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67654-7

Court of Appeals No. 67654-7-1

IN THE WASHINGTON COURT OF APPEALS  
DIVISION ONE

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SAIPRASAD KUNABOINA

Plaintiff/Respondent,

v.

RAJASHEKHAR REDDY GARLAPATI, individually and the marital community composed of Rajashekhar Reddy Garlapati and Jane Doe Garlapati; VENKAT REDDY VENUMULA, individually and the marital community composed of Venkat Reddy Venumula and Jane Doe Venumula; SUDHIR VEMURI, individually and the marital community composed of Sudhir Vemuri and Jane Doe Vemuri, VIVEK SHARMA, and the marital community composed of Vivek Sharma and Jane Doe Sharma, HEADWAY GLOBAL TECHNOLOGIES, LLC., a Texas Domestic Limited Liability Company; NICOINFO SYSTEMS, INC., an Iowa Domestic For-Profit Corporation; DIBON SOLUTIONS, INC., A Texas Foreign For-Profit Corporation,

Defendants/Appellants,

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BRIEF OF APPELLANTS

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## I. INTRODUCTION

This case presents the question of whether Washington may exercise personal jurisdiction over Dibon Solutions (“Dibon”), a Texas Corporation and Mr. Vivek Sharma (“Mr. Sharma”), its former employee. Neither Dibon nor Mr. Sharma entered into an employment contract with Plaintiff, conducted any business in Washington (advertising, offices, authorized agents or otherwise), or availed themselves of the benefits or protections of Washington’s laws.

Dibon and Mr. Sharma contend that they are not subject to the personal jurisdiction of the Snohomish County Superior Court (“Trial Court”) and thus filed their Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to CR 12(b)(2) or, in the Alternative, to Dismiss for Failure to State a Claim Pursuant to CR 12(b)(6).

On August 12, 2011, the Honorable Eric Z. Lucas denied Defendants’ Motion to Dismiss for Lack of Personal Jurisdiction pursuant to CR 12(b)(2) and struck Defendants’ Motion to Dismiss for Failure to State a Claim pursuant to CR 12(b)(6). Following those orders, Dibon and Mr. Sharma filed a Petition for Review in this Court which was granted on April 30, 2012, and this Brief of Appellants follows.

## **II. ASSIGNMENTS OF ERROR**

The trial court erred in—

1. Entering the Order Denying Dibon Solution, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to CR 12(b)(2). CP 85-87;
2. Entering the Order Denying Vivek Sharma's Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to CR 12 (b)(2). CP 85-87;
3. Striking Dibon Solution, Inc.'s and Vivek Sharma's Motion to Dismiss for Failure to State a Claim Pursuant to CR 12(b)(6)  
CP 85-87.

## **II. ISSUES PRESENTED**

In its order dated April 30, 2012, this Court identified the following issues to be briefed:

1. Whether the superior court acted properly in viewing the evidence presented and the pleadings in the light most favorable to Mr. Kunaboina in ruling on the motion to dismiss pursuant to CR 12(b)(2)?
2. Whether, based on the record before it, the superior court erred in denying the motion as to Mr. Sharma?

3. Whether, based on the record before it, the superior court erred in denying the motion as to Dibon?
4. Where the superior court denies a motion to dismiss for lack of personal jurisdiction without resolving facts in controversy, must the order denying the motion be deemed a temporary order and must the defendants be given an opportunity to have the facts found by a trier of fact, either in a subsequent pre-trial hearing or at the trial itself?

### **III. STATEMENT OF THE CASE**

Mr. Kunaboina sued Dibon and Mr. Sharma for breach of contract and failure to pay wages under RCW 49.48 *et seq.* CP 15. Mr. Kunaboina is a Washington resident. CP 16. Dibon is a Texas corporation doing business solely in Texas. CP 21-28. Mr. Sharma is a resident of Texas and is a former employee of Dibon. CP 23-28. Mr. Sharma was an employee of Dibon during the events at issue in Mr. Kunaboina's complaint.

On or about December 10, 2008, Dibon entered into a Supplier Agreement ("Agreement") with Headway Global, a Texas corporation ("Headway") to obtain the technical services necessary to complete a contracted job with one of Dibon's clients. CP 17, 40.

Headway assigned its employee, Mr. Kunaboina, to perform the services described in the Agreement. CP 17-18, 22. Mr. Kunaboina performed the services, as an employee of Headway, at a facility located in Washington. CP 22. Following a dispute over wage payments, Mr. Kunaboina filed suit. CP 15.

In response, Defendants Dibon and Mr. Sharma filed a CR 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction (“Motion”). CP 85-87. The Motion also included a request to dismiss under CR 12(b)(6). CP 85-87.

The trial court denied the Motion. CP 85-87. The trial court did not provide for a resolution of disputed facts to be made at a hearing prior to trial or at trial pursuant to CR 12(d).

On October 6, 2011, Dibon and Mr. Sharma moved for discretionary review in this Court. On April 30, 2012, this Court granted the motion.

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW**

The Appellate Court reviews the denial of a motion to dismiss for lack of jurisdiction under CR 12(b)(2) *de novo*. *In re Estate of Kordon*, 157 Wn.2d 206, 209, 137 P.3d 16 (2006).

Under the *de novo* standard, the Court of Appeals engages in the same inquiry as the trial court and views the evidence in the light most favorable to the non-moving party. *Roger Crane & Assoc., Inc., v. Felice*, 74 Wn. App. 769, 773, 875 P.2d 705 (1994). A reviewing court, on appeal, considers only such evidence as was admitted in the trial court. *Casco Co. v. Public Utility Dist. No. 1 of Thurston County*, 37 Wn.2d 777, 784, 226 P.2d 235 (1951). The Court of Appeals must also give the plaintiff the benefit of all reasonable inferences from the evidence presented. *Gujjosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

In such a review, the party asserting jurisdiction, here Mr. Kunaboina, is required to demonstrate, in his complaint, a *prima facie* showing of jurisdiction. *Precision Laboratory Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 725, 981 P.2d 454 (1999). The party asserting jurisdiction has the burden of establishing its existence. *Bershaw v. Sarbacher*, 40 Wn. App. 653, 655, 700 P.2d 347 (1985). In order to set forth a *prima facie* case for personal jurisdiction over Dibon and Mr. Sharma, Mr. Kunaboina was required to have pled, in accordance with CR 11, that the statutory language in RCW 4.28.185(1) purports to extend jurisdiction over the conduct alleged, and that the exercise of personal jurisdiction

would not violate due process. *Grange Ins. Ass'n v. State*, 110 Wn.2d 752, 756, 757 P.2d 933 (1988). As shown below, Mr. Kunaboina has not met his burden.

**B. THERE IS NO PERSONAL JURISDICTION OVER DIBON OR MR. SHARMA.**

There are two types of personal jurisdiction: general and specific. *Washington Equipment Mfg. Co. Inc., v. Concrete Placing Co. Inc.*, 85 Wn. App. 240, 244, 931 P.2d 170 (1997). General jurisdiction allows a non-resident defendant to be sued in Washington for any claim when “the defendant’s actions in the state are so substantial and continuous that justice allows the exercise of jurisdiction even for claims not arising from the defendant’s contacts within the state.” *Raymond v. Robinson*, 104 Wn. App. 627, 633, 15 P.3d 697 (2001). For example, in *Hein v. Taco Bell, Inc.*, 60 Wn. App. 325, 803 P.2d 329 (1991), this Court found a valid exercise of general jurisdiction where Taco Bell: (1) registered as a foreign corporation in Washington for 14 years, (2) operated 16 restaurants in the Seattle area and others throughout the state, (3) employed hundreds of Washington residents, (4) purchased supplies and sold goods within Washington, and (5) benefitted from

such Washington governmental services as police and fire protection. *Id.* at 331.

Specific jurisdiction, on the other hand, is act specific, and is governed by Washington's "long-arm statute," which provides in pertinent part:

- (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits...to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
  - (a) The transaction of any business within this state;
  - (b) The commission of a tortious act within this state;....

RCW 4.28.185(1).

Even if RCW 4.28.185(1)(a) or (b) is facially satisfied, the exercise of personal jurisdiction must comport with due process. "The Due Process Clause 'does not contemplate that a state may make binding a judgment...against an individual or corporate defendant with which the state has no contacts, ties, or relations.'" *Shaffer v. Heitner*, 433 U.S. 186, 216, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319, 90 L.Ed. 95, 66 S.Ct. 154 (1945). )Therefore, for due process to be satisfied, the following factors must co-exist:

- (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
- (2) The cause of action must arise from, or be connected with, such act or transaction; and
- (3) The exercise of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice....

*Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767, 783 P.2d 78 (1989). That a non-resident's act had some impact in Washington is not alone sufficient under the Constitution to exercise personal jurisdiction. The plaintiff must present evidence that the defendant *purposefully* conducted activities in the state "invoking the benefits and protections of our laws." *Raymond v. Robinson*, 104 Wn. App. 627, 637 15 P.3d 697 (2001) (emphasis added).

Here, Dibon's involvement with Headway was in no way purposefully aimed at Washington, or with the intent that Headway hires a Washington employee. Further, Mr. Kunaboina has failed to allege any facts indicating that Dibon invoked or received any benefit or protection from Washington law.

Finally, the Court may not aggregate the contacts of multiple defendants; rather, the requirements of *International Shoe Co. v. Washington*, must be met as to each defendant over whom the Court asserts jurisdiction. *Huebner v. Sales Promotion, Inc.*, 38

Wn. App. 66, 70-71, 684 P.2d 752, 756 (Wn. Ct, App. 1984) (*citing Rush v. Savchuk*, 444 U.S. 320, 62 L.Ed.2d 516, 100 S.Ct. 571 (1980)). Thus, each defendant's conduct and connection with the forum state must be such that he should reasonably foresee being brought into court in Washington State. *Id.* (*citing World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed.2d 490, 100 S. Ct. 559 (1980)).

**1. There Are No Grounds For General Jurisdiction Over Either Mr. Sharma Or Dibon.**

General jurisdiction is appropriate when a nonresident defendant is "transacting substantial and continuous business within the state of such a character as to give rise to legal obligation." *Raymond v. Robinson*, 104 Wn. App. 627,633 15 P.3d 697 (2001). In his complaint, Mr. Kunaboina fails to allege specific facts to prove that either Dibon or Mr. Sharma have continuous and systematic contacts with the State of Washington to support the exercise of general jurisdiction. To the contrary, as established above, Dibon or Mr. Sharma do not have, and never have had, substantial and continuous contacts with the State of Washington. The undisputed evidence shows:

- Dibon is a corporation incorporated pursuant to the laws of California. CP 39.

- Dibon's principal place of business is located in the city of Carrollton, Dallas County, Texas. CP 39.
- Dibon is not a resident of Washington and neither is required to maintain nor maintains a registered agent for service in Washington. CP 40.
- Dibon does not maintain a place of business, office, or telephone number in Washington and currently has no employees, servants or agents within the state. CP 40.
- Dibon has not entered into any contracts with Washington residents, nor has it entered into any contracts whereby either party is to perform the contract in whole or in part in the state of Washington. CP 41.
- Dibon does not currently engage in business or perform any of its operations in Washington. CP 41.
- Dibon does not own, lease, or rent any real or personal property located in Washington. CP 41.
- Dibon does not maintain any type of bank or securities account in Washington. CP 41.
- Dibon does not pay corporate taxes in Washington. CP 41.
- Dibon does not actively advertise or market itself in Washington. CP 41.
- Dibon has not physically performed any acts in Washington purposefully directed toward Washington or Washington residents. CP 41.
- Dibon has not committed any tort, in whole or in part, within the state of Washington. CP 42.
- Other than the present lawsuit, Dibon has not been sued in nor has it testified, been deposed, or

otherwise participated in any judicial proceeding or arbitration in Washington. CP 42.

- Mr. Sharma resides in the city of Frisco, Collin County, Texas. CP 41.
- Mr. Sharma has never been to the State of Washington. CP 41.
- Mr. Sharma does not personally maintain a place of business, office or telephone number in Washington, and he personally has no employees, servants or agents within the state of Washington. CP 41-42.
- Mr. Sharma has not personally entered into any contracts with Washington residents, nor has he personally entered into any contracts whereby either party is to perform the contract in whole or in part in the state of Washington. CP 42.
- Mr. Sharma does not personally engage in business or perform any operations in Washington. CP 42.
- Mr. Sharma does not personally own, lease or rent any real or personal property located in Washington. CP 42.
- Mr. Sharma does not personally maintain any type of personal bank or securities account in Washington. CP 42.
- Mr. Sharma does not personally pay taxes in Washington. CP 42.
- Mr. Sharma does not personally advertise or market in Washington. CP 42.
- Mr. Sharma has not personally performed any acts in Washington purposefully directed toward Washington or Washington residents. CP 42.

- Mr. Sharma has not personally committed any tort, in whole or in part, within the state of Washington. CP 42.
- Other than the present lawsuit, Mr. Sharma has not personally been sued in Washington nor has he personally testified, been deposed, or otherwise participated in any judicial proceeding or arbitration in Washington. CP 42.<sup>1</sup>

The undisputed evidence shows that Dibon and Mr. Sharma lack substantial and continuous contacts with Washington. The emails between Dibon and Headway pertaining in *small* part to Mr. Kunaboina are not sufficient. CP 74-84; *Boschetto v. Hansing*, 539 F.3d 1011, 1023 (9th Cir. 2008) (holding that emails to a California purchaser of an online good was not enough to exercise personal jurisdiction in California because the email communications were nothing more than a limited and un-substantial contact with the forum.)

Without evidence of continuous and substantial contact with Washington, there are no grounds for asserting general jurisdiction over Dibon and Mr. Sharma. *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 416, 80 L.Ed.2d 404, 104 S. Ct. 1868 (1984)

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<sup>1</sup> A simple internet search would have revealed the state of incorporation for Dibon (California), the lack of a registered agent in Washington for Dibon, and for Dibon and Mr. Sharma, the lack of a physical office or residence in the State of Washington, the lack of property ownership in the State of Washington, the lack of advertising directed at Washington residents, and the failure to be named in any lawsuit filed in the State of Washington.

(finding no general jurisdiction over defendant even though it ventured to the forum state and negotiated a contract for transportation in the forum state, purchased approximately eighty percent of its helicopter fleet--worth over \$4 million--and other related equipment from vendors in the forum state at regular intervals, and sent pilots and other personnel to the forum state for training.).

These cases establish that parties with far more substantial and purposeful contacts with the forum state than Dibon and Mr. Sharma were not subject to general jurisdiction. Accordingly, since Mr. Kunaboina has not established facts sufficient to show the Court should exercise general jurisdiction over Dibon and Mr. Sharma, his claims should have been dismissed.

## **2. Dibon Never Conducted Business in Washington**

To assert specific jurisdiction under RCW 4.28.185(1)(a), Mr. Kunaboina must show that Defendants "purposefully did some act or consummated some transaction in" Washington, and that Mr. Kunaboina's alleged injuries arose from that act. *Raymond v. Robinson*, 104 Wn. App. 627, 637, 15 P.3d 697 (2001). Mr. Kunaboina cannot show either.

Mr. Kunaboina has never been an employee of Dibon, nor has Dibon ever entered into an employment contract or any other contract with Mr. Kunaboina. CP 22, 41. The *only* connection Dibon had to Mr. Kunaboina at all is that Mr. Kunaboina was an employee of Headway, with whom Dibon contracted to provide qualified technical services personnel to work for certain of Dibon's clients. CP 40. By contracting with Headway to provide a technician, Dibon did not choose, seek out, or solicit the services of Mr. Kunaboina in Washington or elsewhere, but rather left the decision of employment up to Headway. CP 22. Under the Agreement, it was Headway who was solely responsible for paying all wages to, its employee, Mr. Kunaboina for work performed by him. CP 22. Dibon has no obligation, under the Agreement or otherwise, to make any payment for wages to Mr. Kunaboina. CP 22. Further, Dibon did not deliver any payments for wages directly to Mr. Kunaboina. CP 22. Dibon was only responsible for providing payments to Headway once received from its client, Tek Systems and then invoiced by Headway. CP 22. Additionally, the Agreement was entered into in Texas, between two Texas entities. CP 22. All payments made by Dibon to Headway were issued from Dibon in Texas and sent to Headway, in Texas. CP 22.

Moreover, Mr. Kunaboina was not a party to the Agreement between Dibon and Headway. But, even if he was a party, that would not be determinative. The mere execution of a contract with a state resident alone is not sufficient to fulfill the “purposeful act” requirement for jurisdiction. *MBM Fisheries, Inc. v. Bollinger Mach; Shop & Shipyard, Inc.*, 60 Wn. App. 414, 423, 804 P.2d 627 (1991); *King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79, 85 L.Ed.2d 528, 105 S.Ct. 2174 (1985).

In contract disputes, purposeful availment often turns on which party solicited the agreement and where. *Byron Nelson Co. v. Orchard Mgmt. Corp.*, 95 Wn. App. 462, 465-66, 975 P.2d 555, *review denied*, 138 Wn.2d 1024 (1999). Here, Dibon did not seek to enter into any contract with Mr. Kunaboina, and it certainly did not seek him out in Washington or anywhere. CP 41. Dibon did not make any wage payments to Mr. Kunaboina in Washington or elsewhere. CP 40. The lone connection to Washington is that Mr. Kunaboina happens to reside in the state, and was hired for his technical services by Headway, with whom Dibon contracted.

Here, the correct inquiry for purposes of determining personal jurisdiction is that of Dibon’s purposeful acts. Simply put, Dibon neither conducted any purposeful act in Washington nor

sought to transact any business with Mr. Kunaboina in Washington. All of Dibon's actions were conducted in the State of Texas, not Washington. Without a showing of purposeful availment, underlying contract obligations, or solicitations for an ongoing business relationship sufficient to warrant personal jurisdiction in Washington, there is simply no justification for maintaining this suit in Washington. See, e.g., *Precision Laboratory Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 728, 981 P.2d 454 (1999) (holding that Washington properly exercised personal jurisdiction over a Georgia Corporation who entered into and negotiated a long-term custom manufacturing contract, a contract which had substantive effects in Washington and which created future obligations).

Here, Dibon not only lacked contacts with Washington, but this matter involved only a short-term services contract between Dibon and Headway, Mr. Kunaboina's employer, not Mr. Kunaboina directly, and certainly not in contemplation of a future or ongoing relationship.

### **3. Mr. Sharma Was Not Doing Business in Washington**

Mr. Sharma's connection to Washington is even more tenuous than Dibon's. Mr. Kunaboina cannot aggregate the contacts of multiple defendants; rather, he must establish specific jurisdiction for each defendant. *Huebner v. Sales Promotion, Inc.*, 38 Wn. App. 66, 70-71, 684 P.2d 752 (1984) However, this is exactly what Mr. Kunaboina has done, grouping Mr. Sharma and Dibon together (along with the other defendants) into a collective. There is simply no evidence that Mr. Sharma purposefully conducted *any* act in Washington in his individual capacity such that he could expect to be sued in this State.

The undisputed evidence shows that Mr. Sharma is merely the Director of Operations for Dibon; he was not a party to the Agreement, has never been to Washington State, and had absolutely nothing to do with this dispute in his individual capacity.

CP 39

Even in the unlikely event that the Court finds that it possesses specific jurisdiction over Dibon, Mr. Kunaboina does not to point out Mr. Sharma's individual contacts with Washington, or why Dibon's corporate veil should be pierced such that Mr. Sharma

should be subject to specific jurisdiction. (Notably, Mr. Sharma is not an owner of Dibon, so even piercing the corporate veil could not confer jurisdiction). CP 39.

The corporate separateness that shields an owner from liability for the acts or liabilities of the separate corporate entity are disregarded only under certain conditions; the result is that if the corporation is found liable or subject to the jurisdiction of the court, the owner is likewise subject to liability and personal jurisdiction. *Rapid Settlementes, Ltd. v. Symetra Life Ins. Co.*, 166 Wn. App. 683, 692, 271 P.3d 925 (2012). Typically, the injustice which dictates a piercing of the corporate veil is one involving fraud, misrepresentation, or some other form of manipulation used to intentionally evade a duty. *Truckweld Equip. Co., Inc. v. Olson*, 26 Wn. App. 638, 644-45, 618 P.2d 1017 (1980).

Mr. Kunaboina offered no allegations to support a finding that Dibon or Mr. Sharma conducted any sort of business in Washington generally or with regard to Mr. Kunaboina during the times relevant to this case. Nor does Mr. Kinaboina offer allegations tending to support the finding of ownership, fraud, misrepresentation, or the intention to evade any owed duty, such that piercing the corporate veil would be justified. The undisputed

facts presented by Dibon and Mr. Sharma specifically preclude any such conclusion. Thus, jurisdiction under the “doing business” prong of Washington’s long-arm statute is not applicable, and Mr. Kunaboina’s claim should be dismissed.

**4. Neither Dibon or Sharma Committed Any Tort**

A Washington court will have personal jurisdiction over a cause of action arising from a defendant’s commission of a “tortious act” in Washington. RCW 4.28.185(1)(b). Mr. Kunaboina fails to adequately allege that Defendants committed a tort against him by allegedly failing to pay him wages as required under Washington’s wage statute (RCW 49.48, *et. seq.*). Without a tort, there is no personal jurisdiction under the “tortious act” prong of RCW 4.28.185.

**a. A Wage Claim is Not a Tort**

First, a wage claim is not a tort. There is no case in Washington holding that a claim for unpaid wages under RCW 49.48.010 constitutes a tort. Rather, it is a statutorily backed contract claim, which the Washington Supreme Court has stated are not tort claims. *See e.g. Wright v. Terrell*, 162 Wn.2d 192, 196, 170 P.3d 570 (2007) (holding that claims under the public

employee unfair labor practice claims were not tort claims for damages).

It is well established under the independent duty doctrine, that unless there is an independent duty to the plaintiff, *outside of the contractual obligation*, the only relief available is that on the contract. *E.g. Jackowski v. Borchelt*, 174 Wn.2d 720, 278 P.3d 1100 (2012)

Here, while Dibon and Mr. Sharma expressly deny the existence of any valid contract between themselves and Mr. Kunaboina, if the Court finds a valid contract with duties owed there under, then the assertion of personal jurisdiction under the “tortious conduct” prong of Washington’s long-arm statute would be improper.

**b. Dibon is Not Mr. Kunaboina’s Employer—Headway Is**

However, to the extent Mr. Kunaboina’s wage claim represents a tort, the Court should still decline to exercise personal jurisdiction over Dibon and Mr. Sharma under RCW 4.28.185(1)(b). Pursuant to RCW 49.48.010, under which Mr. Kunaboina brings his wage claim, it is unlawful for any employer to withhold or divert any portion of an *employee’s wages* (emphasis added). As has been

conclusively established above, Dibon is not and never has been Mr. Kunaboina's employer. CP 41. In fact, the agreement between Dibon and Headway specifically states as much:

“[Headway] agrees that any technical services personnel provided by [Headway] are employees of [Headway] and are **not employees of [Dibon] or Client**”

(Emphasis added). CP 47.

Therefore, Dibon cannot be liable for violating RCW 49.48.010 because it was not Mr. Kunaboina's employer as a matter of fact and of law.

**c. Mr. Sharma is Not An Employer; There is No Basis to Pierce the Corporate Veil**

Similarly, Mr. Sharma cannot be liable to Mr. Kunaboina if Dibon is not Mr. Kunaboina's employer. RCW 49.48.010.

Even if Dibon is found to be Mr. Kunaboina's employer, Mr. Sharma still cannot be personally liable to Mr. Kunaboina. RCW 49.52.070 can impose individual liability against an employer and “any officer, vice principal or agent of any employer.” Under Washington law, a person is considered a “vice principal” and personally liable under RCW 49.52.070 in a wrongful withholding of wages case when that person exercises control over the payment

of funds and acts under that authority. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 523, 22 P.3d 795 (2001).

In contrast, a person who has no control over the payment of wages on behalf of a corporation is not subject to liability. *Id.* There is no evidence that Mr. Sharma exercised control over payment of funds to him and acted under that authority in refusing to pay him. In fact, the evidence is to the contrary. CP 40-42. Thus, Mr. Sharma has no personal liability for the failure to pay wages to Mr. Kunaboina.

**d. No “Tort” Occurred in Washington**

Moreover, Mr. Kunaboina’s “tort” claim does not arise out of a tort which allegedly occurred in Washington. Again, a Washington court will have personal jurisdiction over a cause of action arising from a defendant’s commission of a “tortious act” in Washington. RCW 4.28.185(1)(b). An injury “occurs” in Washington for purposes of the long-arm statute, “if the last event necessary to make the defendant liable for the alleged tort occurred in Washington.” *SeaHAVN, Ltd. V. Glitner Bank*, 154 Wn. App. 550, 569, 226 P.3d 141 ( 2010)

Here, the last event necessary to make Dibon liable to Mr. Kunaboina for his wage claim – Dibon’s alleged failure to pay Mr.

Kunaboina wages – did not occur in Washington. As the undisputed evidence shows, Dibon never sent any payment to Mr. Kunaboina in Washington, nor was it obligated to do so under the Agreement. CP 40. Instead, all payments were made by Dibon to Headway in Texas. CP 40. Thus, if Dibon was obligated to pay wages to Mr. Kunaboina (for which it denies obligation) and failed to do so, that failure by Dibon occurred in Texas, not Washington. The same reasoning applies with regard to Mr. Sharma to the extent Mr. Kunaboina can establish vice principal liability against him (which Mr. Sharma also vehemently denies).

Thus, considering Defendants' alleged tort did not "occur" in Washington, the court cannot exercise personal jurisdiction over them under the "tortious act" prong of Washington's long-arm statute. Without a tort committed in Washington, there can be no jurisdiction under RCW 4.28.185(1)(b). Thus, Mr. Kunaboina's claims against Dibon and Mr. Sharma should be dismissed.

**5. Exercising Personal Jurisdiction over Defendants in Washington Would Violate Due Process.**

Even if Mr. Kunaboina's Complaint states a claim and there exists some ostensible ground for the Court to exercise personal jurisdiction over Dibon and Mr. Sharma, such an exercise of

personal jurisdiction would violate due process. For personal jurisdiction to be constitutional, three factors must be satisfied;

- (1) the defendant must have purposefully committed an act in this state;
- (2) that act must have reasonably caused Plaintiffs' injury; and
- (3) the assumption of jurisdiction must "not offend traditional notions of fair play and substantial justice."

*Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767, 783 P.2d 78 (1989).

The test boils down to the question: Based upon its contact with the forum state, can Appellants reasonably anticipate being haled into court there? *Does 1-9 v. Compcare, Inc.*, 52 Wn. App. 688, 696, 763 P.2d 1237 (1988). Mr. Kunaboina, in order to set forth a *prima facie* case, must demonstrate that Appellants "invoke[ed] the benefits and protections of [Washington] laws." *Id.* The focus of the inquiry is on the quality and nature of [the defendant's] activities in the state...." *Id.*

A mere allegation that Dibon and/or Mr. Sharma have committed a "tortious act" in Washington is not enough to support personal jurisdiction in this state without a showing of "minimum contacts:"

To contend, as the appellant must, that because there was a tortious consequence in this state that there was a tortious act and that because there was a tortious act the defendant Poe is "subject to liability" is sound as far as it goes, but to then contend that because the Poes are "subject to liability" in the strict tort context of the definition that without more they can be served under our long arm statute is to resort to bootstrap logic and to ignore constitutional limitations. Though the Poes may be "subject to liability," nevertheless, personal jurisdiction must be constitutionally obtained. Consideration must be given to "minimum contacts" and other factors which bear upon "traditional notions of fair play and substantial justice."

*Oliver v. American Motors Corp.*, 70 Wn.2d 875, 886, 425 P.2d 647 (1967).

Defendants did not enter into a contract with Mr. Kunaboina in Washington, Defendants did not seek out Mr. Kunaboina's services in Washington, and Defendants did not pay Mr. Kunaboina in Washington. Therefore, exercise of personal jurisdiction over Dibon or Mr. Sharma would not satisfy the first criterion of the due process analysis. Moreover, without some relevant connection between Dibon, Mr. Sharma and Mr. Kunaboina in Washington, his alleged cause of action cannot "arise from or be connected with" anything that defendants allegedly did in Washington. Therefore, exercise of personal jurisdiction over Defendants would not satisfy the second criterion of the due process analysis.

Finally, requiring Dibon and Mr. Sharma to defend a case in Washington state, where they have done nothing to receive the benefits and protections of Washington law, and where all the Defendants, witnesses, business records, etc. are located in Texas does not comport with “traditional notions of fair play and substantial justice.” The inequities of haling Appellants into this Court are self evident. The burden upon Appellants to travel across the country to litigate this action in Washington would be substantial.

Under the above written laws, and the undisputed facts, the exercise of personal jurisdiction over Dibon and Mr. Sharma offends traditional notions of fair play and substantial justice. Accordingly, exercise of personal jurisdiction over them does not satisfy the third criterion of the due process analysis.

**6. The Agreement Mandates That This Suit Be Brought In Texas.**

Finally, this case should be dismissed because of the mandatory choice-of-forum provision in the Agreement. As referenced above, Mr. Kunaboina is not a party to the Agreement between Dibon and Headway. CP 40. However, Mr. Kunaboina clearly attempts to rely on the Agreement to justify his breach of

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contract claim against Dibon and Mr. Sharma. Mr. Kunaboina cannot seek to enforce some provisions of the Agreement to which he feels he is entitled under, and ignore other provisions which are not as favorable to his alleged claims. An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used.

*Snohomish County Public Transp. Benefit Area Corp. v. Firstgroup America, Inc.*, 173 Wn.2d 829, 840, 271 P.3d 850 (2012).

Here, it is clear that Dibon and Headway intended that *any* dispute arising under the terms of the contract shall be resolved in a Texas forum. Here, the Agreement contains the following choice-of-forum provision, which plainly states that Texas is the exclusive jurisdiction for any disputes arising out of the Agreement:

“[A]ny lawsuits pertaining to this Agreement or the services provided hereunder **shall** be decided in the federal or state courts in the state of Texas”

(Emphasis added). CP 49.

If Mr. Kunaboina is deemed to be a party (or third party beneficiary) under the Agreement such that he can hold Dibon responsible there under, then Mr. Kunaboina must also be bound

by all the terms of the Agreement, and must bring the claim in Texas.

Forum selection clauses are prima facie valid. *Dix v. ICT Group, Inc.*, 160 Wn. 2d 826, 834, 161 P.3d 1016 (2007). Courts will enforce a forum selection clause unless it is unfair or unreasonable. *Bank of Am, N.A. v. Miller*, 108 Wn. App. 745, 748, 33 P.3d 91 (2001) The party arguing that the forum selection clause is unfair or unreasonable bears a heavy burden of showing that trial in the chosen forum would be so seriously inconvenient as to deprive the party of a meaningful day in court. *Id.* Absent evidence of fraud, undue influence, or unfair bargaining power, courts are reluctant to invalidate forum selection clauses as they increase contractual predictability. *Id.*

The Agreement could not be clearer in providing that Texas is the exclusive jurisdiction for disputes arising out of the Agreement. Mr. Kunaboina cannot meet his lofty burden of establishing that litigating this case in Texas instead of Washington would be so seriously inconvenient as to deprive him of his day in court, nor has he even pled as much in his Complaint. Thus, the Court should enforce the choice of laws provision in the Agreement and dismiss the case in favor of a Texas venue.

**C. THE TRIAL COURT'S DENIAL OF THE MOTION TO DISMISS SHOULD BE TEMPORARY, AT BEST.**

CR 12(d) prescribes the method for presenting CR 12(b) defenses prior to trial, and states that a party may, but is not required to, ask the court to decide CR 12(b) defenses prior to trial. *French v. Gabriel*, 116 Wn.2d 584, 589, 806 P.2d 1234 (1991). [N]o court rule mandates the assertion of a motion to dismiss before trial, and [f]urthermore, even if a party brings a motion to dismiss, the court may, in its discretion, defer determination until trial. *Id.*

Here, considering the trial court failed to make any findings of fact to resolve disputed facts and issues, the order denying the Motion should remain temporary until a trier of fact has had the opportunity to do so. The facts surrounding the email transactions and the duties underlying the employment contract have yet to be resolved, and if this case is to move forward to trial, the order denying the Motion should be deemed temporary allowing Defendants an opportunity to have the facts found by a trier of fact.

**D. MR. KUNABOINA'S CLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM AS NO CONTRACTUAL PRIVACY EXISTS AS TO DIBON OR MR. SHARMA**

A dismissal pursuant to CR 12(b)(6) for failure to state a claim is proper when the court can conclude that there are no facts

that would justify the relief requested. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). The Rule requires dismissal where the plaintiff includes contentions that show on the face of the complaint that there is some insuperable bar to relief. *Id.* The plaintiff's contentions are presumed to be true. *Id.* When evaluating a defendant's motion to dismiss a complaint based on failure to state a claim, the appellate court presumes the truthfulness of the complaint's allegations, and is reviewed de novo. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007).

Here, Mr. Kunaboina has alleged a breach of contract claim and a wages owing claim, without establishing the existence of any valid contract or contractual obligation owed as between Mr. Kunaboina and Dibon or Mr. Sharma. In fact, the evidence presented, notably the contract between Dibon and Headway specifically states:

Supplier agrees that any technical services personnel provided by [Headway] are employees of [Headway] and are not employees of [Dibon] or [Tek Systems]; that [Headway] at all times retains the primary control over its personnel, including the right to recruit, qualify, hire, terminate, set compensation and benefits, establish codes of conduct . . . ; that [Headway's] personnel will not be entitled to any rights, benefits or privileges provided by [Dibon] or [Tek Systems] to its own employees; that neither [Dibon] nor [Tek Systems] will be liable for payment of

employment taxes, worker's compensation, . . . . .  
[Headway] shall indemnify and hold harmless [Dibon]  
from all damages, costs and expenses resulting from  
any claims by [Headway's] personnel. . . .

CP 47-48.

Without a contract, and therefore contractual privity, and/or contract based claims, a dismissal under CR 12(b)(6) is appropriate. See *Baddeley v. Seek*, 138 Wn. App. 333, 156 P.3d 959 (2007) (affirming defendant engineering firm's CR 12(b)(6) motion to dismiss where Plaintiff homeowner was not found to be a third-party beneficiary nor in contractual privity with the engineering firm, thus there was no grounds for a contract based claim).

While both Dibon and Mr. Sharma agree that Mr. Kunaboina is entitled to his earned wages, the correct party to this suit would be his employer, Headway, for which Mr. Kunaboina has a valid employment contract. CP 22. Dibon's only contractual obligation is to Headway, and it is Headway's obligation to pay Mr. Kunaboina. CP 22, 47. For the reasons stated above, Dibon and Mr. Sharma request that this Court reverse the trial court's striking of their CR 12(b)(6) Motion to Dismiss, as Mr. Kunaboina has failed to allege any relief under a breach of contract theory where no contract exists as between him and Dibon.

**E. ATTORNEYS FEES ARE APPROPRIATELY AWARDED TO DIBON AND MR. SHARMA**

Pursuant to RCW 4.28.185(5), a prevailing Defendant is entitled to their reasonable costs and attorneys fees as compensation for the added costs of litigating in Washington. *Payne v. Saberhagen Holdings, Inc.*, 147 Wn. App. 17, 36, 190 P.3d 102 (2008). Defendants Dibon and Mr. Sharma request attorney fees incurred in this litigation. RAP 18.1.

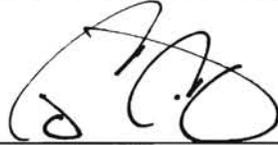
**VI. CONCLUSION**

There are no grounds to assert personal jurisdiction over either Dibon or Mr. Sharma in the State of Washington. Defendants conduct no business in Washington, and have not purposefully availed themselves of the laws and protections of this state sufficient to justify or make reasonably foreseeable being haled into Washington to defend suit. Therefore, Appellants request that this court reverse the trial court's denial of their motion to dismiss for lack of personal jurisdiction and reverse and remand to the trial court for further proceedings, including Appellant's application for attorneys fees at the trial court level.

Dated this 15 day of October, 2012.

THE LAW OFFICE OF CATHERINE C. CLARK, PLLC

By:



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