that would render general jurisdiction over Rampart appropriate.

[13] Furthermore, a consideration of the five factors enumerated in *Burger King, supra,* indicates that Texas is the appropriate forum for resolving this dispute. First, the burden on the defendant would be great. Second, Indiana has little interest in adjudicating this dispute, which clearly arose in Texas and is to be controlled by Texas law. Third, the plaintiff's interest in obtaining convenient and effective relief is minimal due to plaintiff's failure to negotiate in good faith and plaintiff's act of attempting to "steal the forum." Fourth, the interstate judicial system's interest in obtaining the most efficient resolution of this controversy will be best served if this case is resolved in Texas where the dispute arose. And fifth, the shared interest of the states in furthering substantive social policies will be served by thwarting plaintiff's attempt to engage in forum-shopping. Consequently, the court will grant Rampart's motion to dismiss for lack of personal jurisdiction.

Plaintiff's Motion for Default Judgment

[14] Patton has moved for a default judgment on its first amended complaint pursuant to Fed.R.Civ.Pro. 55(a). Patton argues that the defendants have failed to answer, or otherwise timely respond to, Patton's amended complaint. Defendants, however, contend that they have filed several motions pursuant to Rule 12(b) and therefore have clearly "defended" themselves for purposes of Rule 55. Wright & Miller, in their treatise on federal practice and procedure, discuss this type of situation as follows:

A pleading that has been amended under Rule 15(a) supersedes the pleading it modifies and remains in effect throughout the action unless it subsequently is modified. Once an amended pleading is interposed, the original pleading no longer performs any function in the case and any subsequent motion made by an opposing party should be directed at the amended pleading. This effect of an amended pleading under Rule 15(a) becomes particularly important when the amendment purports to cure a defective earlier pleading. For example, plaintiff may file a new complaint that does not ***713** refer to or adopt any of the deficient allegations in the original pleading; if the first complaint is considered superseded by the amendment, the court is not required to dismiss the suit when a motion points up the weaknesses of the earlier pleading. On the other hand, defendants should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending. If some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed

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to the amended pleading. To hold otherwise would be to exalt form over substance.

6 Wright, Miller & Kane, *Federal Practice and Procedure,* § 1476 at 556-58 (2d ed. 1990).

Since Patton's First Amended Complaint suffers from the same deficiencies that are addressed in defendants' motions to dismiss which were directed to Patton's original complaint, the court finds that the defendants have "otherwise defended" for purposes of Rule 55. Accordingly, plaintiff's motion for default judgment will be denied.

Conclusion

For the foregoing reasons, defendants Rampart Air and Connelly/Osth & Co.'s motion for summary judgment is hereby GRANTED. Further, Rampart Air's motion to dismiss pursuant to Rule 12(b)(2) is hereby GRANTED.

N.D.Ind.,1991.
Patton Elec. Co., Inc. v. Rampart Air, Inc.
777 F.Supp. 704

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C

United States District Court,E.D. Pennsylvania.
David C. PENNEBACKER, Plaintiff,
v.
WAYFARER KETCH CORPORATION, Defendant.
Civ. A. No. 90-6472.

April 17, 1991.

Former employee brought wrongful discharge and defamation action against employer, and employer filed motion to dismiss for lack of in personam jurisdiction. The District Court, Huyett, J., held that: (1) employer's conduct in hiring and firing employee by placing telephone calls into Pennsylvania from out of state did not establish basis for exercising in personam jurisdiction under specific jurisdiction theory, and (2) neither claim of wrongful discharge nor defamation made any reference to Pennsylvania or fact occurring in Pennsylvania and thus cause of action did not provide basis for in personam jurisdiction.

Motion to dismiss granted.

West Headnotes

[1] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
Plaintiff bears burden of showing that defendant has contacts sufficient with forum state to provide in personam jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[2] Federal Courts 170B ⚿76.1

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.1 k. In General. Most Cited Cases
(Formerly 170Bk76)
Law of determining whether court may exercise personal jurisdiction over nonresident defendant is cast in terms of fairness to defendant.

[3] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Under due process clause, nonresident is not susceptible to exercise of personal jurisdiction unless there are minimum contacts between defendant and forum state.

[4] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
To determine whether there are minimum contacts between defendant and forum state as required for

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exercise of in personam jurisdiction, court must consider whether quality and nature of defendant's activity is such that it is reasonable and fair to require that defendant conduct defense in forum state.

[5] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases

Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Personal jurisdiction may be established by showing either that cause of action arose specifically from defendant's particular activities within forum state or that defendant engaged in continuous and systematic contacts with forum state.

[6] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
If cause of action arose specifically from defendant's particular activities within forum state, nonresident defendant was subject to personal jurisdiction if it fell within ambit of Pennsylvania long-arm statute, which allowed court to exercise jurisdiction over person to fullest extent allowed under Constitution and could be based on most minimum contact with Commonwealth allowed under Constitution. 42 Pa.C.S.A. § 5322(b).

[7] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
In order to establish personal jurisdiction under Pennsylvania long-arm statute, plaintiff asserting specific jurisdiction over nonresident defendant must show that defendant purposely availed itself of privilege of acting within Pennsylvania thus invoking benefits and protections of Pennsylvania law, that cause of action arose from defendant's activities within Pennsylvania, and that defendant had substantial enough connection with Pennsylvania to make exercise of jurisdiction reasonable. 42 Pa.C.S.A. § 5322(b).

[8] Federal Courts 170B ⚿76.35

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.35 k. Other Particular Types of Cases. Most Cited Cases
Employee failed to show that defendant's conduct in hiring and firing employee by placing telephone calls into Pennsylvania from out of state established in personam jurisdiction over employer; employee's decision to live in Pennsylvania while employed and receive some of his paychecks at home address were essentially unilateral decisions which did not provide basis for jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.; 42 Pa.C.S.A. § 5322(b).

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[9] Federal Courts 170B ⚿76.25

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.25 k. Tort Cases. Most Cited Cases

Federal Courts 170B ⚿76.35

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.35 k. Other Particular Types of Cases. Most Cited Cases
Employee's claim of wrongful discharge and defamation, which made no reference to Pennsylvania or fact occurring in Pennsylvania, did not establish in personam jurisdiction over nonresident employer, even though on one instance employee traveled into Pennsylvania during course of his employment.

[10] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
To establish general personal jurisdiction based on nonforum related activities, plaintiff must show that defendant's business activities within Commonwealth of Pennsylvania were so continuous and substantial as to make it reasonable for state to exercise that jurisdiction.

[11] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Employer's decision to have its helicopters serviced twice a year in Pennsylvania and to accommodate customer requests for flights into and out of Pennsylvania did not establish that defendant maintained continuous and substantial business activities in Pennsylvania sufficient to support exercise of general in personam jurisdiction over nonresident employer.

***1218** Oldrich Foucek, III,Tallman, Hudders & Sorrentino, Allentown, Pa., for plaintiff.
Laurence Shtasel, Philadelphia, Pa., Robert N. Schwartz, New York City, for defendant.

MEMORANDUM AND ORDER

HUYETT, District Judge.
This is an action for wrongful discharge and defamation brought by a pilot formerly employed by defendant Wayfarer Ketch Corporation ("Wayfarer"). Defendant has filed a motion to dismiss for, *inter alia,* lack of *in personam* jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). For the reasons stated below, I grant defendant's***1219** motion to dismiss for lack of jurisdiction.

I.

[1] Plaintiff bears the burden of demonstrating that the defendant has contacts sufficient with the forum state to provide *in personam* jurisdiction. *Compagnie des Bauxites de Guinee v. L'Union,* 723 F.2d 357 (3d Cir.1985). Generally, when the pleading and affidavits are relied upon to meet this burden, the plaintiff succeeds by establishing a *prima facie* showing of facts supporting jurisdiction. *La Rose v. Sponco Mfg. Inc.,* 712 F.Supp. 455 (D.N.J.1989).FN1 Factual discrepancies created by affidavits are generally resolved in favor of the non-moving party, bearing burden of establishing jurisdiction. *Id.* at 458. An affidavit accompanies

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defendant's motion, and another affidavit was submitted with defendant's reply memorandum of law. Plaintiff submitted an affidavit with his response to defendant's motion.

> FN1. I note that neither party has requested an evidentiary hearing to resolve any factual disputes concerning defendant's contacts with the forum state.

II.

After reviewing the pleadings and affidavits relevant to this motion, I conclude that no material discrepancies exist. Turning first to plaintiff's complaint, a single reference to Pennsylvania appears; plaintiff is a citizen of Pennsylvania (Plaintiff Complaint ¶ 1). Regarding defendant, plaintiff alleges that Wayfarer is a New York corporation having a principal place of business at Westchester County Airport, New York. (Plaintiff Complaint ¶ 2).

By way of affidavit, plaintiff avers that he was hired as a First Officer by Wayfarer through an employment agency located in Fairfield, Connecticut. (Plaintiff Affid. ¶ 7). Plaintiff asserts that he underwent testing and evaluation for this position in Connecticut. (Plaintiff Affid. ¶ 10). In contrast, defendant alleges that plaintiff was interviewed by Wayfarer personnel at its office in Hangar G at the Westchester County Airport in New York (Defendant Affid. ¶ 3) and eventually underwent a medical examination in New York City by a doctor hired by defendant (Defendant Affid. ¶ 3 and Exhibit A, Letter from Henry M. Selby, M.D.) This contradiction is insignificant because the parties agree that these aspects of the hiring process that led to plaintiff's employment with defendant took place outside of the Commonwealth of Pennsylvania.

Plaintiff avers that defendant called plaintiff at his home in Pennsylvania to offer him employment (Plaintiff Affid. ¶ 12), that he received a letter from defendant confirming his employment (Plaintiff Affid. ¶ 13), and that he was discharged by a Wayfarer official during a telephone conversation placed to plaintiff's home in Pennsylvania. (Plaintiff Affid. ¶ 40) These statements are uncontested.

During his fourteen months of employment, plaintiff was assigned to work out of the Westchester Airport office of defendant, where he was assigned to flights and flew as a First Officer. (Defendant Affid. ¶ 4) During this period plaintiff alleges he received by mail at least half of his paychecks at his home in Pennsylvania. (Plaintiff Affid. ¶ 21) Defendant asserts that Wayfarer distributes paychecks at the office located at the Westchester Airport unless the payroll department is provided written instructions by an employee requesting his or her paycheck be deposited directly into a specified bank account or be mailed to a particular address. (Defendant Reply Affid. ¶ 4) Plaintiff never requested either of these alternatives. His paycheck was forwarded to the Westchester office and, if mailed to his home, was done so as a result of a request by plaintiff to some individual to mail it as a favor. (Defendant Reply Affid. ¶ 4).

Plaintiff asserts that during his employment with Wayfarer he flew one charter flight into Pennsylvania (Plaintiff Affid. ¶ 22), though Wayfarer flew charter aircraft for hire in and out of Pennsylvania on approximately twenty to thirty occasions. (Plaintiff Affid. ¶ 23) Similarly, plaintiff asserts that defendant has several customers with facilities located in Pennsylvania ***1220** and provides air transportation to employees and guests of these customers including "numerous flights into and out of Pennsylvania." (Plaintiff Affid.¶¶ 25 & 26) Finally, plaintiff states that for the last fifteen years defendant has had its helicopter serviced at least twice a year by a firm located in Phoenixville, Pennsylvania. (Plaintiff Affid. ¶ 27)

Defendant underscores that plaintiff's residence in Pennsylvania during his employment with defendant was not a factor in hiring in or determining job assignments. (Defendant Affid. ¶ 5) Also, defend-

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ant recites several material facts as follows:

1. Wayfarer has no office outside New York, and has no office or other facilities in the Commonwealth of Pennsylvania.

2. Wayfarer is licensed to do business in the State of New York and is not licensed to do business in Pennsylvania.

3. Wayfarer has not consented to be sued, and has never designated an agent for service of process, in the Commonwealth of Pennsylvania.

4. Wayfarer maintains no assets, bank accounts, sales representatives, or employees in the Commonwealth of Pennsylvania. Wayfarer has neither incurred nor paid taxes in the Commonwealth of Pennsylvania.

5. Wayfarer has no listing in any telephone directory and does not advertise in Pennsylvania.

6. Wayfarer conducts no regularly scheduled flights into or out of Pennsylvania. However, on occasion, a Wayfarer charter flight, or a flight staffed by Wayfarer, will land in Pennsylvania in order to service a particular customer request. During the period of plaintiff's employment with defendant, one percent of Wayfarer's flights landed in Pennsylvania.

III.

[2][3][4] The law of determining whether a court may exercise personal jurisdiction over a non-resident defendant is cast in terms of fairness to the defendant. *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (defendant must have minimum contacts with the forum state so that "the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.*) Under the due process clause of the United States Constitution, a non-resident is not susceptible to an exercise of personal jurisdiction unless there are certain minimum contacts between the defendant and the forum state. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Hence, a court must query whether "the quality and nature of the defendant's activity is such that it is reasonable and fair to require [that it] conduct [its] defense in that state." *Kulko v. Superior Court of California,* 436 U.S. 84, 92, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978) (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316-17, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1940)).

[5] Personal jurisdiction may be established by either demonstrating that this cause of action arose specifically from defendant's particular activities within the forum state (referred to a "specific jurisdiction") or that defendant engaged in "continuous and systematic" contacts with the forum state, Pennsylvania ("general jurisdiction"). *Gehling v. St. George's School of Medicine, Ltd.,* 773 F.2d 539 (3d Cir.1985); *La Rose v. Sponco Mfg. Inc.,* 712 F.Supp. 455 (D.N.J.1989).

[6][7] Under specific jurisdiction, a non-resident defendant is subjected to personal jurisdiction if it falls within the ambit of the Pennsylvania Long Arm Statute, 42 Pa.C.S.A. Section 5322(b) (Purdon 1981) which allows a court to exercise jurisdiction over a person "to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." In *Proctor & Schwartz v. Cleveland Lumber Co.,* 228 Pa.Super. 12, 323 A.2d 11 (1974), the Pennsylvania Supreme Court established a tripartite test requiring a plaintiff asserting specific jurisdiction over a non-resident defendant to demonstrate: (1) the defendant purposefully ***1221** availed itself of the privilege of acting within Pennsylvania thus invoking the benefits and protections of its laws; (2) that the cause of action arises from defendant's activities within Pennsylvania; and (3) that the defendant must have a substantial enough connection with Pennsylvania to make the exercise of jurisdiction over it reasonable. *See*

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Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir.1984).

[8] After reviewing carefully the averments of plaintiff's complaint and affidavit I find no basis for exercising *in personam* jurisdiction over the defendant under a specific jurisdiction theory. In particular, plaintiff's complaint is noteworthy only because it is bereft of references to defendant contacts with Pennsylvania. Plaintiff's affidavit strives to make headway by relying on telephone calls placed and correspondence mailed from New York to Pennsylvania. However, the elements of the *Proctor* test have not been met.

Defendant's conduct in hiring and firing plaintiff by placing telephone calls into Pennsylvania from out-of-state do not satisfy this requirement. *Colmen Financial Services v. Charter Equipment Leasing Corp.*, 708 F.Supp. 664 (E.D.Pa.1989) (placing of some forty telephone calls into Pennsylvania by out-of-state defendant as part of contract negotiations does not justify assertion of specific jurisdiction); *Rogers v. Icelandair/Flugleider, International,* 522 F.Supp. 670 (E.D.Pa.1981) (out-of-state mailing of termination notice to plaintiff was inadequate basis for specific jurisdiction). *Baron & Co., Inc. v. Bank of New Jersey,* 497 F.Supp. 534 (E.D.Pa.1980) ("I fail to see how making phone call and mailing checks constitutes an invocation by defendant of the protection of Pennsylvania law." *Id.* at 538). Also, plaintiff acknowledges that the evaluation and interview leading up to defendant's offer of employment all took place outside of Pennsylvania, further undermining the employment negotiations as a basis for jurisdiction. *See Gagner v. Parsons & Whittemore, Inc.*, 450 F.Supp. 1093 (E.D.Pa.1978).

Finally, plaintiff's decision to live in Pennsylvania while employed by defendant and receive some of his paychecks at his home address in Pennsylvania are essentially unilateral decisions on his part for his own convenience which cannot provide a basis of jurisdiction. *Rodale Press, Inc. v. Submatic Irrigation Sys., Inc.*, 651 F.Supp. 208 (E.D.Pa.1986). ("The unilateral activity of those who claim some relationship with a nonresident cannot satisfy the requirement of contact with the forum state." *Id.* at 211).

[9] Plaintiff's cause of action provides no basis for *in personam* jurisdiction. Neither the claim of wrongful discharge from employment nor defamation makes any reference to Pennsylvania or a fact occurring in Pennsylvania. In his affidavit, plaintiff recites a single instance when he flew into Pennsylvania during the course of his employment with defendant. (Plaintiff Affid. ¶ 22) However, this flight was uneventful and in no way contributed to his discharge. Also, as pointed out, plaintiff's decision to live in Pennsylvania is irrelevant to his job duties, assignments, and performance. It cannot be said that plaintiff's cause of action arises from defendant's activities within Pennsylvania. Indeed, plaintiff has failed to meet his *prima facie* burden in establishing specific jurisdiction based on defendant's forum related activities.

[10][11] To succeed in establishing general personal jurisdiction based on non-forum related activities, plaintiff must show the defendant's business activities within the Commonwealth of Pennsylvania are so "continuous and substantial as to make it reasonable for the state to exercise such jurisdiction." *Gavigan v. Walt Disney World, Inc.*, 646 F.Supp. 786 (E.D.Pa.1986) (quoting *Bork v. Mills,* 458 Pa. 228, 231, 329 A.2d 247, 249 (1974)); *See Gehling v. St. George's School of Medicine, Ltd.*, 773 F.2d 539 (3d Cir.1985); 42 Pa.C.S.A. § 5301(a)(2)(iii). Here, plaintiff relies on defendant's decision to have its helicopter serviced semi-annually in Pennsylvania and to accommodate customer requests for flights into and out of Pennsylvania. The ***1222** helicopter servicing trips into Pennsylvania are infrequent at best and do not represent a substantial contact. Similarly, defendant's flights into Pennsylvania do not bolster plaintiff onto safe ground. These flights are neither regular nor scheduled, but depend upon whether a

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▷

United States Court of Appeals,Ninth Circuit.
James E. PETERSON, Plaintiff-Appellant,
v.
Harold KENNEDY, Richard A. Berthelsen, and National Football League Players Association, Defendants-Appellees.
No. 84-5788.

Argued and Submitted Feb. 6, 1985.
Decided Sept. 16, 1985.

Former professional football player brought suit against players' union and two of its attorneys, claiming that the defendants had furnished him with inaccurate advice upon which he detrimentally relied in pursuing a grievance against his ex-ball club. The United States District Court for the Southern District of California, Leland C. Nielsen, J., granted summary judgment for one attorney, issued a directed verdict in favor of the other, granted union's motion for judgment notwithstanding the verdict, and plaintiff appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) the evidence presented was legally insufficient to sustain jury's verdict that union breached its duty of fair representation, since the union did not act in an arbitrary, discriminatory, or bad faith manner; (2) union's chief staff counsel could not be held liable in malpractice to the plaintiff for acts performed as union's agent in the collective bargaining process; and (3) the other individual defendant's making of telephone calls and sending of letters to the forum state was legally insufficient to enable the court to exercise personal jurisdiction over that nonresident.

Affirmed.

Wiggins, Circuit Judge, filed a concurring opinion.

West Headnotes

[1] Labor and Employment 231H ⚿1219(4)

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1219 Actions for Breach of Duty
231Hk1219(4) k. Time to Sue, Limitations, and Laches. Most Cited Cases
(Formerly 232Ak758.1, 232Ak758 Labor Relations)
National Labor Relations Act's six-month statute of limitations for the filing of unfair labor practice claims is applicable to suits against a union for breach of the duty of fair representation. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

[2] Courts 106 ⚿100(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
DelCostello decision, in which the United States Supreme Court held that the National Labor Relations Act's six-month statute of limitations for the filing of unfair labor practice claims is applicable to suits against a union for breach of the duty of fair representation, is to be given retroactive application when doing so serves to lengthen rather than shorten the limitations period that would otherwise be applicable under state law. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

[3] Labor and Employment 231H ⚿1219(4)

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives

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231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1219 Actions for Breach of Duty
231Hk1219(4) k. Time to Sue, Limitations, and Laches. Most Cited Cases
(Formerly 232Ak758.1, 232Ak758 Labor Relations)
Complaint of former professional football player, who claimed that players' union, through two of its attorneys, furnished him with inaccurate advice upon which he detrimentally relied in pursuing a grievance against his ex-ball club, was timely filed whether plaintiff's cause of action arose as early as 1978 or as late as 1981; if the claim accrued in 1978, the timeliness of the complaint would be assessed under California's three-year statute of limitations and would be timely commenced regardless of which accrual date suggested by the union was applicable, and if the cause of action did not accrue until November of 1981, the complaint would be timely under the National Labor Relations Act's six-month statute of limitations. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

[4] Limitation of Actions 241 ⚿2(1)

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k2 What Law Governs
241k2(1) k. In General. Most Cited Cases
Forum court utilizes its own state's statute of limitations.

[5] Limitation of Actions 241 ⚿2(1)

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k2 What Law Governs
241k2(1) k. In General. Most Cited Cases
With one exception, California applies its own limitations law to actions brought by its citizens, rather than that of the state in which cause of action arose. West's Ann.Cal.C.C.P. § 361.

[6] Action 13 ⚿64

13 Action
13IV Commencement, Prosecution, and Termination
13k64 k. Proceedings Constituting Commencement. Most Cited Cases

Limitation of Actions 241 ⚿118(2)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k117 Proceedings Constituting Commencement of Action
241k118 In General
241k118(2) k. Filing Pleadings. Most Cited Cases
Under California law, a cause of action is "commenced" when complaint is filed. West's Ann.Cal.C.C.P. § 350.

[7] Federal Civil Procedure 170A ⚿2610

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(E) Notwithstanding Verdict
170Ak2610 k. Determination of Issues. Most Cited Cases
In suit brought by former professional football player against players association and two of its attorneys, claiming that the union, through its attorneys, had furnished him with inaccurate advice upon which he detrimentally relied in pursuing a grievance against his ex-ball club, the union was properly granted judgment notwithstanding the verdict, since the evidence demonstrated that union's conduct amounted to no more than negligence, and negligent conduct on the part of a union is legally

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insufficient to sustain a claim for breach of the duty of fair representation.

[8] Federal Civil Procedure 170A ⚿2610

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(E) Notwithstanding Verdict
170Ak2610 k. Determination of Issues. Most Cited Cases

Federal Courts 170B ⚿765

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk765 k. Judgment Notwithstanding Verdict. Most Cited Cases
Court of Appeals reviews the propriety of a JNOV under the same standard that is applied by the district court; a judgment notwithstanding the verdict is proper when the evidence permits only one reasonable conclusion as to the verdict.

[9] Federal Courts 170B ⚿801

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions
170Bk801 k. Judgment N. O. v. Most Cited Cases
In reviewing a judgment notwithstanding the verdict, Court of Appeals views the evidence in light most favorable to the nonmoving party and draws all reasonable inferences in favor of that party.

[10] Federal Civil Procedure 170A ⚿2610

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(E) Notwithstanding Verdict
170Ak2610 k. Determination of Issues. Most Cited Cases
Judgment notwithstanding the verdict is improper if reasonable minds could differ over the verdict.

[11] Labor and Employment 231H ⚿1213

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1213 k. Grievances in General. Most Cited Cases
(Formerly 232Ak221 Labor Relations)
Professional football players' union did not breach its duty of fair representation to plaintiff, even assuming arguendo that the union gave plaintiff inaccurate advice upon which he detrimentally relied in pursuing a grievance against his ex-ball club, since the record was devoid of evidence that the union acted in an arbitrary, discriminatory, or bad faith manner.

[12] Labor and Employment 231H ⚿1219(14)

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1219 Actions for Breach of Duty
231Hk1219(14) k. Questions of Law and Fact. Most Cited Cases
(Formerly 232Ak219 Labor Relations)
Duty of fair representation is a judicially established rule imposed on labor organizations because of their status as the exclusive bargaining representative for all employees in a given bargaining unit.

[13] Labor and Employment 231H ⚿1208

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation

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231Hk1208 k. In General. Most Cited Cases
(Formerly 232Ak221 Labor Relations)
Union breaches its duty of fair representation only when its conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

[14] Labor and Employment 231H 1208

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1208 k. In General. Most Cited Cases
(Formerly 232Ak218.1, 232Ak218 Labor Relations)
Unions must retain wide discretion to act in what they perceive to be their members' best interests.

[15] Labor and Employment 231H 1213

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1213 k. Grievances in General. Most Cited Cases
(Formerly 232Ak221 Labor Relations)
Because a union balances many collective and individual interests in deciding whether and to what extent it will pursue a particular grievance, court should accord substantial deference to a union's decisions regarding such matters.

[16] Labor and Employment 231H 1219(12)

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1219 Actions for Breach of Duty
231Hk1219(12) k. Weight and Sufficiency of Evidence. Most Cited Cases
(Formerly 232Ak219 Labor Relations)
A union's representation of its members need not be error free.

[17] Labor and Employment 231H 1219(12)

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1219 Actions for Breach of Duty
231Hk1219(12) k. Weight and Sufficiency of Evidence. Most Cited Cases
(Formerly 232Ak219 Labor Relations)
Mere negligent conduct on the part of a union does not constitute a breach of the union's duty of fair representation.

[18] Labor and Employment 231H 1213

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1213 k. Grievances in General. Most Cited Cases
(Formerly 232Ak221 Labor Relations)

Labor and Employment 231H 1215

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1215 k. Duty to Investigate Grievances. Most Cited Cases
(Formerly 232Ak221 Labor Relations)
A union acts "arbitrarily" when it simply ignores a meritorious grievance or handles it in a perfunctory

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manner, for example, by failing to conduct a "minimal investigation" of a grievance that is brought to its attention.

[19] Labor and Employment 231H ⚿1219(10)

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1219 Actions for Breach of Duty
231Hk1219(10) k. Presumptions and Burden of Proof. Most Cited Cases
(Formerly 232Ak219 Labor Relations)
A union's conduct is "arbitrary" if it is without rational basis, or is egregious, unfair and unrelated to legitimate union interests.

[20] Labor and Employment 231H ⚿1213

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1213 k. Grievances in General. Most Cited Cases
(Formerly 232Ak221 Labor Relations)
Unions are not liable for good faith, nondiscriminatory errors of judgment made in the processing of grievances.

[21] Labor and Employment 231H ⚿1213

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1213 k. Grievances in General. Most Cited Cases
(Formerly 232Ak221 Labor Relations)
A union's conduct may not be deemed arbitrary simply because of an error in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining agreement, or in presenting the grievance at an arbitration hearing.

[22] Labor and Employment 231H ⚿1214

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1214 k. Discretion in Processing Grievances. Most Cited Cases
(Formerly 232Ak221 Labor Relations)
It is for union, not courts, to decide whether and in what manner a particular grievance should be pursued.

[23] Labor and Employment 231H ⚿1219(12)

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1219 Actions for Breach of Duty
231Hk1219(12) k. Weight and Sufficiency of Evidence. Most Cited Cases
(Formerly 232Ak765 Labor Relations)
Record failed to substantiate former professional football player's claim that players' union failed adequately to investigate the facts and circumstances of his claim before advising him, allegedly erroneously, to file an injury grievance, rather than a noninjury grievance.

[24] Federal Civil Procedure 170A ⚿2126.1

170A Federal Civil Procedure
170AXV Trial
170AXV(F) Taking Case or Question from Jury
170AXV(F)1 In General
170Ak2126 Determination
170Ak2126.1 k. In General. Most

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Cited Cases
(Formerly 170Ak2126)

Federal Courts 170B ⚿764

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk764 k. Taking Case from Jury. Most Cited Cases
Court of Appeals reviews a directed verdict under the same standard as that applied when reviewing a JNOV: a directed verdict is proper when the evidence permits only one reasonable conclusion as to the verdict.

[25] Federal Civil Procedure 170A ⚿2126.1

170A Federal Civil Procedure
170AXV Trial
170AXV(F) Taking Case or Question from Jury
170AXV(F)1 In General
170Ak2126 Determination
170Ak2126.1 k. In General. Most Cited Cases
(Formerly 170Ak2126)
A directed verdict is inappropriate if there is substantial evidence to support a verdict for the nonmoving party.

[26] Federal Courts 170B ⚿798

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions
170Bk798 k. Directed Verdict. Most Cited Cases
In reviewing a directed verdict, Court of Appeals considers all the evidence in light most favorable to the nonmoving party and draws all reasonable inferences in favor of that party.

[27] Attorney and Client 45 ⚿26

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Liabilities to Adverse Parties and to Third Persons. Most Cited Cases
Attorneys who perform services for and on behalf of a union may not be held liable in malpractice to individual grievants where the services the attorneys perform constitute part of the collective bargaining process.

[28] Labor and Employment 231H ⚿1971

231H Labor and Employment
231HXII Labor Relations
231HXII(K) Civil Liabilities
231Hk1971 k. Liability of Members and Officers. Most Cited Cases
(Formerly 232Ak752 Labor Relations)
Union officers and employees are not individually liable to third parties for acts performed as representatives of the union in the collective bargaining process.

[29] Labor and Employment 231H ⚿1971

231H Labor and Employment
231HXII Labor Relations
231HXII(K) Civil Liabilities
231Hk1971 k. Liability of Members and Officers. Most Cited Cases
(Formerly 232Ak752 Labor Relations)
No exception to the *Atkinson* rule, viz., union officers and employees are immune from personal liability for acts undertaken as union representatives, should be fashioned for union employees who happen to be attorneys; where the attorney performs a function in the collective bargaining process that would otherwise be assumed by the union's business agents or representatives, the rationale behind *Atkinson* is squarely applicable.

[30] Attorney and Client 45 ⚿64

45 Attorney and Client

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45II Retainer and Authority
45k64 k. What Constitutes a Retainer. Most Cited Cases
Although a union member is justified in expecting an attorney for the union to perform in a competent and professional manner, nevertheless, when the union is providing the services, it is the union, rather than the individual business agent or attorney, that represents and is ultimately responsible to the union member.

[31] Attorney and Client 45 ⚿64

45 Attorney and Client
45II Retainer and Authority
45k64 k. What Constitutes a Retainer. Most Cited Cases
An attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has not entered into an "attorney-client" relationship in the ordinary sense with the particular union member who is asserting the underlying grievance.

[32] Attorney and Client 45 ⚿109

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k109 k. Acts and Omissions of Attorney in General. Most Cited Cases

Labor and Employment 231H ⚿1202

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1200 Extent of Authority and Duties of Representative in General
231Hk1202 k. Litigation Authority. Most Cited Cases
(Formerly 232Ak221 Labor Relations)

Labor and Employment 231H ⚿1208

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1208 k. In General. Most Cited Cases
(Formerly 232Ak221 Labor Relations)
If conduct by a union's attorney is arbitrary, discriminatory or in bad faith, the union member may sue the union for breach of its duty of fair representation; furthermore, the union may sue its attorney for malpractice or for breach of contract, and compensate the union member out of the recovery for any damages he may have suffered.

[33] Attorney and Client 45 ⚿109

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k109 k. Acts and Omissions of Attorney in General. Most Cited Cases
Union members who have themselves retained counsel to process grievances on their behalf may maintain a malpractice suit against such counsel, even though the individual or firm also serves as the union's regular outside counsel and is employed at the union's suggestion; furthermore, union members may also sue attorneys whether or not the attorneys are employed by the union or the legal services provided are wholly unrelated to the collective bargaining process.

[34] Attorney and Client 45 ⚿105.5

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of Malpractice or Negligence Action in General. Most Cited Cases
(Formerly 45k105)
Negligence is the essence of a malpractice action.

[35] Labor and Employment 231H ⚿1219(12)

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation

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231Hk1219 Actions for Breach of Duty
231Hk1219(12) k. Weight and Sufficiency of Evidence. Most Cited Cases
(Formerly 232Ak219 Labor Relations)
Negligence is insufficient to support a breach of the duty of fair representation suit against a union; the union's conduct must be arbitrary, discriminatory, or in bad faith.

[36] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
District court's conclusion that, as a matter of law, one individual defendant had insufficient contacts with California to justify the district court's exercise of personal jurisdiction over him was a legal conclusion reviewable de novo by the Court of Appeals.

[37] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Where a defendant has "substantial" or "continuous and systematic" contacts with the forum state, there is a sufficient relationship between defendant and the state to support general personal jurisdiction, even if the cause of action is unrelated to defendant's forum activities.

[38] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Lacking sufficient contacts to support general jurisdiction, nonresident defendants may still be subject to limited personal jurisdiction dependent on the nature and quality of defendant's contacts with the forum in relation to the cause of action.

[39] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))
A tripartite test has been established for determining whether due process allows for the exercise of limited personal jurisdiction in a given case: (1) the nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws, (2) the claim must be one which arises out of or results from the defendant's forum-related activities, and (3) the exercise of jurisdiction must be reasonable.

[40] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Making of telephone calls and sending of letters to the forum state was legally insufficient to enable the court to exercise personal jurisdiction over the

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nonresident defendant.

[41] Federal Courts 170B ⚿417

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk417 k. Federal Jurisdiction. Most Cited Cases
District court's determination of a party's amenability to suit is made by reference to the law of the state in which it sits.

[42] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Ordinarily, use of the mails, telephone, or other international communications do not qualify as purposeful activity invoking benefits and protection of the forum state and, therefore, such contacts with the forum state are not a sufficient predicate for the exercise of limited personal jurisdiction.

***1247** Joseph A. Yablonski, Yablonski, Both & Edelman, Washington, D.C., Robert Simpson, Rose, Klein & Marias, Los Angeles, Cal., for defendants-appellees.
***1248** Edgar Paul Boyko, Robert K. Schraner, Miller, Boyko & Bell, San Diego, Cal., for plaintiff-appellant.

Appeal from the United States District Court for the Southern District of California.

Before GOODWIN, REINHARDT, and WIGGINS, Circuit Judges.

REINHARDT, Circuit Judge:
Appellant James Peterson brought suit against the National Football League Players Association ("NFLPA" or "union") and two of its attorneys, claiming that the union, through the named attorneys, had furnished him with inaccurate advice upon which he detrimentally relied in pursuing a grievance against his ex-ballclub, the Tampa Bay Buccaneers. Peterson appeals from the district court's decisions to grant summary judgment in favor of one of the individually named union attorneys, to issue a directed verdict in favor of the other union attorney, and to grant the NFLPA's motion for a judgment notwithstanding the verdict after the jury had ruled in his favor. We affirm each of the trial court's decisions.

I. BACKGROUND

A. *Events Giving Rise to Peterson's Grievance*

James Peterson played college football at San Diego State University. After graduating with a physical education degree in 1973, Peterson was drafted by the Los Angeles Rams of the National Football League (NFL). He played for the Rams until 1976, at which time he was traded to the Tampa Bay Buccaneers.

In the summer of 1976, Peterson signed three separate one-year contracts with Tampa Bay for the 1976, 1977, and 1978 football seasons. Each of the contracts contained a standard clause providing that if Peterson were unable to play professional football because of an injury incurred in the performance of services under that contract, the club would continue to pay him his full salary during the remainder of the contract term. In addition, the club agreed to Peterson's request to include a special "injury protection" clause in the 1977 contract. That clause specified that if Peterson were unable to play football in either 1977 or 1978 because of a football-related injury, he would receive the full salary to which he was entitled for the year or years that the injury prevented him from playing. Each of the contracts also contained a provision authorizing the ballclub to terminate the agreement if, in the

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opinion of the head coach, Peterson's level of performance was "unsatisfactory" as compared to that of other members of the club's squad of players.

Peterson's contracts incorporated the terms of the collective bargaining agreement entered into between the NFLPA and the NFL Management Council. The collective bargaining agreement contemplated two distinct grievance procedures by which a player could contest a club's decision to terminate his contract. An "injury grievance" was the proper procedure to be employed by a player seeking to enforce a club's contractual obligation to pay his salary when he incurred an injury in the performance of his services under the contract. A "non-injury" grievance was the appropriate means to resolve all other disputes involving the enforcement of a player's contract. An injury grievance was required to be filed within 20 days of the date on which the dispute arose, a non-injury grievance within 60 days of that date. There were also differences with respect to the intermediate procedures applicable to the two classifications of grievances, but the final step in each was a hearing before a neutral arbitrator. A player was authorized to file and process both forms of grievance on his own without any involvement by the NFLPA.

Peterson was injured in the third game of the 1976 football season. He had surgery on his right knee and was sidelined for the rest of the season. The club honored its contractual obligation to pay Peterson's salary over the balance of the 1976 ***1249** season. After his surgery, Peterson underwent a medically supervised rehabilitation program. He reported to the Tampa Bay pre-season camp in mid-July, 1977. After passing a physical examination administered by the team's physician, Peterson participated fully in all practices and drills during the first seven or eight days of training camp.

The club's records reveal that on July 22, 1977, Peterson was verbally advised that he had been "cut" from the team and placed on waivers. Peterson received written notification that his 1977 and 1978 contracts had been terminated on July 25, 1977.

Peterson believed that he was cut from the team because of reduced mobility attributable to the knee injury that he suffered in the 1976 season. He claimed that, under the "injury protection" clause of the 1977 contract, the club remained obligated to pay him his full salary for both the 1977 and 1978 football seasons. The club disagreed. Its officials told Peterson that he had been released because he lacked sufficient skill to make the team, not because of his knee injury, and that he was therefore not entitled to payment under the "injury protection" clause.

B. *The Handling of Peterson's Grievance*

At trial, the parties vigorously disputed the extent of the NFLPA's involvement in the pursuit of Peterson's grievance against Tampa Bay. Peterson claimed that he called his agent, Richard Mangiarelli, as soon as he was told that he had been released. Mangiarelli testified that he called the NFLPA's main office the following day to seek assistance in enforcing the injury protection clause of Peterson's contract against Tampa Bay. Mangiarelli claimed that he spoke with Harold Kennedy, a recent law school graduate who was then serving as an assistant both to the NFLPA's executive director, Edward Garvey, and to the union's staff counsel, Richard Berthelsen. Mangiarelli said that Kennedy represented to him that he was a practicing attorney, when, in fact, he was not. Mangiarelli testified that he informed Kennedy of the injury protection clause in Peterson's contract and that Kennedy then dictated to him an injury grievance letter with instructions to send the letter to the ballclub. Peterson signed the injury grievance letter on August 5, 1977, within two weeks of the date that he was notified of his release.

Mangiarelli further testified that once the union assured him that it would handle Peterson's grievance, in mid-August, 1977, he put Peterson in direct contact with Kennedy. Peterson claimed that he re-

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mained in frequent contact with both Kennedy and Berthelsen throughout the remainder of 1977 in order to monitor the progress of his grievance. He mentioned specifically that, in early September, he spoke with Kennedy about the injury protection clause and that Kennedy assured him that the union had access to his contract. Peterson testified that he continually relied on the assurances of the two union representatives that they were handling his grievance for him.

The testimony of the union's witnesses differed sharply from that presented by Peterson and Mangiarelli. Kennedy declared that he could not recall ever speaking with either Mangiarelli or Peterson and that he had no recollection of working on Peterson's grievance. Berthelsen testified that he first became aware of Peterson's grievance in late January or early February of 1978. Berthelsen claimed that it was not until mid-February, 1978 that the union was sent copies of Peterson's contract and that he was made aware of the injury protection clause contained therein. Berthelsen explained that after examining the contracts he determined that Peterson should have filed a non-injury grievance and that, on February 17, 1978, he attempted to "rechannel" Peterson's original injury grievance into a non-injury claim. Berthelsen's efforts were undertaken well beyond the 60-day period in which Peterson could have timely filed a non-injury grievance.

The rechanneled non-injury grievance was heard by Arbitrator James Scearce on ***1250** June 16, 1978. After a hearing in which the merits of Peterson's claim under the injury protection clause were fully argued, Arbitrator Scearce dismissed the grievance as untimely filed. He ruled that Berthelsen's efforts in February, 1978 to rechannel Peterson's claim as a non-injury grievance were undertaken more than 60 days after the dispute arose and that the grievance was therefore time-barred. Arbitrator Scearce did not address the merits of Peterson's claim that, because his release was attributable to the knee injury suffered in the 1976 season, the club remained obligated, under the "injury protection" clause, to honor his 1977 and 1978 contracts. Peterson has not challenged the propriety of Arbitrator Scearce's ruling.[FN1]

> FN1. The arbitrator found that because Peterson prefaced the grievance letter with a statement that it was being filed in accordance with Article IX of the collective bargaining agreement (governing injury grievances), the claim could not be construed as a non-injury grievance filed pursuant to Article VII of that agreement. However, the letter fully communicated the nature and the substance of Peterson's claim to Tampa Bay. On this basis alone, we seriously question the arbitrator's ruling that Peterson's grievance was time-barred. Moreover, the arbitrator failed to consider the fact the NFL and the Players Association had regularly failed to follow some of the strict time limits for handling grievances set forth in the collective bargaining agreement and that there was no equitable reason to hold Peterson to them in this case (Decision of Arbitrator Volz, November 13, 1981, referred to *infra* pp. 1249-50). In short, there appears to be little rational basis for the arbitrator's ruling. However, because Peterson has not questioned the arbitrator's ruling, either before the district court or before us, we do not determine its validity.

Peterson complained to Berthelsen that the NFLPA was at fault for the dismissal of the non-injury grievance. The NFLPA then advised Peterson that it planned to reactivate the original injury grievance. The injury grievance was subsequently heard by Arbitrator Marlin M. Volz. The issue considered by Arbitrator Volz was whether Peterson was entitled to his salary under the 1977 contract pursuant to the club's obligation to continue paying his salary if he was injured in the performance of services under *that* contract. Arbitrator Volz ruled against

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Peterson, finding that Peterson failed to establish that he was physically unable to play professional football at the time that the contract was terminated because of an injury incurred under *that* contract. The arbitrator apparently based his decision primarily on the fact that Peterson did not incur an injury during the term of the 1977 contract.[FN2] He also determined, however, that Peterson was not physically unable to play football at the time he was released by Tampa Bay. The latter finding would, in itself, have justified the denial of Peterson's claim.FN3

> FN2. The parties apparently believed that an injury incurred in a prior year is beyond the proper scope of an injury grievance proceeding. We are not at all sure they were correct. It is possible that the question whether Peterson was released due to an injury incurred in the performance of services under the *1976* contract could properly have been considered in the injury grievance proceeding before Arbitrator Volz. There are legitimate arguments for construing Article IX as applicable to grievances involving injuries of the type suffered by Peterson even when they do not qualify as "injury grievances" under a narrow and literal construction of the words of that Article. However, that issue also has not been preserved by Peterson, at least not for purposes of this litigation.
>
> FN3. As in the case of the standard injury clause, under the special "injury protection" clause of the 1977 contract Peterson would have had to establish that he was physically unable to play football at the time of his release. Accordingly, had Arbitrator Scearce reached the merits, he would have been required to determine the identical question that was determined adversely to Peterson by Arbitrator Volz.

C. *Proceedings in the District Court*

Dissatisfied with the union's representation, Peterson filed the instant action in district court in November, 1980. The complaint was not served on any of the defendants, however, during the period that the union continued to pursue Peterson's injury grievance before Arbitrator Volz. Shortly after the injury grievance was dismissed, Peterson filed an amended complaint which was ultimately served on the defendants in early February, 1982.

***1251** The amended complaint alleged that the NFLPA had breached its duty of fair representation by erroneously advising Peterson to file an injury grievance and by failing to rectify its error while there was still time to do so. It also alleged that the union did not conduct an adequate investigation prior to rendering its advice. The complaint included a professional malpractice claim against the union attorneys, Berthelsen and Kennedy, for the same misconduct which formed the basis of Peterson's breach of duty claim against the union.

The district court entered summary judgment in favor of Kennedy, finding that he lacked sufficient contacts with the State of California to enable the court to exercise personal jurisdiction over him. After a three and one-half day jury trial, the district court issued a directed verdict in favor of Berthelsen, ruling that the legal malpractice claim against him was "subsumed" in and precluded by Peterson's breach of duty claim against the union. The jury returned a verdict against the NFLPA for the full amount sought by Peterson, finding that the union had breached its duty of fair representation in handling his grievance. The trial judge, however, granted the union's motion for a judgment notwithstanding the verdict (JNOV). On appeal, Peterson challenges each of the trial court's rulings.

II. THE TIMELINESS OF PETERSON'S COMPLAINT

[1] As a threshold matter, we reject the union's claim that Peterson's complaint was untimely filed. The Supreme Court has held that the National

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Labor Relations Act's (NLRA) six-month statute of limitations for the filing of unfair labor practice claims is applicable to suits against a union for breach of the duty of fair representation. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169, 103 S.Ct. 2281, 2293, 76 L.Ed.2d 476 (1983). Prior to *DelCostello*, federal courts applied the relevant state statute of limitations to breach of duty suits against labor unions. *See, e.g., Price v. Southern Pacific Transportation Co.*, 586 F.2d 750, 752 (9th Cir.1978).

[2] Until quite recently, we had repeatedly refused to give *DelCostello* retroactive effect. *See, e.g., Rodriquez v. Union Carbide Corp.*, 735 F.2d 365, 365-66 (9th Cir.1984); *Barina v. Gulf Trading & Transportation Co.*, 726 F.2d 560, 564 (9th Cir.1984). However, we have now made it clear that *DelCostello* is to be given retroactive application when doing so serves to lengthen rather than shorten the limitations period that would otherwise be applicable under state law. *See Aragon v. Federated Department Stores, Inc.*, 750 F.2d 1447, 1451 (9th Cir.1985); *Glover v. United Grocers, Inc.*, 746 F.2d 1380, 1382 (9th Cir.1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985).

The parties disagree as to the date on which Peterson's cause of action arose. The union maintains that the cause of action accrued either in February, 1978, when Peterson first became aware of the union's alleged error, or in November, 1978, when Arbitrator Scearce dismissed the non-injury grievance as untimely. Peterson contends that the cause of action did not arise until November 13, 1981, the date that his injury grievance was ultimately dismissed by Arbitrator Volz.

[3][4][5][6] We need not determine the exact date that Peterson's cause of action accrued because we conclude that the complaint was timely filed whether the cause of action arose as early as 1978 or as late as 1981. If, as the union contends, Peterson's claim accrued in 1978, the timeliness of the complaint would be assessed under California's three-year statute of limitations,[FN4] and would be timely commenced regardless***1252** of which accrual date suggested by the union is applicable.[FN5] If, as Peterson argues, the cause of action did not accrue until November, 1981, his complaint would be timely under the NLRA's six-month statute of limitations.[FN6]

FN4. The complaint was filed in the Southern District of California. We have long recognized that "the forum court utilizes its own state's statute of limitations." *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 613 (9th Cir.1975); *see also Restatement, 2d, Conflict of Laws § 142.* California applies its own limitations law to actions brought by its citizens, with an exception not applicable here, rather than that of the state in which the cause of action arose. *See*Cal.Civ.Proc.Code § 361; *see also Hall v. Copco*, 224 F.2d 884, 885 (9th Cir.1955); *Western Coal & Mining Co. v. Jones*, 27 Cal.2d 819, 828, 167 P.2d 719 (1946). Our decisions applied California's three-year statute of limitations for actions "upon a liability created by statute,"Cal.Civ.Proc.Code § 338(1), to breach of duty claims that accrued prior to 1981. *See, e.g., Aragon*, 750 F.2d at 1451; *Price*, 586 F.2d at 753. Accordingly, the shorter six-month *DelCostello* rule would not be applied retroactively.

FN5. Under California law, a cause of action is "commenced" when the complaint is filed. *See*Cal.Civ.Proc.Code § 350.

FN6. As explained in *Aragon*, we had applied California's 100-day statute of limitations for actions to vacate arbitration awards, Cal.Civ.Proc.Code § 1288, to all breach of duty claims that accrued after August, 1981 and before June, 1983. *Aragon*, 750 F.2d at 1451-52; *see also Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1353 (9th Cir.1981). Because the

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> NLRA's six-month limitations period exceeds that which otherwise would have been applied under state law, the federal limitations statute governs. *Aragon*, 750 F.2d at 1451.

III. THE DISTRICT COURT'S RULINGS

A. *The JNOV in Favor of the Union*

[7] The district court granted the union's motion for a judgment notwithstanding the verdict (JNOV) on two independent grounds: (1) the evidence demonstrated that the union's conduct amounted to no more than negligence, and negligent conduct on the part of a union is legally insufficient to sustain a claim for breach of the duty of fair representation; and (2) assuming that the union breached its duty, Peterson was not damaged thereby because he would not have prevailed on the non-injury grievance even if it had been timely filed.[FN7] We need only consider the first ground.

> FN7. The district court did not explain the basis for the second ground of its decision. The union's primary argument is that Peterson failed to obtain a disability certification from the club physician and that such a certification constituted a condition precedent to any recovery on his part. The union does not contend that Arbitrator Volz' finding that Peterson was not physically unable to play football should be given binding effect for purposes of the present litigation.

[8][9][10] We review the propriety of a JNOV under the same standard that is applied by the district court. *See, e.g., Garter-Bare Co. v. Munsingwear, Inc.*, 723 F.2d 707, 709 (9th Cir.), *cert. denied*, 469 U.S. 980, 105 S.Ct. 381, 83 L.Ed.2d 316 (1984). A JNOV is proper when the evidence permits only one reasonable conclusion as to the verdict. *Id.* We view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. *Id.* A JNOV is improper if reasonable minds could differ over the verdict. *See, e.g., Yeamen v. United States*, 584 F.2d 322, 326 (9th Cir.1978).

Peterson's breach of duty claim is based principally on allegations that the union, through its representatives, erroneously advised him to file an injury grievance and that the union failed to rectify its error while there still was time to do so. We assume *arguendo* that the advice was in fact erroneous, although it is not entirely clear that such was the case. *See supra* note 2. Viewed in the light most favorable to Peterson, the evidence presented at trial established, *inter alia*, that: Kennedy, after being informed that Peterson's 1977 contract contained an "injury protection" clause, advised Peterson's agent to file an injury grievance against Tampa Bay; based on Kennedy's advice, Peterson designated his claim as an injury grievance; the union failed to recognize its error within the 60 day period in which a non-injury grievance could have timely been filed; union representatives assured Peterson on many occasions during this 60 day period that the union was handling his grievance for him; as a result of the union's assurances, Peterson failed to file a non-injury grievance within the 60 day period.

[11] The district court concluded that the evidence presented was legally insufficient to sustain the jury's verdict that the ***1253** union breached its duty of fair representation. We agree. After reviewing all of the evidence in the light most favorable to Peterson, we conclude that the union did not breach its duty of fair representation; the record is devoid of evidence that the union acted in an arbitrary, discriminatory, or bad faith manner.

[12] The duty of fair representation is a judicially established rule imposed on labor organizations because of their status as the exclusive bargaining representative for all of the employees in a given bargaining unit. The Supreme Court recently explained the basis and scope of the duty:

> The duty of fair representation exists because it is the policy of the National Labor Relations Act to

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> allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."

DelCostello, 462 U.S. at 164 n. 14, 103 S.Ct. at 2290 n. 14 (quoting *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842 (1967)).

[13] A union breaches its duty of fair representation only when its conduct toward a member of the collective bargaining unit is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. at 190, 87 S.Ct. at 916. The duty is designed to ensure that unions represent fairly the interests of all of their members without exercising hostility or bad faith toward any. It stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Id.* at 182, 87 S.Ct. at 912.

[14][15] The Supreme Court has long recognized that unions must retain wide discretion to act in what they perceive to be their members' best interests. *See, e.g., Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38, 73 S.Ct. 681, 685-86, 97 L.Ed. 1048 (1953). To that end, we have "stressed the importance of preserving union discretion by narrowly construing the unfair representation doctrine." *Johnson v. United States Postal Service*, 756 F.2d 1461, 1465 (9th Cir.1985, *as amended* May 3, 1985) (citation omitted). We have emphasized that, because a union balances many collective and individual interests in deciding whether and to what extent it will pursue a particular grievance, courts should "accord substantial deference" to a union's decisions regarding such matters. *Id.* at 1466.

[16][17] A union's representation of its members "need not be error free." *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1482 (9th Cir.1985). We have concluded repeatedly that mere negligent conduct on the part of a union does not constitute a breach of the union's duty of fair representation. *See, e.g., id; Clayton v. Republic Airlines, Inc.*, 716 F.2d 729, 732 (9th Cir.1983); *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1354 (9th Cir.1981); *Stephens v. Postmaster General*, 623 F.2d 594, 596 (9th Cir.1980).

Peterson recognizes and does not challenge the established principle that a union's negligence cannot give rise to a suit for breach of the duty of fair representation. Furthermore, he does not contend that the NFLPA or any of its representatives acted toward him or his grievance in a discriminatory or bad faith manner. Rather, Peterson claims that the union breached its duty to represent him fairly because its mishandling of his grievance was so egregious as to constitute "arbitrary" conduct.

[18][19] Whether in a particular case a union's conduct is "negligent", and therefore non-actionable, or so egregious as to be "arbitrary", and hence sufficient to give rise to a breach of duty claim, is a question that is not always easily answered. A union***1254** acts "arbitrarily" when it simply ignores a meritorious grievance or handles it in a perfunctory manner, *see Vaca v. Sipes*, 386 U.S. at 191, 87 S.Ct. at 917, for example, by failing to conduct a "minimal investigation" of a grievance that is brought to its attention. *See Tenorio v. National Labor Relations Board*, 680 F.2d 598, 601 (9th Cir.1982). We have said that a union's conduct is "arbitrary" if it is "without rational basis," *see Gregg v. Chauffeurs, Teamsters and Helpers Union Local 150*, 699 F.2d 1015, 1016 (9th Cir.1983), or is "egregious, unfair and unrelated to legitimate union interests." *See Johnson v. United States Postal Service*, 756 F.2d 1461, 1465 (9th Cir.1985). In *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082, 1089-90 (9th Cir.1978), we held that a union's unintentional mistake is "arbitrary" if it re-

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flects a "reckless disregard" for the rights of the individual employee, but not if it represents only "simple negligence violating the tort standard of due care." In *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1274 (9th Cir.1983), we concluded that unintentional union conduct may constitute a breach of the duty of fair representation in situations where "the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." FN8

> FN8. In such an instance, the union must also have been "the solitary and indivisible cause of the complete extinguishment of [the] employee's grievance rights" before liability will be imposed. *See Eichelberger v. NLRB*, 765 F.2d 851, 855 (9th Cir.1985).

There are some significant general principles that emerge from our previous decisions. In all cases in which we found a breach of the duty of fair representation based on a union's arbitrary conduct, it is clear that the union failed to perform a procedural or ministerial act, that the act in question did not require the exercise of judgment and that there was no rational and proper basis for the union's conduct. For example, we found a union acted arbitrarily where it failed to: (1) disclose to an employee its decision not to submit her grievance to arbitration when the employee was attempting to determine whether to accept or reject a settlement offer from her employer, *see Robesky*, 573 F.2d at 1091; (2) file a timely grievance *after* it had decided that the grievance was meritorious and should be filed, *see Dutrisac*, 749 F.2d at 1274; (3) consider individually the grievances of particular employees where the factual and legal differences among them were significant, *see Gregg*, 699 F.2d at 1016; or (4) permit employees to explain the events which led to their discharge before deciding not to submit their grievances to arbitration. *See Tenorio*, 680 F.2d at 601.

[20][21][22] We have never held that a union has acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance. To the contrary, we have held consistently that unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances. *See, e.g., Castelli*, 752 F.2d at 1482; *Dutrisac*, 749 F.2d at 1273; *Singer v. Flying Tiger Line, Inc.*, 652 F.2d at 1355; *Ness v. Safeway Stores, Inc.*, 598 F.2d 558, 560 (9th Cir.1979); *see also Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571, 96 S.Ct. 1048, 1059, 47 L.Ed.2d 231 (1976). We have said that a union's conduct may not be deemed arbitrary simply because of an error in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining agreement, or in presenting the grievance at an arbitration hearing. *See Dutrisac*, 749 F.2d at 1273. In short, we do not attempt to second-guess a union's judgment when a good faith, non-discriminatory judgment has in fact been made. It is for the union, not the courts, to decide whether and in what manner a particular grievance should be pursued. We reaffirm that principle here.

Sound policy reasons militate against imposing liability on unions for errors of judgment made while representing their members in the collective bargaining process. In *Dutrisac*, we recognized that ***1255** holding unions liable for such errors would serve ultimately to "defeat the employees' collective bargaining interest in having a strong and effective union." 749 F.2d at 1273. If unions were subject to liability for "judgment calls", it would necessarily undermine their discretion to act on behalf of their members and ultimately weaken their effectiveness. In the long run, the cost of recognizing such liability would be borne not by the unions but by their memberships. Not only would the direct costs of adverse judgments be passed on to the members in the form of increased dues, but, more importantly, unions would become increasingly reluctant to provide guidance to their members in collective bargaining disputes. Such a result would be inconsistent with our oft-repeated commitment to

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construe narrowly the scope of the duty of fair representation in order to preserve the unions' discretion to decide how best to balance the collective and individual interests that they represent.

Freeing a union from liability for ordinary acts of negligence in the performance of its representational responsibilities requiring judgment on its part, reflects a balance of the union's organizational interest against the individual interests of its members. Our cases, and those of the Supreme Court, tip the balance in favor of the union, and accept the consequence of uncompensated loss sustained by an individual union member. Whether liability for a loss occasioned by ordinary negligence of the union might be spread more equitably among the membership as a whole, rather than be borne by the individual member who is harmed, is no longer an open question.

In applying the foregoing principles to the case at hand, we conclude, as a matter of law, that Peterson failed to establish that the NFLPA breached its duty of fair representation. As mentioned, Peterson does not contend that the union acted in a discriminatory or bad faith manner toward either him or his grievance. He relies exclusively on his claim that the union's error was so egregious as to be "arbitrary." We disagree. The alleged error was one of judgment. Viewing the evidence in the light most favorable to Peterson, the most that can be said is that the union provided him with incorrect advice and did not alter its judgment until it was too late to rectify the error. In this case, deciding whether to file an injury or a non-injury grievance was not a purely mechanical function; the union attorneys were required to construe the scope and meaning of the injury and non-injury grievance provisions of the collective bargaining agreement and to determine which of the two grievance procedures was more appropriate. As we have indicated earlier, the answer was not as simple as a literal reading of the two contract sections might indicate. *See supra* note 2.

[23] Peterson also contends that the union failed adequately to investigate the facts and circumstances of his claim before advising him to file an injury grievance. Peterson does not specify exactly what the union neglected to do; however, his only possible claim appears to be that the union failed to examine copies of his contracts with Tampa Bay before rendering its advice. We find this contention insufficient as a matter of law. Both Peterson and his agent testified that they informed Kennedy of the inclusion of the "injury protection" clause in Peterson's 1977 contract and described its substance to him. We do not believe that a further examination of that provision, or of any other provision in Peterson's contracts, would have better enabled Kennedy to advise Peterson as to which form of grievance to file. It was the grievance and arbitration provisions of the standard collective bargaining agreement, rather than the "injury protection" clause of Peterson's contract, that the union was required to construe in order to determine which grievance procedure was applicable to Peterson's claim. Examining the text of the injury protection clause would not have materially influenced the union's judgment in that regard.

Although the union's representatives may have erred in initially advising Peterson to file an injury grievance and in failing***1256** to recognize its mistake in time to file a non-injury grievance in its stead, we are unwilling to subject unions to liability for such errors in judgment. Accordingly, we affirm the district court's conclusion that the evidence presented was insufficient, as a matter of law, to support the jury's verdict against the union.

B. *The Directed Verdict in Favor of Berthelsen*

[24][25][26] The district court issued a directed verdict in favor of Berthelsen, concluding that Peterson's malpractice claim against the union attorney was "subsumed" in and precluded by the breach of duty claim asserted against the union. We review a directed verdict under the same standard as that which we apply when reviewing a JNOV. A directed verdict is proper when the evidence per-

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mits only one reasonable conclusion as to the verdict. *See, e.g., Shakey's Inc. v. Covalt,* 704 F.2d 426, 430 (9th Cir.1983). It is inappropriate if there is substantial evidence to support a verdict for the non-moving party. *See, e.g., Id.; Fabrica Inc. v. El Dorado Corp.,* 697 F.2d 890, 892 (9th Cir.1983). We consider all of the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. *Id.*

The material facts are uncontested. As it customarily did for its members, the NFLPA undertook Peterson's grievance free of charge to him. Berthelsen, as chief staff counsel for the NFLPA, was the union official ultimately responsible for the handling of Peterson's grievance. Dating back to 1972, Berthelsen had been employed as a full-time salaried member of the union's staff. The evidence is undisputed that Berthelsen's sole involvement with Peterson's grievance was in the capacity of staff counsel for the NFLPA; he was not privately retained by Peterson to pursue the grievance.

[27] The district court dismissed the damage claim against Berthelsen, concluding that Peterson could not proceed against him for alleged misconduct that occurred during the course of Berthelsen's employment as the union's staff attorney. Peterson contends that, as an attorney, Berthelsen remains subject to liability for professional malpractice independent of the union's potential liability for breach of its duty of fair representation. He claims that the district court erred in concluding that his malpractice claim against Berthelsen was "subsumed" in his claim against the union. We reject Peterson's contention. We believe that sound policy reasons as well as established precedent compel the conclusion that attorneys who perform services for and on behalf of a union may not be held liable in malpractice to individual grievants where the services the attorneys perform constitute a part of the collective bargaining process.

1. *The Atkinson Rule: Union Officers and Employees Are Immune From Personal Liability For Acts Undertaken As Union Representatives*

[28] It has long been recognized that union officers and employees are not individually liable to third parties for acts performed as representatives of the union in the collective bargaining process. In *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962), the Supreme Court held that individual damage claims may not be maintained against union officials for acts that are undertaken on behalf of the union. In *Atkinson,* the employer brought an action against the union and against certain designated union officers for the defendants' alleged breach of a no-strike agreement. The Court concluded that "the union as an entity ... should in the absence of agreement be the sole source of recovery for injury inflicted by it ...," and emphasized specifically that "[t]his policy cannot be evaded or truncated by the simple device of suing union agents or members, whether in contract or in tort, or both, in a separate count or in a separate action for damages...." *Id.* at 249, 82 S.Ct. at 1325. The *Atkinson* Court explained the historical basis for its refusal to permit third party damage claims to be ***1257** asserted against a union's officers or employees:

> When Congress passed § 301, it declared its view that only the union was to be made to respond for union wrongs, and that the union members were not to be subject to levy. Section 301(b) has three clauses. One makes unions suable in the courts of the United States. Another makes unions bound by the acts of their agents according to conventional principles of agency law (cf. § 301(e)). At the same time, however, the remaining clause exempts agents and members from personal liability for judgments against the union (apparently even when the union is without assets to pay the judgment). The legislative history of § 301(b) makes it clear that this third clause was a deeply felt congressional reaction against the *Danbury Hatters* case (*Loewe v. Lawlor,* 208 U.S. 274 [28 S.Ct. 301, 52 L.Ed. 488 (1908)]; *Lawlor v. Loewe,* 235 U.S. 522 [35 S.Ct. 170, 59 L.Ed. 341

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(1915)]), and an expression of legislative determination that the aftermath (*Loewe v. Savings Bank of Danbury,* 236 F. 444 (C.A.2d Cir. [1916])) of that decision was not to be permitted to recur.

Id. at 247-48, 82 S.Ct. at 1324-25.

In *Complete Auto Transit, Inc. v. Reis,* 451 U.S. 401, 101 S.Ct. 1836, 68 L.Ed.2d 248 (1981), the Supreme Court reaffirmed and extended the holding of *Atkinson.* The Court ruled that a damage claim may not be brought against individual union officers or members even if the individual's conduct was unauthorized by the union and was in violation of an existing collective bargaining agreement. *Id.* at 402, 101 S.Ct. at 1838. The Court reiterated that "the legislative history of § 301 clearly reveals Congress' intent to shield individual employees from liability for damages arising from their breach of ... a collective bargaining agreement." *Id.* at 407, 101 S.Ct. at 1840; *accord Hardline Electric, Inc. v. International Brotherhood of Electrical Workers, Local 1547,* 680 F.2d 622, 624 n. 1 (9th Cir.1982), *cert. denied,* 459 U.S. 1170, 103 S.Ct. 814, 74 L.Ed.2d 1013 (1983).

We have read *Atkinson* to preclude employees from maintaining a state tort claim against union officials in conjunction with a section 301 breach of duty claim against a union. In *Williams v. Pacific Maritime Association,* 421 F.2d 1287 (9th Cir.1970), the petitioners brought a state tort claim against union officials, alleging that the officials conspired to bring about their wrongful deregistration and discharge, in addition to a federal claim against the union, alleging that the officials' conduct amounted to a breach of the union's duty of fair representation. We ruled that, in light of *Atkinson,* the state tort claim could not be maintained against the individual union officials. *Id.* at 1289.

Other courts similarly have read *Atkinson* to prohibit claims, both state and federal, tort and otherwise, against individuals who are employees of or acting as agents or representatives of their unions. *See, e.g., United Steelworkers of America v. Lorain,* 616 F.2d 919, 924 (6th Cir.1980) (union officers not individually liable for damages resulting from alleged breach of collective bargaining agreement), *cert. denied,* 451 U.S. 983, 101 S.Ct. 2313, 68 L.Ed.2d 839 (1981); *Universal Communications Corp. v. Burns,* 449 F.2d 691, 693-94 (5th Cir.1971) (per curiam) (section 301 forbids recovery of damages from individual union members "*even if the claim purports to be based exclusively on state law.*" (emphasis in original)); *Balestreri v. Western Carloading,* 530 F.Supp. 825, 830 (N.D.Cal.1980); *Suwanchai v. International Brotherhood of Electrical Workers,* 528 F.Supp. 851, 862 (D.N.H.1981); *Henry v. Radio Station KSAN,* 374 F.Supp. 260, 267 (N.D.Cal.1974).

2. The Atkinson Rule Applies To and Bars Malpractice Claims Against Attorneys Representing the Union

[29] We do not agree with Peterson's contention that an exception to the *Atkinson* rule should be fashioned for union employees who happen to be attorneys. ***1258** Where, as here, the attorney performs a function in the collective bargaining process that would otherwise be assumed by the union's business agents or representatives, the rationale behind the *Atkinson* rule is squarely applicable.

In handling Peterson's labor grievance, Berthelsen assumed a function that often is performed by a union's business agents or representatives. Labor grievances and arbitrations frequently are handled by union employees or representatives who have not received any professional legal training at all. A union may, on the other hand, choose to have its interests in any part of the collective bargaining process represented by a professionally trained attorney. If so, the union will either utilize the services of its in-house staff of attorneys, if it has one, or the services of its regularly retained outside law firm, or may even on occasion employ special outside counsel. When the union uses its regular outside counsel, the services are sometimes covered under

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an overall retainer agreement, and there is no additional fee or charge to the union for the law firm's handling of the matter. In any event, whether it be house counsel or outside union counsel, where the union is providing the services, the attorney is hired and paid by the union to act for it in the collective bargaining process.[FN9]

> FN9. Our concurring colleage suggests that *Atkinson* mandates that retained outside counsel not be insulated from liability under § 301(b). The relevant language in *Atkinson* is the following:
>
> > Another [clause of § 301(b)] makes unions bound by agents according to conventional principles of agency law (cf. § 301(e)). At the same time, however, the remaining clause exempts agents and members from personal liability ...
>
> 370 U.S. at 248, 82 S.Ct. at 1324 (quoted *supra* at 1257). The concurrence appears to suggest that while the Supreme Court used the word "agents" in the first quoted sentence in its traditional common law sense, it meant something quite different when it used the same word "agents" in the immediately following sentence. Although there is no question that when the Court used "agents" the first time it was referring to all agents, including attorneys and others, regardless of their employment or membership status, according to the concurrence when the Court used "agents" the second time it meant only those agents who also happen to be union members or officials. We cannot believe that the Court would have given the word "agents" such radically different meanings in consecutive sentences without some indication of its intent to do so. For this reason, as well as for the other reasons set forth in this part of our opinion, we reject the approach of our concurring colleague.

[30] We recognize that there are cases in which an attorney represents the union in an arbitration proceeding, but the underlying grievance belongs to a particular union member who has a very real interest in the manner in which the grievance is processed. That union member surely is justified in expecting the attorney to perform in a competent and professional manner; a portion of his dues is paid to enable the union to represent his interests vis-a-vis his employer effectively in all stages of the collective bargaining process. Nevertheless, when the union is providing the services, it is the union, rather than the individual business agent or attorney, that represents and is ultimately responsible to the member.

[31] We do not believe that an attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has entered into an "attorney-client" relationship in the ordinary sense with the particular union member who is asserting the underlying grievance. Although the attorney may well have certain ethical obligations to the grievant, his principal client is the union; it is the union that has retained him, is paying for his services, and is frequently the party to the arbitration proceedings.

The legal theory we describe tracks the practical realities of labor-management relations in the United States today. The union member looks to his union to save his job, gives it credit when a dispute is resolved in his favor, and holds it responsible when his discharge is upheld or he loses other important rights. He views the union attorney as an arm of his union rather than as an individual he has chosen as his lawyer. In fact, it is not uncommon for the union member to be completely unaware, ***1259** at least prior to the arbitration hearing, of who on the union's staff is actually handling his grievance.

Although all of the considerations we have mentioned are important, the rule we adopt is based

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primarily on a functional assessment of the attorney's role as a union representative within the collective bargaining process. Union officers, employees and agents are not subject to individual liability for acts performed on behalf of the union in the collective bargaining process. *See* text *supra* pp. 1256-57. A different result is not warranted or permissible merely because a union chooses to employ an attorney rather than a business agent to perform collective bargaining functions.

[32] Our decision does not mean that union members are necessarily without a remedy when attorneys employed by the union fail to process grievances adequately. If an attorney's conduct falls within the "arbitrary, discriminatory or bad faith" test we have described in section III.A., *supra,* the union member may sue the union for breach of the duty of fair representation. We also note that nothing we have said limits a union's right to sue its attorney for malpractice or for breach of contract, and to compensate a union member out of the recovery for any damages he may have suffered.

[33] There are other instances in which union members whose grievances are improperly handled may recover damages from an attorney. Our decision does not preclude malpractice suits by union members who have themselves retained counsel to process grievances on their behalf, even though the individual or firm also serves as the union's regular outside counsel and is employed at the union's suggestion, *see* text *infra* pp. 1259-60. Union members may also sue attorneys whether or not the attorneys are employed by the union where the legal services provided are wholly unrelated to the collective bargaining process; *e.g.,* drafting a will, handling a divorce or litigating a personal injury suit. In such cases the *Atkinson* rule is inapplicable.

3. *Other Policy Reasons Why Attorneys Representing the Union Should Not Be Subject To Malpractice Liability For Collective Bargaining Activity*

[34][35] Our reluctance to impose malpractice liability on union attorneys for conduct undertaken as the union's collective bargaining agents stems in part from policy considerations independent of the *Atkinson* rule. Negligence is the essence of a malpractice action. *See, e.g., Raddatz v. United States,* 750 F.2d 791, 795 (9th Cir.1984) (medical malpractice). However, negligence is insufficient to support a breach of the duty of fair representation suit against a union; a union's conduct must be arbitrary, discriminatory, or in bad faith. *See supra* section III.A. Holding that union attorneys are subject to malpractice suits by individual grievants for actions undertaken as the union's representative would give rise to an anomalous result: certain agents or employees of the union would be held to a far higher standard of care than the union itself.

Equally important, permitting recovery against union counsel would destroy the rationality and symmetry the Supreme Court has finally brought to the law with respect to the time for the filing of suits in cases involving claims by union members that their grievances were mishandled. If union attorneys were subject to malpractice liability in such cases, litigants would be able to proceed against the attorney long after the expiration of the statutory period for suits against both the union and the employer.FN10 Thus, the union attorney would often be the only defendant against whom a disappointed grievant could proceed. He would become the natural, and ***1260** only, target in large numbers of what would normally be breach of the duty of fair representation suits.

> FN10. In *DelCostello,* the Supreme Court ruled that "hybrid" suits against labor unions and employers must be commenced within six months of the date that the cause of action accrues. 462 U.S. at 172, 103 S.Ct. at 2294. The statutory period for malpractice suits, on the other hand, is considerably longer. *See, e.g.,*Cal.Civ.Proc.Code § 340.6 (West 1982) (limitations period for malpractice claims may be as long as four years from date of alleged wrongful act).

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We find such a prospect not only unsettling but also inconsistent with the considerations that prompted the Supreme Court to apply the NLRA's six-month time limit to "hybrid" suits against labor unions and employers. Instead of bringing labor-management quarrels to a quick termination so that peace and harmony may be restored and all parties may know the meaning of the particular contractual provision at issue, allowing malpractice suits to be brought against a union attorney for two, three, or even four years beyond the time for filing suit against the union or the employer would serve to shift the forum for the dispute and create a new target defendant. In the long run, the cost of legal services to unions would rise, and the ultimate financial burden resulting from such suits would fall on them.

4. *Our Past Precedents*

Peterson contends that two of our prior decisions stand for the proposition that a union member may bring a state malpractice claim against the union's attorney in addition to a federal breach of duty claim against the union. We read those decisions differently.

In *Weitzel v. Oil Chemical & Atomic Workers,* 667 F.2d 785 (9th Cir.1982), we ruled that the district court erred in concluding that, as a matter of law, a malpractice action could not be maintained against a private law firm to which a union member had been referred by his union. In that case, the record before us contained only "fragmentary facts"; we held that they were insufficient to permit the district court to conclude, at the summary judgment stage, that an attorney-client relationship had not been formed between the union member and the law firm. Of course, if such a relationship had been formed, the firm would not have been acting primarily on behalf of the union or as the union's agent in the collective bargaining process. Rather, it would have been serving as private counsel to the individual grievant. Although our opinion did not deal with the precise point, we indicated that such was our view when we explained why Weitzel might ultimately be entitled to recover. We spoke in terms of "[c]omplainants who retain private counsel ...," and added, "[h]aving bargained for private counsel's services, they are entitled to receive them." *Id.* at 787.

Nor did our recent decision in *Aragon v. Federated Department Stores, Inc.,* 750 F.2d 1447 (9th Cir.1985), hold that a law firm that is employed or retained by a labor union may be liable to an individual grievant for malpractice committed in connection with its union representation. In *Aragon,* a discharged employee brought suit against her former employer for breach of its collective bargaining agreement, against her former union for breach of its duty of fair representation, and against the union's outside law firm for professional malpractice. We construed the malpractice claim against the law firm as based on "its alleged unsatisfactory work *on her behalf.*" *Id.* at 1448 (emphasis added). The district court dismissed the malpractice claim pursuant to Fed.R.Civ.Proc. 12(b)(6) for failure to state a claim. We reversed, concluding that summary dismissal was inappropriate.[FN11] In remanding, we said that "[i]t is the province of the [lower] court to determine whether Aragon has alleged facts sufficient to withstand a motion to dismiss." *Id.* at 1458. Thus, *Aragon* stands ***1261** for the proposition that a malpractice claim against a union's outside law firm for its work in connection with a labor grievance may not be dismissed summarily if triable questions of fact exist. Among the factual questions that must be answered where outside union counsel represents the grievant is whether counsel was retained by and was working on behalf of the union or the individual member. If the former, a malpractice suit may not be brought by the grievant; if the latter, the answer will often be to the contrary.

> FN11. Much of our analysis in *Aragon* was devoted to determining whether, as a matter of law, a malpractice claim against a law firm for its mishandling of a labor grievance is preempted by federal labor

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> law. We concluded that it is not. Clearly that result is required where the attorney is neither an employee of the union nor acting as its agent or representative. However, *Aragon* does not discuss *Atkinson* or any of the cases prohibiting the imposition of liability on employees or agents of the union for actions taken on behalf of the union in connection with the collective bargaining process. In the absence of any such discussion, we do not believe that it was the intent of *Aragon* to modify or overrule the well established rule barring suits, including state tort actions, against individual officers or employees of unions.

Neither in *Weitzel* nor in *Aragon* did we decide what facts or circumstances a union member would be required to show in order to establish the existence of a private attorney-client relationship between himself and a law firm that is retained generally to represent his union. Certainly, at the least, it would be necessary for him to prove that in his particular case the law firm was not acting pursuant to its obligation to provide representation for or on behalf of the union and that it had specifically agreed, instead, to provide direct representation to him as an individual client.

We have little difficulty in reconciling our holdings in *Weitzel* and in *Aragon* with the conclusion that we reach in this case. Unlike the earlier cases, it is clear here that the attorneys involved were acting on behalf of the union in carrying out the union's obligation to represent its members in the collective bargaining process. We thus affirm the district court's judgment that a malpractice action against Berthelsen will not lie.

C. *The Summary Judgment in Favor of Kennedy*

[36] Peterson contends that the district court improperly granted summary judgment in favor of Kennedy. The court concluded that, as a matter of law, Kennedy had insufficient contacts with the State of California to justify the exercise of personal jurisdiction over him. We review this legal conclusion *de novo*.

[37] Where a defendant has "substantial" or "continuous and systematic" contacts with the forum state, there is a sufficient relationship between the defendant and the state to support "general personal jurisdiction" even if the cause of action is unrelated to the defendant's forum activities. *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1287 (9th Cir.1977). Peterson does not suggest that Kennedy had such contacts with the State of California. Rather, Peterson contends that Kennedy was subject to the "limited personal jurisdiction" of the district court as a result of his purposeful contacts with California which gave rise to the instant cause of action.

[38][39] Lacking sufficient contacts to support general jurisdiction, non-resident defendants may still be subject to limited personal jurisdiction depending on "the nature and quality of the defendant's contacts [with the forum] in relation to the cause of action." *Id.* We have established a tripartite test for determining whether due process allows for the exercise of limited personal jurisdiction in a given case:

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

Id. (citations omitted). Each of the three tests must be satisfied to permit a district court to exercise limited personal jurisdiction over a non-resident defendant.

[40] Both parties agree that Kennedy's sole contacts with California consisted of a series of telephone

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calls that he made to Peterson from the union's Washington D.C. office and letters that he sent to a California physician regarding Peterson's injury. The parties disagree, however, as to whether such contacts are sufficient to meet the limited jurisdiction test.

***1262** [41][42] Kennedy argues that the nature of his contacts with California were insufficient as a matter of law to enable the district court to exercise limited personal jurisdiction over him. We agree. Both this court and the courts of California [FN12] 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." *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, 670 (1976); *Interdyne Co. v. SYS Computer Corp.,* 31 Cal.App.3d 508, 511-12, 107 Cal.Rptr. 499, 501-02 (1973). Such contacts are normally legally insufficient to satisfy the first prong of the *Data Disc* test. We see no basis for making an exception to the general rule here. We affirm the district court's ruling that it lacked personal jurisdiction over Kennedy.

> FN12. The district court's determination of a party's amenability to suit is made by reference to the law of the state in which it sits. *See, e.g., Paccar International, Inc. v. Commercial Bank of Kuwait, S.A.K.,* 757 F.2d 1058, 1062 n. 2 (9th Cir.1985); *Hunt v. Erie Insurance Group,* 728 F.2d 1244, 1246 (9th Cir.1984).

IV. CONCLUSION

The district court properly concluded that the evidence presented was legally insufficient to sustain the jury's verdict that the union breached its duty of fair representation. The union did not act in an "arbitrary, discriminatory, or bad faith" manner. Moreover, we affirm the district court's dismissal of the malpractice claim against Berthelsen. A union attorney may not be held liable in malpractice to an individual union member for acts performed as the union's agent in the collective bargaining process. Finally, the district court properly entered summary judgment in favor of Kennedy. The making of telephone calls and the sending of letters to the forum state was legally insufficient to enable the court to exercise personal jurisdiction over the non-resident defendant.

AFFIRMED.

WIGGINS, Circuit Judge, concurring:

I concur in Parts II and III A of the court's opinion, and in the affirmance of the district court's judgment. I do not agree with the vast extention of immunity from suit under section 301 of the Labor-Management Relations Act which the majority undertakes, gratuitously, in Part III B of its opinion.

The case before us involves the actions of an attorney who, as a full time employee of a union, undertook the representation of a union member with respect to a grievance with the employer. We need only decide whether the rule of *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962), insulates the union's *in-house* counsel from a claim for damages by a union member who alleged that the attorney was guilty of ordinary negligence. There is no occasion for us to reach the more difficult question of whether *outside* counsel should be afforded the same protections.

Nevertheless, in what can only be characterized as a learned discussion of a hypothetical question, the majority undertakes to apply the rule of *Atkinson* to outside counsel. The majority's discussion is unnecessary to its opinion; more unfortunately it is also wrong. Only because the majority opinion may be misunderstood, and therefore misapplied, do I feel obliged to write separately to rebut its dicta.

The attorney, Berthelsen, was at all relevant times an employee of the union. As a union-employed attorney, he should not ordinarily be liable personally to a union member for actions relating to the uni-

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on's representation responsibilities. In such a case, the reason behind the rule in *Atkinson* demands that liability be fixed on the union itself. Moreover, the union's liability for the conduct of its attorney-employee would be judged against a standard of arbitrary or discriminatory conduct or conduct ***1263** amounting to bad faith and would be determined in a federal cause of action under Section 301. *See Vaca v. Sipes*, 386 U.S. 171, 187-88, 87 S.Ct. 903, 915-16, 17 L.Ed.2d 842 (1967).

I do not challenge the application of these rules to the instant case.[FN1] Those historical reasons that moved Congress to enact section 301(b) freeing union officials from liability for conduct undertaken on behalf of the union or any of its members in furtherance of the representational responsibilities of the union, are described in *Atkinson*, 370 U.S. at 247-249, 82 S.Ct. at 1324-1325. The present facts accord with the reason for the rule stated in *Atkinson*. Berthelsen was a full-time employee. If such an employee, simply because his normal responsibilities required that he act as an attorney for a union member, were to be exposed to the full measure of personal liability for his ordinary negligence, the history of *Danbury Hatters* would be repeated. As *Atkinson* records, it was to avoid a recurrence of the *Danbury Hatters* case that section 301(b) was enacted.

> FN1. In another case, the facts may dictate a different result. An attorney who is a full-time employee of a union may, with the consent of the union and the member, undertake to represent the member with respect to such matters as would justify concluding that the attorney was the independent counsel for the member. In such a case, analysis would proceed as if the attorney, for liability purposes, were independent of the union. Here, the facts do not justify such an analysis. It appears that representation of union members by the union attorney was a usual and customary function of the union, assigned routinely by it to in-house counsel.

The hypothetical case about which the majority writes extensively stands in sharp contrast. The history of the *Danbury Hatters* case, and the Congressional debate leading to the enactment of Section 301(b), see 93 Cong.Rec. 5014, 5041-42 (1947), simply have no application to an independent agent. To be sure, an attorney who is not a union employee but is retained by a union to represent it and its members in grievance disputes with an employer is an "agent" of the union [FN2] and of the union member as well, in the sense that all attorneys are agents of their clients. Such an attorney is an example, but not a typical one, of the many independent agents who provide professional services to unions.[FN3] The question is whether outside counsel, as an independent agent of the union and one of its members, is entitled to the protection of the Labor-Management Relations Act as a defense to an action by the union member client for damages.

> FN2. References in *Atkinson* to the inability to sue union "agents" under section 301(b) should be read in context. *Atkinson* involved a suit against 24 committeemen. The employer's complaint alleged that these workers, as "agents" of the union's international, had led a strike in violation of the contract. 370 U.S. at 240, 82 S.Ct. at 1320. The Court in no way implied that all "agents" of the union, in the common law sense, were to be afforded the same protection against suit as were these committeemen, who were both union members and officers. Similarly, the reference by the Supreme Court to "conventional principles of agency law" must also be put in its context; the reference was not part of a discussion of the third clause of section 301(b), which we must interpret, but of the second clause of that section, which is not under consideration here. 370 U.S. at 248, 82 S.Ct. at 1324. Common law agency principles have been considered relevant

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only as to whether the *union* may be sued for the acts of its officials with regard to wildcat strikes and other extra-contractual activity, *see, e.g. North River Energy Corp. v. United Mine Workers,* 664 F.2d 1184 (11th Cir.1981) (common law agency principles hold union liable for all acts of its officers and agents within the scope of their general authority). The portion of section 301(b) immunizing union members and officers from suits was, in fact, an abrogation of common law agency principles.

FN3. Included in this category of independent agents are insurance brokers, fund managers, economists, accountants, statisticians, consultants, and many others. What sets outside counsel apart from other independent agents is his direct role as the attorney for a particular union member.

The majority concludes that such an independent agent is entitled to that protection. It relies upon "sound policy reasons as well as established precedent...." Ante, at 1256. Believing that relevant precedent points exactly in the opposite direction, it is unnecessary for me to buttress my disagreement with the majority upon policy considerations.

***1264** The linchpin of the majority's case based upon precedent is *Atkinson v. Sinclair Refinning Co., supra.* That case holds that the union is the sole source of recovery for the wrongful acts of union officials and members committed in the bargaining process and causing injury to third parties. As I have noted, *Atkinson* speaks of union "agents" as being within the protection of the rule, but the Court was referring to the acts of union member/officers. Every case cited by the majority on this issue likewise involved union "officials," including business agents employed by the union,[FN4] or rank and file workers.[FN5] Independent research has uncovered no case in which the protection of *Atkinson* was extended to one who was neither a member nor an officer of the union.[FN6] Nevertheless, I believe that Section 301(b) is properly interpreted to insulate a union's non-member employees because Congress' intention was to avoid the debilitating effect on a union that would attend personal judgments against those who are vital to the organization's continued existence. It is the policy behind exempting members and officers that militates in favor of also immunizing the union's non-member employees.

FN4. *United Steelworkers v. Lorain,* 616 F.2d 919, 924 (6th Cir.1980), *cert. denied,* 451 U.S. 983, 101 S.Ct. 2313, 68 L.Ed.2d 839 (1981); *Williams v. Pacific Maritime Association,* 421 F.2d 1287 (9th Cir.1970); *Balestreri v. Western Carloading,* 530 F.Supp. 825, 831 (N.D.Cal.1980); *Suwanchai v. International Broth. of Electrical Workers,* 528 F.Supp. 851, 852 (D.N.H.1981); *Henry v. Radio Station KSAN,* 374 F.Supp. 260, 267 (N.D.Cal.1974).

FN5. *Complete Auto Transit, Inc. v. Reis,* 451 U.S. 401, 402, 101 S.Ct. 1836, 1838, 68 L.Ed.2d 248 (1981) (involved union members; stated that "In *Atkinson...* the Court held that § 301(a) [*sic*] ... does not authorize a damages action against individual union *officers* and *members* when their union is liable for violating a no-strike clause in a collective bargaining agreement" (emphasis added)); *Hardline Electric, Inc. v. International Brotherhood of Electrical Workers Local 1547,* 680 F.2d 622, 624 n. 1 (9th Cir.1982); *Universal Communications Corp. v. Burns,* 449 F.2d 691, 693-4 (5th Cir.1971) (per curi- am).

FN6. *See, e.g., Republic Steel Corp. v. United Mine Workers of America,* 570 F.2d 467, 478 (3rd Cir.1978) (officers and members); *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers Int. Union,* 452 F.2d 49, 52 (7th Cir.1971) (members).

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The absence of authority for the proposition that agents who are neither members nor employees of the union are protected from suit under section 301 is not surprising. As *Atkinson* itself points out, the genesis of section 301(b) was a reaction against the *Danbury Hatters* case, in which union busting by oppressive judgments against union officers and employees was condoned. Judgments against independent third parties, such as outside counsel, because of their negligent acts which harm union members have no necessary economic impact upon the union itself. Attorneys are too plentiful and their rates too competitive to expect a judgment against a particular attorney to result in an attempt by that attorney to recapture the loss by higher rates to his union client.

A judgment against outside counsel for malpractice is not a judgment for which one of its independent clients, the union, is also liable under normal rules of tort law. There is simply no malpractice exposure to the union.[FN7]

> FN7. The union may be responsible under the applicable restrictive standard for referring its members to incompetent attorneys.

Only several months ago this court decided *Aragon v. Federated Department Stores, Inc.*, 750 F.2d 1447 (9th Cir.1985). That case *reversed* a judgment dismissing a legal claim against the union's outside counsel. The claim was analyzed by the court as a pendent state claim and thus completely outside the preemptive arm of section 301(a).

Three years ago we decided *Weitzel v. Oil Chemical and Atomic Workers*, 667 F.2d 785 (9th Cir.1982). There, we also *reversed* a judgment dismissing a claim against outside counsel by a union member.

The majority distinguishes each of these cases on a theory which I believe to be novel: When a union-employed attorney undertakes to represent a union member, the union-employed attorney does not necessarily***1265** become the member's attorney. With this premise in mind, the majority reviewed the sketchy facts in *Aragon* and *Weitzel*. It concluded that in each case the attorney was incidentally outside counsel for the union, but in the particular matter involved in those cases, the attorneys were acting as the personal attorney of the union member and not on behalf of the union. Accordingly, the protections of section 301 were not available to the attorney. Returning to the instant case, the majority concludes that the union-employed attorney, Berthelsen, was acting for the union and not personally on behalf of the union member. Thus, as agent for the union, but not the member, section 301 applies. The majority extends that peculiar notion to outside counsel.

I cannot accept the unusual role which the majority carves out for some attorneys in order to distinguish *Aragon* and *Weitzel*. All attorneys owe allegiance to their clients with respect to the subject of their representation. Attorneys representing a union may, with complete ethical propriety, undertake the simulataneous representation of a union member with respect to a grievance in which the union has no adverse interest. Such an undertaking in no way diminishes the duty which the attorney owes to each client. Each representation is distinct from the other. Each requires the same high degree of judgment, skill and discretion which society properly demands of persons occupying positions of trust and honor.

In the handling of a particular grievance, the union may refer a union member to its retained counsel. The act of referral by the union does not dilute the duty owed by the attorney to the referred client upon accepting the representation. The union may pay the fee to such an attorney. The duty of care owed by an attorney to a client does not depend upon the source of his fees. In summary, there can be no exception to the universally understood rule that when an attorney undertakes to represent a client in a particular matter, he is the attorney for and owes complete allegiance to that client for so long as the relationship continues.

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If I correctly understand its views, the majority would recognize a hyphenated attorney: the union-attorney who may represent a union member, but not as a client. It reaches this conclusion, in my opinion, only because of a felt need to identify outside counsel closely *as the union's attorney* in order to claim the protection of *Atkinson.* As I have previously indicated, the protection of that case and section 301(b) turns upon totally different factors: union membership or employment by the union.

The majority seriously undercuts its basic premise by acknowledging that *unions* may sue their attorneys for ordinary acts of negligence. Ante, at 1259. No principled reason is apparent why public policy justifies the immunity of outside attorneys from suits by one client, the union member, but not another, the union itself.

Although I agree with the result in the instant case, from the foregoing comments it is clear that I believe the majority opinion should be read with caution.

C.A.9 (Cal.),1985.
Peterson v. Kennedy
771 F.2d 1244, 120 L.R.R.M. (BNA) 2520, 54 USLW 2181, 103 Lab.Cas. P 11,677

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EXHIBIT Q

EXHIBIT R

United States District Court,E.D. Pennsylvania.
James L. ROMANN
v.
GEISSENBERGER MANUFACTURING CORP., t/a The Robert Group and Leonard Geissenberger.
No. 94-CV-3325.

Oct. 20, 1994.

Former commissioned salesman, who was Pennsylvania resident, brought action against New Jersey employer and its president alleging breach of contract and violation of Pennsylvania Wage Payment and Collection Law. Employer and president moved to dismiss or transfer action. The District Court, Joyner, J., held that: (1) district court lacked personal jurisdiction over employer and president, but (2) action would be transferred to New Jersey, in interests of justice.

Motion to dismiss denied; motion to transfer granted.

West Headnotes

[1] Federal Civil Procedure 170A ⚿1829

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1829 k. Construction of Pleadings. Most Cited Cases
Court must analyze plaintiff's allegations drawing all reasonable inferences in plaintiff's favor when reviewing motion to dismiss for lack of personal jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[2] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
Once plaintiff's assertion of personal jurisdiction has been challenged, he bears burden of demonstrating jurisdictional predicate by competent proof. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[3] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
Once plaintiff's assertion of personal jurisdiction has been challenged, he must prove with reasonable particularity that sufficient contacts to support jurisdiction exist between defendant and forum state. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[4] Federal Courts 170B ⚿417

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk417 k. Federal Jurisdiction. Most Cited Cases
Federal district court must apply law of state in which it sits in determining whether it may properly exercise personal jurisdiction over nonresident defendant.

[5] Courts 106 ⚿12(2.5)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.5) k. Contacts with Forum State. Most Cited Cases

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Courts 106 ⚿12(2.10)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General
106k12(2.10) k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Under Pennsylvania law, state court may exercise personal jurisdiction pursuant to either statute governing general personal jurisdiction or statute governing specific personal jurisdiction. 42 Pa.C.S.A. §§ 5301, 5322.

[6] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Courts 106 ⚿12(2.1)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General
106k12(2.1) k. In General. Most Cited Cases
Pennsylvania long-arm statute applies only to extent permitted by due process clause. 42 Pa.C.S.A. §§ 5301, 5308, 5322; U.S.C.A. Const.Amend. 14.

[7] Courts 106 ⚿12(2.5)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General
106k12(2.5) k. Contacts with Forum State. Most Cited Cases
Pennsylvania permits exercise of in personam jurisdiction only in those cases where defendant has systematic and continuous contacts with state. 42 Pa.C.S.A. §§ 5301, 5308.

[8] Federal Courts 170B ⚿79

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk79 k. Corporate Activities and Contacts Within District; Doing Business in General. Most Cited Cases
Under Pennsylvania law, district court could not exercise general personal jurisdiction over corporate defendant solely on basis of its voluntary registration and qualification to do business in Pennsylvania. 42 Pa.C.S.A. §§ 5301, 5308.

[9] Constitutional Law 92 ⚿3965(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases
(Formerly 92k305(6))

Federal Courts 170B ⚿79

170B Federal Courts
170BII Venue
170BII(A) In General

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170Bk77 Corporations, Actions by or Against
170Bk79 k. Corporate Activities and Contacts Within District; Doing Business in General. Most Cited Cases
In order to satisfy due process requirements for exercise of personal jurisdiction over corporate defendant, defendant's contacts with forum state must be extensive and pervasive, amounting to purposeful availment of privilege of conducting activities within forum state, thus invoking benefits and protection of its laws. U.S.C.A. Const.Amend. 14.

[10] Corporations 101 ⚿665(.5)

101 Corporations
101XVI Foreign Corporations
101k663 Actions by or Against
101k665 Jurisdiction
101k665(.5) k. In General. Most Cited Cases
Under Pennsylvania law, there is no established test to determine whether corporation's activities are continuous and systematic as required for exercise of general personal jurisdiction and, as result, court must proceed by evaluating facts of each case. 42 Pa.C.S.A. § 5301(a)(2)(iii).

[11] Federal Courts 170B ⚿79

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk79 k. Corporate Activities and Contacts Within District; Doing Business in General. Most Cited Cases
It is overall nature of activity, rather than its quantitative character, that determines whether court may have general personal jurisdiction over corporate defendant.

[12] Federal Courts 170B ⚿81

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk81 k. Sales, Solicitation and Advertising. Most Cited Cases

Federal Courts 170B ⚿82

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk82 k. Agent Within District; Parent and Subsidiary. Most Cited Cases
Under Pennsylvania law, district court could not exercise general personal jurisdiction over New Jersey corporate defendant, even though defendant was qualified to do business in Pennsylvania, defendant's national sales manager and commissioned salesman resided and maintained offices in Pennsylvania, and noncompetition clause in employment contract included Pennsylvania as location in which competing conduct was prohibited; only two to four percent of defendant's sales occurred in Pennsylvania, there was no evidence that defendant advertised or otherwise promoted its products in way specifically targeted at Pennsylvania or that defendant required or encouraged manager and salesman to reside or maintain offices in Pennsylvania, and states listed in noncompetition clause did not represent defendant's assessment as to states with which it had continuous and substantial contacts, but, rather, represented places from which defendant anticipated that its competition would originate. 42 Pa.C.S.A. § 5301(a)(2)(iii).

[13] Federal Courts 170B ⚿76.20

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General

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170Bk76.20 k. Persons Acting in Representative Capacity, Venue For; Fiduciary Shield. Most Cited Cases
Under Pennsylvania law, district court could not exercise personal jurisdiction over corporation's president; president was New Jersey resident, was served in new Jersey, and did not consent to jurisdiction, and, as acts of corporation were insufficient to establish general personal jurisdiction over corporation, jurisdiction could not be predicated on president's alleged personal liability for acts of corporation. 42 Pa.C.S.A. § 5301(a)(1).

[14] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Specific personal jurisdiction arises from defendant's activities in forum state that relate to particular cause of action being litigated.

[15] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Court can properly exercise specific jurisdiction when defendant has purposefully established minimum contacts with forum state such that he would reasonably anticipate being haled into court there.

[16] Federal Courts 170B ⚿81

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk81 k. Sales, Solicitation and Advertising. Most Cited Cases

Federal Courts 170B ⚿84

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk84 k. Miscellaneous Particular Activities. Most Cited Cases
Under Pennsylvania law, district court could not exercise specific personal jurisdiction over New Jersey employer corporation in former commission salesman's action alleging breach of contract and violation of Pennsylvania Wage Payment and Collection Law, even though salesman was Pennsylvania resident; existence of employment contract with Pennsylvania resident was not sufficient to establish necessary minimum contacts, and other contacts related to employer's business conducted in Pennsylvania, its qualification to do business in Pennsylvania, and employer's agent who resided and worked in Pennsylvania did not relate to salesman's cause of action. 42 Pa.C.S.A. § 5322(a).

[17] Courts 106 ⚿12(2.30)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.30) k. Contract Cases. Most Cited Cases
Under Pennsylvania law, existence of nonresident defendant's employment contract with Pennsylvania resident does not, in itself, constitute sufficient contact with Pennsylvania to exercise specific personal

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jurisdiction over breach of contract action; consideration of parties' prior negotiations, their actual course of dealing, and terms of contract must be analyzed in order to determine whether defendant has established requisite minimum contacts. 42 Pa.C.S.A. § 5322(a).

[18] Federal Courts 170B ⚿76.20

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.20 k. Persons Acting in Representative Capacity, Venue For; Fiduciary Shield. Most Cited Cases
Under Pennsylvania law, district court could not exercise specific personal jurisdiction over president of New Jersey employer corporation in former commission salesman's action alleging breach of contract and violation of Pennsylvania Wage Payment and Collection Law; president was New Jersey resident, there was no evidence that president in his individual capacity had any contacts with Pennsylvania relating to action, and, to extent assertion of jurisdiction was based on president's official capacity, he did not have sufficient minimum contacts as corporation itself did not have sufficient contacts. 42 Pa.C.S.A. § 5322(a).

[19] Federal Courts 170B ⚿102

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk102 k. Jurisdiction and Power to Transfer; Consent and Waiver. Most Cited Cases
District court's power to transfer case to another federal jurisdiction exists even where court cannot exercise personal jurisdiction. 28 U.S.C.A. §§ 1404(a), 1631.

[20] Federal Courts 170B ⚿103

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk103 k. Discretion of Court. Most Cited Cases
In deciding whether it should exercise its authority to transfer action, district court has broad discretion. 28 U.S.C.A. §§ 1404(a), 1631.

[21] Federal Courts 170B ⚿144

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)4 Proceedings and Effect of Change
170Bk144 k. Presumptions and Burden of Proof. Most Cited Cases
Moving party has burden to justify transfer of action. 28 U.S.C.A. §§ 1404(a), 1631.

[22] Federal Courts 170B ⚿104

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk104 k. Matters Considered. Most Cited Cases

Federal Courts 170B ⚿105

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk105 k. Plaintiff's Choice of Forum; Forum Shopping. Most Cited Cases
Factors to be considered in deciding whether to transfer action include plaintiff's choice of forum, relative ease of access to sources of proof, availability of compulsory process for attendance of un-

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willing witnesses, cost of obtaining attendance of willing witnesses, possibility of viewing premises, if applicable, all other practical problems that make trial of case easy, expeditious, and inexpensive, relative congestion of court dockets, choice of law, and relationship of communities in which courts and jurors are required to serve to occurrences that give rise to action. 28 U.S.C.A. §§ 1404(a), 1631.

[23] Federal Courts 170B ⇐106.5

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk106 Determination in Particular Transferable Actions
170Bk106.5 k. In General. Most Cited Cases
(Formerly 170Bk106)
Pennsylvania district court, upon finding that it did not have jurisdiction over employer and its president in former commissioned salesman's action alleging breach of contract and violation of Pennsylvania Wage Payment and Collection Law, would transfer action to New Jersey district court; majority of witnesses and evidence were in New Jersey, approximately 90% of salesman's sales took place in New Jersey, compulsory process for New Jersey witnesses might be very costly or impossible, and New Jersey had most significant relation to action. 28 U.S.C.A. §§ 1404(a), 1631.

***258** Barnett Satinsky,Jeffrey P. Scarpello, Fox, Rothschild, O'Brien & Frankel, Philadelphia, PA, for plaintiff.
Andrew Fylypovych, Harvey, Pennington, Herting & Renneisen, Ltd., Philadelphia, PA, for defendants.

MEMORANDUM AND ORDER

JOYNER, District Judge.
This is a breach of contract action brought under diversity jurisdiction in which defendants have moved to dismiss plaintiff's complaint for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. In the alternative, defendants ask the Court to dismiss the case for lack of proper venue under Rule 12(b)(3), or to transfer it to the District of New Jersey, Newark Division, pursuant to 28 U.S.C.A. §§ 1404(a), 1631 (West 1994). For the following reasons, this Court concludes that it cannot take personal jurisdiction over either defendant. In the interests of justice, however, defendants' motion to dismiss the complaint will be denied and its motion to transfer will be granted. Given our disposition, we need not address the defendant's contention that this Court is an improper venue for this action.

I. *HISTORY OF THE CASE*

The plaintiff in this case is James Romann, a Pennsylvania resident who worked as a commissioned salesman for the defendant Geissenberger Manufacturing Corporation (GMC) until he was fired in April of 1994. GMC is a New Jersey corporation that operates under the trade name of The Robert Group. Defendant Leonard Geissenberger, a New Jersey resident, is GMC's president and chief executive officer and a New Jersey resident. Mr. Romann's complaint alleges that GMC failed to pay him more than $50,000 in sales commissions, and in the process, GMC not only breached an oral contract it had with Mr. Romann, but also violated Pennsylvania's Wage Payment and Collection Law, 43 Pa.Cons.Stat.Ann. §§ 260.1-301 (1994). Mr. Romann also requests an order declaring a post-employment no-compete agreement void on various grounds.

The defendants respond by arguing that this Court cannot properly exercise its personal jurisdiction under the given circumstances. Mr. Geissenberger argues he has no contacts with Pennsylvania, while GMC contends that, although it is qualified to do business under Pennsylvania law, it has had only *de minimus* contacts with Pennsylvania, does relat-

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ively little business in the commonwealth, and maintains no offices or facilities here. In an affidavit, Mr. Geissenberger avers that between two and four percent of GMC's sales, and ten percent of Mr. Romann's sales, were made to Pennsylvania customers. He also states that Mr. Romann had an office at the GMC facilities in New Jersey, that he received telephone calls there in person and by voice mail, and that Mr. Romann's paychecks and expense reimbursements were generated from New Jersey.

Mr. Romann contends that the exercise of personal jurisdiction over defendants is warranted because he spent thirty to forty percent of his time generating Pennsylvania ***259** business while a GMC employee, he maintained an office in Pennsylvania dedicated solely to his GMC affairs, he received his paychecks in Pennsylvania and spent ninety-five percent of his administrative time working out of his Pennsylvania office. In addition, GMC paid his Pennsylvania office telephone bills as well as other expenses and costs associated with his Pennsylvania office. As evidence of GMC's presence in the state, Mr. Romann avers that GMC is registered to do business in Pennsylvania and has sold and shipped GMC products into the commonwealth. He further states that GMC's national sales manager is a Pennsylvania resident who works substantially out of a Pennsylvania office, and that Mr. Romann and the national sales manager communicated extensively between their Pennsylvania offices about GMC business. Finally, as evidence of the extent of GMC's Pennsylvania business, Mr. Romann attaches to his motion a copy of a non-competition agreement between GMC and another former employee that includes Pennsylvania among the places in which competing conduct is prohibited.

II. *DISCUSSION*

A. *Rule 12(b)(2) Standard*

[1][2][3] A court must analyze the plaintiff's allegations drawing all reasonable inferences in the plaintiff's favor when reviewing a Rule 12(b)(2) motion. *Bucks County Playhouse v. Bradshaw,* 577 F.Supp. 1203, 1206 (E.D.Pa.1983) (citation omitted). However, once the plaintiff's assertion of personal jurisdiction has been challenged, he bears the burden of demonstrating a jurisdictional predicate by competent proof. *Id.* (citing *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80 L.Ed. 1135 (1936)). In other words, the plaintiff must prove with "reasonable particularity that sufficient contacts to support jurisdiction exist between the defendant and the forum state." *Massachusetts Sch. of Law v. American Bar Ass'n.,* 846 F.Supp. 374, 377 (E.D.Pa.1994). In the instant proceeding, therefore, because defendants have interposed a jurisdictional challenge, Mr. Romann must bring forward sufficient evidence to allow this Court to exercise personal jurisdiction over these defendants.

B. *Personal Jurisdiction*

[4][5][6] A federal district court must apply the laws of the state in which it sits in determining whether it may properly exercise personal jurisdiction over a non-resident defendant. *Bucks County Playhouse,* 577 F.Supp. at 1206 (citation omitted). Under Pennsylvania law, a state court may exercise personal jurisdiction pursuant to either the provision on general personal jurisdiction, 42 Pa.Cons.Stat.Ann. § 5301 (1994) ("section 5301"), or the provision on specific personal jurisdiction, 42 Pa.Cons.Stat.Ann. § 5322 (1994) ("section 5322"). *Jaffe v. Julien,* 754 F.Supp. 49, 52 (E.D.Pa.1991). These so-called "long-arm statutes" apply only to the extent permitted by the Due Process clause of the Fourteenth Amendment. *Fields v. Ramada Inn, Inc.,* 816 F.Supp. 1033, 1035 (E.D.Pa.1993); 42 Pa.Cons.Stat.Ann. §§ 5308, 5322(b). Thus, "the court's exercise of personal jurisdiction over ... nonresident defendants is proper so long as there is no violation of due process." *Fields,* 816 F.Supp. at 1035-36 (citing *Mellon Bank PSFS, N.A. v. Farino,* 960 F.2d 1217, 1221

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(3d Cir.1992)).

1. *General Personal Jurisdiction*

[7] The Pennsylvania provision on general personal jurisdiction provides in relevant part:

(a) General Rule.-The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:

(1) Individuals.-

(i) Presence in this Commonwealth at the time when process is served.

(ii) Domicile in this Commonwealth at the time when process is served.

(iii) Consent, to the extent authorized by consent.

***260** (2) Corporations.-

(i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the con- sent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

42 Pa.Cons.Stat.Ann. § 5301 (1994). The Pennsylvania statute further provides that the exercise of jurisdiction is proper "only where the contact with this Commonwealth is sufficient under the Constitution of the United States." 42 Pa.Cons.Stat.Ann. § 5308 (1994). Thus, Pennsylvania permits the exercise of *in personam* jurisdiction only in those cases where the defendant has "systematic and continuous" contacts with the forum state. *International Shoe Co. v. Washington,* 326 U.S. 310, 320, 66 S.Ct. 154, 160, 90 L.Ed. 95 (1945).

a. *General Jurisdiction over GMC*

Mr. Romann contends that general personal jurisdiction should be established over GMC merely because GMC has registered to do business in Pennsylvania. While Section 5301(a)(2)(i) appears to grant general jurisdiction on that basis, due process requirements, as noted above, limit the exercise of general jurisdiction to cases where a corporation has "systematic and continuous" contacts with the forum state. Moreover, the cases upon which plaintiff relies do not support the notion that a court may exercise its personal jurisdiction solely on the basis of corporation's registration or qualification to do business in Pennsylvania.

[8] In one such case, *Bane v. Netlink, Inc.,* 925 F.2d 637, 640 (3d Cir.1991), the U.S. Court of Appeals for the Third Circuit held that a district court could properly exercise its personal jurisdiction over a non-resident defendant solely on the basis of the defendant's registration in the Commonwealth. The Third Circuit concluded that registration could be equated with consent to jurisdiction under section 5301(a)(2)(ii). *Id.* at 641. The *Bane* court, however, reached its decision by applying Pennsylvania's former registration statute, which required a registered corporation to designate the secretary of state as an agent who may be served on behalf of the corporation.[FN1] *Id.* at 640. The current statute, applicable to the instant action, does not require express consent to service of process. As a result, *Bane* does not support the plaintiff's position. In light of the Pennsylvania legislature's decision to repeal its registration statute, this Court cannot exercise general personal jurisdiction over GMC solely on the basis of its voluntary registration and qualification to do business in Pennsylvania.

FN1. Paragraph (6) of the now-repealed

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> statute, 42 Pa.Cons.Stat.Ann. § 2004, required the registering corporation to expressly designate "the Secretary of the Commonwealth and his successor in office as the true and lawful attorney of the corporation upon whom all lawful process in any action against it may be served...." Paragraph (6) was repealed in 1978; the remainder of the section was repealed in 1988. *See* Historical and Statutory Notes, 42 Pa.Cons.Stat.Ann. §§ 2001-2007 (repealed). The subject matter of the repealed provisions is now contained in 15 Pa.Cons.Stat.Ann. § 4124 (1994), which became effective Oct. 1, 1989.

[9] A second basis for exercising general personal jurisdiction over a non-resident corporation is to demonstrate that the defendant conducted "a continuous and systematic part of its general business" in forum state. § 5301(a)(2)(iii); *Fields,* 816 F.Supp. at 1036; *Derman v. Wilair Services, Inc.,* 404 Pa.Super. 136, 148, 590 A.2d 317, 323,*appeal denied,* 529 Pa. 621, 600 A.2d 537 (1991). In order to satisfy due process requirements, therefore, a corporation's contacts must be "extensive and pervasive," amounting to a purposeful availment of the " 'privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.' " *Fields,* 816 F.Supp. at 1036 (citations omitted).

[10][11] There is no established test to determine whether a corporation's activities are "continuous and systematic." *Derman,* 404 Pa.Super. at 148, 590 A.2d at 323. As a result, a court must proceed by evaluating of the facts of each case. For example, in *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), the Supreme Court held that a Texas court could not exercise general ***261** jurisdiction over a Colombian defendant because his activities did not constitute continuous and systematic business contacts with the state even though the defendant had purchased eighty percent of its helicopters and more than $4 million in parts and accessories in Texas and had sent personnel to train in Texas. In contrast, an out-of-state bank with less than 0.1% of its deposits, depositors, and outstanding loans in Pennsylvania was subject to general personal jurisdiction because the nature of its activity in Pennsylvania-daily wire transfers of funds from the state-was held to be "continuous and systematic." *Provident Nat'l Bank v. California Fed. Sav. & Loan Assoc.,* 819 F.2d 434 (3d Cir.1987). Thus, it is the overall nature of the activity, rather than its quantitative character, that determines whether a Court may have general personal jurisdiction.

This Court has stated that "general jurisdiction is usually found 'where a non-resident defendant makes a substantial number of direct sales in the forum, solicits business regularly and advertises in a way specifically targeted at the forum market.' " *Modern Mailers v. Johnson & Quin, Inc.,* 844 F.Supp. 1048, 1054 (E.D.Pa.1994) (quoting *Strick Corp. v. A.J.F. Warehouse Distribs., Inc.,* 532 F.Supp. 951, 956 (E.D.Pa.1982)). Applying this analysis, this Court found that the defendant corporation's contacts with Pennsylvania were not "continuous and systematic" although the corporation had made $230,000 worth of direct sales to Pennsylvania (less than 0.5% of its total sales), and its salespersons had solicited orders in the state. Of greater significance was the fact that many of the orders were unsolicited, the corporation did not regularly solicit sales, and there was no evidence that the corporation "advertised in a way specifically targeted at Pennsylvania." *Id.*[FN2]

> FN2. *See also Pennebacker v. Wayfarer Ketch Corp.,* 777 F.Supp. 1217, 1222 (E.D.Pa.1991) (no general jurisdiction although defendant airline had equipment serviced in Pennsylvania twice a year, operated charter flights occasionally to and from the state, and had a toll-free telephone listing in the state); *Keystone Helicopter Corp. v. Aviation Materials, Inc.,*

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No. 89-4804, 1990 WL 126160. (E.D.Pa. Aug. 27, 1990) (no general jurisdiction where defendant corporation was not incorporated or qualified as foreign corporation in Pennsylvania, had no agents or officers in state and never targeted customers nor advertised in state); *Bucks County Playhouse,* 577 F.Supp. at 1209 (no general jurisdiction where defendant's only contacts were three telephone calls, the mailing of a picture, a contract and one telegraphic communication); *Derman,* 404 Pa.Super. at 150-51, 590 A.2d at 324 (no general jurisdiction where defendant had no employees who resided or were based in Pennsylvania, did not advertise or maintain a mailing address in state, and where a small portion of total business (1.5%) was conducted in state); *Skinner v. Flymo, Inc.,* 351 Pa.Super. 234, 249-50, 505 A.2d 616, 624-25 (1986) (no continuous and systematic activity where defendant was not incorporated, paid no taxes, did not advertise or maintain offices, had no officers, agents, salesmen or representatives and was not qualified to do business in Pennsylvania); *Plymouth Yarn Co. v. Monarch Enter.,* No. 86-1408, 1986 WL 12142 (E.D.Pa. Oct. 28, 1986) (no general jurisdiction over non-resident corporation although corporation purchased and sold goods to and from Pennsylvania and had a Maryland sales representative who included Pennsylvania in territory).

[12] Applying these principles to the case at hand, this court is not persuaded that GMC acted to establish sufficient "continuous and systematic" contacts with Pennsylvania to be subject to the general personal jurisdiction of this Court. First, the record reflects that only two to four percent of GMC's sales occurred in Pennsylvania. Such a figure is hardly reflective of the type of "extensive and pervasive" contact required by the *in personam* jurisdiction standard. *Fields,* 816 F.Supp. at 1036 (citation omitted). This conclusion is especially warranted under circumstances, such as these, where there has been no evidence to show that GMC advertises or otherwise promotes its products in a way specifically targeted at Pennsylvania. *Modern Mailers,* 844 F.Supp. at 1054.

As noted above, GMC's qualification to do business in the commonwealth, standing alone, does not amount to continuous and systematic business activity. Moreover, although Mr. Romann and GMC's national sales manager reside in Pennsylvania, there is no evidence to suggest that GMC either required or encouraged Mr. Romann to reside in Pennsylvania as a condition of employment. The unilateral decisions of Mr. Romann and the national sales manager to ***262** reside in Pennsylvania and receive paychecks there do not constitute purposeful contacts by GMC, and cannot serve as the basis for the exercise of personal jurisdiction over Mr. Romann's employer. *See Rodale Press, Inc. v. Submatic Irrigation Systems, Inc.,* 651 F.Supp. 208, 211 (E.D.Pa.1986) (unilateral activity of those who claim some relationship with non-resident defendant cannot satisfy the requirement of contact with the forum state). The Court reaches the same conclusion with respect to the Pennsylvania offices maintained by Mr. Romann and the national sales manager.[FN3] The record suggests that these offices were maintained for the convenience of their occupants, and not as some purposeful availment by GMC of the privilege of conducting business in Pennsylvania.

FN3. Based on the addresses provided in the record, Romann's office is in his home.

Finally, the non-competition clause does not provide a basis for general jurisdiction in the instant proceeding. Mr. Romann argues GMC must do significant business in Pennsylvania if Pennsylvania is among the locales that is listed in the non-competition clause. The states listed in the non-competition clause, however, are not GMC's assessment as to the states with which it has substantial and continuous contacts. Instead, these jur-

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isdictions represent the places from which GMC anticipates that its competition will originate. Indeed, the non-competition clause also prohibits former employees from competing with GMC in Maryland, the District of Columbia and Virginia-and there is no evidence that GMC does any business in those jurisdictions. Accordingly, this court cannot exercise general personal jurisdiction over GMC.

b. *General Jurisdiction Over Leonard Geissenberger.*

[13] In order to be subject to the general personal jurisdiction of a Pennsylvania court, an individual must consent to such jurisdiction, or be present or domiciled in the state when process is served. 42 Pa.Cons.Stat.Ann. § 5301(a)(1) (1994). It is evident that Mr. Geissenberger has not consented to jurisdiction. He is a New Jersey resident and was served in New Jersey. Therefore, he cannot be subject to the general personal jurisdiction of this Court.

The Court need not address Mr. Romann's argument that Mr. Geissenberger is subject to general jurisdiction because of his dominant role as an officer of GMC. Such an argument predicates jurisdiction over Mr. Geissenberger on his personal liability for the acts of GMC. Because the acts of GMC are insufficient to establish general personal jurisdiction, it follows that jurisdiction cannot be exercised over Mr. Geissenberger based upon the same acts.

2. *Specific Jurisdiction*

[14][15] Specific personal jurisdiction arises from a defendant's activities in the forum state that relate to the particular cause of action being litigated. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472-73, 105 S.Ct. 2174, 2181-83, 85 L.Ed.2d 528 (1985) (citing *Helicopteros,* 466 U.S. at 414, 104 S.Ct. at 1872 (1984)). A court can properly exercise specific jurisdiction when the defendant has purposefully established "minimum contacts" with the forum state such that he would reasonably anticipate being haled into court there. *Id.* at 474, 105 S.Ct. at 2183 (citing *International Shoe,* 326 U.S. at 316, 66 S.Ct. at 158; *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295, 100 S.Ct. 559, 580, 62 L.Ed.2d 490 (1980); *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958)).

The Pennsylvania long-arm statute, 42 Pa.Cons.Stat.Ann. § 5322(a) (1994), provides for specific personal jurisdiction only over those out-of-state actors who have engaged in designated activities from which the cause of action arises.[FN4] Similar to general jurisdiction,***263** specific jurisdiction in Pennsylvania is subject to due process requirements. The statute states that it "may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." § 5322(b); *Pennebacker v. Wayfarer Ketch Corp.,* 777 F.Supp. 1217, 1220-21 (E.D.Pa.1991).

FN4. The statute provides in relevant part:

> A tribunal of this Commonwealth may exercise personal jurisdiction over a person [or representative] who acts directly or by an agent, as to a cause of action or other matter arising from such person:
>
> (1) Transacting any business in this Commonwealth....
>
> * * * * * *
>
> (3) Causing harm or tortious injury by an act or omission in this Commonwealth.
>
> (4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.
>
> . . . . .
>
> 42 Pa.Cons.Stat.Ann. § 5322(a) (1994).

a. *Specific Jurisdiction over GMC*

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[16][17] Assuming GMC's alleged contacts comport with one or more of the activities listed in section 5322(a), the Court concludes that GMC has not established the necessary minimum contacts to warrant the exercise of specific jurisdiction. The existence of GMC's employment contract with a Pennsylvania resident does not constitute a sufficient contact with the commonwealth. In *Burger King,* 471 U.S. at 478, 105 S.Ct. at 2185, the Supreme Court stressed that the mere existence of a contract with an out-of-state defendant does not, by itself, establish sufficient minimum contacts to satisfy due process requirements. Consideration of the parties' prior negotiations, their actual course of dealing and the terms of the contract itself must be analyzed in order to determine whether the defendant has established the requisite minimum contacts with the forum state. *Id.; see also Grand Entertainment Group v. Star Media Sales,* 988 F.2d 476 (3d Cir.1993) (exercise of personal jurisdiction predicated upon numerous telephone communications and negotiations with an agent within the forum state).

Further, Mr. Romann has failed to show that the alleged oral agreement governing his commissions established sufficient minimum contacts between GMC and Pennsylvania. The Pennsylvania long arm statute makes it clear that the contacts upon which a plaintiff relies must relate to the cause of action. This proceeding arises out of the alleged breach of an employment contract. The contacts upon which Mr. Romann relies, however, concern the amount of business that GMC conducts in Pennsylvania, its qualification to do business in the commonwealth, and the GMC agents who reside and work in Pennsylvania. Mr. Romann has failed to demonstrate how these contacts relate to this cause of action. As a result, this court cannot take specific personal jurisdiction over GMC.

b. *Specific Jurisdiction Over Leonard Geissenberger*

[18] For similar reasons to those expressed above, this Court cannot exercise specific jurisdiction over Mr. Geissenberger. There has been no evidence that Mr. Geissenberger in his individual capacity has had any contacts with Pennsylvania related to the instant action. To the extent that Mr. Geissenberger is subject to jurisdiction by virtue of his official capacity of chairman of GMC, he cannot have sufficient minimum contacts because GMC itself does not have sufficient minimum contacts for specific jurisdiction.

C. *Motion to Transfer*

[19] Having decided that this Court cannot take personal jurisdiction over these defendants, the final issue to determine is whether to transfer the case to the United States District Court for the District of New Jersey, Newark Division. In the interest of justice, a federal district court may cure want of jurisdiction by transferring a case "to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred...." 28 U.S.C.A. § 1631 (West 1994). Further, 28 U.S.C. § 1404(a) allows a district court to "transfer any civil action to any other district or division where it might have been brought." This court has held that the power to transfer a case to another district exists even where the court cannot exercise personal jurisdiction over the defendant. *Founds v. Shedaker,* 278 F.Supp. 32, 33 (E.D.Pa.1968).

***264** [20][21][22] In deciding whether it should exercise its authority to transfer, a district court has broad discretion. *Leonardo Da Vinci's Horse v. O'Brien,* 761 F.Supp. 1222, 1229 (E.D.Pa.1991) (citing *Norwood v. Kirkpatrick,* 349 U.S. 29, 75 S.Ct. 544, 99 L.Ed. 789 (1955)). But while the district court has "broad discretion to decide whether to transfer an action, it is the burden of the moving party to justify the transfer." *Leonardo Da Vinci's Horse,* 761 F.Supp. at 1229 (citing *Plum Tree, Inc. v. Stockment,* 488 F.2d 754 (3d Cir.1973)). There

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are a number of factors, both public and private, that a court needs to examine when deciding whether to transfer a case. They include the following:

(1) Plaintiff's choice of forum;

(2) Relative ease of access to sources of proof;

(3) Availability of compulsory process for attendance of unwilling witnesses;

(4) Cost of obtaining attendance of willing witnesses;

(5) Possibility of viewing premises, if applicable;

(6) All other practical problems that make trial of a case easy, expeditious, and inexpensive; and

(7) "Public interest" factors, including the relative congestion of court dockets, choice of law consideration, and the relationship of the community in which the courts and jurors are required to serve to the occurrences that give rise to the litigation.

Leonardo Da Vinci's Horse, 761 F.Supp. at 1229 (citing *Gulf Oil v. Gilbert,* 330 U.S. 501, 508-509, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947)).

[23] Applying these factors to the case at bar, the Court holds that justice favors the transfer of this case to the United States District Court for the District of New Jersey, Newark Division. While Mr. Romann selected Pennsylvania as the forum, this Court does not have jurisdiction over either GMC or Mr. Geissenberger. Further, both plaintiff and defendant acknowledge that the majority of the evidence and witnesses are in New Jersey. Notions of fairness and convenience dictate that the case should be heard in New Jersey. Approximately 90% of plaintiff's sales took place in New Jersey and New York; thus, New Jersey is a much more convenient forum for those witnesses required to testify regarding plaintiff's alleged unpaid commissions. Compulsory process in Philadelphia might be very costly or impossible for these persons. The public interest factors also weigh in favor of transferring the case to New Jersey: it is clear that New Jersey has the most significant relation to this litigation. Thus, upon examination of these factors, this court concludes that the case should be litigated in New Jersey. Accordingly, the defendants' motion to transfer the case to the United States District Court for the District of New Jersey, Newark Division will be granted.

III. *CONCLUSION*

For the foregoing reasons, this court cannot take personal jurisdiction over either defendant. The defendants' motion to dismiss the complaint is denied. However, in the interest of justice the motion to transfer the case to the United States District Court for the District of New Jersey, Newark Division is granted.

E.D.Pa.,1994.
Romann v. Geissenberger Mfg. Corp.
865 F.Supp. 255

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United States Court of Appeals,Ninth Circuit.
Richard ROTH; Richard Roth Productions,
Plaintiffs-Appellants,
v.
Gabriel GARCIA MARQUEZ; Carmen Balcells,
Defendants-Appellees.
Richard ROTH; Richard Roth Productions,
Plaintiffs-Cross-Appellees,
v.
Gabriel GARCIA MARQUEZ; Carmen Balcells,
Defendants-Cross-Appellants.
Nos. 90-55713, 90-55751.

Argued and Submitted June 7, 1991.
Decided Aug. 8, 1991.

Film maker brought breach of contract action against author and author's agent. The United States District Court for the Central District of California, Manuel L. Real, Chief Judge, dismissed complaint, and appeal was taken. The Court of Appeals, D.W. Nelson, Circuit Judge, held that: (1) court had personal jurisdiction over defendants, and (2) parties' agreement was not binding contract.

Affirmed.

O'Scannlain, Circuit Judge, specially concurred and filed opinion.

West Headnotes

[1] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Where underlying facts are undisputed, denial of motion to dismiss for lack of personal jurisdiction is reviewed de novo.

[2] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Test for limited personal jurisdiction is that nonresident defendant must have purposefully availed himself of privilege of conducting activities in forum by some affirmative act or conduct, plaintiff's claim must arise out of or result from defendant's forum-related activities, and exercise of jurisdiction must be reasonable.

[3] Federal Courts 170B ⚿76.30

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.30 k. Contract Cases. Most Cited Cases
Breach of contract defendants were subject to personal jurisdiction of district court sitting in California, even though it was California resident who had solicited foreign defendants' participation, where contract concerned making of film, most of the work for which would have been performed in California. U.S.C.A. Const.Amends. 5, 14; West's Ann.Cal.C.C.P. § 410.10.

[4] Federal Courts 170B ⚿97

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk97 k. Determination of Venue Questions. Most Cited Cases
Factors to be considered in determining reasonable-

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ness of exercising personal jurisdiction include extent of defendant's purposeful interjection into forum state's affairs, burden on defendant, conflicts of law between forum and defendant's home jurisdiction, forum's interest in adjudicating dispute, most efficient judicial resolution of dispute, plaintiff's interest in convenient and effective relief, and existence of alternative forum.

[5] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
Once purposeful availment has been established, forum's exercise of personal jurisdiction is presumptively reasonable; to rebut presumption, defendant must present compelling case that exercise of jurisdiction in fact would be unreasonable.

[6] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Order dismissing complaint for failure to state claim is reviewed de novo.

[7] Contracts 95 ⚿35

95 Contracts
95I Requisites and Validity
95I(C) Formal Requisites
95k35 k. Signature. Most Cited Cases

Contracts 95 ⚿39

95 Contracts
95I Requisites and Validity
95I(C) Formal Requisites
95k39 k. Incomplete Instruments. Most Cited Cases
Alleged agreement between author's agent and film maker, subject to author's approval, was not enforceable contract where it was not signed by author and essential terms were missing.

[8] Federal Civil Procedure 170A ⚿851

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak851 k. Form and Sufficiency of Amendment. Most Cited Cases
Denial of motion to amend breach of contract complaint was not abuse of discretion in that amendment would be futile: it was clear that no binding contract had been formed between parties. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[9] Federal Courts 170B ⚿698.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(G) Record
170Bk698 Defects and Objections
170Bk698.1 k. In General. Most Cited Cases
(Formerly 170Bk698)
Although it was preferable that reasons for denial of motion to amend complaint be stated on record, denial would be affirmed where reason for denial, futility of amendment, was apparent. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

***618** Maxwell M. Blecher, Blecher & Collins, Los Angeles, Cal., for plaintiffs-appellants.
Dennis M. Perlus, Hufstedler, Kaus & Ettinger, Los Angeles, Cal., and Jay Cohen, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before D.W. NELSON, O'SCANNLAIN and TROTT, Circuit Judges.

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D.W. NELSON, Circuit Judge:
This case revolves around Richard Roth's and Richard Roth Productions' ("Roth") attempt to secure the movie rights to Gabriel Garcia Marquez' novel *Love in the Time of Cholera.* Roth appeals the district court's dismissal of his complaint for failure to state a claim and its denial of leave to amend. In addition, Garcia Marquez and agent Carmen Balcells appeal the district court's denial of their motion to dismiss for lack of personal jurisdiction. While none of these three issues is easily resolved, we initially affirm the district court's finding of personal jurisdiction. We also affirm the district court's dismissal for failure to state a claim and its denial of leave to amend. In sum, we are unwilling to grant through litigation what negotiation could not achieve.

**619 I. FACTUAL AND PROCEDURAL BACKGROUND*

Appellant Richard Roth is a movie producer who lives in California and carries out his projects through Richard Roth Productions. Gabriel Garcia Marquez, an internationally renowned author who won the Nobel Prize for Literature in 1982, has written numerous bestselling novels. The film rights to his work *Love in the Time of Cholera* ("*Cholera*") are at issue in the present litigation. Garcia Marquez has resided in Mexico City for the last sixteen years. Carmen Balcells is the president of a literary agency headquartered in Barcelona, Spain. A resident of Barcelona, Balcells has been Garcia Marquez' literary agent for more than 25 years.

In late 1986, Roth contacted Garcia Marquez in Mexico City to express his interest in making a film based on *Cholera.* Roth flew to Havana, Cuba, to meet Garcia Marquez on this matter. Garcia Marquez told Roth that he would consider selling film rights under the following three conditions: 1) Roth would agree to pay him a large sum of money (later Balcells specified the sum of five million dollars); 2) Roth would agree to use a Latin American director; and 3) Roth would shoot the film in Colombia. Garcia Marquez later authorized Balcells to pursue negotiations with Roth.

Negotiations dragged on with disputes both about the price for the option and the identity of the possible director. Roth traveled a number of times to Barcelona and Mexico City to meet with Balcells and Garcia Marquez, and repeated calls, letters, and faxes passed between the parties. The only meetings that occurred in the United States were in May 1988, when Balcells traveled to California to attend an American Booksellers Association convention and met with Roth on the side, and in November 1988, when Garcia Marquez visited Los Angeles for four days at the social invitation of a friend. He met with Roth and agreed that Roth could shoot the film in Brazil, not Colombia, but he remained firm on the other two terms.

On November 17, 1988, the same day that Roth and Garcia Marquez met, Alan Schwartz, Roth's representative, faxed a letter to Balcells in Barcelona. The letter offered Garcia Marquez $200,000 for the grant of an option of two years on the film rights, the right to extend the option for another year for an additional $100,000, these monies to be applied against $1,250,000 to be paid when the option was exercised, $400,000 more on the release of the video, $350,000 more on the release of television showing, and 5% of the net profits of the film. On January 19, 1989, Schwartz telecopied another letter, which changed the first sum of $200,000 for the option to $400,000. The letter, which is the crux of this litigation, stated that the first paragraph of the November 17, 1988, letter was changed to the following:

(a) A payment of $400,000 for an option of two years to acquire the motion picture and allied rights to this novel. The option shall commence upon signature by Gabriel Garcia Marquez to the formal agreement and the return of said signed agreement to me or Richard Roth, at which time the option payment shall be made to you as agent for Gabriel Garcia Marquez.

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The letter also stated: "On behalf of Richard Roth and myself I am very happy to confirm the final agreement between Richard and Gabriel Garcia Marquez ..." and "Please convey to Garcia Marquez the excitement Richard and I feel in being able finally to get this project moving." Balcells countersigned the letter and faxed back the following the next day:
Thank you for today's fax and I am happy that this deal is finally concluded.

I had no time to tell Gabo [Marquez] about this conclusion. In any case, I am returning your letter duly signed.

I shall await the formal agreement at your earliest convenience.

That same day, Roth wrote independently to Balcells thanking her "so much for concluding the deal" and telling her he was "putting the best champagne on ice so we can celebrate and drink it together."

In late February Schwartz transmitted the 25-page formal agreement to Balcells. Balcells objected to a number of points, ***620** particularly the omission of clauses about a Latin American director and the site of the shooting. Balcells communicated these objections, and weeks of renewed negotiations failed to produce an agreement. Garcia Marquez never signed the formal agreement, and the money was never paid him.

For personal jurisdiction analysis, Garcia Marquez lives in Mexico City and has never resided in California. He has visited the state four times for a total of twenty days. He met with Roth once in California, but entered the state for a social purpose. He has never owned property in the state, nor has he ever conducted business on a regular basis or authorized any resident of the state to do so on his behalf. He has maintained a checking account, not his principal one, in Los Angeles since 1988 for the purposes of having an account in dollars for certain transactions occurring outside of California.

Balcells lives in Barcelona. She has never lived in California, though she has visited twice. On one of those occasions, she met with Roth, though she was in the state for a convention. She has never owned property in California, has no office or telephone number there, and has never conducted business on a regular basis or authorized any resident of the state to do so for her.

In December 1989, Roth filed a complaint in district court seeking declaratory relief to determine the status of his rights to produce the film. Appellees filed a motion to dismiss, alleging both that the court lacked personal jurisdiction over each defendant and that because appellees had not entered into a binding contract, the complaint failed to state a claim upon which relief could be granted. The district court denied the motion to dismiss for lack of personal jurisdiction, but it granted the motion to dismiss for failure to state a claim. The district court also denied Roth's motion for leave to amend the complaint. Both sides now appeal the unfavorable ruling(s) against them.

II. PERSONAL JURISDICTION

Appellees cross-appeal the district court's denial of their motion to dismiss for lack of personal jurisdiction. Neither Balcells nor Garcia Marquez may be haled into court, they contend, without offending due process.

[1] We review de novo the denial of a motion to dismiss for lack of personal jurisdiction where the underlying facts are undisputed. *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1441 (9th Cir.1987).

The California long-arm statute provides that jurisdiction may be exercised over nonresident defendants "on any basis not inconsistent with the Constitution of this state or of the United States." Cal.Civ.Proc.Code § 410.10. Since California's jurisdictional statute is coextensive with federal due process requirements, the jurisdictional inquiries

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under state law and federal due process merge into one analysis. *FDIC*, 828 F.2d at 1441. The due process clause prohibits the exercise of jurisdiction over nonresident defendants unless those defendants have "minimum contacts" with the forum state so 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, 158, 90 L.Ed. 95 (1945) (internal quotation omitted).

[2] We have interpreted *International Shoe* and its progeny as allowing jurisdiction by California courts over a nonresident defendant if he has enough continuous contacts with California to subject him to the court's *general* jurisdiction or if the specific cause of action arises out of a defendant's more limited contacts with the state so that California may exercise *limited* or *specific* jurisdiction over him. *Data Disc v. Systems Technology Assoc.*, 557 F.2d 1280, 1287 (9th Cir.1977). Appellants concede that there is no general jurisdiction over appellees; the question, then, turns on whether the contacts in this case enable California to exercise limited jurisdiction over Balcells and Garcia Marquez. A three-part test has been articulated for limited jurisdiction: 1) the nonresident defendant must have *purposefully availed* himself of the privilege of conducting activities ***621** in the forum by some affirmative act or conduct; 2) plaintiff's claim must *arise out of* or result from the defendant's forum-related activities; and 3) exercise of jurisdiction must be *reasonable*. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir.1990) (emphasis added), *rev'd on other grounds*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991); *Sinatra v. National Enquirer*, 854 F.2d 1191, 1195 (9th Cir.1988).

A. Purposeful Availment

As we explained in *Sinatra:*

Purposeful availment analysis examines whether the defendant's contacts with the forum are attributable to his own actions or are solely the actions of the plaintiff. In order to have purposefully availed oneself of conducting activities in the forum, the defendant must have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state.

854 F.2d at 1195 (citations omitted). The Supreme Court has explained: "This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person." *Burger King v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985) (citations and internal quotations omitted).

It is important to distinguish contract from tort actions. For example, we have stated in a tort case that "within the rubric of 'purposeful availment' the Court has allowed the exercise of jurisdiction over a defendant whose only 'contact' with the forum state is the 'purposeful direction' of a *foreign* act having *effect* in the forum state." *Haisten v. Grass Valley Medical Reimbursement Fund*, 784 F.2d 1392, 1397 (9th Cir.1986) (citing *Calder v. Jones*, 465 U.S. 783, 789, 104 S.Ct. 1482, 1486-87, 79 L.Ed.2d 804 (1984)).

In the contract context, however, *Burger King* specifically noted that the existence of a contract with a resident of the forum state is insufficient by itself to create personal jurisdiction over the nonresident. 471 U.S. at 478, 105 S.Ct. at 2185; *see also Gray & Co. v. Firstenberg Machinery Co.*, 913 F.2d 758, 760 (9th Cir.1990). *Burger King* stated that "with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." 471 U.S. at 473, 105 S.Ct. at 2182 (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647, 70 S.Ct. 927, 929, 94 L.Ed. 1154 (1950)).

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Appellees argue that because Roth initiated all the contacts and because he was the one who "reached out" to effect the contract, they should not be subject to California law. There was no solicitation of business by appellees, they maintain, that resulted in contract negotiations or the transaction of business. *See Shute,* 897 F.2d at 381; *Sinatra,* 854 F.2d at 1195. We have explained that "the purposeful availment analysis turns upon whether the defendant's contacts are attributable to 'actions by the defendant *himself,*' or conversely to the unilateral activity of another party." *Hirsch v. Blue Cross, Blue Shield of Kansas City,* 800 F.2d 1474, 1478 (9th Cir.1986) (quoting *Burger King,* 471 U.S. at 475, 105 S.Ct. at 2184) (emphasis in *Burger King*).

Here, it seems clear that the predominant efforts were made by the appellant, not the appellees. Roth traveled to Havana, Barcelona, and Mexico City in his peripatetic effort to secure the movie rights. Garcia Marquez and Balcells were in Los Angeles for other purposes when each met individually with Roth. While we concede that negotiations did take place at that time, it should be borne in mind that "temporary physical presence" in the forum does not suffice to confer personal jurisdiction. *FDIC,* 828 F.2d at 1443. Further, Roth and his agents placed over 100 calls and sent numerous faxes to the two appellees. "When a California business seeks out purchasers in other states ...***622** [and] deals with them by out-of-state agents or by interstate mail and telephone, it is not entitled to force the customer to come to California to defend an action on the contract." *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica,* 614 F.2d 1247, 1252 (9th Cir.1980) (quoting *Interdyne Co. v. SYS Computer Corp.,* 31 Cal.App.3d 508, 510, 107 Cal.Rptr. 499 (1973)).

Roth also contends that the phone lines were used in the other direction-i.e., appellees made calls and returned letters and faxes to him. As this court held in *Shute,*"[M]any transactions take place solely by mail or wire across state lines, obviating the need for physical presence.... Thus, the Court has held that the physical absence of the defendant and the transaction from the forum cannot defeat the exercise of personal jurisdiction." *Id.* at 382. However, "[b]oth this court 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, 1262 (9th Cir.1985) (quoting *Gonzalez,* 614 F.2d at 1254) (footnote omitted); *see also McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 816 (9th Cir.1988) (no jurisdiction where contract signed in forum because negotiated in England, and execution and termination conducted by mail).

[3] There are two facts, then, that marginally work in appellees' favor: their minimal physical presence in the forum and the fact that it was appellant who made the sedulous efforts of solicitation. While this is a very close call, a final and broader issue appears to swing the first prong for Roth, namely the *future consequences* of the contract. *See, e.g., FDIC,* 828 F.2d at 1443 ("[t]he negotiations and contemplated future consequences of the contract ... must be considered"); *Gray,* 913 F.2d at 760 (" '[p]rior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing' are the factors to be considered") (quoting *Burger King,* 471 U.S. at 479, 105 S.Ct. at 2185); *Corporate Inv. Business Brokers v. Melcher,* 824 F.2d 786, 789 (9th Cir.1987) ("[*Burger King*] insisted that past and future consequences of the contractual arrangement involving a resident of the forum state be evaluated."); *Hirsch,* 800 F.2d at 1478 ("prong is satisfied when a defendant takes deliberate actions within the forum state or creates continuing obligations to forum residents"). The *Burger King* Court, in finding jurisdiction, emphasized that the Michigan franchisee defendant had entered into a relationship that "envisioned continuing and wide-reaching contacts with Burger King in Florida [the forum]." *Burger King,* 471 U.S. at 480, 105 S.Ct. at 2186.

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The point here is simply that the contract concerned a film, most of the work for which would have been performed in California. Though the shooting most likely would have taken place in Brazil, all of the editing, production work, and advertising would have occurred in California. This is not an instance where the contract was a one-shot deal that was merely negotiated and signed by one party in the forum; on the contrary, most of the future of the contract would have centered on the forum. The checks that Roth would have sent Garcia Marquez, which appellees attempt to minimize, would have depended upon activities in California and the United States. In looking at the "economic reality," *Haisten,* 784 F.2d at 1398, it seems that the contract's subject would have continuing and extensive involvement with the forum.

Though neither side decisively triumphs under this analysis, it appears that there was enough purposeful availment here to compel a finding of jurisdiction on this prong.

B. Arising Out of Forum-Related Activities

There is no dispute on this second prong, as appellees concede that appellant's claim arises out of the January 19 letter, which was negotiated and executed by a party who was in the forum at the time, namely Roth in Los Angeles.

***623** *C. Reasonableness*

[4] The third prong asks whether the exercise of jurisdiction would be reasonable. *Data Disc,* 557 F.2d at 1287. We have set forth a congeries of factors to be considered in determining whether the exercise of jurisdiction over a nonresident defendant satisfies the reasonableness test: 1) the extent of the defendant's purposeful interjection into the forum state's affairs; 2) the burden on the defendant; 3) conflicts of law between the forum and defendant's home jurisdiction; 4) the forum's interest in adjudicating the dispute; 5) the most efficient judicial resolution of the dispute; 6) the plaintiff's interest in convenient and effective relief; and 7) the existence of an alternative forum. *Sinatra,* 854 F.2d at 1199-1201; *Insurance Co. of North America v. Marina Salina Cruz,* 649 F.2d 1266, 1270 (9th Cir.1981) (first setting out factors). Since none of these factors is dispositive, we must balance the seven. *FDIC,* 828 F.2d at 1442.

1. Extent of Purposeful Interjection

In light of the first prong of purposeful availment, analysis of this first factor in the third prong would be redundant. As we have concluded, albeit narrowly, that appellees purposefully availed themselves of the privilege of conducting activities in California, there is no need to analyze this first factor separately. *Sinatra,* 854 F.2d at 1199; *Haisten,* 784 F.2d at 1401.

2. Burdens on Defendant

Appellees argue that because they are residents of foreign countries and speak different languages than English, requiring them to come defend a suit in California would impose a great burden. They cite *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102, 114, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987), for the proposition that a court should give "significant weight" to the "unique burdens" placed on a defendant that must defend in a foreign court. Appellant rejoins that "modern advances in communications and transportation have significantly reduced the burden of litigating in another country." *Sinatra,* 854 F.2d at 1199. Yet *Sinatra* specifically noted that "[t]he continuing contacts between the Clinic's United States-based agent and California translate into less of a litigation burden than if the Clinic maintained no physical presence or agent within the United States." *Id.* Here, neither appellee has an agent or office in the United States.

Roth argues that it would be no more burdensome for appellees to litigate here than for him to litigate in Mexico or Spain, and "this court 'must examine

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the burden on the defendant in light of the corresponding burden on the plaintiff.' " *Shute,* 897 F.2d at 386 (quoting *Sinatra,* 854 F.2d at 1199). This seems to be in conflict with language from *FDIC,* which states that "[t]he primary concern is for the defendant's burden." 828 F.2d at 1444. At bottom, because Roth had no problems in his globe-trotting endeavors to persuade Balcells and Garcia Marquez to sell the film rights to him, he should not complain that litigation outside the United States would be particularly onerous for him. Appellees have shown no similar propensity for travel. Although this factor cuts in favor of appellees, "[u]nless such inconvenience is so great as to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction." *Hirsch,* 800 F.2d at 1481 (citing *Burger King*). An examination of the other factors is thus required.

3. Extent of Conflict With Sovereignty of Foreign State

Appellees point the court to the language of *Asahi:* "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi,* 480 U.S. at 115, 107 S.Ct. at 1034 (internal quotations omitted). In addition, "a foreign nation presents a higher sovereignty barrier than another state within the United States." *FDIC,* 828 F.2d at 1144. Nonetheless, "[t]he factor of conflict with the sovereignty of the defendant's state is not dispositive because, if given controlling weight, it would always prevent suit against a foreign national in a United States court." ***624***Sinatra,* 854 F.2d at 1199 (internal quotations omitted). The *Sinatra* court found that the scales tipped for the plaintiff on this issue, but much of that was again based on the fact that the defendant had an agent in the United States, unlike appellees. In fact, *Sinatra* even distinguished *FDIC* on the grounds that there the defendant maintained no officer or affiliate in the United States. *Id.* at 1200. This factor, then, must line up on appellees' side.

4. Forum State's Interest in Adjudication

Appellees argue that California has little interest in the outcome of a private contractual dispute. They distinguish torts, for which there is a strong public interest in redress of wrongs. Appellees even go so far as to say that assumption of jurisdiction where minimal contacts exist might have an adverse effect on commerce, since foreigners would be loathe to enter into contracts with Californians that might result in their being haled into foreign courts. Appellant states simply that any state has an interest in providing an effective means of redress for residents who have negotiated and executed contracts within the state. Of course, appellees remonstrate that their whole point is that this contract was neither negotiated-for the most part-nor executed in California.

Sinatra intones the bromide that California has a greater interest in protecting her residents than nonresidents who wish to sue in her courts. *Id.* at 1200. On the other hand, the preceding sentence's reference to a "strong interest" is in the tort context. *Id.* There is little case law in the contracts context in this circuit. One other case that appellees note is *Floyd J. Harkness Co. v. Amezcua,* 60 Cal.App.3d 687, 693, 131 Cal.Rptr. 667 (1976), where the state appellate court held that jurisdiction over a Mexican defendant was unreasonable because the forum state had little interest in the outcome of a dispute over performance under a contract.

In sum, this factor seems to be a toss-up, with perhaps a slight edge going to appellees.

5. Most Efficient Judicial Resolution

This category, too, holds no edge for either party. Appellees live outside the United States, while appellant lives in California. Witnesses to the meetings in Mexico City, Havana, and Barcelona obviously live in foreign countries, while Roth's agents live in California. Though the film would be financed in California and would employ other Cali-

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fornians, these persons' testimony would not be relevant to whether a contract was formed; they would not be witnesses in this trial. Other cases in this circuit provide no guidance because of differing fact patterns. This factor is a push.

6. Convenience and Effectiveness of Relief for Plaintiff

Appellees dare not argue that it would be more convenient for Roth to litigate outside the United States. Nevertheless, they posit that because Roth was willing and able to pursue Balcells and Garcia Marquez by flying to different countries, he cannot now complain that it would be too inconvenient for him to return to the site of his solicitations in order to seek by litigation what he failed to achieve by negotiation. Both *Shute* and *Sinatra* stated that it would be more inconvenient for those plaintiffs to try cases outside the forum, but no doctorate in astrophysics is required to deduce that trying a case where one lives is almost always a plaintiff's preference. Both of the aforementioned cases can be distinguished from the present on the grounds that Sinatra never went to Switzerland to talk to the Clinic and the Shutes never traveled to Florida. Here, Roth did display an ability to meet and work in foreign countries. In all, this factor goes to Roth, but not as decisively as in other cases.

7. Availability of an Alternative Forum

Alternative fora are Spain, where Balcells lives, and Mexico, where Garcia Marquez resides. While neither is decidedly a worse place than California to try the case, neither is demonstrably better. We have held that the plaintiff "bears the burden of proving the unavailability of an alternative forum." *FDIC,* 828 F.2d at 1445; ***625***Sinatra,* 854 F.2d at 1201. In *FDIC* the court held that "[a]lthough [plaintiff] has argued that California would be a more convenient forum, it has not met its burden of proving that it would be precluded from suing [defendant] outside of California." *FDIC,* 828 F.2d at 1445. Here, Roth has not shown that he could not litigate in Spain or Mexico. Doubtless he would prefer not to, but that is not the test. Chalk this one up for appellees.

8. Balancing the Seven Factors

Of the seven factors, then, the following two favor appellant: purposeful interjection and convenience for plaintiff. The following three tilt toward appellees: burden on defendant, conflict with sovereignty of another state, and availability of an alternative forum. Finally, two factors do not favor either side: forum state's interest and efficient judicial resolution. This is, in sum, an extremely close question.

D. Weighing the Three Prongs

[5] Appellant has narrowly satisfied the first prong, namely that appellees purposefully availed themselves of the privilege of conducting activities in the forum. He has also passed the second prong in that the claim arises out of appellees' forum-related activities. Garcia Marquez and Balcells, on the other hand, can make a strong argument on the third prong, namely that the exercise of jurisdiction may be unreasonable. Their difficulty, though, is in surmounting the following standard: "Once purposeful availment has been established, the forum's exercise of jurisdiction is *presumptively reasonable.* To rebut that presumption, a defendant 'must present a *compelling* case' that the exercise of jurisdiction would, in fact, be unreasonable." *Shute,* 897 F.2d at 386 (quoting *Burger King,* 471 U.S. at 476, 105 S.Ct. at 2184) (emphasis added); *Sinatra,* 854 F.2d at 1198 (burden then shifts to defendant to present compelling case). Appellees may be able to show that the exercise of jurisdiction might be unreasonable, but the closeness of the question manifests that they cannot do so in a compelling fashion. Because in the end appellees' showing does not surmount their hurdle, we find that personal jurisdiction does exist. We affirm the district court's denial

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of appellees' motion to dismiss.

III. FAILURE TO STATE CLAIM

[6] We review de novo an order dismissing a complaint for failure to state a claim. *Massey v. Inland Boatmen's Union*, 886 F.2d 1188, 1189 (9th Cir.1989).

The district court dismissed appellant's complaint on the grounds that Roth had not stated a claim upon which relief could be granted under Fed.R.Civ.P. 12(b)(6). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) (footnote omitted). The question, therefore, is whether or not Roth could prove facts that would support his interpretation that the parties intended the January 19, 1989, agreement to constitute a binding contract.[FN1]

> FN1. In general, "[w]e must accept material allegations in the complaint as true and construe them in the light most favorable to the appellant." *Cooke, Perkiss & Liehe v. Northern California Collection Serv.*, 911 F.2d 242, 244 (9th Cir.1990) (citing *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1152 (9th Cir.1989)). However, "[i]f a complaint is accompanied by attached documents, the court is not limited by the allegations contained in the complaint. These documents are part of the complaint and may be considered in determining whether the plaintiff can prove any set of facts in support of the claim." *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir.1987), *cert. denied*, 484 U.S. 944, 108 S.Ct. 330, 98 L.Ed.2d 358 (1987) (citing *Amfac Mortgage Corp. v. Arizona Mall of Tempe*, 583 F.2d 426, 429-30 (9th Cir.1978)). Moreover, when the allegations of the complaint are refuted by an attached document, the Court need not accept the allegations as being true. *Ott v. Home Savings & Loan Ass'n*, 265 F.2d 643, 646 n. 1 (9th Cir.1958). In this case, the documents were indeed attached to the complaint; we may thus consider them.

Appellant argues that the language in Schwartz' January 19 fax that he was "confirm[ing] the final agreement between Richard and Gabriel Garcia Marquez," Balcells' response that she was "happy that this deal is finally concluded," and Roth's ***626** letter thanking Balcells "for concluding the deal" all prove that the parties intended the January 19 letter to be a binding contract. The long-form agreement, appellant maintains, was merely boilerplate required by the studios.

Appellees rejoin that the letter was but an agreement to make an agreement in the future, an expression of intent to negotiate a contract that would be signed by Garcia Marquez. They note that language saying that "[t]he option shall commence upon signature by Gabriel Garcia Marquez to the formal agreement and the return of said signed agreement" demonstrates that his signature was a condition precedent to the forming of a binding contract. Since he never signed, no contract was formed. Further, appellees argue that because the January 19 letter only discusses price, several essential terms, including shooting location and nationality of the director, were omitted, thus rendering the contract invalid.

A. Condition Precedent

[7] A fundamental premise of California-or any contract-law is that courts must look at the intent of the parties:

It is, of course, elementary that a writing which is intended by the parties to be a mere memorandum of intention to negotiate a contract and which does not purport to state the essentials of a proposed

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agreement is unenforceable. Whether the writing which is before us should be construed as a complete agreement or only as a memorandum which left essentials to future negotiations was to be decided in accordance with the ascertained intentions of the parties.

Carter v. Milestone, 170 Cal.App.2d 189, 193, 338 P.2d 569 (1959) (internal citation omitted). Roth argues that Schwartz stated in his affidavit that the reference to Garcia Marquez' signature was meant solely to fix the date on which the first $400,000 payment was to be made and to set the starting date for the running of the two-year option period. Appellees respond that the pellucid language of the writing shows that nothing was binding until Garcia Marquez signed.

Witkin notes that "if the evidence shows that the signatures of other parties were required as one of the conditions of the completed agreement, it is incomplete and not binding upon those who sign until the others sign." 1 B. Witkin, *Summary of California Law,* Contracts § 143 (9th ed. 1987). This language is echoed in *Santa Clara-San Benito Chapter of the Nat'l Elec. Contractors Ass'n v. Local Union No. 332,* 40 Cal.App.3d 431, 436, 114 Cal.Rptr. 909 (1974): "When ... two parties execute a contract with the understanding that the approval of a third party is necessary for the agreement to take effect, the contract is not complete until the third party has approved. Until that happens neither party is bound by the agreement."

The closest factual parallel may be found in *Los Angeles Rams Football Club v. Cannon,* 185 F.Supp. 717 (S.D.Cal.1960), in which LSU star Billy Cannon signed a contract with the Rams before his last college game. When wooed with a richer deal by the upstart AFL's Houston Oilers, Cannon sought to escape from his Rams deal. The court held that because the contract contained the following language: "This agreement shall become valid and binding upon each party hereto only when, as and if it shall be approved by the Commissioner," *id.* at 721, the Commissioner's failure to sign rendered the contract unenforceable. The court held that such language "is too definite to be ignored. It jumps out at you. The words employed are too strong to permit of ambiguity. Their selection was obviously made with great care so that there would be no dispute about their meaning." *Id.* at 722.

Roth attempts to distinguish such a condition precedent by saying that the *Cannon* contract contained the words "only when, as and if." We agree, however, with appellees that these are not a required magical incantation. Roth's argument about the signature merely triggering the payment date is simply too flimsy to stand in the face of such a clear condition precedent. Garcia Marquez' signature was required***627** for the contract to be binding. Finally, appellant can provide no case for the court in which the later required signing of a contract was held to mark something other than a condition precedent.

B. Exclusion of Essential Terms

Even if we believed that Garcia Marquez' signature was not a condition precedent, we must also be satisfied that all essential terms were included in the contract. We agree that it is not enough for appellees to argue that the long-form contract was not signed, because "[w]here all of the essential terms of an agreement are definitely agreed upon in the writing[,] there is a binding contract even though there is an intention that a formal writing will be executed later." *Smissaert v. Chiodo,* 163 Cal.App.2d 827, 830, 330 P.2d 98 (1958); *see also* 1 Witkin § 136 ("[preliminary] negotiations ordinarily result in a binding contract when all of the terms are definitely understood, even though the parties intended that a formal writing embodying these terms shall be executed later").

On the other hand, we have held that "[i]f an essential element of a promise is reserved for future agreement by both parties there is no legal obligation until such future agreement is made." If the

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term is not essential, then the contract will be deemed binding. *Hotel del Coronado Corp. v. Foodservice Equip.*, 783 F.2d 1323, 1325 (9th Cir.1986); *see also Jackson v. Grant*, 890 F.2d 118, 120 (9th Cir.1989) ("If an essential element of the contract is reserved for the future agreement of both parties, there is generally no legal obligation created until such an agreement is entered into."); 1 Witkin § 156 ("A contract which leaves an essential element for future agreement of the parties is usually held fatally uncertain and unenforceable."). "Whether a term is essential depends upon the relative importance and the severability of the matter left to the future; it is a question of degree.... The importance of a term may depend in part on the intentions of the parties." *Coronado*, 783 F.2d at 1325 (internal quotations and citations omitted).

The issue thus boils down to whether or not the letters of January 19 and November 17 set out the essential terms of the agreement. The terms they do set out are the following: 1) price for option rights; 2) price for extension of rights; 3) price for exercising option; 4) further payment on release of video; 5) further payment on television release; and 6) percentage of net profits. All of these terms, at bottom, concern *price*. Yet the other two critical terms-where the film would be shot and who would direct it-were not in this agreement. In fact, they were absent from the long-form agreement as well, which seems to be a major reason why it was never signed. In addition, Balcells objected to a number of other points, including assignability and scope of the rights being transferred to Roth.

The closest fact situation occurs in *Carter*, where a California appellate court held that no binding contract existed between a producer and the writer of a screenplay. The writing at issue stated in the first sentence: "The signatures of the parties below will indicate that this is the general understanding under which formal contracts will be prepared." 170 Cal.App.2d at 192 n. 1, 338 P.2d 569. The writing went on to detail seven different terms including setting up of the company, price to be paid, and option length. The detail, it should be mentioned, was more comprehensive than it is in this case. Paragraph 6 stated: "The parties agree that the form of formal contract to be entered into will be the standard form of motion picture production contract and shall contain all of the rights usually contained therein...." *Id.* The court held that the writing was not intended to be binding. It affirmed the district court's finding that " '[t]here is no such thing as a standard form of motion picture production contract. Such contracts generally run from seventy to ninety pages and each of the terms of such contracts can and do vary.' " *Id.* at 195, 338 P.2d 569 (quoting district court). Though contracts may be more standardized now than 30 years ago, there were still many items to be worked out between the parties here. Specifically, the nature and scope of rights ***628** transferred had not been adequately delineated. We agree with the district court that because all of the essential terms were not set out, no binding contract existed.

Because we find as a matter of law both that essential terms were missing and a condition precedent was unfulfilled, we affirm the district court's dismissal for failure to state a claim.

IV. LEAVE TO AMEND

Federal Rule of Civil Procedure 15(a) deals with amendments to pleadings. Once a responsive pleading has been filed, as is the case here, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *Id.* A district court's denial of such leave to amend is reviewed under an abuse of discretion standard. *United States v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1511 (9th Cir.1991) (citing *Hurn v. Retirement Fund Trust*, 648 F.2d 1252, 1254 (9th Cir.1981)). "In exercising this discretion, a court must be guided by the underlying purpose of Rule 15-to facilitate decision on the merits, rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th

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Cir.1981). Further, "Rule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.' " *Id., quoted in DCD Programs, Ltd. v. Leighton,* 833 F.2d 183, 186 (9th Cir.1987).

[8] "Four factors are commonly used to determine the propriety of a motion for leave to amend. These are: bad faith, undue delay, prejudice to the opposing party, and futility of amendment." *DCD Programs,* 833 F.2d at 186; *see also Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962) (identifying these factors that later became the test). In this case there is no doubt that delay, bad faith, and prejudice are not involved. Whether leave to amend should have been granted hinges on the futility of amendment. Roth argues that he could have pleaded with greater specificity that both parties intended the January 19 letter to be a binding contract. Appellees, however, have convinced us that the plain language of the letter, which required Garcia Marquez' signature and failed to include essential terms, and the existence of the long-form agreement vitiate whatever else appellant could bring up in an amended complaint.

Appellant also points to a number of cases that require written findings by the district court explaining why amendment would be futile. For example, we have held that "a denial without stated reasons, where the reasons are not readily apparent, constitutes an abuse of discretion." *Hurn,* 648 F.2d at 1254. In *Webb* we stated: "In the absence of some statement of reasons or findings of fact showing bad faith or prejudice, we cannot determine whether it was an abuse of discretion to deny Webb's motion for leave to amend his pleadings." 655 F.2d at 980; *see also Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau,* 701 F.2d 1276, 1292-93 (9th Cir.1983) ("where the record does not clearly dictate the district court's denial, we have been unwilling to affirm absent written findings, and have reversed findings that were merely conclusory") (citations omitted), *cert. denied,* 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983); *DCD Programs,* 833 F.2d at 186.

Despite this strong language, we can cite an equal number of cases holding that where the reason for denial is apparent, the district court need not state reasons. The sentence following the one quoted above in *Klamath-Lake* says: "At the same time, futile amendments should not be permitted." *Id., quoted in DCD Programs,* 833 F.2d at 188. In *Loehr v. Ventura County Community College Dist.,* 743 F.2d 1310, 1319 (9th Cir.1984), we held that since the "reasons for denial are readily apparent," the district court did not abuse its discretion. *See also Ascon Properties,* 866 F.2d at 1160 (reasons readily apparent). In *Johnson v. American Airlines, Inc.,* 834 F.2d 721 (9th Cir.1987), we denied leave to amend, stating that "courts have discretion to deny leave to amend a complaint for 'futility,' and futility includes the inevitability of a claim's defeat on summary judgment."***629** *Id.* at 724 (citations omitted); *see also Gabrielson v. Montgomery Ward & Co.,* 785 F.2d 762, 766 (9th Cir.1986) ("any amendment would have been futile in that it could be defeated on a motion for summary judgment").

[9] In many of the cases appellant cites, where we reversed a district court's refusal to permit amendment, the plaintiffs wished to add defendants or entirely separate claims. *See, e.g., Hurn,* 648 F.2d at 1254 (plaintiff wished to amend in order to allege claim under different statute); *Webb,* 655 F.2d at 979 (to allege different type of claim); *DCD Programs,* 833 F.2d at 184 (to add a new defendant); *but see id.* at 186 ("liberality in granting leave to amend is not dependent on whether the amendment will add causes of action or parties"). Here, Roth simply wishes to plead more specifically. The district court has already considered Roth's claim that a contract existed, and it read the declarations of Roth and Schwartz. While it may be preferable that reasons be stated on the record, it seems fairly obvious that denial was based on the futility of amendment. Though we do not lightly affirm a denial of leave to amend, it is difficult to argue that the district court abused its discretion in the instant case.

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Were amendment allowed, the claim would certainly be defeated at summary judgment. *See Johnson,* 834 F.2d at 724; *Gabrielson,* 785 F.2d at 766. In sum, because appellant's argument ultimately founders on the high deference owed the district court, we affirm the district court's denial of leave to amend.

V. CONCLUSION

We affirm the district court's finding that personal jurisdiction existed as to the appellees. We also affirm the district court's dismissal and denial of leave to amend because no contract existed between the parties as a result of the January 19 letter and amendment could not show otherwise.

AFFIRMED.

O'SCANNLAIN, Circuit Judge, specially concurring:

I concur in the result and in Parts I, III, and IV of the court's opinion. In light of our resolution of the issues raised on appeal by Roth, I would dismiss the cross-appeal and therefore not reach the challenge to the district court's exercise of personal jurisdiction over Garcia Marquez and Balcells.

C.A.9 (Cal.),1991.
Roth v. Garcia Marquez
942 F.2d 617

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EXHIBIT S

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172 F.3d 58
172 F.3d 58, 1999 WL 109676 (C.A.9 (Or.))
(Table, Text in WESTLAW), Unpublished Disposition

C

NOTICE: THIS IS AN UNPUBLISHED OPINION.(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.

Jeanette H. SLEPIAN, Plaintiff-Appellant,

v.

F. William GUERIN, Steven T. Price, and the Orbit Network, Defendants-Appellees.

No. 98-35039.

D.C. No. CV-97-724-JMS (MLM).

Argued and Submitted Jan. 11, 1999.
Decided March 1, 1999.

Appeal from the United States District Court for the District of Oregon Malcolm F. Marsh, District Judge, Presiding.

Before LEAVY, McKEOWN, and WARDLAW, Circuit Judges.

MEMORANDUM [FN1]

FN1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

*1 Jeanette H. Slepian ("Slepian") appeals the district court's dismissal of her complaint against Appellees, F. William Guerin ("Guerin"), Steven T. Price ("Price"), and The Orbit Network ("Orbit"), for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2). We have jurisdiction under 28 U.S.C. § 1291 (1994), and we affirm.

The parties are familiar with the facts and prior proceedings; thus, they need not be summarized here except as necessary to explain the disposition.

It is the plaintiff's burden to establish the court's personal jurisdiction over a defendant. *See Cubbage v. Merchant,* 744 F.2d 665, 667 (9th Cir.1984). Where, as here, the relevant jurisdictional facts are undisputed, we review *de novo* the district court's determination as to personal jurisdiction. *See Fireman's Fund Ins. Co. v. National Bank of Coops.,* 103 F.3d 888, 893 (9th Cir.1996). Oregon's long arm statute conferring specific jurisdiction is coextensive with the limits of due process. Or. R. Civ. P. 4L. Consequently, the Court need only determine whether the exercise of jurisdiction in this case comports with due process. *See Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.,* 1 F.3d 848, 850 (9th Cir.1993).

To prove that the exercise of jurisdiction comports with due process and therefore that specific personal jurisdiction exists, plaintiff must allege "minimum contacts" with the forum such that:

(1) The nonresident defendant must do some act or consummate some transaction within the forum 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 results from the defendant's forum-related activities;

(3) exercise of jurisdiction must be reasonable.

Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir.1998) (citation omitted). In this case, Slepian has failed to demonstrate that Orbit purposefully availed itself of the privilege of doing business in the state of Oregon. We therefore do not address whether her claim arose from the alleged forum-related activities or whether the exercise of jurisdiction would be reasonable. *See McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 817-18 n. 10 (9th

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Cir.1988) (all three parts of the minimum contacts test must be satisfied to establish specific personal jurisdiction).

This case arose in the context of an employment contract between Slepian, an Oregon resident, and Orbit, a California employer, which conducts no business activities in Oregon. In applying the purposeful availment test, this court distinguishes tort from contract actions. *See Roth v. Garcia Marquez,* 942 F.2d 617, 621 (9th Cir.1991). In tort actions, the Supreme Court "has allowed the exercise of jurisdiction over a defendant whose only contact with the forum state is the purposeful direction of a foreign act having effect in the forum state."*Id.* (citations and internal quotations omitted). In contract actions, the Supreme Court has held that the existence of an interstate contract in and of itself is not sufficient to establish the purposeful availment element of minimum contacts analysis. *See Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 478 (1985). In determining whether an interstate contractual relationship, such as the employment contract at issue, establishes that the defendant purposefully engaged in forum-related activities, we must further examine the "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." *Id.* at 479.

***2** Record evidence as to the prior negotiations of the parties is notably lacking. The district court found, however, that Slepian initiated contact with Orbit by sending her resume to Orbit's headquarters in California and interviewing with Orbit in California. Slepian does not claim that these findings are erroneous and they weigh against a determination that Orbit purposefully conducted any activity in the forum state. The future consequences of the contract also weigh in favor of Orbit because Slepian's employment agreement with Orbit did not contemplate future consequences in the forum state. *Cf. Roth,* 942 F.2d at 622 (purposeful availment established where "most of the future of the contract would have centered on the forum."); *Burger King,* 471 U.S. at 480 (purposeful availment established where contract involved carefully structured 20-year interstate contractual relationship). Slepian's use of phone, fax, and electronic mail to perform some of her job duties from home does not establish that Orbit conducted sufficient activities in the forum. *See Peterson v. Kennedy,* 771 F.2d 1244, 1262 (9th Cir.1985) ("[O]rdinarily 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.") (citations and internal quotations omitted).

The district court also adopted the magistrate judge's finding that Slepian's "employment contract was negotiated in California and performed by Orbit in California and by Slepian nationwide."Slepian's services for Orbit were never directed at Oregon residents or Oregon businesses. Under similar circumstances, many courts in other jurisdictions have found purposeful availment lacking. *See e .g., Charlesworth v. Marco Mfg., Co.,* 878 F.Supp. 1196, 1201 (E.D.Pa.1995) (specific personal jurisdiction not established where negotiation and subsequent termination of plaintiff's employment contract had no relationship to forum state); *Van Steenwyk v. Interamerican Management Consulting Corp.,* 834 F.Supp. 336, 342 (E.D.Wash.1993) (purposeful availment not established where contract was to be performed outside of forum and would not create ongoing work in forum); *Pennebacker v. Wayfarer Ketch Corp.,* 777 F.Supp. 1217, 1221 (E.D.Pa.1991) (specific personal jurisdiction not established where plaintiff unilaterally decided to live in forum state and received some of his paychecks at his forum residence but defendant conducted no forum-related activities).

Slepian's presence in Oregon and Orbit's accommodation of Slepian's choice of residence were not coupled with other contacts initiated by Orbit and directed toward the forum. *Cf. T.M. Hylwa, M.D., Inc. v. Palka,* 823 F.2d 310, 314 (9th Cir.1987) (purposeful availment established where plaintiff chose to move to forum but defendant traveled to

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forum to conduct financial audits of services performed for forum customers); *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1479 (9th Cir.1986) (purposeful availment established where insured hired forum resident but defendant accepted insurance application from forum resident and collected insurance premiums). Therefore, Slepian has failed to establish that Orbit purposefully availed itself of the privilege of conducting activities in Oregon.

***3** Because Slepian cannot show purposeful availment, she has failed to meet her burden of demonstrating that specific personal jurisdiction exists over Orbit. *See McGlinchy*, 845 F.2d at 817-18 n. 10. As the district court correctly found, because the court lacks personal jurisdiction over Orbit, it necessarily lacks personal jurisdiction over Orbit's shareholders, Guerin and Price, under the alter ego theory advanced by Slepian. *See Flynt Distributing Co. v. Harvey*, 734 F.2d 1389, 1393 (9th Cir.1984) (finding signatories purposefully availed themselves of conducting business in the forum before examining whether signatories' contacts with forum could be attributed to other defendants utilizing an alter ego theory).

Accordingly, we affirm the district court's dismissal of Slepian's complaint.

AFFIRMED.

C.A.9 (Or.),1999.
Slepian v. Guerin
172 F.3d 58, 1999 WL 109676 (C.A.9 (Or.))

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EXHIBIT T

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49 F.3d 555
49 F.3d 555, 63 USLW 2568, 40 Cont.Cas.Fed. (CCH) P 76,777

United States Court of Appeals,Ninth Circuit.
Loral TERRACOM, Plaintiff-Appellant,
v.
VALLEY NATIONAL BANK, a federally chartered bank; Citizens Bank Trust Co., a Kentucky corporation and state chartered bank, Defendants-Appellees.
No. 93-55660.

Argued and Submitted Nov. 16, 1994.
Decided March 7, 1995.

Subcontractor on government construction project brought action alleging that banks had negligently failed or unreasonably performed investigations of financial strengths of applicant sureties for bonds submitted in accordance with Miller Act before executing Certificates of Sufficiency in accordance with governing regulations. The United States District Court, Southern District of California, Judith Nelson Keep, Chief Judge, granted banks' joint motion to dismiss for failure to state claim, and granted Kentucky bank's motion to dismiss for lack of personal jurisdiction. Banks appealed. The Court of Appeals, Choy, Circuit Judge, held that: (1) banks owed no duty to conduct independent investigation into financial condition of applicant sureties before signing Certificates, and (2) District Court lacked specific personal jurisdiction over Kentucky bank.

Affirmed.

West Headnotes

[1] United States 393 ⚿67(3)

393 United States
393III Contracts
393k67 Contractors' Bonds
393k67(3) k. Sufficiency of Bond; Approval of Sureties. Most Cited Cases
Banks did not owe subcontractor on government construction project duty of care to independently investigate financial condition of Miller Act surety applicants before signing Certificates of Sufficiency, despite practical use of certification by federal contracting officers in approving applicants; subcontractor failed to explain how contracting officer's possible reliance, without more, established duty of care. Miller Act, § 1, 40 U.S.C.A. § 270a; 48 C.F.R. § 28.200 et seq.

[2] United States 393 ⚿67(3)

393 United States
393III Contracts
393k67 Contractors' Bonds
393k67(3) k. Sufficiency of Bond; Approval of Sureties. Most Cited Cases
Neither Miller Act nor governing regulations imposed on banks duty to independently investigate veracity of financial information provided by applicant sureties before signing Certificates of Sufficiency; phrase "to the best of my knowledge" in Certificates indicated that certifier attested for surety on basis of certifier's previous, personal knowledge about surety and examination of any documents provided with affidavit, and such language limited such representation to what certifier personally knew and put hearer on notice that further investigation might be needed. Miller Act, § 1, 40 U.S.C.A. § 270a; 48 C.F.R. § 28.202-2(c).

[3] United States 393 ⚿67(3)

393 United States
393III Contracts
393k67 Contractors' Bonds
393k67(3) k. Sufficiency of Bond; Approval of Sureties. Most Cited Cases
Limitation placed upon those who may sign Certificate of Sufficiency on behalf of Miller Act surety applicant did not establish duty of care on part of banks to independently investigate veracity of financial information provided by applicants before signing Certificates; such investigation would be beyond scope of expertise for many of individuals

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authorized to sign Certificates. Miller Act, § 1, 40 U.S.C.A. § 270a; 48 C.F.R. § 28.202-2(b).

[4] Federal Courts 170B ⚿417

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk417 k. Federal Jurisdiction. Most Cited Cases
Court of Appeals would apply long-arm statute of state in which district court sat in diversity case where no federal statute governing personal jurisdiction was applicable.

[5] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Courts 106 ⚿12(2.1)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General
106k12(2.1) k. In General. Most Cited Cases
California's long-arm statute allows exercise of personal jurisdiction over defendants to fullest extent permitted by due process. U.S.C.A. Const.Amend. 14; West's Ann.Cal.C.C.P. § 410.10 et seq.

[6] Federal Courts 170B ⚿84

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk84 k. Miscellaneous Particular Activities. Most Cited Cases
California district court lacked specific personal jurisdiction over Kentucky bank alleged to have breached duty to investigate Miller Act surety applicant; bank's sole contact with California was through its agent's signing of Certificate of Sufficiency, agent could not be assumed to have known that code allegedly on Certificate indicated connection to California, it could not be said that "but for" bank's signing certificate, government official would not have approved applicant, and balancing of seven factors set forth in case law revealed that district court could not reasonably exercise personal jurisdiction over bank. U.S.C.A. Const.Amend. 14.

[7] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
"Purposeful availment" standard for exercise of specific personal jurisdiction requires more than foreseeability of causing injury in another state. U.S.C.A. Const.Amend. 14.

[8] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
"Purposeful availment" prong of three-part test for existence of specific personal jurisdiction prevents defendants from being haled into jurisdiction through random, fortuitous or attenuated contacts.

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U.S.C.A. Const.Amend. 14.

[9] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Second prong of specific jurisdiction test, that claim must arise out of defendant's forum-related activities, is met if but for contacts between defendant and forum state, cause of action would not have arisen. U.S.C.A. Const.Amend. 14.

[10] Federal Courts 170B ⚿76.1

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.1 k. In General. Most Cited Cases
(Formerly 170Bk76)
Law of personal jurisdiction is asymmetrical and is primarily concerned with defendant's burden. U.S.C.A. Const.Amend. 14.

***556** Davide Golia,Marks & Golia, San Diego, CA, for plaintiff-appellant.
Michael J. Rusing, Rusing & Lopez, Tucson, AZ, Kerry D. Smith, McMurray & Livingston, Paducah, KY, for defendants-appellees.

Appeal from the United States District Court for the Southern District of California.

Before CHOY, FARRIS and BRUNETTI, Circuit Judges.

CHOY, Circuit Judge:
Loral Terracom ("Loral") appeals the district court's order granting Citizens Bank and Trust Company's ("Citizens") and Valley National Bank's ("Valley") joint Fed.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Loral alleges that Citizens and Valley ("the Banks") negligently failed or unreasonably performed investigations of the financial strengths of applicant sureties for bonds submitted in accordance with the Miller Act, 40 U.S.C. § 270a, before executing Certificates of Sufficiency ("Certificates") in accordance with 48 C.F.R. § 28.200, et seq. Loral contends that as a result, financially unfit individuals qualified as sureties on Miller Act payment bonds to Loral's detriment.

Loral also appeals the district court's order granting Citizens' Fed.R.Civ.P. 12(b)(2) motion to dismiss for lack of personal jurisdiction.***557** Having jurisdiction under 28 U.S.C. § 1291, we affirm both dismissals.

I

Loral was a subcontractor to West Coast Construction ("West Coast"). West Coast had a contract for the construction of communications/electronics improvement at Camp Pendleton Marine Corps Base, California ("Project") with the United States Department of the Navy ("Government").

40 U.S.C. § 270a of the Miller Act requires that a contractor of any public building or work provide a payment bond with a surety satisfactory to the federal officer awarding the contract before any contract in excess of $25,000 is awarded. The purpose of the payment bond is to protect all persons supplying labor and materials for the completion of the Project. *See*40 U.S.C. § 270(a)(2). The government contracting officer has the sole responsibility of determining the acceptability of an individual surety applicant. *See*48 C.F.R. § 28.202-2(a) (1987). In making the determination, the officer considers the information on the Standard form 28 as well as other factors, such as the applicant surety's outstanding bond commitments. *See*48 C.F.R. § 28.202-2(a),

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(b) (1987).

In accordance with the Miller Act, West Coast executed two payment bonds with individual sureties, Purdy L. Sisson ("Sisson") and Hugh J. Johnson ("Johnson"), in July, 1987 and submitted the bonds to the Government. In accordance with 48 C.F.R. § 28.202-2(b) in effect in 1987, each bond was accompanied by a Standard Form 28, containing a sworn Affidavit of Individual Surety ("Affidavit") and the Certificate on the reverse side. The Affidavit contains a worksheet where the surety applicant must list his assets and liabilities and declare his intent to become a surety on a federal works project. The Certificate provides that the surety named in the Affidavit is personally known to the signatory and that "to the best of [the signatory's] knowledge," the facts stated in the Affidavit are true. The Certificate does not contain specific instructions as to either the method or the extent of verification for the information provided. The instructions on the Affidavit provide that the certifier can be:

an officer of a bank or trust company, a judge or clerk of a court of record, a United States district attorney or commissioner, a postmaster, a collector or deputy collector of internal revenue, or any other officer of the United States acceptable to the department or establishment concerned.

The Certificate for Sisson's Affidavit was signed by Janis Morris ("Morris"), an officer of Citizens. Citizens is a Kentucky corporation doing business in the Commonwealth of Kentucky. The Certificate accompanying Johnson's Affidavit was signed by Carol J. Reynolds ("Reynolds"), an officer of Valley, a federally chartered bank with its principal place of business in Phoenix, Arizona.

West Coast subsequently breached its subcontract with Loral, and Loral filed a complaint in the United States District Court, Southern District of California, alleging among other claims, breach of contract, intentional and negligent misrepresentation, and for enforcement of the Miller Act. Johnson, Sisson, Dwight C. Lundell (a personal surety on a third payment bond), West Coast and its two general partners were named as defendants. In addition, Loral named the Banks as defendants for negligently executing the Certificates. On November 20, 1989, the Banks were dismissed without prejudice on the ground that Loral's claims against the Banks were premature. Although Loral obtained a court judgment against the remaining defendants on April 6, 1992, it has been unable to collect any portion of the judgment.

In a second action, Loral renewed its assertions against the Banks for negligently investigating Johnson's and Sisson's financial strengths before signing the Certificates. The district court granted the Banks' simultaneous motions to dismiss for failure to state a claim upon which relief can be granted. The district court also granted Citizens' motion to dismiss for lack of personal jurisdiction. Judgment was entered on April 14, 1993. Loral timely filed an appeal to this court on May 3, 1993.

II

Loral's first contention of error is that the district court's Fed.R.Civ.P. 12(b)(6) dismissal***558** was improper because (1) the district court considered matters outside the pleadings; and (2) the Banks owed a duty to investigate the veracity of the financial information provided by the sureties.

We review de novo a Fed.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Frey v. California,* 982 F.2d 399, 401 (9th Cir.), *cert. denied,* 509 U.S. 906, 113 S.Ct. 3000, 125 L.Ed.2d 693 (1993). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). In applying this standard, we assume that all of Loral's allegations are true. *See Reddy v. Litton Indus., Inc.,* 912 F.2d 291, 293 (9th

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Cir.1990), *cert. denied,* 502 U.S. 921, 112 S.Ct. 332, 116 L.Ed.2d 272 (1991).

First, Loral contends that the district court erred procedurally when it considered matters outside the pleadings while ruling on the 12(b)(6) motion to dismiss. During the hearing when it granted the Banks' Fed.R.Civ.P. 12(b)(6) motion to dismiss, the district court made a passing reference to Morris' affidavit which Citizens had submitted in support of its motion to dismiss for lack of personal jurisdiction. The district court, however, did not rely upon the affidavit to render its decision. Rather, the motion to dismiss was granted on the basis of the district court's interpretation of the Miller Act, its accompanying regulations and the qualified language used in the Certificate.

The district court determined that Loral was not entitled to relief under any set of facts because the Banks did not owe a duty to perform an independent investigation into the financial condition of each applicant surety. The court's decision was based solidly on the allegations in the complaint; the reference to Morris' affidavit was a minor parenthetical observation rather than a material basis for the district court's decision.

[1] Next, Loral contends that the district court erred in deciding that the Banks did not owe a duty of care to independently investigate the veracity of the financial information provided by the applicant sureties. Loral argues that such a duty arises under common law principles of negligence rather than under the Miller Act. Loral first contends that the Banks' duty arises from the practical use of the certification by the federal contracting officers in approving sureties. Loral, however, fails to explain how the federal contracting officer's possible reliance, without more, establishes a duty of care.

[2] Second, Loral argues that the language in the Certificate establishes a duty of care. We find no language in the Miller Act or its accompanying regulations which imposes such a duty upon the Banks.[FN1] The Certificate states:

FN1. The Sixth Circuit has likewise found that the Miller Act does not impose a duty upon the signatories of the Certificate to conduct a personal investigation of the sureties' financial strengths. *See Goldman Servs. Mechanical Contracting, Inc. v. Citizens Bank & Trust Co.,* 9 F.3d 107, 1993 WL 428641 (6th Cir.1993), *aff'g* 812 F.Supp. 738 (W.D.Ky.1992); *see also, Beall Plumbing & Heating Co. v. First Nat'l Bank,* 847 F.Supp. 1307, 1314 (S.D.W.Va.1994).

I Hereby Certify, That the surety named herein is personally known to me; that, in my judgment, said surety is responsible, and qualified to act as such; and that, to the *best of my knowledge,* the facts stated by said surety in the foregoing affidavit are true. (emphasis added).
The phrase, "to the best of my knowledge," indicates that the certifier attests for the surety on the basis of the certifier's previous, personal knowledge about the surety and an examination of any documents provided with the Affidavit. The language limits the representation to what the maker personally knows. *See Northwestern Mutual Life Ins. Co. v. Gridley,* 100 U.S. 614, 616, 25 L.Ed. 746 (1880). It puts the hearer on notice that further investigation may be needed.

The only situation where a certifying official is required to conduct an investigation arises when the government contracting officer has requested continuing proof of acceptability after the contract has been awarded. ***559** 48 C.F.R. § 28-202.2(c) (1987). Instruction 5 on the Certificate imposes a duty on the executing official to conduct a personal investigation for *further* certificates showing additional assets. Specifically the instruction provides:

Further certificates showing additional assets, or a new surety, may be required to assure protection of the Government's interest. Such certificates must be based on the personal investigation of the certifying officer at the time of the making thereof, and not upon prior certifications.

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The language merely instructs the certifier to conduct a personal investigation of *additional* facts not covered by the original Certificate and does not impose a duty to investigate for the initial certifica- tion.

[3] Finally, Loral contends that the limitation placed upon those who may sign the Certificate establishes a duty of care. We disagree. Rather than establishing a duty of care, the various types of individuals authorized to sign the Certificate indicate that a detailed investigation into the applicant surety's financial situation is not required before certification. Such an investigation would be beyond the scope of expertise for many of these individuals. Furthermore, interpreting the regulations in a manner as to impose a duty of independent investigation would lead to absurd results.

For example, Kentucky has a statute which makes it a misdemeanor for a person to sign or prepare a document providing financial information unless she holds an accounting license. Ky.Rev.Stat.Ann. § 325.990 (Michie 1994). Imposing a duty to conduct an independent investigation into an applicant surety's financial strength would subject any certifying official, without an accounting license, to criminal liability. The drafters of the regulations accompanying the Miller Act could not have intended such a result.

We find that the Banks did not owe a duty to conduct an independent investigation into the financial condition of the applicant surety before signing the Certificates. Thus, Loral cannot win under any set of facts. We therefore affirm the district court's grant of the motion to dismiss.

We find it unnecessary to reach the issue of proximate causation because we find that the banks did not owe a duty to investigate. Furthermore, we refuse to consider Loral's assertion that the Banks are liable under a common law negligent misrepresentation theory. Such a theory was neither pled in the complaint nor brought before the district court. It is a well-established precedent that this court will not consider contentions which were not originally brought before the district court. *See Fry v. Melaragno,* 939 F.2d 832, 835 (9th Cir.1991); *Eason v. Dickson,* 390 F.2d 585, 589 (9th Cir.), *cert. denied,* 392 U.S. 914, 88 S.Ct. 2076, 20 L.Ed.2d 1373 (1968).

III

Loral's second contention of error is that the district court improperly granted Citizens' 12(b)(2) motion to dismiss for lack of personal jurisdiction. Where jurisdictional facts are not disputed, we review de novo a Fed.R.Civ.P. 12(b)(2) motion to dismiss for lack of personal jurisdiction. *Brainerd v. Governors of the Univ. of Alberta,* 873 F.2d 1257, 1258 (9th Cir.1989). The district court's factual findings on all jurisdictional issues must be accepted unless clearly erroneous. *Nike, Inc. v. Commercial Iberica de Exclusivas Deportivas, S.A.,* 20 F.3d 987, 990 (9th Cir.1994).

[4][5] We apply the long-arm statute of the state in which the district court sits in this diversity case where no federal statute governing personal jurisdiction is applicable. *See Core-Vent Corp. v. Nobel Indus. AB,* 11 F.3d 1482, 1484 (9th Cir.1993), *citing Hylwa, M.D., Inc. v. Palka,* 823 F.2d 310, 312 (9th Cir.1987). California's long-arm statute allows the exercise of personal jurisdiction over defendants to the fullest extent permitted by due process. *Core-Vent Corp.,* 11 F.3d at 1484,*citing Data Disc, Inc. v. Systems Tech. Assocs., Inc.,* 557 F.2d 1280, 1286 (9th Cir.1977). "[D]ue process requires only that ... [the person] 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.' " *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).

***560** [6] Loral argues that the district court can exercise "specific" or "limited" personal jurisdiction over Citizens because the "cause of action arises out of or is related to the defendant's forum activit-

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ies...." *Hirsch v. Blue Cross, Blue Shield,* 800 F.2d 1474, 1477 (9th Cir.1986). In order to determine whether the exercise of specific jurisdiction comports with due process, we apply the following three part test:

(1) The defendant must have done 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 arise out of the defendant's forum-related activities; and

(3) the exercise of jurisdiction must be reasonable.

Shute v. Carnival Cruise Lines, 897 F.2d 377, 381 (9th Cir.1990) (citations omitted), *rev'd on other grounds,* 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

[7][8] We find that Citizens did not purposely avail itself of the privilege of conducting activities in California. The purposeful availment standard requires more than foreseeability of causing injury in another state. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985). Rather, "the foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). The purposeful availment prong prevents defendants from being haled into a jurisdiction through "random," "fortuitous," or "attenuated" contacts. *Burger King,* 471 U.S. at 475, 105 S.Ct. at 2183.

Citizens' only place of business is McCracken County, Kentucky, and its only contact with California has been through Morris' act of signing the Certificates. Morris, presumably acting as an agent of Citizens, signed a number of Certificates without specific knowledge that one of those Certificates may be used for a federal works project based in California.

Loral asserts that by agreeing to execute these Certificates, Citizens purposefully directed its activities to other states and knew that it would be subject to liability in any of these other states for its actions. Loral fails to give any supporting authority for this novel assertion. In fact, Loral's assertion contradicts established law on personal jurisdiction. "[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Asahi Metal Indus. Co. v. Super. Ct.,* 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1987).

Loral also argues that Citizens could have foreseen being haled into court in California because the code N62474-86-C-0388 typed on the Affidavit indicated or should have indicated that the signed Certificate would be used in a federal works project in California. First, there is a question as to whether the code was typed on the Certificate at the time of Morris' signature. Citizens claims that the code number appeared in Block No. 12 of the Certificate *after* the Certificate left Morris' control. In support, Citizens presents the affidavits of both Morris and Sisson stating that the code did not appear on the Certificate at the time of Morris' signature.

Loral disputes both Morris' and Sisson's affidavits and asserts that the code number was present at the time of Morris' signature. Loral points to the perfect match between the typeface and alignment used in items 10 and 12 and the rest of the form to support its contention. Such evidence which turns on the skill of the second typist, however, is tenuous at best.

Even assuming *arguendo* that the code was on the Certificate at the time of Morris' signature, it is too much to assume, without more, that Morris should have known that the code indicated a connection to California. The state of California was never noted on the Certificate nor was it ever mentioned in dis-

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cussions between Morris and Sisson. Indeed, the district court noted that Loral had not presented any evidence that indicates Morris knew or should have known the significance of the code.

***561** Citizens has not purposefully availed itself of the privilege of conducting activities within California by signing the Certificates. The contact between California and Citizens through Citizens' act of signing the Certificates was fortuitous and does not justify the district court's exercise of personal jurisdiction.

[9] The second prong of the specific jurisdiction test is met if "but for" the contacts between the defendant and the forum state, the cause of action would not have arisen. *Carnival Cruise Lines,* 897 F.2d at 385-86. The contracting officer has the sole responsibility of determining the acceptability of an individual surety. *See*48 C.F.R. § 28.202-2(a) (1987). In addition, the regulations implementing the Miller Act made clear that the contracting officer's consideration of the Certificate was only a part of the independent evaluation. *See*48 C.F.R. § 28.202-2(b) (1987). Under such circumstances, it cannot be said that "but for" Citizens' signing the Certificates, the Government official would not have approved Sisson as a surety.

Finally, we consider the following factors to determine the reasonableness of the district court's exercise of jurisdiction, the third prong:

(1) [T]he extent of the defendant['s] purposeful interjection into the forum state's affairs;

(2) the burden on the defendant of defending in the forum;

(3) the extent of conflict with the sovereignty of the defendants' state;

(4) the forum state's interest in adjudicating the dispute;

(5) the most efficient judicial resolution of the controversy;

(6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and

(7) the existence of an alternative forum.

Core-Vent Corp., 11 F.3d at 1487-88. We balance all seven factors, recognizing that none of the factors is dispositive in itself. *Id.* at 1488.

[10] Loral could not prove the first prong of purposeful availment, thus, the first factor of purposeful interjection weighs heavily in Citizens' favor. Likewise, the second factor, the burden on Citizens of having to defend in California, favors Citizens. Ninth Circuit cases have been inconsistent in determining whether the plaintiff's burden should alter the impact of this second factor on the overall reasonableness determination. *Core-Vent,* 11 F.3d at 1488-89. This standard need not be resolved in this case, however, because it is as burdensome for Citizens and its witnesses to travel to California as it is for Loral and its witnesses to travel to Kentucky. Where the burdens are equal, the second factor tips in favor of Citizens because the law of personal jurisdiction is asymmetrical and is primarily concerned with the defendant's burden. *See Insurance Co. of N. Am. v. Marina Salina Cruz,* 649 F.2d 1266, 1272 (9th Cir.1981).

There is minimal conflict with Kentucky's sovereignty, therefore, the third factor weighs in favor of Loral. Kentucky has little interest in resolving claims involving a federal works project in California, a California prime contractor and bonds accepted in California by a California contracting officer. However, the fourth factor, California's interest in adjudicating the dispute, does not necessarily favor Loral. Although California has some interest in adjudicating the suit because it is obligated to protect its residents from tortious acts of non-resident defendants, its interest is not as strong in this case because Loral, a Delaware corporation which is a wholly owned subsidiary of a New York corporation, does not operate exclusively in California. *See Karsten Mfg. Corp. v. United States Golf Ass'n,* 728 F.Supp. 1429, 1436 (D.Ariz.1990).

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Efficiency of forum, the fifth factor, is evaluated by looking at where the witnesses and the evidence are likely to be located. *Core-Vent,* 11 F.3d at 1489. The fifth factor does not lie in either party's favor because there are witnesses and evidence in both California and Kentucky.

The sixth factor of convenience and effectiveness of relief for Loral weighs in favor of Citizens. Loral argues that forcing it to bring claims in two jurisdictions will require it to prove its case twice, possibly leading to inconsistent verdicts. Loral's argument is ***562** not convincing. The acts of Valley and Citizens are discrete, and the actions of each bank will be judged individually. Finally, the seventh factor, the existence of an alternate forum, favors Citizens. The district court found, and Loral has not disputed, the fact that Kentucky could serve as an adequate alternate forum. The balance of the seven factors reveals that a California district court cannot reasonably exercise personal jurisdiction over Citizens.

On the basis of our three part analysis, we conclude that the district court correctly refused to exercise personal jurisdiction over Citizens.

Furthermore, the district court did not abuse its discretion by refusing to grant a continuance to allow Loral to conduct jurisdictional discovery. Loral failed to demonstrate how further discovery would allow it to contradict the affidavits of Morris and Sisson. "[W]here a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the Court need not permit even limited discovery...." *Rich v. KIS Cal., Inc.,* 121 F.R.D. 254, 259 (M.D.N.C.1988).

IV

We **AFFIRM** the district court's grant of the Banks' Fed.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim. The district court did not improperly consider matters outside the pleadings when it ruled on the Banks' 12(b)(6) motions, and Loral failed to demonstrate that the Banks owed a duty to conduct an independent financial investigation of the applicant sureties.

Likewise, we **AFFIRM** the district court's Fed.R.Civ.P. 12(b)(2) dismissal of Loral's complaint against Citizens.

AFFIRMED.

C.A.9 (Cal.),1995.
Terracom v. Valley Nat. Bank
49 F.3d 555, 63 USLW 2568, 40 Cont.Cas.Fed. (CCH) P 76,777

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C

United States District Court, E.D. Michigan, Southern Division.
TIDY CAR INTERNATIONAL, INC., Plaintiff,
v.
Gary T. FIRESTINE, Defendant.
No. 92-CV-76339-DT.

Jan. 5, 1993.

Car maintenance corporation brought action against former licensee to prevent former licensee from using trademarks, trade names, and systems after licensing agreement had been terminated. The District Court, Zatkoff, J., held that car maintenance corporation failed to show that former licensee had purposefully established sufficient minimum contacts with Michigan to justify the exercise of personal jurisdiction in light of prior negotiations between parties, contemplated future consequences of licensing agreement, terms of licensing agreement, and parties' actual course of conduct.

Motion to dismiss granted.

West Headnotes

[1] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
District court's determination of whether former licensee of Michigan car maintenance company had purposefully established minimum contacts with Michigan to justify district court's exercise of personal jurisdiction over licensee depended on consideration of prior negotiations, contemplated future consequences, terms of contract, and parties' actual course of conduct.

[2] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Licensing agreement was signed in Canada while car maintenance company was Canadian corporation with headquarters in New York and, thus, prior negotiations did not support finding that former licensee of Michigan car maintenance company had purposefully established minimum contacts with Michigan to justify district court's exercise of personal jurisdiction over licensee.

[3] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Contemplated future consequences of signing licensing agreement with Canadian car maintenance corporation that was headquartered in New York could have been only that licensee would have contact with Canada or New York and, thus, future consequences did not support finding that former licensee of Michigan car maintenance company had purposefully established minimum contacts with Michigan to justify district court's exercise of personal jurisdiction over licensee; Michigan corporation purchased prior Canadian corporation after license agreement had been established.

[4] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue

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170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Licensing agreement with Michigan car maintenance corporation provided that law of state of New York would govern construction of agreement and, thus, terms of agreement did not support finding that former licensee of Michigan car maintenance company had purposefully established minimum contacts with Michigan to justify district court's exercise of personal jurisdiction over licensee.

[5] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Former licensee's actual course of conduct connecting licensee with Michigan car maintenance corporation was limited to periodic purchases, monthly payments, and letters and telephone calls which were insufficient to show that former licensee had purposefully established minimum contacts with Michigan to justify exercise of personal jurisdiction; corporation had not changed licensing agreement to require Michigan law to apply after Michigan corporation bought Canadian corporation with whom licensee had entered agreement and licensee would not be haled into jurisdiction based solely on unilateral act of sale of original corporation.

***200** Steven M. Raymond, May, Simpson & Strote, Bloomfield Hills, MI, for plaintiff.
Larry E. Coey, Michelle L. Riske, Elyria, OH, for defendant.

MEMORANDUM OPINION AND ORDER

ZATKOFF, District Judge.
This matter is before the Court on defendant's, Gary T. Firestine's ("Firestine" or "defendant"), motion to quash service of process, motion to dismiss for lack personal jurisdiction, and, in the alternative, motion for change of venue. Plaintiff, Tidy Car International, Inc.[FN1] ("Tidy Car" or "plaintiff"), filed a timely reply brief that addressed Firestine's various motions. Firestine***201** filed a single reply brief which was both untimely under the Local Rules of the Eastern District of Michigan and of an unauthorized length. Tidy Car did not object to Firestine's reply brief. In the interest of justice, the Court will consider Firestine's reply brief. Pursuant to E.D.Mich. LR 7.1(e)(2), the Court ORDERS that Firestine's motions be disposed of upon the briefs that the parties have filed and without the Court entertaining oral arguments. For the reasons set forth below, Firestine's motion to dismiss for lack of personal jurisdiction is granted.[FN2]

FN1. Tidy Car International, Inc., is a subsidiary of Ziebart International Corporation. Plaintiff's Complaint, Exhibit C and Exhibit D.

FN2. In so holding, Firestine's motion to quash service and motion for change of venue are MOOT. In addition, Tidy Car has filed a motion for a preliminary injunction that also is MOOTED by this Memorandum Opinion and Order.

I. BACKGROUND

In April 1978, Firestine entered into an "Associate Dealer Agreement" ("Agreement") with Tidy Car, Inc., wherein Firestine obtained all the rights and privileges as a Tidy Car Independent Operator. The agreement was signed in Toronto, Ontario, Canada. Tidy Car, Inc., was a Canadian corporation with its headquarters in Toronto. Tidy Car, Inc., also had offices in Buffalo, New York, and this is where Firestine purchased its Tidy Car supplies. In addition, the Agreement specified that the law of the State of New York would govern how the contract

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was to be construed.

In August 1989, Tidy Car, Inc., sold and assigned all of its right, title, and interest in its business, including rights in the Agreement, to Plaintiff Tidy Car. Plaintiff's Complaint ¶ 10. Tidy Car is a Michigan Corporation with its principal place of business in Troy, Michigan. Plaintiff's Complaint ¶ 3. Tidy Car is in the business of licensing, via written licensing agreements, the use of its distinctive Tidy Car name and other registered trademarks and service marks and distinctive process developed by Tidy Car for maintaining the interior and exterior of automobiles and trucks. Plaintiff's Complaint ¶ 3.

On October 28, 1992, Tidy Car filed suit in this Court against Firestine. This suit arises out of defendant's alleged use of a product known as "Rust Evader." [FN3] Tidy Car did not approve of its tradename being associated with the sale of "Rust Evader." Plaintiff's Complaint ¶ 12 and Exhibit B. Tidy Car alleges in its complaint that Firestine continued to use "Rust Evader" at his shop in Ohio and that such use violated ¶ 10(c) of the Agreement.FN4 Based on this, in a letter dated 26 August 1992, Tidy Car informed Firestine that the Agreement would be terminated on 28 September 1992 and that by 28 September 1992, Firestine had to remove all Tidy Car identification and materials from his premises and that Firestine had to cease using any reference in any way to Tidy Car trademarks, trade names, and logos. In the present action, Tidy Car seeks a declaratory judgment that Firestine has no further rights under the Agreement; an order requiring Firestine to cease using the Tidy Car trademarks, trade names, service marks, and systems; an order requiring Firestine to account for his gross sales since 28 September 1992; an order allowing Tidy Car to audit Firestine's books; and damages for infringement of Tidy Car's trademarks.

FN3. "Rust Evader" is an electronic corrosion control device which was developed from the scientific principle of cathodic corrosion protection. Tidy Car believes that this scientific principle is only valid when it is applied to stationary objects which have continuous contact with the ground or water, such as bridges and pipelines. Based on its own research and that of independent corrosion experts, Tidy Car concluded that this technology did not apply to vehicles. Plaintiff's Complaint, Exhibit B.

FN4. Paragraph 10(c) of the Agreement provided that Firestine agreed to:

> deal with his customers in a fair and businesslike manner and to provide high quality and efficient service in keeping with the policies of the Company.

II. OPINION

A. Standard of Review

It is axiomatic that Tidy Car bears the burden of establishing that personal jurisdiction exists in this Court. *Theunissen v. Matthews,* 935 F.2d 1454, 1458 (6th Cir.1991) (citing ***202***McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80 L.Ed. 1135, 1141 (1936); *accord Am. Greeting Corp. v. Cohn,* 839 F.2d 1164, 1168 (6th Cir.1988); *Weller v. Cromwell Oil Co.,* 504 F.2d 927, 929 (6th Cir.1974)). Furthermore, once Firestine filed its properly supported motion for dismissal, Tidy Car "may not stand on ... [its] pleadings, but must, by affidavit or otherwise, set forth specific facts showing that the court has [personal] jurisdiction [over defendant]." *Theunissen,* 935 F.2d at 1458 (citing *Weller,* 504 F.2d at 930). Here both Firestine and Tidy Car have submitted affidavits. In addition, Tidy Car submitted a summary of purchases which Firestine has made from Tidy Car's Troy, Michigan location. In response to this summary and Tidy Car's affidavit,FN5 Firestine submitted a second affidavit with his reply brief.

FN5. Nancy McMath swore out the affi-

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davit for Tidy Car. She is the Director of Credit, Collection & Licensing for Tidy Car. McMath Affidavit ¶ 1.

Accordingly, the Court has before it a properly supported 12(b)(2) motion and opposition thereto. At this stage of the proceedings the Court has three options:

> [I]t may decide the motion upon the affidavits alone; it may permit discovery in aid of deciding the motion; or it may conduct an evidentiary hearing to resolve any apparent factual questions.

Theunissen, 935 F.2d at 1458 (citing *Serras v. First Tennessee Bank Nat. Ass'n,* 875 F.2d 1212, 1214 (6th Cir.1989)). It is within the Court's discretion to decide which method it will employ in deciding the motion. *Theunissen,* 935 F.2d at 1458 (citations omitted). "However, the method selected will affect the burden of proof the plaintiff must bear to avoid dismissal.... Where the court relies solely on the parties affidavits to reach its decision, the plaintiff must make only a *prime facie* showing that personal jurisdiction exists in order to defeat dismissal." *Id.* (citations omitted). In addition, "the pleadings and affidavits submitted on a 12(b)(2) motion are received in a light most favorable to the plaintiff." *Id.* at 1459 (citations omitted). "[H]owever, the court disposing of a 12(b)(2) motion ... [cannot] weigh the controverting assertions of the party seeking dismissal." *Id.* (citations omitted). Because the Court will decide Firestine's motion on the affidavits submitted, it is under the parameters set forth above that the Court will analyze the instant motion.

B. Personal Jurisdiction

Both Tidy Car and Firestine agree that under Rule 4(e) of the Federal Rules of Civil Procedure [FN6] that the Court must look to the Michigan long-arm statute, M.C.L.A. § 600.705 in determining whether personal jurisdiction exists in the case at bar.[FN7] M.C.L.A. § 600.715(1) provides: [FN8]

FN6. Rule 4(e) states:

> Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within this state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

FN7. In addition, both parties agree that the facts in this case do not allow the Court to assert general personal jurisdiction over Firestine. " 'Specific' jurisdiction contrasts with 'general' jurisdiction, pursuant to which 'a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum.' " *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 n. 15, 105 S.Ct. 2174, 2182 n. 15, 85 L.Ed.2d 528 (1985) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 n. 9, 104 S.Ct. 1868, 1872 n. 9, 80 L.Ed.2d 404 (1984)).

FN8. Both parties inadvertently cited the Michigan long-arm statute as § 600.705(1).

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> The existence of any of the following relationships between an individual or his agent and the State shall constitute a ***203** sufficient basis of jurisdiction to enable a Court of record of this State to exercise limited personal jurisdiction over the individual and to enable the Court to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships:
>
> (1) The transaction of any business within the State.

In *Sifers v. Horen,* 385 Mich. 195, 188 N.W.2d 623 (1971), the Michigan Supreme Court stated that the word "any" which is found in M.C.L.A. § 600.715(a)"means just what it says. It includes 'each' and 'every'.... It comprehends that 'slightest.' " *Id.* at 199 n. 2, 188 N.W.2d 623. *See also Lanier v. American Bd. of Endodontics,* 843 F.2d 901, 905-906 (6th Cir.1988). Because Firestine does not dispute that he comes within § 600.715(1), the Court will assume that it would have personal jurisdiction under the Michigan long-arm statute. "However, constitutional concerns of due process limit the application of this state law." *Theunissen,* 935 F.2d at 1459 (citation omitted).

Both parties agree as to the substantive law which governs the resolution of the issue of personal jurisdiction which is before the Court.

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing 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 must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Theunissen, 935 F.2d at 1460 (quoting *LAK, Inc. v. Deer Creek Enterprises,* 885 F.2d 1293, 1299 (6th Cir.1989), *cert. denied,* 494 U.S. 1056, 110 S.Ct. 1525, 108 L.Ed.2d 764 (1990)) (citing *Southern Machine Co. v. Mohasco Industries, Inc.,* 401 F.2d 374, 381 (6th Cir.1968) (hereinafter "*Southern Machine* test")).

Tidy Car relies on *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) in support of its contention that Firestine has purposefully availed himself to the privilege of acting within the state of Michigan. In *Burger King,* the Supreme Court, per Justice Brennan, set forth a concise but comprehensive review of the Supreme Court's personal jurisdiction jurisprudence which is worthy of being repeated here. The Supreme Court stated that:

> The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful "contacts, ties, or relations." By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,"... the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit...."
>
> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum ... and the litigation results from alleged injuries that "arise out of or relate to" those activities....
>
> We have noted several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who "purposefully directs" his activities toward forum residents. A State generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.... Moreover, where individuals "purposefully de-

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rive 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.... And because "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity," it usually will not be unfair to subject him to the ***204** burdens of litigating in another forum for disputes relating to such activity....

Notwithstanding these considerations, the constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum State.... "[T]he foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there...." In defining when it is that a potential defendant should "reasonably anticipate" out-of-state litigation [we have stated that] ...:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with a forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated," contacts ... or of the "unilateral activity of another party or a third person...."

Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State.

471 U.S. at 470-475, 105 S.Ct. at 2181-184 (citations omitted).

The Court went on and stated that:

> [W]e have emphasized the need for a "highly realistic" approach that recognized that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction...." It is these factors-prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing-that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

471 U.S. at 477, 105 S.Ct. at 2185 (citations omitted).

Tidy Car cites to the following contacts which Firestine has with Michigan in support of Tidy Car's argument that Firestine has purposefully availed to the benefits of Michigan's laws: 1) Firestine made periodic purchases of products from Tidy Car in the State of Michigan; 2) Firestine made monthly payments to Tidy Car in Michigan to cover royalties owed pursuant to the Agreement; and 3) Firestine wrote letters and made telephones calls to Tidy Car's Michigan Office.[FN9]

> FN9. "Telephone conversations and letters are insufficient to fulfill" purposeful availment. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog,* 954 F.2d 1174, 1177 (6th Cir.1992) (citations omitted).

[1] The fact that Firestine made his royalty payments in Michigan and the fact that Firestine purchased a few products from Michigan are insufficient to establish purposeful availment in this case. As stated above, the following factors are relevant in the Court's determination of whether Firestine purposefully established minimum contacts in the

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State of Michigan: 1) prior negotiations; 2) contemplated future consequences; 3) terms of the contract; and 4) the parties' actual course of conduct. *Burger King, supra.*

[2][3] Here, it is not disputed that the Agreement was signed in Toronto, Ontario, Canada in April 1978. Defendant's Brief in Support of Motion to Dismiss at 3; Defendant's Reply Brief at 3. At that time, Tidy Car, Inc., was a Canadian corporation with its headquarters in Toronto and offices in Buffalo, New York. Thus, during the negotiations and the signing of the Agreement it cannot be said that Firestine purposefully established minimum contacts within Michigan, because there was absolutely no connection with the State of Michigan. In addition, in 1978, the contemplated***205** future consequences could only be that Firestine would have contact with the Nation of Canada and the State of New York. Accordingly, contemplated future consequences does not lead the Court to find that Firestine purposefully established minimum contacts with the State of Michigan.

[4] Examining the terms of the Agreement, the Court finds that this factor also weighs in the favor of not finding purposefully availment. As the Supreme Court stated in *Burger King*"[n]othing in our cases ... suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's law' for jurisdictional purposes ... [a]lthough such a provision standing along would be insufficient to confer jurisdiction...." *Burger King*, 471 U.S. at 481, 105 S.Ct. at 2187 (emphasis in original). Here, the Agreement provided that the law of the State of New York would govern the construction of the Agreement. Again, the Court cannot find that, by the terms of the contract, Firestine purposefully availed himself to the benefits and protections of the State of Michigan's law, and thus this factor weighs against finding that Firestine purposefully established minimum contacts within Michigan.

[5] The last factor, the parties' actual course of conduct, is the only factor which can be said to arguably weigh in favor of finding minimum contacts. Since August 1989, Tidy Car has being a Michigan corporation and Firestine has purchased some products from Michigan. However, Tidy Car did not have the Agreement changed to require that the State of Michigan's laws would apply to the Agreement. In addition, Firestine had no say in whether Tidy Car, Inc., would be bought out by Tidy Car International, which allowed Tidy Car to become a Michigan corporation with offices in Michigan. This is a classic example of where a defendant is haled into a jurisdiction based on a unilateral act of another party. Personal jurisdiction will not be found in such a case. *Burger King*, 471 U.S. at 474, 105 S.Ct. at 2183.[FN10] Moreover, from 1978 through August 1989, Firestine had no contacts with the State of Michigan.

> FN10. To hold otherwise in this case would mean that any person, who signed an agreement similar to the one in this case, would be subject to the jurisdiction in any of the fifty states of the United States simply because the original corporation was bought out by another corporation and the defendant ordered some supplies from the new corporation, supplies which the defendant could not get from anywhere else. This would not allow individuals to have fair warning that a particular activity-signing an agreement-may subject them to the jurisdiction of a foreign sovereign which is required under the Due Process Clause.

Accordingly, after weighing all of the relevant factors and viewing the facts in the light most favorable to Tidy Car, the Court holds that Firestine has not purposefully established minimum contacts with the State of Michigan under the facts in this case.

CONCLUSION

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For all of the reasons set forth above, defendant Firestine's motion to dismiss for lack of personal jurisdiction is hereby GRANTED.

IT IS SO ORDERED.

E.D.Mich.,1993.
Tidy Car Intern., Inc. v. Firestine
810 F.Supp. 199

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EXHIBIT U

EXHIBIT V

C

United States District Court,E.D. Washington.
Mark VAN STEENWYK and Marites Van Steenwyk, Plaintiffs,
v.
INTERAMERICAN MANAGEMENT CONSULTING CORPORATION, Defendant.
No. CS-93-219-FVS.

Sept. 23, 1993.

Prospective employee brought breach of contract action against prospective employer. Prospective employer moved to dismiss. The District Court, Van Sickle, J., held that minimum contacts did not exist to support personal jurisdiction over prospective employer under Washington long-arm statute, as proposed contract of employment was not to have been performed in state.

Motion granted.

West Headnotes

[1] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
Plaintiffs have burden of establishing personal jurisdiction.

[2] Federal Courts 170B ⚿96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases
In cases involving a defendant's motion to dismiss, for lack of personal jurisdiction, being decided solely upon affidavits, plaintiffs may satisfy their burden in establishing jurisdiction by making prima facie showing.

[3] Federal Courts 170B ⚿417

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk417 k. Federal Jurisdiction. Most Cited Cases
In diversity action, question of personal jurisdiction is governed by laws of forum state. 28 U.S.C.A. §§ 1332(a)(1), 1441.

[4] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Federal Courts 170B ⚿76.1

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.1 k. In General. Most Cited Cases
(Formerly 170Bk76)
When existence of personal jurisdiction is challenged, court must consider whether forum state's long-arm statute confers personal jurisdiction, and whether invoking jurisdiction is consistent with principles of due process. 28 U.S.C.A. §§ 1332(a)(1), 1441.

[5] Courts 106 ⚿12(2.15)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction

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in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General
106k12(2.15) k. Transacting or Doing Business. Most Cited Cases
"General jurisdiction" under Washington law, sufficient to confer personal jurisdiction on defendants in diversity action, flows from nonresident defendant's continuous, systematic business contacts in Washington, sufficient to require nonresident defendant to submit to jurisdiction of court sitting in state, even though pending cause of action does not arise out of defendant's forum-related activities. 28 U.S.C.A. §§ 1332(a)(1), 1441; West's RCWA 4.28.080(10).

[6] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
"Specific jurisdiction" under Washington law, sufficient to provide basis for personal jurisdiction of federal court in diversity action, exists when court agrees to entertain cause of action arising from forum-related activities, when nonresident defendant has had "fair warning" that its activities in state may subject it to jurisdiction of courts. 28 U.S.C.A. §§ 1332(a)(1), 1441; West's RCWA 4.28.185.

[7] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Courts 106 ⚿12(2.10)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General
106k12(2.10) k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
State statute providing for specific personal jurisdiction over defendants, based on their activities within state, is intended to extend as far as permitted under due process clause. West's RCWA 4.28.185; U.S.C.A. Const.Amend. 14.

[8] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
District court may exercise "specific jurisdiction" over individual, under Washington law, only upon demonstration that defendant has established "minimum contacts" with state. West's RCWA 4.28.185.

[9] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
In order for there to be personal jurisdiction, under Washington law, sufficient to permit federal court

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to entertain diversity suit, there must be some act by which defendant purposefully avails itself of privilege of conducting activities within state, so as to invoke benefits and protection of its laws. 28 U.S.C.A. §§ 1332(a)(1), 1441; West's RCWA 4.28.185.

[10] Courts 106 ⚿12(2.10)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General
106k12(2.10) k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Requirement of "purposeful availment" on part of defendant in courts of state, required in order to establish that defendant has had minimum contacts with state so as to be amenable to personal jurisdiction under state's long-arm statute, requires conduct and connection such that defendant should reasonably anticipate being haled into court there. West's RCWA 4.28.185(1)(a); U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Once a plaintiff has established, under Washington law, that defendant purposefully availed itself of opportunity to conduct activities within state, it must additionally be established that assertion of personal jurisdiction would comport with fair play and substantial justice before such jurisdiction would be found, so as to allow diversity action. West's RCWA 4.28.185(1)(a); U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1332(a)(1), 1441.

[12] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Courts 106 ⚿12(2.10)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General
106k12(2.10) k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
In order for assertion of personal jurisdiction under state long-arm law to comport with fair play and substantial justice, plaintiff must show that defendant has purposefully availed itself of privilege of conducting activities in Washington, that their claims arise out of defendant's forum-related activities, and that exercise of jurisdiction would be reasonable. U.S.C.A. Const.Amend. 14; West's RCWA 4.28.185(1)(a); 28 U.S.C.A. §§ 1332(a)(1), 1441.

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[13] Courts 106 ⚿12(2.25)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General
106k12(2.25) k. Tort Cases. Most Cited Cases
In determining whether defendant, over whom personal jurisdiction is sought to be asserted under Washington law, has purposefully availed himself of privilege of conducting activities in state when tort claim is involved, personal jurisdiction may be proper when defendant's only contact with forum state is purposeful direction of foreign act having effect in forum state. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1332(a)(1), 1441; West's RCWA 4.28.185.

[14] Federal Courts 170B ⚿76.15

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.15 k. Transacting or Doing Business. Most Cited Cases
Existence of contract between resident of forum state and nonresident defendant is insufficient by itself to create personal jurisdiction over nonresident under Washington law, so as to permit maintenance of diversity action; whether contract signifies necessary purposeful availment of opportunity to do business in Washington depends upon additional factors such as prior negotiations and contemplated future consequences, along with terms of contract and parties' actual course of dealing. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1332(a)(1), 1441; West's RCWA 4.28.185.

[15] Federal Courts 170B ⚿76.30

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.30 k. Contract Cases. Most Cited Cases
When contract is offered as basis of personal jurisdiction in federal diversity case, court must examine "economic reality" embodied in agreement. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1332(a)(1), 1441.

[16] Federal Courts 170B ⚿76.30

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.30 k. Contract Cases. Most Cited Cases
Minimum contacts with state of Washington did not exist, as required in order to obtain personal jurisdiction over out-of-state prospective employer, who allegedly breached contract with in-state employee, even though it was established that alleged contract had been negotiated in Washington; employment contract was to have been performed outside of state. U.S.C.A. Const.Amend. 14; West's RCWA 4.28.185; 28 U.S.C.A. §§ 1332(a)(1), 1441.

***338** Steven C. Miller, Miller & Wainwright, Cheney, WA, for plaintiffs.
Lawrence E. Hard, David S. Grossman, LeSourd & Patten, Seattle, WA, for defendant.

ORDER

VAN SICKLE, District Judge.
BEFORE THE COURT is the defendant's motion to dismiss for lack of personal jurisdiction (Ct.Rec. 3). The defendant is represented by Lawrence E. Hard and David S. Grossman. The plaintiff is represented by Steven C. Miller.[FN1]

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FN1. The plaintiffs originally filed this action in Spokane County (Washington) Superior Court alleging breach of contract. The defendant removed it to federal court based upon diversity of citizenship. 28 U.S.C. § 1441; 28 U.S.C. § 1332(a)(1).

I. BACKGROUND

In 1992, USAID (a government agency) requested proposals for a development project it intended to fund in Indonesia. Development Alternatives, Inc. ("DAI") organized a consortium of companies to prepare a proposal. (Affidavit of Mark Van Steenwyk (Ct.Rec. 9).) Eventually, defendant Interamerican Management Consulting Corporation ("IMCC") became a member of the consortium. (Declaration of Richard Koskella (Ct.Rec. 15).)

IMCC is a management consulting firm which is incorporated in Florida; its headquarters are in Key Biscayne. In addition, it maintains an office in Arlington, Virginia. (Declaration of Paul B. Pieper (Ct.Rec. 10) at 2.) By contrast, IMCC's contacts with Washington are limited. It does not maintain an office in this state; does not have a registered agent here; nor is it listed in any Washington telephone directory. *Id.* at 5.

Plaintiff Mark Van Steenwyk was contacted at his Medical Lake, Washington, residence by a DAI employee during April, 1992. (Van Steenwyk Affidavit at 1-2.) The DAI employee wanted to know whether he would be interested in working on the development project described above. Van Steenwyk was informed that the project would require a five-year commitment. After a series of communications spanning approximately two months, Van Steenwyk sent a letter of commitment. *Id.* at 2.

During July, 1992, Van Steenwyk received two letters from IMCC representatives. One was from a Mr. Clifton Barton, who clearly identified himself as an IMCC official. *Id.* at 2. In his letter of July 21, 1992, Mr. Barton wrote, in part, "On behalf of Interamerican Management Consulting Corporation (IMCC) I would like to express our pleasure to have you join our proposed project team as the Agribusiness Organizations Advisor for the full 5 year term of the contract." (Supplemental Affidavit of Mark Van Steenwyk (Ct.Rec. 13).)

The plaintiffs allege that these communications constitute an offer of employment, and that Mark Van Steenwyk accepted the offer. (Van Steenwyk Affidavit at 3.) They further allege that IMCC breached the agreement by hiring another person as Agribusiness Organizations Advisor. (*Id.* at 4.)

IMCC Director of Administration Paul B. Pieper denies that IMCC had any contact with the plaintiff prior to February, 1993, the date USAID awarded the project to the DAI consortium. (Pieper Declaration at 4.) Pieper implies that IMCC Junior Associate Christina Kolbjornsen was the first IMCC employee to confer with Van Steenwyk. *Id.* at 4-5.

***339** Pieper's denial notwithstanding, the Barton letter of July 21, 1992, can plausibly be construed as a confirmation of an offer of employment. In any event, it flatly contradicts Pieper's assertion that IMCC had no direct contact with the Van Steenwyk prior to February, 1993.

II. RULING

[1][2] The plaintiffs bear the burden of demonstrating personal jurisdiction. *Shute v. Carnival Cruise Lines,* 897 F.2d 377, 379 (9th Cir.1990), *rev'd on other grounds,* 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).[FN2] However, since the defendant's motion is being decided solely upon affidavits, the plaintiffs may satisfy their burden by making a prima facie showing of jurisdiction. *Rano v. Sipa Press, Inc.,* 987 F.2d 580, 587 n. 3 (9th Cir.1993); *Shute,* 897 F.2d at 379.[FN3]

FN2. The Supreme Court held that the Court of Appeals erred by refusing to enforce a forum-selection clause. *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, ---- - ----, 111 S.Ct. 1522, 1528-29, 113

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L.Ed.2d 622 (1991).

FN3. If an evidentiary hearing is held, the plaintiff must establish the existence of personal jurisdiction by a preponderance of the evidence. *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 587 n. 3 (9th Cir.1993).

[3][4] In a diversity action, the question of personal jurisdiction is governed by the law of the forum state. *Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1065 (9th Cir.1990). When the existence of jurisdiction is challenged, two issues must be addressed: whether the forum state's long-arm statute confers personal jurisdiction; and whether invoking jurisdiction is consistent with principles of due process. *See Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1286 (9th Cir.1977); *Amba Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784, 787 (9th Cir.1977).

Under Washington's long-arm statutes, personal jurisdiction may be either general or specific. *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 850-51 (9th Cir.1993). RCW 4.28.080(10) creates general jurisdiction. *See Hein v. Taco Bell, Inc.*, 60 Wash.App. 325, 328, 803 P.2d 329 (1991). RCW 4.28.185 creates specific jurisdiction. *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wash.App. 414, 422, 804 P.2d 627 (1991).

[5] General jurisdiction flows from a non-resident defendant's continuous, systematic business contacts with Washington. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S.Ct. 1868, 1873, 80 L.Ed.2d 404 (1984). In such circumstances, the non-resident defendant may be required to submit to the jurisdiction of a court sitting in this forum even though the pending cause of action does not arise out of the defendant's forum-related activities. *See Rano*, 987 F.2d at 587-88; *MBM Fisheries, Inc.*, 60 Wash.App. at 418, 804 P.2d 627.

[6] Specific jurisdiction exists, by contrast, when a court agrees to entertain a cause of action which does arise from forum-related activities. *See Helicopteros*, 466 U.S. at 414 n. 8, 104 S.Ct. at 1872 n. 8. However, specific jurisdiction may be asserted only when the non-resident defendant has had "fair warning" that its activities in Washington may subject it to the jurisdiction of courts in this forum. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528 (1985).

The plaintiffs do not seek to establish general jurisdiction over the defendant. They rely instead on RCW 4.28.185(1)(a), arguing that the Court has specific jurisdiction because their claims are based upon the defendant's business transactions in this state. (Memorandum of Authorities (Ct.Rec. 8) at 2.)

[7] RCW 4.28.185 reaches as far as the due process clause will allow. *Shute v. Carnival Cruise Lines*, 113 Wash.2d 763, 767, 783 P.2d 78 (1989); *Deutsch v. West Coast Mach. Co.*, 80 Wash.2d 707, 711, 497 P.2d 1311,*cert. denied*, 409 U.S. 1009, 93 S.Ct. 443, 34 L.Ed.2d 302 (1972).[FN4] In fact, the test which Washington courts employ to decide ***340** the existence of personal jurisdiction under RCW 4.28.185(1)(a) is virtually identical to the specific-jurisdiction due process test utilized in this circuit. *Shute*, 897 F.2d at 380 n. 2. Because the two tests are essentially the same, the Court of Appeals has concluded that RCW 4.28.185(1)(a) establishes "no limitations beyond those imposed by due process." *Shute*, 897 F.2d at 380 n. 2. As a result, the statutory issue (*i.e.*, whether the plaintiffs' claims against the defendant fall within the scope of Washington's long-arm statute) and the constitutional issue (*i.e.*, whether invoking specific personal jurisdiction is consistent with due process) merge into a single inquiry: Is the assertion of specific jurisdiction compatible with due process? *Shute*, 897 F.2d at 380 (internal quotation marks and citation omitted). If so, personal jurisdiction may be invoked under RCW 4.28.185(1)(a).

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FN4. Although a state need not assert its authority over nonresident defendants to the extent permitted by the due process clause, *see*4 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1075, at 482 (2d ed. 1987), Washington has chosen to do so.

[8][9][10] This Court may exercise specific jurisdiction only if the plaintiffs can demonstrate that the defendant has established "minimum contacts" with Washington. *Burger King,* 471 U.S. at 474, 105 S.Ct. at 2183 (internal quotation marks and citation omitted). In other words, " 'there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " *Burger King,* 471 U.S. at 475, 105 S.Ct. at 2183 (quoting *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958)). The requirement that the plaintiffs show purposeful availment ensures " 'that the defendant's conduct and connection with the forum State are such that [the defendant] should reasonably anticipate being haled into court there.' " *Burger King,* 471 U.S. at 474, 105 S.Ct. at 2183 (quoting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980)).

[11] If the plaintiffs can demonstrate "purposeful availment," the Court must then decide whether "the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " *Burger King,* 471 U.S. at 476, 105 S.Ct. at 2184 (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 320, 66 S.Ct. 154, 160, 90 L.Ed. 95 (1945)). Once the inquiry reaches that stage, it is the defendant who must "present a compelling case" that it would be unreasonable for the Court to exercise personal jurisdiction. *Burger King,* 471 U.S. at 477, 105 S.Ct. at 2185.

[12] The Court of Appeals has incorporated the due process considerations identified by the Supreme Court into a three-part test. Under this circuit's approach, specific jurisdiction does not exist unless the plaintiffs can show the following: that the defendant has purposefully availed itself of the privilege of conducting activities in Washington; that their claims arise out of the defendant's forum-related activities; and that the exercise of jurisdiction would be reasonable. *Neaves,* 912 F.2d at 1065. The three prongs of the test are conjunctive. All three must be satisfied if the Court is to exercise personal jurisdiction. *Rano,* 987 F.2d at 588.

[13][14] With respect to the "purposeful availment" prong, the showing the plaintiffs must make depends upon whether their claims sound in tort or contract. When tort claims are involved, personal jurisdiction may be proper when the defendant's only contact with the forum state is the purposeful direction of a foreign act having an effect in the forum state. *Roth v. Garcia Marquez,* 942 F.2d 617, 621 (9th Cir.1991) (internal quotation marks, citation, and emphasis omitted). A contract claim is a different matter, however. The existence of a contract between a resident of the forum state and a non-resident defendant is insufficient by itself to create personal jurisdiction over the non-resident. *Roth,* 942 F.2d at 621 (citing *Burger King,* 471 U.S. at 478, 105 S.Ct. at 2185). Whether a contract signifies purposeful availment depends upon a number of additional factors. They include "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." *Burger King,* 471 U.S. at 479, 105 S.Ct. at 2185.

The following decisions illustrate this circuit's approach to the question of purposeful availment in contract cases. In *Roth v. Garcia*341 Marquez, supra,* the plaintiff (a California film producer) attempted to persuade the defendant (a novelist residing in Mexico City) to sell the film rights to a novel he had written. For the most part, negotiations were conducted by mail, telephone, and fax. 942 F.2d at 619. The defendant novelist met with the plaintiff in California only once; and on that occasion, the meeting was not the novelist's primary reason for

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traveling to that state. 942 F.2d at 620.

The plaintiff argued that the novelist's letters, telephone calls, and fax transmissions supported the district court's decision to exercise personal jurisdiction. The Court of Appeals disagreed. It said that a non-resident defendant's use of mail, telephone, or other means of international communication does not ordinarily qualify as purposeful activity. 942 F.2d at 622 (internal quotation marks and citations omitted).

Given the record before it, the Court of Appeals characterized the question of purposeful availment as "a very close call," *Roth,* 942 F.2d at 622, especially since the plaintiff producer was the one who initiated negotiations, and the novelist had few physical ties to California. Nevertheless, the circuit court concluded that the plaintiff had satisfied the first prong of the test.

The Court of Appeals based that decision on the alleged contract's future consequences, noting that the contract involved production of a film. Although the movie most likely would have been filmed in a foreign country, all of the editing, production, and advertising would have occurred in California. Because the contract would have generated ongoing work in California, the Court of Appeals decided that the novelist had purposefully availed himself of the privilege of doing business in that state. *Roth,* 942 F.2d at 622.

Another example of purposeful availment is found in *T.M. Hylwa, M.D., Inc. v. Palka,* 823 F.2d 310 (9th Cir.1987). In that case, the plaintiff physician first retained the services of the defendant accountant when both resided in Kansas. Thereafter, the physician discontinued his Kansas medical practice and moved to California. Even though the physician moved, the defendant continued to act as his accountant. 823 F.2d at 312.

On those facts, the Court of Appeals ruled that the plaintiff had established purposeful availment. Since the defendant had continued to provide accounting services to the plaintiff for approximately three years after the plaintiff moved, the defendant "should have reasonably anticipated being haled into court in California for claims arising out of his employment." *T.M. Hylwa, M.D., Inc.,* 823 F.2d at 314-15.

By contrast, in *McGlinchy v. Shell Chemical Co.,* 845 F.2d 802 (9th Cir.1988), the Court of Appeals held that one of the defendants-there were several-had not purposefully availed itself of the privilege of doing business in California. The question of personal jurisdiction arose after a California resident agreed to sell a foreign corporation's petrochemical product in the Middle East. 845 F.2d at 805. The contract was negotiated in England, but signed in California. (Apparently, the plaintiff had invited representatives of the foreign corporation to visit its facilities, and the foreign corporation had accepted the invitation.) 845 F.2d at 816.

To demonstrate purposeful availment, the plaintiff relied upon the fact that the contract had been signed in California. 845 F.2d at 816. The Court of Appeals was unpersuaded, listing four reasons why jurisdiction could not be grounded upon the location the contract was signed. First, the "substance of the relationship" was formed in England. Second, the contract made no reference to California. Third, no part of the contract was performed in California. Fourth, the fact that the foreign corporation sent representatives to California to use and observe the plaintiff's facilities did not constitute purposeful availment since the defendant had done so at the plaintiff's invitation. *McGlinchy,* 845 F.2d at 816.

[15] The three cases summarized above illustrate an important point. A contract typically constitutes " 'an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.' " *Burger King,* 471 U.S. at 479, 105 S.Ct. at 2185 (quoting ***342***Hoopeston Canning Co. v. Cullen,* 318 U.S. 313, 316-17, 63 S.Ct. 602, 605-05, 87 L.Ed. 777 (1943)). Thus, when a contract is

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offered as the basis of personal jurisdiction, a court must examine the "economic reality" embodied in the agreement. *Roth,* 942 F.2d at 622 (citation omitted).

[16] Here, the plaintiffs argue that the following factors reflect purposeful availment: (1) the defendant solicited plaintiff Mark Van Steenwyk's application, and offered the plaintiff employment; (2) the defendant sent pertinent communications to the plaintiffs' Washington residence; (3) plaintiff Mark Van Steenwyk's employment contract was effected in Washington; and (4) the plaintiffs have suffered injury in this state because the defendant breached its contractual obligations. (Memorandum of Authorities (Ct.Rec. 8) at 2, 6.)

It is clear that the defendant did not purposefully avail itself of the privilege of conducting business in Washington simply by sending communications to the plaintiffs' Washington residence. *Peterson v. Kennedy,* 771 F.2d 1244, 1262 (9th Cir.1985). However, the plaintiffs have made a prima facie showing that the defendant negotiated the substance of an employment contract with Mark Van Steenwyk while he was residing in Washington. The defendant's decision to do so is significant. *Cf. Roth,* 942 F.2d at 621-22 (question of specific jurisdiction depends, in part, upon which party initiated contact).

Nevertheless, it is undisputed that Mark Van Steenwyk was to have performed his part of the agreement in Indonesia. *Cf. McGlinchy,* 845 F.2d at 816 (non-resident defendant did not avail itself of privilege of doing business in California where the contract was formed in England and the plaintiff was to sell the defendant's product in the Middle East). Moreover, unlike both *Roth* and *T.M. Hylwa, M.D., Inc.,* the contract in issue here would not have created ongoing work in this state. In fact, no part of the contract would have been performed here.

Against that backdrop, the fact that the substance of the agreement was formed in Washington (even when combined with the injury the plaintiffs incurred when the defendant allegedly failed to perform its contractual duties) will not suffice to confer personal jurisdiction.[FN5] Simply put, the economic relationships created by the contract were to have found their fulfillment outside this state.

> FN5. *See generally, Burger King,* 471 U.S. at 474, 105 S.Ct. at 2183 (fact that injury in another state is "foreseeable" is "not a 'sufficient benchmark' for exercising personal jurisdiction").

It follows that the defendant's activities in Washington were not such that it could have reasonably anticipated being "haled" into court here. That being the case, the defendant lacks the "minimum contacts" with this forum necessary to satisfy due process.[FN6] Thus, although the Court specifically finds that the plaintiffs' claims are neither frivolous nor malicious, the defendant's motion to dismiss must be granted.

> FN6. Since the three prongs of this circuit's specific-jurisdiction due process test are conjunctive, *see Rano,* 987 F.2d at 588, it is unnecessary to examine the two remaining prongs.

IT IS HEREBY ORDERED:

1. The defendant's motion to dismiss (Ct.Rec. 3) is **granted.**

2. The plaintiffs' claims against the defendant are dismissed **without prejudice.**

IT IS SO ORDERED. The Clerk is hereby directed to enter this order, furnish copies to counsel, and close the file.

E.D.Wash.,1993.
Van Steenwyk v. Interamerican Management Consulting Corp.
834 F.Supp. 336

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EXHIBIT W

Supreme Court of the United States
WORLD- WIDE VOLKSWAGEN CORPORATION et al., Petitioners,
v.
Charles S. WOODSON, District Judge of Creek County, Oklahoma, et al.
No. 78-1078.

Argued Oct. 3, 1979.
Decided Jan. 21, 1980.

In a products liability suit in Oklahoma, a claim by defendants of want of jurisdiction under the Oklahoma long-arm statute by reason of constitutional limitations was denied by the Supreme Court of Oklahoma, 585 P.2d 351, by way of denial of a writ of prohibition to restrain the trial court from exercising in personam jurisdiction. Certiorari was granted, and the Supreme Court, Mr. Justice White, held that where corporate defendants, automobile wholesaler and retailer, carried on no activity whatsoever in Oklahoma and availed themselves of no privileges or benefits of Oklahoma law, mere fortuitous circumstance that a single automobile sold in New York to New York residents happened to suffer an accident while passing through Oklahoma did not constitute "minimum contacts" with Oklahoma so as to permit Oklahoma courts to exercise jurisdiction consistently with due process under state long-arm statute interpreted by Oklahoma courts as conferring jurisdiction to limits permitted by United States Constitution.

Reversed.

Mr. Justice Marshall dissented and filed opinion in which Mr. Justice Blackmun joined.

Mr. Justice Blackmun dissented and filed opinion.

Mr. Justice Brennan dissented.

See, also, dissenting opinion, 100 S.Ct. 580.

West Headnotes

[1] Constitutional Law 92 ⚷3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))
Due process clause of Fourteenth Amendment limits power of state court to render valid personal judgment against nonresident defendant. U.S.C.A.Const. Amend. 14.

[2] Judgment 228 ⚷815

228 Judgment
228XVII Foreign Judgments
228k814 Judgments of State Courts
228k815 k. Adjudications Operative in Other States. Most Cited Cases
Judgment rendered in violation of due process is void in rendering state and is not entitled to full faith and credit elsewhere. U.S.C.A.Const. Amend. 14.

[3] Constitutional Law 92 ⚷3963

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3963 k. Personal Jurisdiction in General. Most Cited Cases
(Formerly 92k305(4.1), 92k305(4))

Constitutional Law 92 ⚷3974

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3973 Process or Other Notice
92k3974 k. In General. Most Cited Cases
(Formerly 92k309(1))
Due process requires that defendant be given adequate notice of suit and be subject to personal

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jurisdiction of the court. U.S.C.A.Const. Amend. 14.

[4] Courts 106 ⚷12(2.5)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.5) k. Contacts with Forum State. Most Cited Cases
(Formerly 106k12(2))

State court may exercise personal jurisdiction over nonresident defendant only so long as there exist "minimum contacts" between defendant and forum state.

[5] Courts 106 ⚷12(2.5)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.5) k. Contacts with Forum State. Most Cited Cases
(Formerly 106k12(2))

Concept of "minimum contacts" protects defendant against burdens of litigating in distant or inconvenient forum and acts to insure that states, through their courts, do not reach out beyond limits imposed on them by their status as coequal sovereigns in federal system.

[6] Corporations 101 ⚷665(1)

101 Corporations
101XVI Foreign Corporations
101k663 Actions by or Against
101k665 Jurisdiction
101k665(1) k. Facts and Circumstances Conferring Jurisdiction. Most Cited Cases

Relationship between corporate defendant and forum must be such that it is reasonable to require corporation to defend particular suit where it is brought.

[7] Courts 106 ⚷12(2.1)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.1) k. In General. Most Cited Cases
(Formerly 106k12(2))

Burden on defendant, while always primary concern in determining jurisdiction of a nonresident defendant, will in appropriate case be considered in light of other relevant factors, including interest of forum state in adjudicating disputes, plaintiff's interest in obtaining convenient and effective relief, at least when such interest is not adequately protected by plaintiff's power to choose forum, interstate judicial system's interest in obtaining most efficient resolution of controversies, and shared interest of the several states in furthering fundamental, substantive, social policies.

[8] States 360 ⚷1

360 States
360I Political Status and Relations
360I(A) In General
360k1 k. Nature, Status, and Sovereignty in General. Most Cited Cases

Sovereignty of each state implies limitation on sovereignty of all sister states, a limitation express or implicit in both original scheme of Constitution and Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

[9] Constitutional Law 92 ⚷3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Constitutional Law 92 ⚷3965(3)

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92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) k. Business, Business Organizations, and Corporations in General. Most Cited Cases
(Formerly 92k305(6))
Due process clause does not contemplate that state may make binding judgment in personam against individual or corporate defendant with which state has no contacts, ties or relations. U.S.C.A.Const. Amend. 14.

[10] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))
Even if defendant would suffer minimal or no inconvenience from being forced to litigate before tribunals of another state, even if forum state has joint interest in applying its law to controversy and even if forum state is most convenient location for litigation, due process clause, acting as instrument of interstate federalism, may act to divest state of its power to render valid judgment. U.S.C.A.Const. Amend. 14.

[11] Constitutional Law 92 ⚿3965(4)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(4) k. Manufacture, Distribution, and Sale. Most Cited Cases
(Formerly 92k305(6))
Where corporate defendants, automobile wholesaler and retailer, carried on no activity whatsoever in Oklahoma and availed themselves of no privileges or benefits of Oklahoma law, mere fortuitous circumstance that single automobile sold in New York to New York residents happened to suffer accident while passing through Oklahoma did not constitute "minimum contacts" with Oklahoma so as to permit Oklahoma courts to exercise jurisdiction consistently with due process under state long-arm statute interpreted by Oklahoma courts as conferring jurisdiction to limits permitted by United States Constitution. 12 O.S.1971, § 1701.03(a)(3, 4); U.S.C.A.Const. Amend. 14.

[12] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5), 106k12(2))
Element of "foreseeability" has never alone been sufficient benchmark for personal jurisdiction under due process clause. U.S.C.A.Const. Amend. 14.

[13] Courts 106 ⚿12(2.5)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.5) k. Contacts with Forum State. Most Cited Cases
(Formerly 106k12(2))
As bearing upon "minimal contacts" required for exercise of personal jurisdiction of state courts consistent with due process clause, there is no difference between automobile and any other chattel, and "dangerous instrumentality" concept has relevance as bearing not upon jurisdiction but on possible desirability of imposing substantive principles of tort law such as strict liability.

[14] Constitutional Law 92 ⚿3965(4)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue

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92k3965 Particular Parties or Circumstances

92k3965(4) k. Manufacture, Distribution, and Sale. Most Cited Cases

(Formerly 92k305(5))

Foreseeability that is critical to due process analysis of state court's jurisdiction of a nonresident defendant is not mere likelihood that product will find its way into forum state but rather it is that defendant's conduct and connection with forum state are such that he should reasonably anticipate being haled into court there. U.S.C.A.Const. Amend. 14.

[15] Constitutional Law 92 ⚿3962

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3962 k. In General. Most Cited Cases

(Formerly 92k305(5))

Due process clause by insuring orderly administration of laws gives degree of predictability to legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. U.S.C.A.Const. Amend. 14.

[16] Constitutional Law 92 ⚿3964

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3964 k. Non-Residents in General. Most Cited Cases

(Formerly 92k305(5))

Financial benefits accruing to defendant from collateral relation to forum state will not support jurisdiction over defendant if they do not stem from constitutionally cognizable contact with that state. U.S.C.A.Const. Amend. 14.

****561 *286 Syllabus*** [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 288, 50 L.Ed. 499.

A products-liability action was instituted in an Oklahoma state court by respondents husband and wife to recover for personal injuries sustained in Oklahoma in an accident involving an automobile that had been purchased by them in New York while they were New York residents and that was being driven through Oklahoma at the time of the accident. The defendants included the automobile retailer and its wholesaler (petitioners), New York corporations that did no business in Oklahoma. Petitioners entered special appearances, claiming that Oklahoma's exercise of jurisdiction over them would offend limitations on the State's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment. The trial court rejected petitioners' claims and they then sought, but were denied a writ of prohibition in the Oklahoma Supreme Court to restrain respondent trial judge from exercising *in personam* jurisdiction over them.

Held: Consistently with the Due Process Clause, the Oklahoma trial court may not exercise *in personam* jurisdiction over petitioners. Pp. 564-568.

(a) A state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. The defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional ****562** notions of fair play and substantial justice, *id.*, at 316, 66 S.Ct., at 158, and the relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there," *id.*, at 317, 66 S.Ct., at 158. The Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.*, at 319, 66 S.Ct., at 159. Pp. 564-566.

(b) Here, there is a total absence in the record of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in

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Oklahoma; they close no sales and perform no services there, avail *287 themselves of none of the benefits of Oklahoma law, and solicit no business there either through salespersons or through advertising reasonably calculated to reach that State. Nor does the record show that they regularly sell cars to Oklahoma residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. Although it is foreseeable that automobiles sold by petitioners would travel to Oklahoma and that the automobile here might cause injury in Oklahoma, "foreseeability" alone is not a sufficient benchmark for personal jurisdiction under the Due Process Clause. The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State, but rather is that the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there. Nor can jurisdiction be supported on the theory that petitioners earn substantial revenue from goods used in Oklahoma. Pp. 566-568.

Okl., 585 P.2d 351, reversed.

Herbert Rubin, New York City, for petitioners.
Jefferson G. Greer, Tulsa, Okl., for respondents.

Mr. Justice WHITE delivered the opinion of the Court.

The issue before us is whether, consistently with the Due Process Clause of the Fourteenth Amendment, an Oklahoma court may exercise *in personam* jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma.

*288 I

Respondents Harry and Kay Robinson purchased a new Audi automobile from petitioner Seaway Volkswagen, Inc. (Seaway), in Massena, N. Y., in 1976. The following year the Robinson family, who resided in New York, left that State for a new home in Arizona. As they passed through the State of Oklahoma, another car struck their Audi in the rear, causing a fire which severely burned Kay Robinson and her two children.[FN1]

FN1. The driver of the other automobile does not figure in the present litigation.

The Robinsons [FN2] subsequently brought a products-liability action in the District Court for Creek County, Okla., claiming that their injuries resulted from defective design and placement of the Audi's gas tank and fuel system. They joined as defendants the automobile's manufacturer, Audi NSU Auto Union Aktiengesellschaft (Audi); its importer Volkswagen of America, Inc. (Volkswagen); its regional distributor, petitioner World-Wide Volkswagen Corp. (World-Wide); and its retail dealer, petitioner Seaway. Seaway and World-Wide entered special appearances,[FN3] claiming **563 that Oklahoma's exercise of jurisdiction over them would offend the limitations on the State's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment.[FN4]

FN2. Kay Robinson sued on her own behalf. The two children sued through Harry Robinson as their father and next friend.

FN3. Volkswagen also entered a special appearance in the District Court, but unlike World-Wide and Seaway did not seek review in the Supreme Court of Oklahoma and is not a petitioner here. Both Volkswagen and Audi remain as defendants in the litigation pending before the District Court in Oklahoma.

FN4. The papers filed by the petitioners also claimed that the District Court lacked "venue of the subject matter," App. 9, or "venue over the subject matter," *id.*, at 11.

The facts presented to the District Court showed that World-Wide is incorporated and has its business office in New *289 York. It distributes vehicles, parts, and accessories, under contract with Volkswagen, to retail dealers in New York, New Jersey, and Connecticut. Seaway, one of these retail dealers, is incorporated and has its place of business in New York. Insofar as the record reveals, Seaway and World-Wide are fully independent corporations whose relations with each other and with Volkswagen and Audi are contractual only. Respondents adduced no evidence that either World-

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Wide or Seaway does any business in Oklahoma, ships or sells any products to or in that State, has an agent to receive process there, or purchases advertisements in any media calculated to reach Oklahoma. In fact, as respondents' counsel conceded at oral argument, Tr. of Oral Arg. 32, there was no showing that any automobile sold by World-Wide or Seaway has ever entered Oklahoma with the single exception of the vehicle involved in the present case.

Despite the apparent paucity of contacts between petitioners and Oklahoma, the District Court rejected their constitutional claim and reaffirmed that ruling in denying petitioners' motion for reconsideration.[FN5] Petitioners then sought a writ of prohibition in the Supreme Court of Oklahoma to restrain the District Judge, respondent Charles S. Woodson, from exercising *in personam* jurisdiction over them. They renewed their contention that, because they had no "minimal contacts," App. 32, with the State of Oklahoma, the actions of the District Judge were in violation of their rights under the Due Process Clause.

FN5. The District Court's rulings are unreported, and appear at App. 13 and 20.

The Supreme Court of Oklahoma denied the writ, 585 P.2d 351 (1978), [FN6] holding that personal jurisdiction over petitioners was authorized by Oklahoma's "long-arm" statute ***290** Okla.Stat., Tit. 12, § 1701.03(a)(4) (1971).[FN7] Although the court noted that the proper approach was to test jurisdiction against both statutory and constitutional standards, its analysis did not distinguish these questions, probably because § 1701.03(a)(4) has been interpreted as conferring jurisdiction to the limits permitted by the United States Constitution.[FN8] The court's rationale was contained in the following paragraph, 585 P.2d, at 354:

FN6. Five judges joined in the opinion. Two concurred in the result, without opinion, and one concurred in part and dissented in part, also without opinion.

FN7. This subsection provides:

"A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's . . . causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state . . . ."

The State Supreme Court rejected jurisdiction based on § 1701.03(a)(3), which authorizes jurisdiction over any person "causing tortious injury in this state by an act or omission in this state." Something in addition to the infliction of tortious injury was required.

FN8. *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48 (Okla.1976); *Carmack v. Chemical Bank New York Trust Co.*, 536 P.2d 897 (Okla.1975); *Hines v. Clendenning*, 465 P.2d 460 (Okla.1970).

"In the case before us, the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by the petitioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given ****564** the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma. This being the case, we hold that under the facts presented, the trial court was justified in concluding***291** that the petitioners derive substantial revenue from goods used or consumed in this State."

We granted certiorari, 440 U.S. 907, 99 S.Ct. 1212, 59 L.Ed.2d 453 (1979), to consider an important constitutional question with respect to state-court jurisdiction and to resolve a conflict between the Supreme Court of Oklahoma and the highest courts of at least four other States.[FN9] We reverse.

FN9. Cf. *Tilley v. Keller Truck & Implement Corp.*, 200 Kan. 641, 438 P.2d 128 (1968);

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Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 492 P.2d 624 (1972); *Pellegrini v. Sachs & Sons*, 522 P.2d 704 (Utah 1974); *Oliver v. American Motors Corp.*, 70 Wash.2d 875, 425 P.2d 647 (1967).

II

[1][2][3] The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. *Kulko v. California Superior Court*, 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978). A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. *Pennoyer v. Neff*, 95 U.S. 714, 732-733, 24 L.Ed. 565 (1878). Due process requires that the defendant be given adequate notice of the suit, *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313-314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), and be subject to the personal jurisdiction of the court, *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In the present case, it is not contended that notice was inadequate; the only question is whether these particular petitioners were subject to the jurisdiction of the Oklahoma courts.

[4][5][6][7] As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. *International Shoe Co. v. Washington, supra*, at 316, 66 S.Ct., at 158. The concept of minimum contacts, in turn, can be seen to perform two related, but ***292** distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness." We have said that the defendant's contacts with the forum State must be such that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington, supra*, at 316, 66 S.Ct., at 158, quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940). The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." 326 U.S., at 317, 66 S.Ct., at 158. Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, see *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, see *Kulko v. California Superior Court, supra*, 436 U.S., at 92, 98 S.Ct., at 1697, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, cf. *Shaffer v. Heitner*, 433 U.S. 186, 211, n. 37, 97 S.Ct. 2569, 2583, n. 37, 53 L.Ed.2d 683 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see ****565***Kulko v. California Superior Court, supra*, 436 U.S., at 93, 98, 98 S.Ct., at 1697, 1700.

The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years. As we noted in ***293***McGee v. International Life Ins. Co., supra*, 355 U.S., at 222-223, 78 S.Ct., at 201, this trend is largely attributable to a fundamental transformation in the American economy:

"Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

The historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided.

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[8] Nevertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the Nation was to be a common market, a "free trade unit" in which the States are debarred from acting as separable economic entities. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538, 69 S.Ct. 657, 665, 93 L.Ed. 865 (1949). But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States-a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Hence, even while abandoning the shibboleth that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established," *Pennoyer v. Neff, supra*, 95 U.S., at 720, we emphasized that the reasonableness of asserting jurisdiction over the defendant must be assessed "in the context of our federal system of government," ***294** *International Shoe Co. v. Washington*, 326 U.S., at 317, 66 S.Ct., at 158, and stressed that the Due Process Clause ensures not only fairness, but also the "orderly administration of the laws," *id.*, at 319, 66 S.Ct., at 159. As we noted in *Hanson v. Denckla*, 357 U.S. 235, 250-251, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958):

"As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565, to the flexible standard of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. [Citation omitted.] Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."

[9][10] Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S., at 319, 66 S.Ct., at 159. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of ****566** another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. *Hanson v. Denckla, supra*, 357 U.S., at 251, 254, 78 S.Ct., at 1238, 1240.

***295** III

[11] Applying these principles to the case at hand,[FN10] we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.

FN10. Respondents argue, as a threshold matter, that petitioners waived any objections to personal jurisdiction by (1) joining with their special appearances a challenge to the District Court's subject-

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matter jurisdiction, see n. 4, *supra*, and (2) taking depositions on the merits of the case in Oklahoma. The trial court, however, characterized the appearances as "special," and the Oklahoma Supreme Court, rather than finding jurisdiction waived, reached and decided the statutory and constitutional questions. Cf. *Kulko v. California Superior Court*, 436 U.S. 84, 91, n. 5, 98 S.Ct. 1690, 1696, n. 5, 56 L.Ed.2d 132 (1978).

[12] It is argued, however, that because an automobile is mobile by its very design and purpose it was "foreseeable" that the Robinsons' Audi would cause injury in Oklahoma. Yet "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. In *Hanson v. Denckla, supra*, it was no doubt foreseeable that the settlor of a Delaware trust would subsequently move to Florida and seek to exercise a power of appointment there; yet we held that Florida courts could not constitutionally ***296** exercise jurisdiction over a Delaware trustee that had no other contacts with the forum State. In *Kulko v. California Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978), it was surely "foreseeable" that a divorced wife would move to California from New York, the domicile of the marriage, and that a minor daughter would live with the mother. Yet we held that California could not exercise jurisdiction in a child-support action over the former husband who had remained in New York.

[13][14][15] If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, see *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (CA4 1956); a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey, *Reilly v. Phil Tolkan Pontiac, Inc.*, 372 F.Supp. 1205 (N.J.1974); or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there, see *Uppgren v. Executive Aviation Services, Inc.*, 304 F.Supp. 165, 170-171 (Minn.1969). Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel. We recently abandoned the outworn rule of *Harris v. Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905), that the interest of a creditor in a debt could be extinguished or otherwise affected by any State having transitory jurisdiction over the debtor. *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). Having inferred the mechanical rule that a creditor's amenability to a *quasi in rem* action travels ****567** with his debtor, we are unwilling to endorse an analogous principle in the present case.[FN11]

FN11. Respondents' counsel, at oral argument, see Tr. of Oral Arg. 19-22, 29, sought to limit the reach of the foreseeability standard by suggesting that there is something unique about automobiles. It is true that automobiles are uniquely mobile, see *Tyson v. Whitaker & Son, Inc.*, 407 A.2d 1, 6, and n. 11 (Me.1979) (McKusick, C. J.), that they did play a crucial role in the expansion of personal jurisdiction through the fiction of implied consent, *e. g., Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927), and that some of the cases have treated the automobile as a "dangerous instrumentality." But today, under the regime of *International Shoe*, we see no difference for jurisdictional purposes between an automobile and any other chattel. The "dangerous instrumentality" concept apparently was never used to support personal jurisdiction; and to the extent it has relevance today it bears not on jurisdiction but on the possible desirability of imposing substantive principles of tort law such as strict liability.

***297** This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. See *Kulko v. California Superior Court, supra*, 436 U.S., at 97-98, 98 S.Ct., at 1699-1700; *Shaffer v. Heitner*, 433 U.S., at 216, 97 S.Ct., at 2586, and see *id.*, at 217-219, 97 S.Ct., at 2586-2587 (Stevens, J., concurring in judgment). The Due Process Clause, by ensuring the "orderly administration of the laws," *International Shoe Co. v. Washington*, 326 U.S., at 319, 66 S.Ct., at 159, gives a degree of predictability to the legal system that allows potential defendants to

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structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v. Denckla*, 357 U.S., at 253, 78 S.Ct., at 1240, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen 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 has there been the source of injury to its owner or to others. The forum State does not ***298** 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 they will be purchased by consumers in the forum State. Cf. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961).

But there is no such or similar basis for Oklahoma jurisdiction over World-Wide or Seaway in this case. Seaway's sales are made in Massena, N. Y. World-Wide's market, although substantially larger, is limited to dealers in New York, New Jersey, and Connecticut. There is no evidence of record that any automobiles distributed by World-Wide are sold to retail customers outside this tristate area. It is foreseeable that the purchasers of automobiles sold by World-Wide and Seaway may take them to Oklahoma. But the mere "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson v. Denckla, supra*, at 253, 78 S.Ct., at 1239-1240.

In a variant on the previous argument, it is contended that jurisdiction can be supported by the fact that petitioners earn substantial revenue from goods used in Oklahoma. The Oklahoma Supreme Court so found, 585 P.2d, at 354-355, drawing the ****568** inference that because one automobile sold by petitioners had been used in Oklahoma, others might have been used there also. While this inference seems less than compelling on the facts of the instant case, we need not question the court's factual findings in order to reject its reasoning.

[16] This argument seems to make the point that the purchase of automobiles in New York, from which the petitioners earn substantial revenue, would not occur *but for* the fact that the automobiles are capable of use in distant States like Oklahoma. Respondents observe that the very purpose of an automobile is to travel, and that travel of automobiles sold by petitioners is facilitated by an extensive chain of Volkswagen service centers throughout the country, including some in Oklahoma.***299** [FN12] However, financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. See *Kulko v. California Superior Court*, 436 U.S., at 94-95, 98 S.Ct., at 1698-1699. In our view, whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of *in personam* jurisdiction over them.

> FN12. As we have noted, petitioners earn no direct revenues from these service centers. See *supra*, at 562-563.

Because we find that petitioners have no "contacts, ties, or relations" with the State of Oklahoma, *International Shoe Co. v. Washington, supra*, 326 U.S., at 319, 66 S.Ct., at 159, the judgment of the Supreme Court of Oklahoma is

Reversed.

***313** Mr. Justice MARSHALL, with whom Mr. Justice BLACKMUN joins, dissenting.

For over 30 years the standard by which to measure the constitutionally permissible reach of state-court jurisdiction has been well established:

"[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional

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notions of fair play and substantial justice.' " *International Shoe, Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940).

The corollary, that the Due Process Clause forbids the assertion of jurisdiction over a defendant "with which the state has no contacts, ties, or relations," 326 U.S., at 319, 66 S.Ct., at 160, is equally clear. The concepts of fairness and substantial justice as applied to an evaluation of "the quality and nature of the [defendant's] activity," *ibid.*, are not readily susceptible of further definition, however, and it is not surprising that the constitutional standard is easier to state than to apply.

This is a difficult case, and reasonable minds may differ as to whether respondents have alleged a sufficient "relationship among the defendant[s], the forum, and the litigation," *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977), to satisfy the requirements of *International Shoe*. I am concerned, however, that the majority has reached its result by taking an unnecessarily narrow view of petitioners' forum-related conduct. The majority asserts that "respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York ***314** residents, happened to suffer an accident while passing through Oklahoma." *Ante*, at 566. If that were the case, I would readily agree that the minimum contacts necessary to sustain jurisdiction are not present. But the basis for the assertion of jurisdiction is not the happenstance that an individual over whom petitioner had no control made a unilateral decision to take a chattel with him to a distant State. Rather, jurisdiction is premised on the deliberate ****569** and purposeful actions of the defendants themselves in choosing to become part of a nationwide, indeed a global, network for marketing and servicing automobiles.

Petitioners are sellers of a product whose utility derives from its mobility. The unique importance of the automobile in today's society, which is discussed in Mr. Justice BLACKMUN'S dissenting opinion, *post*, at 571, needs no further elaboration. Petitioners know that their customers buy cars not only to make short trips, but also to travel long distances. In fact, the nationwide service network with which they are affiliated was designed to facilitate and encourage such travel. Seaway would be unlikely to sell many cars if authorized service were available only in Massena, N. Y. Moreover, local dealers normally derive a substantial portion of their revenues from their service operations and thereby obtain a further economic benefit from the opportunity to service cars which were sold in other States. It is apparent that petitioners have not attempted to minimize the chance that their activities will have effects in other States; on the contrary, they have chosen to do business in a way that increases that chance, because it is to their economic advantage to do so.

To be sure, petitioners could not know in advance that this particular automobile would be driven to Oklahoma. They must have anticipated, however, that a substantial portion of the cars they sold would travel out of New York. Seaway, a local dealer in the second most populous State, and World-Wide,***315** one of only seven regional Audi distributors in the entire country, see Brief for Respondents 2, would scarcely have been surprised to learn that a car sold by them had been driven in Oklahoma on Interstate 44, a heavily traveled transcontinental highway. In the case of the distributor, in particular, the probability that some of the cars it sells will be driven in every one of the contiguous States must amount to a virtual certainty. This knowledge should alert a reasonable businessman to the likelihood that a defect in the product might manifest itself in the forum State-not because of some unpredictable, aberrant, unilateral action by a single buyer, but in the normal course of the operation of the vehicles for their intended purpose.

It is misleading for the majority to characterize the argument in favor of jurisdiction as one of " 'foreseeability' alone." *Ante*, at 566. As economic entities petitioners reach out from New York, knowingly causing effects in other States and receiving economic advantage both from the ability to cause such effects themselves and from the activities of dealers and distributors in other States. While they did not receive revenue from making direct sales in Oklahoma, they intentionally became part of an interstate economic network, which included dealerships in Oklahoma, for pecuniary gain. In light of this purposeful conduct I do not believe it can be said that petitioners "had no reason

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to expect to be haled before a[n Oklahoma] court." *Shaffer v. Heitner, supra*, 433 U.S., at 216, 97 S.Ct., at 2586; see *ante*, at 566-567, and *Kulko v. California Superior Court*, 436 U.S. 84, 97-98, 98 S.Ct. 1690, 1699-1700, 94 L.Ed.2d 132 (1978).

The majority apparently acknowledges that if a product is purchased in the forum State by a consumer, that State may assert jurisdiction over everyone in the chain of distribution. See *ante*, at 567. With this I agree. But I cannot agree that jurisdiction is necessarily lacking if the product enters the State not through the channels of distribution but in the course of its intended use by the consumer. We have recognized***316** the role played by the automobile in the expansion of our notions of personal jurisdiction. See *Shaffer v. Heitner, supra*, 433 U.S., at 204, 97 S.Ct., at 2579; *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927). Unlike most other chattels, which may find their way into States far from where they were purchased because their owner takes them there, the intended use of the automobile is precisely as a means of traveling from one place to another. In such a case, it is highly artificial to restrict the concept of the "stream of commerce" to the chain of ****570** distribution from the manufacturer to the ultimate consumer.

I sympathize with the majority's concern that the persons ought to be able to structure their conduct so as not to be subject to suit in distant forums. But that may not always be possible. Some activities by their very nature may foreclose the option of conducting them in such a way as to avoid subjecting oneself to jurisdiction in multiple forums. This is by no means to say that all sellers of automobiles should be subject to suit everywhere; but a distributor of automobiles to a multistate market and a local automobile dealer who makes himself part of a nationwide network of dealerships can fairly expect that the cars they sell may cause injury in distant States and that they may be called on to defend a resulting lawsuit there.

In light of the quality and nature of petitioners' activity, the majority's reliance on *Kulko v. California Superior Court, supra*, is misplaced. *Kulko* involved the assertion of state-court jurisdiction over a nonresident individual in connection with an action to modify his child custody rights and support obligations. His only contact with the forum State was that he gave his minor child permission to live there with her mother. In holding that exercise of jurisdiction violated the Due Process Clause, we emphasized that the cause of action as well as the defendant's actions in relation to the forum State arose *"not from the defendant's commercial transactions in interstate commerce*, but rather from his personal, ***317** domestic relations," 436 U.S., at 97, 98 S.Ct., at 1699 (emphasis supplied), contrasting Kulko's actions with those of the insurance company in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), which were undertaken for commercial benefit.[FN*]

> FN* Similarly, I believe the Court in *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), was influenced by the fact that trust administration has traditionally been considered a peculiarly local activity.

Manifestly, the "quality and nature" of commercial activity is different, for purposes of the *International Shoe* test, from actions from which a defendant obtains no economic advantage. Commercial activity is more likely to cause effects in a larger sphere, and the actor derives an economic benefit from the activity that makes it fair to require him to answer for his conduct where its effects are felt. The profits may be used to pay the costs of suit, and knowing that the activity is likely to have effects in other States the defendant can readily insure against the costs of those effects, thereby sparing himself much of the inconvenience of defending in a distant forum.

Of course, the Constitution forbids the exercise of jurisdiction if the defendant had no judicially cognizable contacts with the forum. But as the majority acknowledges, if such contacts are present the jurisdictional inquiry requires a balancing of various interests and policies. See *ante*, at 564; *Rush v. Savchuk*, 444 U.S., at 332,100 S.Ct., at 579. I believe such contacts are to be found here and that, considering all of the interests and policies at stake, requiring petitioners to defend this action in Oklahoma is not beyond the bounds of the Constitution. Accordingly, I dissent.

Mr. Justice BLACKMUN, dissenting.

I confess that I am somewhat puzzled why the plaintiffs in this litigation are so insistent that the regional distributor and the retail dealer, the

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petitioners here, who handled the ill-fated Audi automobile involved in this litigation, be named defendants. It would appear that the manufacturer and the *318 importer, whose subjectability to Oklahoma jurisdiction is not challenged before this Court, ought not to be judgment-proof. It may, of course, ultimately amount to a contest between insurance companies that, once begun, is not easily brought to a termination. Having made this much of an observation, I pursue it no further.

For me, a critical factor in the disposition of the litigation is the nature of the instrumentality**571 under consideration. It has been said that we are a nation on wheels. What we are concerned with here is the automobile and its peripatetic character. One need only examine our national network of interstate highways, or make an appearance on one of them, or observe the variety of license plates present not only on those highways but in any metropolitan area, to realize that any automobile is likely to wander far from its place of licensure or from its place of distribution and retail sale. Miles per gallon on the highway (as well as in the city) and mileage per tankful are familiar allegations in manufacturers' advertisements today. To expect that any new automobile will remain in the vicinity of its retail sale-like the 1914 electric driven car by the proverbial "little old lady"-is to blink at reality. The automobile is intended for distance as well as for transportation within a limited area.

It therefore seems to me not unreasonable-and certainly not unconstitutional and beyond the reach of the principles laid down in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny-to uphold Oklahoma jurisdiction over this New York distributor and this New York dealer when the accident happened in Oklahoma. I see nothing more unfair for them than for the manufacturer and the importer. All are in the business of providing vehicles that spread out over the highways of our several States. It is not too much to anticipate at the time of distribution and at the time of retail sale that this Audi would be in Oklahoma. Moreover, in assessing "minimum contacts," foreseeable use in another State seems to me to be little different from foreseeable resale *319 in another State. Yet the Court declares this distinction determinative. *Ante*, at 567-568.

Mr. Justice BRENNAN points out in his dissent, 444 U.S., at 307, 100 S.Ct., at 585, that an automobile dealer derives substantial benefits from States other than its own. The same is true of the regional distributor. Oklahoma does its best to provide safe roads. Its police investigate accidents. It regulates driving within the State. It provides aid to the victim and thereby, it is hoped, lessens damages. Accident reports are prepared and made available. All this contributes to and enhances the business of those engaged professionally in the distribution and sale of automobiles. All this also may benefit defendants in the very lawsuits over which the State asserts jurisdiction.

My position need not now take me beyond the automobile and the professional who does business by way of distributing and retailing automobiles. Cases concerning other instrumentalities will be dealt with as they arise and in their own contexts.

I would affirm the judgment of the Supreme Court of Oklahoma. Because the Court reverses that judgment, it will now be about parsing every variant in the myriad of motor vehicles fact situations that present themselves. Some will justify jurisdiction and others will not. All will depend on the "contact" that the Court sees fit to perceive in the individual case.

U.S.Okl.,1980.
World-Wide Volkswagen Corp. v. Woodson
444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490

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EXHIBIT X

EXHIBIT Z

authorized to sign Certificates. Miller Act, § 1, 40 U.S.C.A. § 270a; 48 C.F.R. § 28.202-2(b).

[4] Federal Courts 170B ⚿417

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk417 k. Federal Jurisdiction. Most Cited Cases
Court of Appeals would apply long-arm statute of state in which district court sat in diversity case where no federal statute governing personal jurisdiction was applicable.

[5] Constitutional Law 92 ⚿3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Courts 106 ⚿12(2.1)

106 Courts
1061 Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General
106k12(2.1) k. In General. Most Cited Cases
California's long-arm statute allows exercise of personal jurisdiction over defendants to fullest extent permitted by due process. U.S.C.A. Const.Amend. 14; West's Ann.Cal.C.C.P. § 410.10 et seq.

[6] Federal Courts 170B ⚿84

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk77 Corporations, Actions by or Against
170Bk84 k. Miscellaneous Particular Activities. Most Cited Cases
California district court lacked specific personal jurisdiction over Kentucky bank alleged to have breached duty to investigate Miller Act surety applicant; bank's sole contact with California was through its agent's signing of Certificate of Sufficiency, agent could not be assumed to have known that code allegedly on Certificate indicated connection to California, it could not be said that "but for" bank's signing certificate, government official would not have approved applicant, and balancing of seven factors set forth in case law revealed that district court could not reasonably exercise personal jurisdiction over bank. U.S.C.A. Const.Amend. 14.

[7] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
"Purposeful availment" standard for exercise of specific personal jurisdiction requires more than foreseeability of causing injury in another state. U.S.C.A. Const.Amend. 14.

[8] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
"Purposeful availment" prong of three-part test for existence of specific personal jurisdiction prevents defendants from being haled into jurisdiction through random, fortuitous or attenuated contacts.

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U.S.C.A. Const.Amend. 14.

[9] Federal Courts 170B ⚿76.10

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.10 k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases
Second prong of specific jurisdiction test, that claim must arise out of defendant's forum-related activities, is met if but for contacts between defendant and forum state, cause of action would not have arisen. U.S.C.A. Const.Amend. 14.

[10] Federal Courts 170B ⚿76.1

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.1 k. In General. Most Cited Cases
(Formerly 170Bk76)
Law of personal jurisdiction is asymmetrical and is primarily concerned with defendant's burden. U.S.C.A. Const.Amend. 14.

***556** Davide Golia,Marks & Golia, San Diego, CA, for plaintiff-appellant.
Michael J. Rusing, Rusing & Lopez, Tucson, AZ, Kerry D. Smith, McMurray & Livingston, Paducah, KY, for defendants-appellees.

Appeal from the United States District Court for the Southern District of California.

Before CHOY, FARRIS and BRUNETTI, Circuit Judges.

CHOY, Circuit Judge:
Loral Terracom ("Loral") appeals the district court's order granting Citizens Bank and Trust Company's ("Citizens") and Valley National Bank's ("Valley") joint Fed.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Loral alleges that Citizens and Valley ("the Banks") negligently failed or unreasonably performed investigations of the financial strengths of applicant sureties for bonds submitted in accordance with the Miller Act, 40 U.S.C. § 270a, before executing Certificates of Sufficiency ("Certificates") in accordance with 48 C.F.R. § 28.200, et seq. Loral contends that as a result, financially unfit individuals qualified as sureties on Miller Act payment bonds to Loral's detriment.

Loral also appeals the district court's order granting Citizens' Fed.R.Civ.P. 12(b)(2) motion to dismiss for lack of personal jurisdiction.***557** Having jurisdiction under 28 U.S.C. § 1291, we affirm both dismissals.

I

Loral was a subcontractor to West Coast Construction ("West Coast"). West Coast had a contract for the construction of communications/electronics improvement at Camp Pendleton Marine Corps Base, California ("Project") with the United States Department of the Navy ("Government").

40 U.S.C. § 270a of the Miller Act requires that a contractor of any public building or work provide a payment bond with a surety satisfactory to the federal officer awarding the contract before any contract in excess of $25,000 is awarded. The purpose of the payment bond is to protect all persons supplying labor and materials for the completion of the Project. *See*40 U.S.C. § 270(a)(2). The government contracting officer has the sole responsibility of determining the acceptability of an individual surety applicant. *See*48 C.F.R. § 28.202-2(a) (1987). In making the determination, the officer considers the information on the Standard form 28 as well as other factors, such as the applicant surety's outstanding bond commitments. *See*48 C.F.R. § 28.202-2(a),

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(b) (1987).

In accordance with the Miller Act, West Coast executed two payment bonds with individual sureties, Purdy L. Sisson ("Sisson") and Hugh J. Johnson ("Johnson"), in July, 1987 and submitted the bonds to the Government. In accordance with 48 C.F.R. § 28.202-2(b) in effect in 1987, each bond was accompanied by a Standard Form 28, containing a sworn Affidavit of Individual Surety ("Affidavit") and the Certificate on the reverse side. The Affidavit contains a worksheet where the surety applicant must list his assets and liabilities and declare his intent to become a surety on a federal works project. The Certificate provides that the surety named in the Affidavit is personally known to the signatory and that "to the best of [the signatory's] knowledge," the facts stated in the Affidavit are true. The Certificate does not contain specific instructions as to either the method or the extent of verification for the information provided. The instructions on the Affidavit provide that the certifier can be:

an officer of a bank or trust company, a judge or clerk of a court of record, a United States district attorney or commissioner, a postmaster, a collector or deputy collector of internal revenue, or any other officer of the United States acceptable to the department or establishment concerned.

The Certificate for Sisson's Affidavit was signed by Janis Morris ("Morris"), an officer of Citizens. Citizens is a Kentucky corporation doing business in the Commonwealth of Kentucky. The Certificate accompanying Johnson's Affidavit was signed by Carol J. Reynolds ("Reynolds"), an officer of Valley, a federally chartered bank with its principal place of business in Phoenix, Arizona.

West Coast subsequently breached its subcontract with Loral, and Loral filed a complaint in the United States District Court, Southern District of California, alleging among other claims, breach of contract, intentional and negligent misrepresentation, and for enforcement of the Miller Act. Johnson, Sisson, Dwight C. Lundell (a personal surety on a third payment bond), West Coast and its two general partners were named as defendants. In addition, Loral named the Banks as defendants for negligently executing the Certificates. On November 20, 1989, the Banks were dismissed without prejudice on the ground that Loral's claims against the Banks were premature. Although Loral obtained a court judgment against the remaining defendants on April 6, 1992, it has been unable to collect any portion of the judgment.

In a second action, Loral renewed its assertions against the Banks for negligently investigating Johnson's and Sisson's financial strengths before signing the Certificates. The district court granted the Banks' simultaneous motions to dismiss for failure to state a claim upon which relief can be granted. The district court also granted Citizens' motion to dismiss for lack of personal jurisdiction. Judgment was entered on April 14, 1993. Loral timely filed an appeal to this court on May 3, 1993.

II

Loral's first contention of error is that the district court's Fed.R.Civ.P. 12(b)(6) dismissal***558** was improper because (1) the district court considered matters outside the pleadings; and (2) the Banks owed a duty to investigate the veracity of the financial information provided by the sureties.

We review de novo a Fed.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Frey v. California,* 982 F.2d 399, 401 (9th Cir.), *cert. denied,* 509 U.S. 906, 113 S.Ct. 3000, 125 L.Ed.2d 693 (1993). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). In applying this standard, we assume that all of Loral's allegations are true. *See Reddy v. Litton Indus., Inc.,* 912 F.2d 291, 293 (9th

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Cir.1990), *cert. denied,* 502 U.S. 921, 112 S.Ct. 332, 116 L.Ed.2d 272 (1991).

First, Loral contends that the district court erred procedurally when it considered matters outside the pleadings while ruling on the 12(b)(6) motion to dismiss. During the hearing when it granted the Banks' Fed.R.Civ.P. 12(b)(6) motion to dismiss, the district court made a passing reference to Morris' affidavit which Citizens had submitted in support of its motion to dismiss for lack of personal jurisdiction. The district court, however, did not rely upon the affidavit to render its decision. Rather, the motion to dismiss was granted on the basis of the district court's interpretation of the Miller Act, its accompanying regulations and the qualified language used in the Certificate.

The district court determined that Loral was not entitled to relief under any set of facts because the Banks did not owe a duty to perform an independent investigation into the financial condition of each applicant surety. The court's decision was based solidly on the allegations in the complaint; the reference to Morris' affidavit was a minor parenthetical observation rather than a material basis for the district court's decision.

[1] Next, Loral contends that the district court erred in deciding that the Banks did not owe a duty of care to independently investigate the veracity of the financial information provided by the applicant sureties. Loral argues that such a duty arises under common law principles of negligence rather than under the Miller Act. Loral first contends that the Banks' duty arises from the practical use of the certification by the federal contracting officers in approving sureties. Loral, however, fails to explain how the federal contracting officer's possible reliance, without more, establishes a duty of care.

[2] Second, Loral argues that the language in the Certificate establishes a duty of care. We find no language in the Miller Act or its accompanying regulations which imposes such a duty upon the Banks.[FN1] The Certificate states:

FN1. The Sixth Circuit has likewise found that the Miller Act does not impose a duty upon the signatories of the Certificate to conduct a personal investigation of the sureties' financial strengths. *See Goldman Servs. Mechanical Contracting, Inc. v. Citizens Bank & Trust Co.,* 9 F.3d 107, 1993 WL 428641 (6th Cir.1993), *aff'g* 812 F.Supp. 738 (W.D.Ky.1992); *see also, Beall Plumbing & Heating Co. v. First Nat'l Bank,* 847 F.Supp. 1307, 1314 (S.D.W.Va.1994).

I Hereby Certify, That the surety named herein is personally known to me; that, in my judgment, said surety is responsible, and qualified to act as such; and that, to the *best of my knowledge,* the facts stated by said surety in the foregoing affidavit are true. (emphasis added).
The phrase, "to the best of my knowledge," indicates that the certifier attests for the surety on the basis of the certifier's previous, personal knowledge about the surety and an examination of any documents provided with the Affidavit. The language limits the representation to what the maker personally knows. *See Northwestern Mutual Life Ins. Co. v. Gridley,* 100 U.S. 614, 616, 25 L.Ed. 746 (1880). It puts the hearer on notice that further investigation may be needed.

The only situation where a certifying official is required to conduct an investigation arises when the government contracting officer has requested continuing proof of acceptability after the contract has been awarded. ***559** 48 C.F.R. § 28-202.2(c) (1987). Instruction 5 on the Certificate imposes a duty on the executing official to conduct a personal investigation for *further* certificates showing additional assets. Specifically the instruction provides:

Further certificates showing additional assets, or a new surety, may be required to assure protection of the Government's interest. Such certificates must be based on the personal investigation of the certifying officer at the time of the making thereof, and not upon prior certifications.

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The language merely instructs the certifier to conduct a personal investigation of *additional* facts not covered by the original Certificate and does not impose a duty to investigate for the initial certifica- tion.

[3] Finally, Loral contends that the limitation placed upon those who may sign the Certificate establishes a duty of care. We disagree. Rather than establishing a duty of care, the various types of individuals authorized to sign the Certificate indicate that a detailed investigation into the applicant surety's financial situation is not required before certification. Such an investigation would be beyond the scope of expertise for many of these individuals. Furthermore, interpreting the regulations in a manner as to impose a duty of independent investigation would lead to absurd results.

For example, Kentucky has a statute which makes it a misdemeanor for a person to sign or prepare a document providing financial information unless she holds an accounting license. Ky.Rev.Stat.Ann. § 325.990 (Michie 1994). Imposing a duty to conduct an independent investigation into an applicant surety's financial strength would subject any certifying official, without an accounting license, to criminal liability. The drafters of the regulations accompanying the Miller Act could not have intended such a result.

We find that the Banks did not owe a duty to conduct an independent investigation into the financial condition of the applicant surety before signing the Certificates. Thus, Loral cannot win under any set of facts. We therefore affirm the district court's grant of the motion to dismiss.

We find it unnecessary to reach the issue of proximate causation because we find that the banks did not owe a duty to investigate. Furthermore, we refuse to consider Loral's assertion that the Banks are liable under a common law negligent misrepresentation theory. Such a theory was neither pled in the complaint nor brought before the district court. It is a well-established precedent that this court will not consider contentions which were not originally brought before the district court. *See Fry v. Melaragno,* 939 F.2d 832, 835 (9th Cir.1991); *Eason v. Dickson,* 390 F.2d 585, 589 (9th Cir.), *cert. denied,* 392 U.S. 914, 88 S.Ct. 2076, 20 L.Ed.2d 1373 (1968).

III

Loral's second contention of error is that the district court improperly granted Citizens' 12(b)(2) motion to dismiss for lack of personal jurisdiction. Where jurisdictional facts are not disputed, we review de novo a Fed.R.Civ.P. 12(b)(2) motion to dismiss for lack of personal jurisdiction. *Brainerd v. Governors of the Univ. of Alberta,* 873 F.2d 1257, 1258 (9th Cir.1989). The district court's factual findings on all jurisdictional issues must be accepted unless clearly erroneous. *Nike, Inc. v. Commercial Iberica de Exclusivas Deportivas, S.A.,* 20 F.3d 987, 990 (9th Cir.1994).

[4][5] We apply the long-arm statute of the state in which the district court sits in this diversity case where no federal statute governing personal jurisdiction is applicable. *See Core-Vent Corp. v. Nobel Indus. AB,* 11 F.3d 1482, 1484 (9th Cir.1993), *citing Hylwa, M.D., Inc. v. Palka,* 823 F.2d 310, 312 (9th Cir.1987). California's long-arm statute allows the exercise of personal jurisdiction over defendants to the fullest extent permitted by due process. *Core-Vent Corp.,* 11 F.3d at 1484,*citing Data Disc, Inc. v. Systems Tech. Assocs., Inc.,* 557 F.2d 1280, 1286 (9th Cir.1977). "[D]ue process requires only that ... [the person] 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.' " *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).

***560** [6] Loral argues that the district court can exercise "specific" or "limited" personal jurisdiction over Citizens because the "cause of action arises out of or is related to the defendant's forum activit-

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ies...." *Hirsch v. Blue Cross, Blue Shield,* 800 F.2d 1474, 1477 (9th Cir.1986). In order to determine whether the exercise of specific jurisdiction comports with due process, we apply the following three part test:

(1) The defendant must have done 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 arise out of the defendant's forum-related activities; and

(3) the exercise of jurisdiction must be reasonable.

Shute v. Carnival Cruise Lines, 897 F.2d 377, 381 (9th Cir.1990) (citations omitted), *rev'd on other grounds,* 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

[7][8] We find that Citizens did not purposely avail itself of the privilege of conducting activities in California. The purposeful availment standard requires more than foreseeability of causing injury in another state. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985). Rather, "the foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). The purposeful availment prong prevents defendants from being haled into a jurisdiction through "random," "fortuitous," or "attenuated" contacts. *Burger King,* 471 U.S. at 475, 105 S.Ct. at 2183.

Citizens' only place of business is McCracken County, Kentucky, and its only contact with California has been through Morris' act of signing the Certificates. Morris, presumably acting as an agent of Citizens, signed a number of Certificates without specific knowledge that one of those Certificates may be used for a federal works project based in California.

Loral asserts that by agreeing to execute these Certificates, Citizens purposefully directed its activities to other states and knew that it would be subject to liability in any of these other states for its actions. Loral fails to give any supporting authority for this novel assertion. In fact, Loral's assertion contradicts established law on personal jurisdiction. "[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Asahi Metal Indus. Co. v. Super. Ct.,* 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1987).

Loral also argues that Citizens could have foreseen being haled into court in California because the code N62474-86-C-0388 typed on the Affidavit indicated or should have indicated that the signed Certificate would be used in a federal works project in California. First, there is a question as to whether the code was typed on the Certificate at the time of Morris' signature. Citizens claims that the code number appeared in Block No. 12 of the Certificate *after* the Certificate left Morris' control. In support, Citizens presents the affidavits of both Morris and Sisson stating that the code did not appear on the Certificate at the time of Morris' signature.

Loral disputes both Morris' and Sisson's affidavits and asserts that the code number was present at the time of Morris' signature. Loral points to the perfect match between the typeface and alignment used in items 10 and 12 and the rest of the form to support its contention. Such evidence which turns on the skill of the second typist, however, is tenuous at best.

Even assuming *arguendo* that the code was on the Certificate at the time of Morris' signature, it is too much to assume, without more, that Morris should have known that the code indicated a connection to California. The state of California was never noted on the Certificate nor was it ever mentioned in dis-

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cussions between Morris and Sisson. Indeed, the district court noted that Loral had not presented any evidence that indicates Morris knew or should have known the significance of the code.

***561** Citizens has not purposefully availed itself of the privilege of conducting activities within California by signing the Certificates. The contact between California and Citizens through Citizens' act of signing the Certificates was fortuitous and does not justify the district court's exercise of personal jurisdiction.

[9] The second prong of the specific jurisdiction test is met if "but for" the contacts between the defendant and the forum state, the cause of action would not have arisen. *Carnival Cruise Lines,* 897 F.2d at 385-86. The contracting officer has the sole responsibility of determining the acceptability of an individual surety. *See*48 C.F.R. § 28.202-2(a) (1987). In addition, the regulations implementing the Miller Act made clear that the contracting officer's consideration of the Certificate was only a part of the independent evaluation. *See*48 C.F.R. § 28.202-2(b) (1987). Under such circumstances, it cannot be said that "but for" Citizens' signing the Certificates, the Government official would not have approved Sisson as a surety.

Finally, we consider the following factors to determine the reasonableness of the district court's exercise of jurisdiction, the third prong:

(1) [T]he extent of the defendant['s] purposeful interjection into the forum state's affairs;

(2) the burden on the defendant of defending in the forum;

(3) the extent of conflict with the sovereignty of the defendants' state;

(4) the forum state's interest in adjudicating the dispute;

(5) the most efficient judicial resolution of the controversy;

(6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and

(7) the existence of an alternative forum.

Core-Vent Corp., 11 F.3d at 1487-88. We balance all seven factors, recognizing that none of the factors is dispositive in itself. *Id.* at 1488.

[10] Loral could not prove the first prong of purposeful availment, thus, the first factor of purposeful interjection weighs heavily in Citizens' favor. Likewise, the second factor, the burden on Citizens of having to defend in California, favors Citizens. Ninth Circuit cases have been inconsistent in determining whether the plaintiff's burden should alter the impact of this second factor on the overall reasonableness determination. *Core-Vent,* 11 F.3d at 1488-89. This standard need not be resolved in this case, however, because it is as burdensome for Citizens and its witnesses to travel to California as it is for Loral and its witnesses to travel to Kentucky. Where the burdens are equal, the second factor tips in favor of Citizens because the law of personal jurisdiction is asymmetrical and is primarily concerned with the defendant's burden. *See Insurance Co. of N. Am. v. Marina Salina Cruz,* 649 F.2d 1266, 1272 (9th Cir.1981).

There is minimal conflict with Kentucky's sovereignty, therefore, the third factor weighs in favor of Loral. Kentucky has little interest in resolving claims involving a federal works project in California, a California prime contractor and bonds accepted in California by a California contracting officer. However, the fourth factor, California's interest in adjudicating the dispute, does not necessarily favor Loral. Although California has some interest in adjudicating the suit because it is obligated to protect its residents from tortious acts of non-resident defendants, its interest is not as strong in this case because Loral, a Delaware corporation which is a wholly owned subsidiary of a New York corporation, does not operate exclusively in California. *See Karsten Mfg. Corp. v. United States Golf Ass'n,* 728 F.Supp. 1429, 1436 (D.Ariz.1990).

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Efficiency of forum, the fifth factor, is evaluated by looking at where the witnesses and the evidence are likely to be located. *Core-Vent,* 11 F.3d at 1489. The fifth factor does not lie in either party's favor because there are witnesses and evidence in both California and Kentucky.

The sixth factor of convenience and effectiveness of relief for Loral weighs in favor of Citizens. Loral argues that forcing it to bring claims in two jurisdictions will require it to prove its case twice, possibly leading to inconsistent verdicts. Loral's argument is ***562** not convincing. The acts of Valley and Citizens are discrete, and the actions of each bank will be judged individually. Finally, the seventh factor, the existence of an alternate forum, favors Citizens. The district court found, and Loral has not disputed, the fact that Kentucky could serve as an adequate alternate forum. The balance of the seven factors reveals that a California district court cannot reasonably exercise personal jurisdiction over Citizens.

On the basis of our three part analysis, we conclude that the district court correctly refused to exercise personal jurisdiction over Citizens.

Furthermore, the district court did not abuse its discretion by refusing to grant a continuance to allow Loral to conduct jurisdictional discovery. Loral failed to demonstrate how further discovery would allow it to contradict the affidavits of Morris and Sisson. "[W]here a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the Court need not permit even limited discovery...." *Rich v. KIS Cal., Inc.,* 121 F.R.D. 254, 259 (M.D.N.C.1988).

IV

We **AFFIRM** the district court's grant of the Banks' Fed.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim. The district court did not improperly consider matters outside the pleadings when it ruled on the Banks' 12(b)(6) motions, and Loral failed to demonstrate that the Banks owed a duty to conduct an independent financial investigation of the applicant sureties.

Likewise, we **AFFIRM** the district court's Fed.R.Civ.P. 12(b)(2) dismissal of Loral's complaint against Citizens.

AFFIRMED.

C.A.9 (Cal.),1995.
Terracom v. Valley Nat. Bank
49 F.3d 555, 63 USLW 2568, 40 Cont.Cas.Fed. (CCH) P 76,777

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C

United States District Court, E.D. Michigan, Southern Division.
TIDY CAR INTERNATIONAL, INC., Plaintiff,
v.
Gary T. FIRESTINE, Defendant.
No. 92-CV-76339-DT.

Jan. 5, 1993.

Car maintenance corporation brought action against former licensee to prevent former licensee from using trademarks, trade names, and systems after licensing agreement had been terminated. The District Court, Zatkoff, J., held that car maintenance corporation failed to show that former licensee had purposefully established sufficient minimum contacts with Michigan to justify the exercise of personal jurisdiction in light of prior negotiations between parties, contemplated future consequences of licensing agreement, terms of licensing agreement, and parties' actual course of conduct.

Motion to dismiss granted.

West Headnotes

[1] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
District court's determination of whether former licensee of Michigan car maintenance company had purposefully established minimum contacts with Michigan to justify district court's exercise of personal jurisdiction over licensee depended on consideration of prior negotiations, contemplated future consequences, terms of contract, and parties' actual course of conduct.

[2] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Licensing agreement was signed in Canada while car maintenance company was Canadian corporation with headquarters in New York and, thus, prior negotiations did not support finding that former licensee of Michigan car maintenance company had purposefully established minimum contacts with Michigan to justify district court's exercise of personal jurisdiction over licensee.

[3] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Contemplated future consequences of signing licensing agreement with Canadian car maintenance corporation that was headquartered in New York could have been only that licensee would have contact with Canada or New York and, thus, future consequences did not support finding that former licensee of Michigan car maintenance company had purposefully established minimum contacts with Michigan to justify district court's exercise of personal jurisdiction over licensee; Michigan corporation purchased prior Canadian corporation after license agreement had been established.

[4] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue

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170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Licensing agreement with Michigan car maintenance corporation provided that law of state of New York would govern construction of agreement and, thus, terms of agreement did not support finding that former licensee of Michigan car maintenance company had purposefully established minimum contacts with Michigan to justify district court's exercise of personal jurisdiction over licensee.

[5] Federal Courts 170B ⚿76.5

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk76 Actions Against Non-Residents; "Long-Arm" Jurisdiction in General
170Bk76.5 k. Contacts with Forum State. Most Cited Cases
Former licensee's actual course of conduct connecting licensee with Michigan car maintenance corporation was limited to periodic purchases, monthly payments, and letters and telephone calls which were insufficient to show that former licensee had purposefully established minimum contacts with Michigan to justify exercise of personal jurisdiction; corporation had not changed licensing agreement to require Michigan law to apply after Michigan corporation bought Canadian corporation with whom licensee had entered agreement and licensee would not be haled into jurisdiction based solely on unilateral act of sale of original corporation.

***200** Steven M. Raymond, May, Simpson & Strote, Bloomfield Hills, MI, for plaintiff.
Larry E. Coey, Michelle L. Riske, Elyria, OH, for defendant.

MEMORANDUM OPINION AND ORDER

ZATKOFF, District Judge.
This matter is before the Court on defendant's, Gary T. Firestine's ("Firestine" or "defendant"), motion to quash service of process, motion to dismiss for lack personal jurisdiction, and, in the alternative, motion for change of venue. Plaintiff, Tidy Car International, Inc.[FN1] ("Tidy Car" or "plaintiff"), filed a timely reply brief that addressed Firestine's various motions. Firestine***201** filed a single reply brief which was both untimely under the Local Rules of the Eastern District of Michigan and of an unauthorized length. Tidy Car did not object to Firestine's reply brief. In the interest of justice, the Court will consider Firestine's reply brief. Pursuant to E.D.Mich. LR 7.1(e)(2), the Court ORDERS that Firestine's motions be disposed of upon the briefs that the parties have filed and without the Court entertaining oral arguments. For the reasons set forth below, Firestine's motion to dismiss for lack of personal jurisdiction is granted.[FN2]

FN1. Tidy Car International, Inc., is a subsidiary of Ziebart International Corporation. Plaintiff's Complaint, Exhibit C and Exhibit D.

FN2. In so holding, Firestine's motion to quash service and motion for change of venue are MOOT. In addition, Tidy Car has filed a motion for a preliminary injunction that also is MOOTED by this Memorandum Opinion and Order.

I. BACKGROUND

In April 1978, Firestine entered into an "Associate Dealer Agreement" ("Agreement") with Tidy Car, Inc., wherein Firestine obtained all the rights and privileges as a Tidy Car Independent Operator. The agreement was signed in Toronto, Ontario, Canada. Tidy Car, Inc., was a Canadian corporation with its headquarters in Toronto. Tidy Car, Inc., also had offices in Buffalo, New York, and this is where Firestine purchased its Tidy Car supplies. In addition, the Agreement specified that the law of the State of New York would govern how the contract

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was to be construed.

In August 1989, Tidy Car, Inc., sold and assigned all of its right, title, and interest in its business, including rights in the Agreement, to Plaintiff Tidy Car. Plaintiff's Complaint ¶ 10. Tidy Car is a Michigan Corporation with its principal place of business in Troy, Michigan. Plaintiff's Complaint ¶ 3. Tidy Car is in the business of licensing, via written licensing agreements, the use of its distinctive Tidy Car name and other registered trademarks and service marks and distinctive process developed by Tidy Car for maintaining the interior and exterior of automobiles and trucks. Plaintiff's Complaint ¶ 3.

On October 28, 1992, Tidy Car filed suit in this Court against Firestine. This suit arises out of defendant's alleged use of a product known as "Rust Evader." [FN3] Tidy Car did not approve of its tradename being associated with the sale of "Rust Evader." Plaintiff's Complaint ¶ 12 and Exhibit B. Tidy Car alleges in its complaint that Firestine continued to use "Rust Evader" at his shop in Ohio and that such use violated ¶ 10(c) of the Agreement.FN4 Based on this, in a letter dated 26 August 1992, Tidy Car informed Firestine that the Agreement would be terminated on 28 September 1992 and that by 28 September 1992, Firestine had to remove all Tidy Car identification and materials from his premises and that Firestine had to cease using any reference in any way to Tidy Car trademarks, trade names, and logos. In the present action, Tidy Car seeks a declaratory judgment that Firestine has no further rights under the Agreement; an order requiring Firestine to cease using the Tidy Car trademarks, trade names, service marks, and systems; an order requiring Firestine to account for his gross sales since 28 September 1992; an order allowing Tidy Car to audit Firestine's books; and damages for infringement of Tidy Car's trademarks.

FN3. "Rust Evader" is an electronic corrosion control device which was developed from the scientific principle of cathodic corrosion protection. Tidy Car believes that this scientific principle is only valid when it is applied to stationary objects which have continuous contact with the ground or water, such as bridges and pipelines. Based on its own research and that of independent corrosion experts, Tidy Car concluded that this technology did not apply to vehicles. Plaintiff's Complaint, Exhibit B.

FN4. Paragraph 10(c) of the Agreement provided that Firestine agreed to:

> deal with his customers in a fair and businesslike manner and to provide high quality and efficient service in keeping with the policies of the Company.

II. OPINION

A. Standard of Review

It is axiomatic that Tidy Car bears the burden of establishing that personal jurisdiction exists in this Court. *Theunissen v. Matthews,* 935 F.2d 1454, 1458 (6th Cir.1991) (citing ***202***McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80 L.Ed. 1135, 1141 (1936); *accord Am. Greeting Corp. v. Cohn,* 839 F.2d 1164, 1168 (6th Cir.1988); *Weller v. Cromwell Oil Co.,* 504 F.2d 927, 929 (6th Cir.1974)). Furthermore, once Firestine filed its properly supported motion for dismissal, Tidy Car "may not stand on ... [its] pleadings, but must, by affidavit or otherwise, set forth specific facts showing that the court has [personal] jurisdiction [over defendant]." *Theunissen,* 935 F.2d at 1458 (citing *Weller,* 504 F.2d at 930). Here both Firestine and Tidy Car have submitted affidavits. In addition, Tidy Car submitted a summary of purchases which Firestine has made from Tidy Car's Troy, Michigan location. In response to this summary and Tidy Car's affidavit,FN5 Firestine submitted a second affidavit with his reply brief.

FN5. Nancy McMath swore out the affi-

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> davit for Tidy Car. She is the Director of Credit, Collection & Licensing for Tidy Car. McMath Affidavit ¶ 1.

Accordingly, the Court has before it a properly supported 12(b)(2) motion and opposition thereto. At this stage of the proceedings the Court has three options:

> [I]t may decide the motion upon the affidavits alone; it may permit discovery in aid of deciding the motion; or it may conduct an evidentiary hearing to resolve any apparent factual questions.

Theunissen, 935 F.2d at 1458 (citing *Serras v. First Tennessee Bank Nat. Ass'n,* 875 F.2d 1212, 1214 (6th Cir.1989)). It is within the Court's discretion to decide which method it will employ in deciding the motion. *Theunissen,* 935 F.2d at 1458 (citations omitted). "However, the method selected will affect the burden of proof the plaintiff must bear to avoid dismissal.... Where the court relies solely on the parties affidavits to reach its decision, the plaintiff must make only a *prime facie* showing that personal jurisdiction exists in order to defeat dismissal." *Id.* (citations omitted). In addition, "the pleadings and affidavits submitted on a 12(b)(2) motion are received in a light most favorable to the plaintiff." *Id.* at 1459 (citations omitted). "[H]owever, the court disposing of a 12(b)(2) motion ... [cannot] weigh the controverting assertions of the party seeking dismissal." *Id.* (citations omitted). Because the Court will decide Firestine's motion on the affidavits submitted, it is under the parameters set forth above that the Court will analyze the instant motion.

B. Personal Jurisdiction

Both Tidy Car and Firestine agree that under Rule 4(e) of the Federal Rules of Civil Procedure [FN6] that the Court must look to the Michigan long-arm statute, M.C.L.A. § 600.705 in determining whether personal jurisdiction exists in the case at bar.[FN7] M.C.L.A. § 600.715(1) provides: [FN8]

FN6. Rule 4(e) states:

> Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within this state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

FN7. In addition, both parties agree that the facts in this case do not allow the Court to assert general personal jurisdiction over Firestine. " 'Specific' jurisdiction contrasts with 'general' jurisdiction, pursuant to which 'a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum.' " *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 n. 15, 105 S.Ct. 2174, 2182 n. 15, 85 L.Ed.2d 528 (1985) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 n. 9, 104 S.Ct. 1868, 1872 n. 9, 80 L.Ed.2d 404 (1984)).

FN8. Both parties inadvertently cited the Michigan long-arm statute as § 600.705(1).

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> The existence of any of the following relationships between an individual or his agent and the State shall constitute a ***203** sufficient basis of jurisdiction to enable a Court of record of this State to exercise limited personal jurisdiction over the individual and to enable the Court to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships:
>
> (1) The transaction of any business within the State.

In *Sifers v. Horen,* 385 Mich. 195, 188 N.W.2d 623 (1971), the Michigan Supreme Court stated that the word "any" which is found in M.C.L.A. § 600.715(a)"means just what it says. It includes 'each' and 'every'.... It comprehends that 'slightest.' " *Id.* at 199 n. 2, 188 N.W.2d 623. *See also Lanier v. American Bd. of Endodontics,* 843 F.2d 901, 905-906 (6th Cir.1988). Because Firestine does not dispute that he comes within § 600.715(1), the Court will assume that it would have personal jurisdiction under the Michigan long-arm statute. "However, constitutional concerns of due process limit the application of this state law." *Theunissen,* 935 F.2d at 1459 (citation omitted).

Both parties agree as to the substantive law which governs the resolution of the issue of personal jurisdiction which is before the Court.

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing 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 must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Theunissen, 935 F.2d at 1460 (quoting *LAK, Inc. v. Deer Creek Enterprises,* 885 F.2d 1293, 1299 (6th Cir.1989), *cert. denied,* 494 U.S. 1056, 110 S.Ct. 1525, 108 L.Ed.2d 764 (1990)) (citing *Southern Machine Co. v. Mohasco Industries, Inc.,* 401 F.2d 374, 381 (6th Cir.1968) (hereinafter "*Southern Machine* test")).

Tidy Car relies on *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) in support of its contention that Firestine has purposefully availed himself to the privilege of acting within the state of Michigan. In *Burger King,* the Supreme Court, per Justice Brennan, set forth a concise but comprehensive review of the Supreme Court's personal jurisdiction jurisprudence which is worthy of being repeated here. The Supreme Court stated that:

> The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful "contacts, ties, or relations." By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,"... the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit...."
>
> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum ... and the litigation results from alleged injuries that "arise out of or relate to" those activities....
>
> We have noted several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who "purposefully directs" his activities toward forum residents. A State generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.... Moreover, where individuals "purposefully de-

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rive 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.... And because "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity," it usually will not be unfair to subject him to the ***204** burdens of litigating in another forum for disputes relating to such activity....

Notwithstanding these considerations, the constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum State.... "[T]he foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there...." In defining when it is that a potential defendant should "reasonably anticipate" out-of-state litigation [we have stated that] ...:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with a forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated," contacts ... or of the "unilateral activity of another party or a third person...."

Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State.

471 U.S. at 470-475, 105 S.Ct. at 2181-184 (citations omitted).

The Court went on and stated that:

> [W]e have emphasized the need for a "highly realistic" approach that recognized that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction...." It is these factors-prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing-that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

471 U.S. at 477, 105 S.Ct. at 2185 (citations omitted).

Tidy Car cites to the following contacts which Firestine has with Michigan in support of Tidy Car's argument that Firestine has purposefully availed to the benefits of Michigan's laws: 1) Firestine made periodic purchases of products from Tidy Car in the State of Michigan; 2) Firestine made monthly payments to Tidy Car in Michigan to cover royalties owed pursuant to the Agreement; and 3) Firestine wrote letters and made telephones calls to Tidy Car's Michigan Office.[FN9]

> FN9. "Telephone conversations and letters are insufficient to fulfill" purposeful availment. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1177 (6th Cir.1992) (citations omitted).

[1] The fact that Firestine made his royalty payments in Michigan and the fact that Firestine purchased a few products from Michigan are insufficient to establish purposeful availment in this case. As stated above, the following factors are relevant in the Court's determination of whether Firestine purposefully established minimum contacts in the

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State of Michigan: 1) prior negotiations; 2) contemplated future consequences; 3) terms of the contract; and 4) the parties' actual course of conduct. *Burger King, supra.*

[2][3] Here, it is not disputed that the Agreement was signed in Toronto, Ontario, Canada in April 1978. Defendant's Brief in Support of Motion to Dismiss at 3; Defendant's Reply Brief at 3. At that time, Tidy Car, Inc., was a Canadian corporation with its headquarters in Toronto and offices in Buffalo, New York. Thus, during the negotiations and the signing of the Agreement it cannot be said that Firestine purposefully established minimum contacts within Michigan, because there was absolutely no connection with the State of Michigan. In addition, in 1978, the contemplated***205** future consequences could only be that Firestine would have contact with the Nation of Canada and the State of New York. Accordingly, contemplated future consequences does not lead the Court to find that Firestine purposefully established minimum contacts with the State of Michigan.

[4] Examining the terms of the Agreement, the Court finds that this factor also weighs in the favor of not finding purposefully availment. As the Supreme Court stated in *Burger King*"[n]othing in our cases ... suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's law' for jurisdictional purposes ... [a]lthough such a provision standing along would be insufficient to confer jurisdiction...." *Burger King*, 471 U.S. at 481, 105 S.Ct. at 2187 (emphasis in original). Here, the Agreement provided that the law of the State of New York would govern the construction of the Agreement. Again, the Court cannot find that, by the terms of the contract, Firestine purposefully availed himself to the benefits and protections of the State of Michigan's law, and thus this factor weighs against finding that Firestine purposefully established minimum contacts within Michigan.

[5] The last factor, the parties' actual course of conduct, is the only factor which can be said to arguably weigh in favor of finding minimum contacts. Since August 1989, Tidy Car has being a Michigan corporation and Firestine has purchased some products from Michigan. However, Tidy Car did not have the Agreement changed to require that the State of Michigan's laws would apply to the Agreement. In addition, Firestine had no say in whether Tidy Car, Inc., would be bought out by Tidy Car International, which allowed Tidy Car to become a Michigan corporation with offices in Michigan. This is a classic example of where a defendant is haled into a jurisdiction based on a unilateral act of another party. Personal jurisdiction will not be found in such a case. *Burger King*, 471 U.S. at 474, 105 S.Ct. at 2183.[FN10] Moreover, from 1978 through August 1989, Firestine had no contacts with the State of Michigan.

> FN10. To hold otherwise in this case would mean that any person, who signed an agreement similar to the one in this case, would be subject to the jurisdiction in any of the fifty states of the United States simply because the original corporation was bought out by another corporation and the defendant ordered some supplies from the new corporation, supplies which the defendant could not get from anywhere else. This would not allow individuals to have fair warning that a particular activity-signing an agreement-may subject them to the jurisdiction of a foreign sovereign which is required under the Due Process Clause.

Accordingly, after weighing all of the relevant factors and viewing the facts in the light most favorable to Tidy Car, the Court holds that Firestine has not purposefully established minimum contacts with the State of Michigan under the facts in this case.

CONCLUSION

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For all of the reasons set forth above, defendant Firestine's motion to dismiss for lack of personal jurisdiction is hereby GRANTED.

IT IS SO ORDERED.

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