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DIVISION III, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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SANDRA LYNNE DOWNING, individually and as Personal  
Representative of The Estate of Brian Downing, deceased,  
and on behalf of KRISTYL DOWNING and JAMES DOWNING,  
Death Beneficiaries of The Estate of Brian Downing,  
Respondents,

v.

BLAIR LOSVAR, Personal Representative of THE ESTATE OF  
ALBERT E. LOSVAR, deceased;  
Respondent,

LYCOMING, A DIVISION OF AVCO CORPORATION, a Delaware  
corporation and subsidiary of TEXTRON, INC., a foreign corporation;  
Defendant,

TEXTRON AVIATION, INC., a Kansas corporation, formerly  
CESSNA AIRCRAFT COMPANY,  
Appellant.

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ON APPEAL FROM OKANOGAN COUNTY SUPERIOR COURT  
No. 15-2-00516-4  
(Hon. Christopher Culp)

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**BRIEF OF APPELLANT**

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David M. Schoegg1, WSBA No. 13638  
Hans N. Huggler, WSBA No. 51662  
*Attorneys for Appellant Textron  
Aviation, Inc.*

LANE POWELL PC  
1420 Fifth Avenue, Suite 4200  
P.O. Box 91302  
Seattle, WA 98111-9402  
206.223.7000

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## **I. INTRODUCTION**

This is a product liability wrongful death action stemming from a fatal 2015 accident in which a single-engine Cessna T182T aircraft (FAA Reg. No. N6289Z) collided with terrain near Oroville, Washington. Appellant Textron Aviation Inc. (“TAI”), a Kansas corporation headquartered in Wichita, Kansas, manufactured the accident aircraft in Kansas and sold it to a California aircraft dealer in 2008. The dealer sold it to a buyer in that California, and N6289Z was eventually resold to a Washington-based owner. TAI had no involvement in those transactions. TAI’s only connection with the aircraft after it arrived in Washington was to send its registered owner the same “service bulletins” it sends to every registered owner in the United States—none of which related to the accident or to the plaintiffs’ liability theories.

Given the absence of any specific contacts between TAI and Washington related to plaintiffs’ claims, TAI moved to dismiss for lack of personal jurisdiction. The plaintiffs conceded there was no general jurisdiction, but argued for specific jurisdiction based on evidence that TAI had four Washington-based employees. The trial court found it had jurisdiction over TAI because (1) the “availability of [TAI] services [in Washington] that could have addressed the alleged causation of the crash that prompted this lawsuit” supported jurisdiction, and (2) because TAI

engages in “sufficient activity” in Washington “to believe [TAI] enjoys the benefits and protection of Washington law.” CP 750-752 (memorandum opinion); CP 110-112 (order). This was error.

The United States Supreme Court has, in a series of recent cases, clarified and narrowed the constitutionally permissible reach of personal jurisdiction. Specifically, the exercise of specific jurisdiction over a nonresident defendant requires a causal connection between the defendant’s contacts with the forum state and the claims raised in the suit. “Where there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the forum State.” *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1781 (2017). By basing its ruling on TAI’s contacts with Washington *unrelated* to N6289Z or to the accident and on a supposition that the aircraft’s owner could have—but did not—ask TAI to perform maintenance on it, the trial court erred in its personal jurisdictional analysis. Accordingly, the trial court’s denial of TAI’s motion to dismiss must be reversed and TAI must be dismissed from the case.

## **II. ASSIGNMENT OF ERROR**

The trial court erred when it denied TAI’s CR 12(b)(2) motion to dismiss for lack of personal jurisdiction. CP 110-112 (order).

### **III. STATEMENT OF ISSUE**

The issue on appeal is whether Washington courts can exercise “specific” personal jurisdiction over TAI in connection with this accident.<sup>1</sup> Since Respondents have not made a prima facie showing that the crash of N6289Z arose out of or related to any contact between TAI and Washington, Washington courts lack personal jurisdiction over TAI in this case.

### **IV. STATEMENT OF THE CASE**

#### **A. Jurisdictional Facts.**

On August 13, 2015, N6289Z crashed soon after takeoff near Oroville, Washington. CP 139 (Downing Pls.’ Second Am. Compl. ¶¶ 4.2, 4.5). Aboard were Albert Losvar and Brian Downing, both of whom died in the accident. CP 139 (*Id.* ¶ 4.5).

TAI, formerly known as Cessna Aircraft Company, designed and manufactured the aircraft in Kansas. CP 777-778 (Declaration of Sherry

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<sup>1</sup> “There are two approaches to personal jurisdiction: specific and general.” *Noll v. Am. Bilrite Inc.*, 188 Wn.2d 402, 412, 395 P.3d 1021 (2017). “General jurisdiction requires extensive and systematic contacts with the forum state” which plainly are not present here. *Id.*; see *BNSF Rwy. Co. v. Tyrell*, 137 S. Ct. 1549, 1559 (2017) (no general jurisdiction in Montana over railway not headquartered or incorporated in Montana, despite presence of 2,000 employee and 2,000 miles of railroad track within state). Respondents opposed TAI’s Motion to Dismiss on the basis of specific jurisdiction only, and the trial court rightly did not comment on general jurisdiction, which does not exist here.

L. Fleming (hereinafter, “Fleming Decl.”) ¶ 4). It then sold the aircraft to an authorized dealer in Napa, California on August 11, 2008. *Id.* A representative of the dealer took delivery of the aircraft in Independence, Kansas, and presumably flew the plane from there to California. *Id.* The dealer thereafter sold the plane to an individual with a San Francisco, California address. *Id.* It appears Mr. Losvar purchased the aircraft from the San Francisco, California owner in 2012. *Id.* TAI had no role in that sale or the aircraft’s subsequent move from California to Washington. *Id.* TAI never serviced the aircraft in Washington (or anywhere else) while it was owned by Mr. Losvar. *Id.* (¶ 5).

TAI is a corporation organized under the laws of the State of Kansas and maintains its principal place of business in Wichita, Kansas. *Id.* at 777-778 (Fleming Decl. ¶ 2). TAI designs, manufactures and sells general aviation aircraft. *Id.* Out of 8,400 persons employed by TAI, only four are based in Washington. CP 778 (Fleming Decl. ¶ 3). Of those four, two are in sales and two are mechanics. *Id.* TAI’s Washington personnel were not involved in any aspect of the sale or maintenance of Losvar’s plane. TAI does not own real estate in Washington and has no bank accounts in the state. *Id.* The company does not maintain corporate offices in Washington, and no TAI officer or director lives or is based in the state. *Id.* In 2015 (the year of the accident), TAI’s Washington

revenue represented less than one percent of the company's total revenue. *Id.*

**B. Procedural Background.**

This suit was filed in Okanagan County Superior Court in December 2015 by the Downing Respondents<sup>2</sup> against the Estate of Albert Losvar, alleging the crash was caused by Mr. Losvar's negligent maintenance and piloting of the aircraft. Later, the Downing Respondents amended their complaint to include product liability claims against Lycoming (the manufacturer of the aircraft's engine) and TAI. CP 136-148. The Losvar Respondent then asserted the same claims against TAI in a cross-claim. CP 229-239. Respondents now assert that a fuel selector valve in the engine's carburetor became blocked due to an alleged design or manufacturing error, causing the aircraft's engine to quit in flight. CP 140; CP 232. As to jurisdiction, Respondents acknowledge TAI is incorporated and headquartered in Kansas, CP 138, but claim jurisdiction exists under Washington's long-arm statute because TAI "committed tortious acts in Washington State." CP 139; CP 230-231. Recognizing the potential weakness of their jurisdictional position, the Downing

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<sup>2</sup> The Downing Respondents are Sandra, Kristyl and James Downing, original plaintiffs in the action below. The Losvar Respondent is Blair Losvar, defendant and cross-claim plaintiff below. The distinction is insignificant as to the legal issues in this appeal, and TAI refers to all Respondents collectively as "Respondents."

Respondents filed parallel lawsuits against TAI in Kansas and Pennsylvania.<sup>3</sup>

After responding to jurisdictional discovery, TAI moved to dismiss for lack of personal jurisdiction. CP 77-91 (motion); CP 265-272 (reply). Lycoming, which manufactured N6289Z's engine, also moved to dismiss for lack of personal jurisdiction. In its Opinion dated July 30, 2018, the trial court denied TAI's motion to dismiss, stating:

The Court denies CESSNA's motion because, while the Lycoming/AVCO co-defendant ultimately have the same parent company, CESSNA has far greater contact with Washington State than does AVCO. Those contacts, assumed to be true for purposes of this motion, suggest the defendant has purposefully availed itself of benefits of doing business in this state; it does more than simply allow its aircraft to enter the stream of commerce in hopes they end up in Washington. In *State vs. LG*, the Washington Supreme Court analyzed a stream of commerce-based claim of Due Process. The Court determined the defendant company's size in the global market and their sales into international streams of commerce with intent that their product would come to Washington were important consideration. . . . This case is similar.

The Declaration of Mr. Biggs and Defendant Losvar's Response at pages 3-6 itemize extensive activities of the defendant in this state and around the world. Ms. Brodkowitz' Declaration makes clear that CESSNA offers sales and after-sale service in Washington. And the Declarations of Mark Pottinger (submitted by defendant Losvar) and Keyran Walsh (submitted by plaintiff) connect availability of CESSNA services *that could have* addressed

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<sup>3</sup> See *Downing v. Losvar*, No. 2:17-cv-02469-CM-KGS (D. Kan.); *Downing v. Losvar*, No. 4:17-cv-01430-MWB (M.D. Pa.).

the alleged causation of the crash that prompted this lawsuit. CESSNA has only four employees in Washington but some or all of them provide ready service for any of the over 3000 Cessna aircraft owners while some six service centers in the state provide more extensive maintenance and/or repair capability. There is sufficient activity to believe CESSNA enjoys the benefits and protection of Washington law. And there is a basis to find this suit arises from contacts the defendant has with the state.

CP 751-752 (emphasis added).

TAI moved the trial court to certify its Opinion and Order for discretionary review under RAP 2.3(b)(4). CP 26-31. Over Respondents' objections, CP 769-776, the trial court granted TAI's motion to certify on August 29, 2018, finding "there is a substantial ground for a difference of opinion" on the jurisdictional question such that "immediate review of the [Opinion] may materially advance the ultimate termination of the litigation." CP 113-114 (modification in original). TAI filed a timely notice of discretionary review and this Court granted review on December 20, 2018 on the same grounds. CP 115-117.

#### **IV. ARGUMENT**

##### **A. The Standard Of Review Is *De Novo*.**

This Court reviews a trial court's determination of its personal jurisdiction *de novo*. *Precision Lab. Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 725, 981 P.2d 454 (1999). If, as here, the trial court based its ruling on affidavits and evidence arising out of jurisdictional discovery,

Respondents must make a prima facie showing that jurisdiction is proper. *Id.*

**B. Specific Personal Jurisdiction Requires A Purposeful Contact Between The Defendant And Washington That Was A “But For” Cause Of The Claims Raised.**

“Under Washington’s long arm jurisdiction statute, RCW 4.28.185, personal jurisdiction exists in Washington over nonresident defendants and foreign corporations as long as it complies with federal due process.” *Noll v. Am. Bilrite Inc.*, 188 Wn.2d 402, 411, 395 P.3d 1021 (2017). “For [specific] personal jurisdiction to comply with due process, three elements must be met: (1) purposeful ‘minimum contacts’ must exist between the defendant and the forum state, (2) the plaintiff’s injuries must ‘arise out of or relate to’ those minimum contacts, and (3) the exercise of jurisdiction must be reasonable, that is, consistent with notions of ‘fair play and substantial justice.’” *State v. LG Elecs., Inc.*, 186 Wn.2d 169, 176-77, 375 P.3d 1035, 1040 (2016) (citing *Grange Ins. Ass’n v. State*, 110 Wn.2d 752, 758, 757 P.2d 933 (1988) (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985))).

“To establish purposeful minimum contacts, 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.’” *LG Elecs.*, 186 Wn.2d at 177 (citing *Burger*

*King*, 471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))). That inquiry “focuses on the relationship among the defendant, the forum, and the litigation” because “[d]ue process limits on [a state’s] adjudication authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties.” *Walden v. Fiore*, 571 U.S. 277, 283-84 (2014) (internal citations omitted).

Accordingly, “[a] foreign manufacturer or distributor does not purposefully avail itself of a forum . . . when the unilateral act of a consumer or other third party brings the product into the forum state.” *LG Elecs.*, 168 Wn.2d at 177; see *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) (“[The] unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction”).

The constitutional inquiry does not end with establishing “minimum contacts” between the defendant and forum state. Presuming such contacts exist, “a plaintiff’s injuries must relate to or arise out of” those contacts. *LG Elecs.*, 168 Wn.2d at 177 (internal quotation marks omitted). More precisely, specific jurisdiction requires an “affiliation between the forum and the underlying controversy, principally, [an] activity or occurrence that takes place in the forum State.” *Folweiler*

*Chiropractic, PS v. Fair Health, Inc.*, 4 Wn. App. 2d 1001, 2018 WL 2684374, \*3 (2018) (unpublished) (quoting *Bristol-Myers*, 137 S. Ct. at 1780 (alteration in original)). Accordingly, “a corporation’s continuous activity in [Washington] cannot make up for the lack of an adequate link between that activity and the claims made in the case.” *Id.* (citing *Bristol-Myers*, 137 S. Ct. at 1781).

While *Bristol-Myers* and *Folweiler*, discussed below, have clarified the point, this is not new law—Washington courts have long recognized this principle and applied a “but for” test to determine whether a defendant’s contacts with Washington give rise to the claims in a suit. *See Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 772, 783 P.2d 78 (1989) (adopting on certified questions the “but for” causation standard); *CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wn. App. 699, 719, 919 P.2d 1243, 1253-54 (1996) (“To determine whether a claim against a foreign entity arises from its solicitation of business within this jurisdiction, Washington courts apply the ‘but for’ test. Jurisdiction is proper in Washington if the events giving rise to the claim would not have occurred ‘but for’ the corporation’s solicitation of business within this state.”). And “[w]here there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the forum State.” *Bristol-Myers*, 137 S. Ct. at 1781.

In *Bristol-Myers*, the United States Supreme Court emphasized the need for a causal connection between a defendant's contacts with the forum state and a plaintiff's claims. There, in-state and out-of-state plaintiffs sued Bristol-Myers over the drug Plavix, asserting product liability, negligence, and misrepresentation claims under California law. Bristol-Myers did not develop, manufacture, label, or package Plavix in California—all such activities took place in New York or New Jersey. Bristol-Myers did sell Plavix in California, generating \$900 million in sales annually, and Bristol-Myers had five research laboratories and 160 employees (unrelated to Plavix) in the state. *Bristol-Myers*, 137 S. Ct. at 1778.

The trial court denied Bristol-Myers's motion to dismiss the out-of-state plaintiffs for lack of personal jurisdiction, and Bristol-Myers appealed. The California Supreme Court held specific jurisdiction existed, applying a "sliding scale" approach under which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 889 (Cal. 2016). Consequently, that court concluded that "[Bristol-Myers's] extensive contacts with California" permitted the exercise of specific jurisdiction "based on a less direct

connection between [Bristol-Myers’s] forum activities and plaintiffs’ claims than might otherwise be required.” *Id.*

The Supreme Court rejected California’s “sliding scale” approach. The Court stated that “[o]ur cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant’s general connections with the forum are not enough.” *Bristol-Myers*, 137 S. Ct. at 1781. The Court explained that:

[t]he present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents’ claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims. As we have explained, “a defendant’s relationship with a ... third party, standing alone, is an insufficient basis for jurisdiction.” This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that [Bristol-Myers] conducted research in California on matters unrelated to Plavix. ***What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.***

*Id.* (citation omitted; emphasis added). Contrary to Respondents’ arguments below, it was not just that the out-of-state plaintiffs suffered no harm in California. *See* CP 257-258. Rather, “all the conduct giving rise

to the nonresidents’ claims”—that is, the chain of events through which the out-of-state plaintiffs obtained, used, and were harmed by Plavix—“occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction.” *Bristol-Myers*, 137 S. Ct. at 1782.

The Court of Appeals has looked to *Bristol-Myers* to reject a similar “sliding scale” approach to jurisdiction in Washington. *Folweiler Chiropractic, PS v. Fair Health, Inc.*, 4 Wn. App. 2d 1001, 2018 WL 2684374 (2018) (unpublished). Folweiler was a Washington corporation providing chiropractic and massage therapy care. *Id.* at \*1. FAIR Health, a New York nonprofit corporation, “provide[d] an independent, impartial source of data about the cost of health care procedures. It educate[d] consumers and offer[ed] them free tools to make it easier for them to estimate out-of-network expenses, disseminate[d] its data to all health care participants to promote fair billing and reimbursement practices, and ma[de] its data available for policy making and academic research.” *Id.* After a third-party insurer rejected bills from Folweiler on the basis of information provided by FAIR Health, Folweiler sued FAIR Health in King County. *Id.* at \*1-2. The trial court denied FAIR Health’s motion to dismiss for lack of personal jurisdiction, but granted it summary judgment as to liability. Both parties appealed. *Id.* at \*2.

On review, the Court relied extensively on *Bristol-Myers* to hold that Washington lacked personal jurisdiction over FAIR Health. *Id.* at \*3.

Discussing FAIR Health’s contacts with Washington, it recounted that:

FAIR Health has contacts in Washington. *But they are not sufficiently connected to the claims made in this lawsuit to make the exercise of specific personal jurisdiction appropriate.* As the trial court observed, FAIR Health’s product is organized geographically and it collects data from Washington to be used in Washington. But FAIR Health had no direct contact with Progressive or the health care providers included in the class of plaintiffs. FAIR Health collects data in Washington from health insurers and third-party administrators. FAIR Health does not collect data from auto insurers, like Progressive, or health care providers, like the class members. *FAIR Health has customers in Washington, but the class’s claims did not arise out of those contacts.* The class bases its claims on a contract that FAIR Health had with Mitchell, a company located in California. Mitchell had a contract with Progressive that had a contract with Folweiler’s patient. Under these facts, FAIR Health’s contacts with Washington are not sufficiently connected to the claims made in this lawsuit to make the exercise of personal jurisdiction proper.

*Id.* (emphasis added). What was lacking in *Folweiler* was a “but for” connection between FAIR Health’s activities in Washington and Folweiler’s claim. As explained below, the same link is missing in this case.

**C. The Trial Court Erred By Relying On “Contacts” Between TAI And Washington That Were Not A “But For” Cause Of The Claims Raised, And No Such Contacts Exist.**

The trial court held it could exercise jurisdiction over TAI on two bases—the “availability of [TAI] services [in Washington] that *could have*

addressed the alleged causation of the crash that prompted this lawsuit” (emphasis added) and because TAI engages in “sufficient activity” in Washington “to believe [TAI] enjoys the benefits and protection of Washington law.” CP 750-752. Neither of these grounds satisfies the requirement that the accident would not have happened “but for” these contacts. Therefore, they cannot support a valid exercise of personal jurisdiction.

**1. The availability of unused TAI maintenance services in Washington is not a “contact” with Washington that supports specific jurisdiction.**

The trial court held it could exercise jurisdiction over TAI due to the “availability of [TAI] services [in Washington] that could have addressed the alleged causation of the crash that prompted this lawsuit.” While the record contains evidence that TAI offered certain maintenance services in Washington, there is no evidence in the record to suggest that Mr. Losvar either sought or received any such service. CP 750-752. The availability of TAI maintenance services Mr. Losvar could—but did not—use in Washington is jurisdictionally irrelevant. This is because “it is the defendant’s *conduct* that must form the necessary connection with the forum State that is the basis for its jurisdiction.” *Walden*, 571 U.S at 286 (emphasis added). There is no evidence nor allegation of any *affirmative*

*conduct* by TAI connecting the availability of services in Washington to Mr. Losvar or the crash.

Both longstanding law and logic reject the idea that omission or failure to act can create specific jurisdiction. Because a defendant “fails to act” in every place where it is not acting, making this the basis for personal jurisdiction would eviscerate the due process protections personal jurisdiction is premised upon and lead to unconstitutional universal jurisdiction. *See, e.g., Cary v. Beech*, 679 F.2d 1051, 1061 n.10 (3d Cir. 1982) (“Since almost every products liability case has a potential issue of failure to warn, grounding jurisdiction solely on allegation of such an omission might remove any limitation upon a state’s assertion of personal jurisdiction and again be beyond ‘traditional notions of fair play and substantial justice.’”) (quoting *Walsh v. Nat’l Seating Co.*, 411 F. Supp. 564, 570 (D. Mass. 1976)); *Chlebda v. H.E. Fortna and Bro., Inc.*, 609 F.2d 1022 (1st Cir. 1979) (considering “whether an omission, viz., a failure to act, may be thought to furnish the minimum contact with that state that is needed to confer jurisdiction” and rejecting such a theory); *Sulak v. Am. Eurocopter Corp.*, No. 1:09-cv-00135 DAE-KSC, 2009 WL 2849136 (D. Haw. Aug. 26, 2009) (rejecting failure-to-warn as jurisdictional theory and noting “[i]nstead of arguing that AEC

purposefully availed itself of the forum, Plaintiff is arguing that AEC did nothing regarding this particular helicopter”).

This Court must likewise reject a theory of personal jurisdiction premised on the theory that TAI had the capacity to service the subject aircraft in Washington had Mr. Losvar asked it to do so. This is true even if, as the trial court speculated, the hypothetical service that was not requested or given “could have addressed the alleged causation of the crash.” That is not the law. As *Bristol-Myers* reiterates, the focus must be on whether TAI took affirmative actions directed at Washington that gave rise to the plaintiff’s claims.<sup>4</sup> Lack of action is not sufficient.

**2. TAI’s general activities in Washington cannot support jurisdiction; LG Electronics does not require otherwise.**

The trial court also found it had jurisdiction over TAI because TAI engages in “sufficient activity” in Washington “to believe [it] enjoys the benefits and protection of Washington law.” CP 750-752.

It is undisputed that general jurisdiction does not exist in Washington over TAI under the strict test mandated by the U.S. Supreme Court. *BNSF*, 137 S. Ct. at 1559 (2017). Yet the trial court’s second ground is exactly the type of “loose and spurious form of general

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<sup>4</sup> Even if Mr. Losvar had utilized TAI maintenance services in Washington State, the Court’s jurisdictional inquiry would not end. Rather, the Court would then need to determine whether a causal link existed between the services received in Washington and the crash.

jurisdiction” the Supreme Court prohibited in *Bristol-Myers*. 137 S. Ct. at 1781.

In support of its second ground, the trial court cited to *State v. LG Electronics*, referring to this case as “similar” to the facts there. *Id.* In *LG Electronics*, the State of Washington sued more than 20 foreign electronics manufacturing companies for fixing the prices of cathode ray tubes (“CRT”), a primary component of televisions and computer monitors prior to the advent of flat-panel display technologies. 186 Wn.2d at 173. North America was alleged to be the largest market for CRT televisions and monitors, and Washington asserted jurisdiction because defendants’ alleged acts had a “substantial and foreseeable effect” on the prices of such products in Washington. *Id.* at 173-74. The manufacturers moved to dismiss for lack of personal jurisdiction, asserting they did not sell products directly in to Washington or otherwise conduct business here. *Id.* at 174-75.

On review, the Washington Supreme Court analyzed whether the manufacturers’ had “contacts” with Washington. The court considered the Supreme Court’s jurisprudence on “stream of commerce,” concluding that “a foreign manufacturer’s sale of products through an independent nationwide distribution system is not sufficient, absent something more, for a State to assert personal jurisdiction over a manufacturer when only

one product enters a state and causes injury.” *Id.* at 181 (citing *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 888-889 (2011) (Breyer, J., concurring)). The Court gave the following rationale for exercising specific jurisdiction:

[t]he State alleges that (1) the Companies together dominated the global market for CRTs, (2) the Companies sold CRTs into international streams of commerce with the intent that the CRTs would be incorporated into millions of CRT products sold across the United States and in large quantities in Washington, and (3) along with their coconspirators, ***the Companies intended for their price-fixing activities to elevate the price of CRT Products purchased by consumers in Washington.*** Taking these allegations as verities, as we must at this stage, we agree with the State that “[t]he presence of millions of CRTs in Washington was not the result of chance or the random acts of third parties, but a fundamental attribute of [the Companies’] businesses.”

*Id.* at 183 (emphasis added).

*LG Electronics* reflects the principle that a defendant’s conduct intended to not only reach Washington consumers, but to affirmatively harm them, is a sufficient to meet due process standards for specific jurisdiction. *Cf. Calder v. Jones*, 465 U.S. 783 (1984) (permitting exercise of personal jurisdiction where intentional conduct is “calculated” to have harmful effect in the forum state”). Importantly, the defendant manufacturers’ contacts with Washington in *LG Electronics* were intertwined with the claims raised—the act of price fixing gave rise to

consumer claims alleging harm from higher prices. That satisfied the additional constitutional requirement that the claims raised against the manufacturers were causally linked with the manufacturer's contacts with Washington. That is not the case here.

Here, the trial court identified the following "purposeful contacts" between TAI and Washington: (1) offering sales and after-sales services in Washington, (2) having four employees in Washington, some of whom "provide ready service" to TAI owners, (3) the presence of approximately "3000 Cessna aircraft owners" in the state, (4) and the presence of "six service centers in the state [which] provide more extensive maintenance and/or repair capability." CP 751-752. There is no evidence in the record whatsoever to suggest that any of these contacts has anything to do with Mr. Losvar's death or the claims in this lawsuit. Any of the alleged manufacturing and design errors by TAI occurred in Kansas. CP 777-778 (Fleming Decl. ¶ 4). Had the aircraft crashed in California, personal jurisdiction might have existed there because TAI knowingly sold the aircraft to a California dealer. However, the aircraft arrived in Washington through the unilateral acts of its third owner having nothing to do with TAI. Once in the state, TAI never had any contacts that are alleged to be "but for" causes of the accident. *Id.* (Fleming Decl. ¶¶ 4-5); CP 139-145.

Because TAI had no role in the aircraft's arrival in Washington nor any contact with the aircraft while in Washington, Respondents cannot make a prima facie showing that their claims "arise out of or relate to" TAI's contacts with this state. *LG Elecs.*, 186 Wn.2d at 176-77. *LG Electronics* is consistent with that result, because the issue here is not whether TAI has *some* contacts with Washington (it does), but whether those contacts are relevant to specific jurisdiction because they are but-for causes of the harm alleged (they are not). Without any contact between TAI and Washington from which Respondents' claim arise, Washington courts lack jurisdiction over TAI in this suit.

**D. State And Federal Courts Have Properly Rejected Personal Jurisdiction In Numerous Analogous Cases.**

Washington would not be an outlier in holding it lacks jurisdiction over TAI on these facts. For example, in *Montgomery v. Airbus Helicopters, Inc.*, 414 P.3d 824 (Okla. 2018), the Oklahoma Supreme Court held that Oklahoma lacked personal jurisdiction over Airbus Helicopters, a Texas company, on wrongful death, negligence, and product liability claims stemming from a helicopter air ambulance crash in Oklahoma City that killed two Oklahoma residents. *Id.* at 825-26. Airbus sold the helicopter to a Delaware company headquartered in Kansas. *Id.* at 826. The helicopter was delivered in Texas, whereupon the buyer transported it to Kansas and placed it in service. *Id.* The buyer later sold

the helicopter to an Oklahoma subsidiary and operated it out of bases in Oklahoma—allegedly with Airbus’s knowledge. *Id.* Airbus successfully moved to dismiss for lack of personal jurisdiction. *Id.* at 827-28.

On review, the Oklahoma Supreme Court summarized *Bristol-Myers* as requiring that (1) “there must be an affiliation between the forum and the underlying controversy such as an activity or an occurrence that takes place in the forum State, which subjects the cause to the State’s regulation”; and (2) “an adjudication of issues must derive from, or be connected with, the very controversy that establishes jurisdiction.” *Id.* at 830. In finding these conditions unmet, the court explained that:

[i]n *Bristol-Myers*, *supra*, and *Walden*, *supra*, the Court, relying on its previous minimum contacts cases, clarified specific jurisdiction analysis and omitted from that analysis any previous “stream of commerce” analysis. [By omitted, we mean the Court neglected to mention it at all, presumptively, at least implicitly, rejecting such analysis.]

\* \* \* \*

Oklahoma may have an interest in adjudicating this case. The crash happened in Oklahoma and the helicopter took off from a base in this State. The two people killed were citizens of this State. Most of the harm from this incident occurred in this State, but these facts alone, without Airbus . . . having further direct and specific conduct with this State directly related to the incident giving rise to the injuries, is insufficient for asserting specific personal jurisdiction over them. Furthermore, we cannot see the need for additional jurisdictional discovery in this cause because the “totality of the contacts” or “stream of

commerce” is no longer the analysis this Court will use to determine specific personal jurisdiction.

*Id.* at 831, 834. *Montgomery*’s facts are similar to those here—an in-state accident with no affirmative, related contact between the aircraft manufacturer and the forum state. Like in *Montgomery*, this Court must conclude Washington lacks personal jurisdiction over TAI.

The federal courts have likewise concluded they lack specific personal jurisdiction in cases similar to this one. Recently, two separate judges of the United States District Court for the District of Alaska dismissed a Canadian manufacturer from suits arising out of fatal air crashes in Alaska.<sup>5</sup> *In re Crash of Aircraft N93PC on July 7, 2013 at Soldotna, Alaska*, No. 3:15-cv-00112/00113/00115-HRH, 2018 WL 4905006 (D. Alaska Oct. 9, 2018) (appeal dismissed 2018 WL 7348217 (9th Cir. Dec. 5, 2018)); *Specter v. Texas Turbine Conversions, Inc.*, No. 3:17-cv-00194-TMB, 2019 WL 1396426 (D. Alaska Mar. 25, 2019).

There, defendant manufacturer sold its product to a Canadian aircraft refurbisher, who installed the product on refurbished aircraft

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<sup>5</sup> Both courts had previously determined they lacked “general jurisdiction” over the manufacturer, and permitted jurisdictional discovery as to specific personal jurisdiction. *In re Crash of Aircraft N93PC on July 7, 2013 at Soldotna, Alaska*, No. 3:15-cv-00112/00113/00115-HRH, 2018 WL 1613769 (D. Alaska Apr. 3, 2018); *Specter v. Texas Turbine Conversions, Inc.*, No. 3:17-cv-00194-TMB, ECF No. 70 (Order Granting Motion to Dismiss in Part) (D. Alaska June 13, 2018) (Appendix A).

bound for Alaskan customers. Plaintiffs in both cases presented evidence that aircraft modified by the manufacturer's products were common in Alaska, the manufacturer had made unrelated sales of its products into the state, and the manufacturer had sent updated technical documents and notices to operators of its equipment in the state. *N93PC*, 2018 WL 4905006, at \*3; *Specter*, 2019 WL 1396426, at \*4. Both courts rejected specific jurisdiction over the manufacturer, finding that none of the contacts between the manufacturer and Alaska were causal to the claims at issue. *N93PC*, 2018 WL 4905006, at \*4; *Specter*, 2019 WL 1396426, at \*4.

Similarly, in *Hinkle v. Continental Motors, Inc.*, No. 9:16-03707-RMG, 2017 WL 4574794 (D.S.C. Oct. 12, 2017), the United States District Court for the District of South Carolina held it lacked specific jurisdiction over a Wisconsin-based aircraft manufacturer despite the fact that the accident occurred in South Carolina and the manufacturer had authorized service centers and flight instructors in that state. Relying on *Bristol-Myers*, the court reasoned that “[t]here is no allegation that Plaintiffs’ claims arise out of those [forum] activities.” *Id.* at \*3.<sup>6</sup>

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<sup>6</sup> See also *D’Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 103 (3d Cir. 2009) (no jurisdiction over Swiss company where aircraft was designed and manufactured in Switzerland, sold in Europe, and “later reached the United States via a series of third-party

The above cases reinforce the fundamental jurisdictional point emphasized by *Bristol-Myers* and already recognized by Washington courts—a court may not exercise specific personal jurisdiction over an out-of-state defendant unless a contact between that defendant and the forum state was a “but for” cause of the claims at issue. Here, the trial court found no such link, and this Court should likewise conclude that TAI is not subject to jurisdiction in Washington.

**E. The Trial Court Correctly Rejected Arguments That RCW 4.28.185 Creates a “Contact” With Washington By Operation of Law Because the Accident Occurred in Washington.**

In the trial court, Respondents argued that Washington’s long-arm statute, RCW 4.28.185, conferred jurisdiction over TAI by operation of law without regard to due process.<sup>7</sup> The trial court did not adopt Respondents’ theory, correctly recognizing that doing so would turn

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resales in which Pilatus was not involved”); *Carpenter v. Sikorsky Aircraft Corp.*, 101 F. Supp. 3d 911, 923 (C.D. Cal. 2015) (no jurisdiction over helicopter manufacturer despite the fact that manufacturer sold helicopters to and derived revenue from the forum because none of those contacts were linked to the helicopter or the accident at issue); *Sulak v. Am. Eurocopter Corp.*, No. 1:09-cv-00135 DAE-KSC, 2009 WL 2849136 (D. Haw. Aug. 26, 2009) (no jurisdiction over out-of-state helicopter manufacturer despite the fact that the helicopter crashed in Hawaii, and that the manufacturer had a service center in Hawaii, because there was no connection between those contacts and plaintiffs’ product liability claims).

<sup>7</sup> See CP 754, 765 (“the entirety of Cessna’s legal analysis and arguments addressing the second element of the Due Process Clause analysis is irrelevant” because “[u]nder RCW 4.28.185(1)(b), a tortious act committed in the state of Washington is a specifically enumerated basis for exercising jurisdiction over a foreign corporation”).

federal due process principles on their head. Because Respondents may again raise this theory on appeal, TAI addresses it here.

RCW 4.28.185(b) authorizes Washington courts to exercise jurisdiction over persons who “comm[it] a tortious act within” the state. Respondents may contend that if their product liability claims are valid, then TAI committed a tortious act in Washington. *Grange*, 110 Wn.2d at 757 (“Where an injury occurs in Washington, “it is an inseparable part of the ‘tortious act’ and that act is deemed to have occurred in this state for purposes of the long-arm statute.”). Respondents may then suggest that due process requirements can be dispensed with because the long arm statute confers jurisdiction. This argument is of course backwards—due process limits the reach of the long arm statute, not the other way around.

“[T]he Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal’s authority to proceed against a defendant.” *Noll*, 188 Wn.2d 412 (quoting *Goodyear Dunlop Tires Ops., SA v. Brown*, 564 U.S. 915, 923 (2011)). Accordingly, personal jurisdiction is a two-step inquiry: “(1) does the statutory language purport to extend jurisdiction, and (2) would imposing jurisdiction violate constitutional principles,” and Washington courts cannot exercise jurisdiction unless doing so passes *both* statutory and constitutional muster. *Grange*, 110 Wn.2d at 756. Indeed, in *Grange* the Washington

Supreme Court rejected jurisdiction on constitutional grounds after holding the facts of that case fell within its statutory authority. *Id.* at 762.

For all the reasons discussed above, even if Respondents' claims satisfy RCW 4.28.185's criteria for statutory jurisdiction, they do not satisfy the Due Process Clause's criteria for constitutional jurisdiction. Any effort by Respondents' to shortcut the required two-step inquiry must be rejected, and their claims dismissed on constitutional grounds.

#### **V. CONCLUSION**

TAI had no purposeful contact with Washington that relate to or gave rise to Respondents' claims—a constitutional requirement for the exercise of personal jurisdiction. Accordingly, the trial court's denial of TAI's motion to dismiss must be reversed, and the case remanded with instructions to dismiss TAI from this action for lack of personal jurisdiction.

RESPECTFULLY SUBMITTED this 17th day of May, 2019.

LANE POWELL PC

By *s/Hans N. Huggler*  
David M. Schoeggl, WSBA #13638  
Hans N. Huggler, WSBA #51584  
*Attorneys for Defendant-Appellant Textron  
Aviation, Inc.*

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the within and foregoing document upon the following persons:

<p><i>Attorneys for Respondent Downing, et al.:</i></p> <p>Alisa Brodkowitz, WSBA No. 31749  Rachel M. Luke, WSBA No. 42194  Friedman Rubin PLLP  1109 – 1st Avenue, Suite 501  Seattle, WA 98101  alisa@friedmanrubin.com  rachel@friedmanrubin.com  jvick@friedmanrubin.com</p> <p>Karen J. Scudder, WSBA No. 35351  John J. Greaney, WSBA No. 11252  Greaney Law Firm, PLLC  203 Madison Avenue  Kent, WA 98032  kscudder@greaneylaw.com  jgreaney@greaneylaw.com</p>	<p><input checked="" type="checkbox"/> <b>by Washington State Appellate Courts’ Electronic Filing Portal</b></p> <p><input type="checkbox"/> <b>by Electronic E-mail</b></p> <p><input type="checkbox"/> <b>by First Class Mail</b></p> <p><input type="checkbox"/> <b>by Hand Delivery</b></p> <p><input type="checkbox"/> <b>by Overnight Delivery</b></p> <p><input checked="" type="checkbox"/> <b>by Washington State Appellate Courts’ Electronic Filing Portal</b></p> <p><input type="checkbox"/> <b>by Electronic E-mail</b></p> <p><input type="checkbox"/> <b>by First Class Mail</b></p> <p><input type="checkbox"/> <b>by Hand Delivery</b></p> <p><input type="checkbox"/> <b>by Overnight Delivery</b></p>
<p><i>Attorneys for Respondent Blair Losvar, Personal Representative of The Estate of Albert E. Losvar, deceased:</i></p> <p>Mark S. Northcraft, WSBA No. 7888  Aaron D. Bigby, WSBA No. 29271  Northcraft Bigby P.C.  819 Virginia Street, Suite C-2  Seattle, WA 98101  Marks_northcraft@northcraft.com  Aaron_bigby@northcraft.com  Christina_weidner@northcraft.com</p>	<p><input checked="" type="checkbox"/> <b>by Washington State Appellate Courts’ Electronic Filing Portal</b></p> <p><input type="checkbox"/> <b>by Electronic E-mail</b></p> <p><input type="checkbox"/> <b>by First Class Mail</b></p> <p><input type="checkbox"/> <b>by Hand Delivery</b></p> <p><input type="checkbox"/> <b>by Overnight Delivery</b></p>

Lilly_tang@northcraft.com	
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DATED this 17th day of May, 2019, at Seattle, Washington.

*s/ Lou Rosenkranz*

Lou Rosenkranz, Legal Assistant

# **APPENDIX A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

JOLYN L. SPECTER, et al.,

Plaintiffs,

v.

RAINBOW KING LODGE, INC., et al.,

Defendants.

Case No. 3:17-cv-00194-TMB

ORDER ON MOTION TO DISMISS  
FOR LACK OF JURISDICTION AND  
MOTION TO CONTINUE  
(DKTS. 26 & 35)

TEXAS TURBINE CONVERSIONS, INC.,  
and RECON AIR CORPORATION,

Third-Party Plaintiffs,

v.

JOHN FURNIA, JR.,

Third-Party Defendant.

RECON AIR CORPORATION,

Cross Claimant,

v.

RODGER GLASPEY, et al.,

Cross Defendants.

**I. INTRODUCTION**

Defendant Stolairus Aviation, Inc. (“Stolairus”) filed a motion to dismiss for lack of personal jurisdiction at docket 26. Plaintiffs oppose this motion, and also filed a motion to continue in order to conduct necessary jurisdictional discovery at docket 35. For the following

reasons, Defendant Stolairus' motion to dismiss is **GRANTED IN PART**, and Plaintiffs' motion to continue is **GRANTED IN PART** and **DENIED IN PART**.

## II. BACKGROUND

This case concerns a plane crash that occurred on September 15, 2015, shortly after takeoff from East Wind Lake, Alaska.<sup>1</sup> Plaintiffs' decedent, James E. Specter, and Plaintiff David W. Wood, Jr. were passengers on the plane, a DeHavilland DHC-3 "Otter" aircraft.<sup>2</sup> The plane was owned and operated by Defendant Rainbow King Lodge, Inc. ("Rainbow King").<sup>3</sup> In April 2014, Defendant Recon Air Corporation ("Recon Air") installed a kit in the aircraft "known as Stol Kit STC SA00287NY, a Baron Stol Kit manufactured by Stolairus Aviation, Inc."<sup>4</sup>

As relevant to the present motions, Plaintiffs contend that Defendant Stolairus "caused the aircraft to crash to the ground" as the STOL Kit "changed the center of gravity, making the center of gravity too far aft and contributing to or causing a stall and or loss of control of the aircraft," and that Stolairus "failed to inspect, identify, and warn" of this change.<sup>5</sup> Plaintiffs bring claims against Stolairus for negligence, strict liability, misrepresentation/breach of warranties,

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<sup>1</sup> Dkt. 1 at ¶ 1; *see also* Dkt. 17 at ¶ 1; Dkt. 25 at ¶ 1; Dkt. 28 at ¶ 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* Plaintiffs also initially claimed that the plane was owned and operated by Jacob Sheely, Rodger Glaspey, Ted Sheely, and or Zachary Sheely, officials at Rainbow King, although Plaintiffs have since dismissed their claims against those defendants. *See* Dkt. 1 at ¶¶ 1, 21; Dkt. 59.

<sup>4</sup> Dkt. 1 at ¶ 4; *see also* Dkt. 25 at ¶ 4; Dkt. 28 at ¶ 4.

<sup>5</sup> Dkt. 1 at ¶ 35.

wrongful death, and personal injury.<sup>6</sup> Stolairus is a Canadian company with its principal place of business in Kelowna, British Columbia, Canada.<sup>7</sup> Plaintiffs assert that the Court has personal jurisdiction over Stolairus as Stolairus “provides support for aircraft worldwide, including the United States and specifically Alaska.”<sup>8</sup>

Stolairus, for its part, moves for dismissal under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction.<sup>9</sup> Stolairus contends that it does not have an office, pay taxes, or own property in Alaska, nor does it advertise in the United States or send its employees to Alaska to provide services for its products.<sup>10</sup> With respect to the specific STOL Kit in question, Stolairus explains that it sold the kit to Recon Air, another Canadian company, and had no contact with Rainbow King or any knowledge that the kit was destined for an aircraft that would operate in Alaska.<sup>11</sup> Stolairus also notes that it has had two direct contacts with Alaska in its eleven years of operation, and that “[n]either of these contacts have anything to do with Rainbow King’s STOL Kit.”<sup>12</sup> Stolairus argues that the Court lacks both general jurisdiction over Stolairus, as Stolairus is not “at home” in Alaska, and specific jurisdiction over Stolairus, as Stolairus did not “purposefully direct” the STOL Kit at issue towards Alaska.<sup>13</sup>

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<sup>6</sup> *Id.* at ¶¶ 52–88, 94–99.

<sup>7</sup> *Id.* at ¶ 23; Dkt. 26 at 3.

<sup>8</sup> Dkt. 1 at ¶ 23.

<sup>9</sup> Dkt. 26.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 3–4.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.* at 5–10.

Plaintiffs filed both a response in opposition and a motion to continue to conduct jurisdictional discovery.<sup>14</sup> Plaintiffs emphasize that Stolairus “admits to two contacts with Alaska,” and ask the Court to “allow Plaintiffs to conduct jurisdictional discovery regarding Stolairus’s admissions and relationships between the defendant parties” to determine whether Stolairus had sufficient minimum contacts with Alaska to support an exercise of specific personal jurisdiction.<sup>15</sup> Plaintiffs also submit that “jurisdictional discovery is required to determine whether the court has general personal jurisdiction over Stolairus.”<sup>16</sup> Plaintiffs seek leave to depose Stolairus and to serve thirty-six proposed requests for production.<sup>17</sup>

Stolairus filed a combined reply in support of its motion to dismiss and response in opposition to Plaintiffs’ motion to continue.<sup>18</sup> Stolairus argues that Plaintiffs have offered “no evidence that supports even the inference that Stolairus has contacts with Alaska beyond those Stolairus itself has presented to the Court,” and have not provided “any basis to conclude discovery will reveal facts pertinent to the Court’s jurisdictional inquiry.”<sup>19</sup> Stolairus asks the Court to deny jurisdictional discovery, or, if the Court determines discovery is warranted, to limit discovery to Stolairus’s sale of the STOL Kit from Stolairus to Recon Air and only allow Plaintiffs to serve one of the thirty-six proposed requests for production.<sup>20</sup>

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<sup>14</sup> Dkt. 33; Dkt. 35.

<sup>15</sup> Dkt. 33 at 5–8; Dkt. 35 at 3.

<sup>16</sup> *Id.* at 8.

<sup>17</sup> *See* Dkt. 36.

<sup>18</sup> Dkt. 39; Dkt. 40 (same document).

<sup>19</sup> Dkt. 39 at 2, 4.

<sup>20</sup> *Id.* at 4–5.

Lastly, Plaintiffs filed a reply in support of their motion to continue.<sup>21</sup> Plaintiffs contend that Stolairus’s products are “pervasive” in Alaska, and stress that “[i]f the Court has any question as to personal jurisdiction over Stolairus, jurisdictional discovery is appropriate.”<sup>22</sup> Plaintiffs note that that Stolairus produces and installs “kits modifying deHavilland ‘Otter’ and ‘Beaver’ aircraft,” and that “Alaska has the largest market share of those aircraft models anywhere in the United States.”<sup>23</sup> Plaintiffs also argue that discovery should not be limited to Stolairus’s sale of the specific STOL Kit to Recon Air, as the proposed discovery is relevant to both the specific and personal jurisdiction standards and proportional to this case.<sup>24</sup>

### III. ANALYSIS

Where a defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff bear the burden of demonstrating that jurisdiction is appropriate.<sup>25</sup> If “the motion is based on written materials rather than an evidentiary hearing, ‘the plaintiff need only make a prima facie showing of jurisdictional facts.’”<sup>26</sup> Although the plaintiff may not “simply rest on the bare allegations of its complaint,” any “uncontroverted allegations in the complaint must be

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<sup>21</sup> Dkt. 43.

<sup>22</sup> *Id.* at 3, 5.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* at 5–7.

<sup>25</sup> *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002).

<sup>26</sup> *Id.* (quoting *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990)).

taken as true,”<sup>27</sup> and “any evidentiary materials submitted on the motion ‘are construed in the light most favorable to the plaintiff[ ] and all doubts are resolved in [its] favor.’”<sup>28</sup>

Jurisdictional discovery “may be appropriately granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.”<sup>29</sup> However, when “a plaintiff’s claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants, the [c]ourt need not permit even limited discovery.”<sup>30</sup> A court may deny a request for jurisdictional discovery that is “based on little more than a hunch that it might yield jurisdictionally relevant facts.”<sup>31</sup>

“Where, as here, there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits.”<sup>32</sup> Alaska’s long-arm statute is coextensive with federal due process requirements.<sup>33</sup> Due process “requires that the defendant ‘have certain minimum contacts’ with the forum state ‘such that the maintenance of

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<sup>27</sup> *Id.* (quoting *Amba Mktg. Sys., Inc. v. Jobar Int’l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977) and citing *AT & T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996); *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)).

<sup>28</sup> *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1187 (9th Cir. 2002) (quoting *Metro. Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1064 n.1 (9th Cir. 1990)).

<sup>29</sup> *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) (quoting *Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977)).

<sup>30</sup> *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006) (quoting *Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 562 (9th Cir. 1995)).

<sup>31</sup> *Boschetto*, 539 F.3d at 1020.

<sup>32</sup> *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

<sup>33</sup> *Alaska Telecom, Inc. v. Schafer*, 888 P.2d 1296, 1299 (Alaska 1995).

the suit does not offend traditional notions of fair play and substantial justice.”<sup>34</sup> “Depending on the strength of those contacts, there are two forms that personal jurisdiction may take: general and specific.”<sup>35</sup> Plaintiffs argue that Stolairus could be subject to both general and specific jurisdiction.<sup>36</sup>

*A. General jurisdiction*

Courts have general jurisdiction over a foreign corporation “only if the corporation’s connections to the forum state ‘are so continuous and systematic as to render [it] essentially at home in the forum State.’”<sup>37</sup> The “paradigmatic circumstance for exercising general jurisdiction” is when a “corporate defendant is incorporated or has its principal place of business in the forum state.”<sup>38</sup> “Only in an ‘exceptional case’ will general jurisdiction be available anywhere else.”<sup>39</sup>

Stolairus is not incorporated and does not have its principal place of business in Alaska.<sup>40</sup> Stolairus also submits that it does not maintain an office, pay taxes, own property, advertise in,

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<sup>34</sup> *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015) (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)).

<sup>35</sup> *Picot*, 780 F.3d at 1211.

<sup>36</sup> Dkt. 43 at 3.

<sup>37</sup> *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1020 (9th Cir. 2017) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

<sup>38</sup> *Id.*

<sup>39</sup> *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014) (quoting *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 n. 19 (2014)); see also *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1070 (9th Cir. 2015) (explaining that “the general jurisdiction inquiry examines a corporation's activities worldwide—not just the extent of its contacts in the forum state—to determine where it can be rightly considered at home”) (citing *Daimler AG.*, 134 S. Ct. at 762 n.20).

<sup>40</sup> Dkt. 27-1 at 2.

or send employees to Alaska to support its products, and reports only “two known contacts” with the state.<sup>41</sup> Plaintiffs note that Stolairus STOL kits have Supplemental Type Certificates for DeHavilland DHC-3 “Otter” and DHC-2 “Beaver” planes and provide evidence that a majority of Otter and Beaver aircraft are registered in Alaska, and argue that Stolairus’ products are “pervasive” in Alaska.<sup>42</sup>

While this evidence may suggest that some Stolairus products are reaching Alaska, it does not indicate that Stolairus itself has additional contact with the state, let alone the “continuous and systematic” contact necessary to render a foreign corporation “at home” in Alaska.<sup>43</sup> As none of the evidence before the Court, viewed in the light most favorable to Plaintiffs, suggests that Stolairus could potentially be “at home” in Alaska, Plaintiffs’ request to take jurisdictional discovery is **DENIED** and Stolairus’ motion to dismiss is **GRANTED** with respect to general jurisdiction.

*B. Specific jurisdiction*

The Ninth Circuit applies a three-part test in analyzing claims of specific personal jurisdiction:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

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<sup>41</sup> *Id.*

<sup>42</sup> Dkt. 43 at 3–4.

<sup>43</sup> *Accord In re Crash of Aircraft N93PC on July 7, 2013, at Soldotna, Alaska*, No. 3:15-CV-0112-HRH, 2018 WL 1613769, at \*3 (D. Alaska Apr. 3, 2018). Moreover, Plaintiffs’ unsupported contention that “Stolairus has downplayed its contacts with and business in Alaska,” in the face of specific denials by Defendant Stolairus, is precisely the sort of “hunch” that does not warrant jurisdictional discovery. Dkt. 43 at 7.

(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.<sup>44</sup>

The plaintiff bears the burden of satisfying the first two prongs of the test.<sup>45</sup> If the plaintiff is successful, the burden shifts to the defendant to “present a compelling case” that the exercise of jurisdiction would be unreasonable.<sup>46</sup>

The first prong of this test includes both purposeful availment and purposeful direction, and “may be satisfied by purposeful availment of the privilege of doing business in the forum; by purposeful direction of activities at the forum; or by some combination thereof.”<sup>47</sup> In claims concerning intentional torts, the Ninth Circuit evaluates purposeful direction by applying the “effects” test from *Calder v. Jones*,<sup>48</sup> and Plaintiffs direct the Court to this test in their briefing.<sup>49</sup> However, “the *Calder* test applies only to intentional torts,”<sup>50</sup> and Plaintiffs’ assertions are not

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<sup>44</sup> *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015) (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)).

<sup>45</sup> *Schwarzenegger*, 374 F.3d at 802.

<sup>46</sup> *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985)).

<sup>47</sup> *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006).

<sup>48</sup> 465 U.S. 783, 788–89 (1984); *see also Picot*, 780 F.3d at 1213.

<sup>49</sup> *See* Dkt. 33 at 6. The *Calder*-effects test “requires that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002); *see also Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir.2006) (en banc)).

<sup>50</sup> *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 460 (9th Cir. 2007); *see also Cottle v. W. Skyways Inc.*, No. 117CV00049DADBAM, 2017 WL 1383277, at \*4 (E.D. Cal. Apr. 18, 2017) (collecting cases and concluding that as “plaintiffs' complaint asserts contract and negligence claims” the court “will therefore apply the purposeful availment test”); *Purely*

limited to such claims.<sup>51</sup> In products liability cases, courts generally conduct a purposeful availment analysis.<sup>52</sup> Purposeful availment requires that the defendant “have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state.”<sup>53</sup> The “mere placement of a product into the stream of commerce,” without “something more,” will not constitute purposeful availment;<sup>54</sup> instead, “defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum.”<sup>55</sup>

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*Pomegranate, Inc. v. Fallon Trading Co.*, No. SACV150840DOCJCGX, 2015 WL 13283452, at \*3 (C.D. Cal. Nov. 24, 2015) (concluding that “[b]ecause the claims at issue do not involve intentional torts,” the “purposeful availment standard provides the proper analysis (at least based on *Holland America* and its progeny”).

<sup>51</sup> Plaintiffs assert claims against Stolairus for “negligence,” “strict liability,” “misrepresentation/breach of warranties,” “wrongful death,” and “personal injury.” See Dkt. 1 at ¶¶ 52–57 (negligence), 58–74 (strict liability), 75–88 (misrepresentation/breach of warranties) 94–96 (wrongful death), 97–99 (personal injury). Indeed, Plaintiffs do not clarify in their complaint whether they are asserting an intentional or negligent misrepresentation claim.

<sup>52</sup> See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (“As a general rule, the exercise of judicial power is not lawful unless the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . . There may be exceptions, say, for instance, in cases involving an intentional tort. But the general rule is applicable in this products-liability case.”) (internal citations omitted); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011).

<sup>53</sup> *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990) (quoting *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir.1988)); see also *J. McIntyre Mach.*, 564 U.S. at 882 (“The principal inquiry in cases of this sort is whether the defendant’s activities manifest an intention to submit to the power of a sovereign.”).

<sup>54</sup> *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 459 (9th Cir. 2007) (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987)).

<sup>55</sup> *J. McIntyre Mach.*, 564 U.S. at 882; see also *Anhing Corp. v. Viet Phu, Inc.*, 671 F. App’x 956, 959 (9th Cir. 2016) (unreported).

Plaintiffs do not point to any specific conduct by Stolairus, but seek to conduct further jurisdictional discovery as the “facts do not indicate that the geographic scope of Stolairus was limited to British Columbia.”<sup>56</sup> Plaintiffs note that Stolairus has admitted to two contacts with Alaska, and that the Federal Aviation Administration published an Airworthiness Directive addressing Stolairus STOL kits and at least two Alaska pilots made public comments regarding this directive.<sup>57</sup> Plaintiffs also argue, as described above, that Stolairus produces STOL kits used in DeHavilland Otter and Beaver aircraft and that the majority of these aircraft are registered in Alaska.<sup>58</sup> Stolairus, for its part, contends that it sold the STOL kit at issue to Recon Air, a Canadian company, with no knowledge of the kit’s final destination.<sup>59</sup> Stolairus argues that any jurisdictional discovery is unnecessary, but alternatively, asks the Court to limit any jurisdictional discovery to the sale of the specific STOL kit from Stolairus to Recon Air.<sup>60</sup>

Plaintiffs’ jurisdictional facts are, at best, sparse. Although Stolairus may have been aware some of its STOL kits were likely to end up in Alaska based on the number of Beaver and Otter planes present in the state and the pilot comments, this does not constitute purposeful availment, as Plaintiffs must show that Stolairus in some way targeted Alaska.<sup>61</sup> Moreover, under the second prong of the personal jurisdiction test, Plaintiffs must show that Stolairus’s

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<sup>56</sup> Dkt. 33 at 7.

<sup>57</sup> *Id.* at 6–7.

<sup>58</sup> Dkt. 43 at 6–7.

<sup>59</sup> Dkt. 40 at 3.

<sup>60</sup> *Id.* at 4–8.

<sup>61</sup> To the extent Plaintiffs’ claims do include intentional torts and the purposeful direction test applies, Plaintiffs likewise have not identified any “intentional act” by Stolairus that was “expressly aimed” at Alaska.

forum-related activities have a nexus with the alleged claims. Plaintiffs, to date, have not provided the Court with any evidence that Stolairus performed some type of affirmative conduct that intentionally targeted Alaska, or that such conduct relates to Plaintiffs' claims.

However, as there are some, albeit tenuous, connections between Stolairus and Alaska, the Court will permit Plaintiffs to conduct limited jurisdictional discovery to attempt to make "a more satisfactory showing of the facts."<sup>62</sup> In light of the requirements for personal jurisdiction, this discovery will be limited to Stolairus's contacts with Alaska having to do with Stolairus's STOL kits. Plaintiffs will be allowed to depose Stolairus only on this issue, and as agreed to by Plaintiffs, the deposition will take place in British Columbia.<sup>63</sup> The Court will address discovery costs when jurisdictional discovery is complete. Plaintiffs' motion to continue is therefore **GRANTED** with respect to specific jurisdiction. The Court requests supplemental briefing from the parties following the close of jurisdictional discovery, and will defer ruling on Defendants' motion to dismiss with respect to specific jurisdiction until receipt of this briefing.

#### IV. CONCLUSION

For the foregoing reasons, Defendant Stolairus' motion to dismiss is **GRANTED IN PART**, and Plaintiffs' motion to continue is **GRANTED IN PART** and **DENIED IN PART**. Jurisdictional discovery must be completed by August 1, 2018. Plaintiffs' supplemental

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<sup>62</sup> *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008); see also *In re Crash of Aircraft N93PC on July 7, 2013, at Soldotna, Alaska*, No. 3:15-CV-0112-HRH, 2018 WL 1613769, at \*5 (D. Alaska Apr. 3, 2018) (considering a similar motion to dismiss by Stolairus and request for jurisdictional discovery and concluding "the number of Otters and Beavers in Alaska suggest that it is plausible that Stolairus had an intent to serve the Alaska market," and "[a]lthough this is pretty thin information on which to base a request to take jurisdictional discovery, the court will exercise its discretion to permit plaintiffs to take discovery").

<sup>63</sup> Dkt. 43 at 7.

response to Stolairus's motion to dismiss shall be filed on or before August 20, 2018. Stolairus's supplemental brief shall be filed ten days after the filing of Plaintiffs' supplemental brief.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 13th day of June, 2018.

/s/ Timothy M. Burgess  
TIMOTHY M. BURGESS  
UNITED STATES DISTRICT JUDGE

**LANE POWELL PC**

**May 17, 2019 - 4:33 PM**

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