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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

JIM SCHUMACHER,

Appellant,

v.

IMG GROUP, LLC

Respondent

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

IMG hired Appellant Jim Schumacher and entered into an employment contract with him. Because IMG offered no office or other space suitable for his work it had him work from his home in Bonney Lake part of the time. He periodically travelled to various sites – including Washington State University – to do certain portions of his work. CP 142. IMG was aware that Schumacher worked a good portion of the time in Washington and never objected. *Id.* IMG never provided a work space as promised in the contract. CP 22, 142-43. Under Washington law the exercise of personal jurisdiction over IMG is appropriate because it knew a substantial amount of Schumacher's work under his contract with IMG was performed in Washington. This dispute centers around that work and the contract. Schumacher asks the Court to reverse the trial court's erroneous ruling and find that personal jurisdiction exists over IMG under Washington's Long Arm statute, RCW 4.28.195. The Court should also reverse the related award of attorneys' fees to IMG. CP 165-66, 270-71.

II. STATEMENT OF CASE

During the course of Schumacher's employment with IMG, he worked a substantial portion of the time in Washington because IMG never provided him with the work space required by his Employment Agreement. In the course and scope of his employment with IMG,

Schumacher registered IMG to do business in Washington, purchased equipment and supplies for IMG in Washington from Washington manufacturers, called on Washington companies on behalf of IMG, and performed testing of resins developed by IMG at Washington State University. CP 141-43. All of these acts took place in Washington within the course and scope of Schumacher's employment with IMG. IMG paid the State of Washington, not the State of Utah, workers compensation and employment security taxes for Schumacher. *Id.*

Eventually, disillusioned with IMG's failure to provide consideration promised under the contract, Schumacher filed the underlying lawsuit in Washington. CP 1-5. At the time he filed, he had not been served with the separate suit in Utah that IMG had previously filed. CP 17. IMG later moved to dismiss this suit asserting that the exercise of jurisdiction over IMG was improper. The trial court granted the motion and dismissed Schumacher's claims, then awarded over \$33,000 in attorneys fees under RCW 4.28.185(5).

III. RESTATED ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) Did the trial court err in failing to exercise personal jurisdiction over IMG where it hired an employee who performed substantial work for IMG in Washington and who was conducting business on behalf of IMG in Washington?

(2) Did the trial court abuse its discretion in awarding over \$33,000 in attorneys fees for a straightforward motion to dismiss for lack of jurisdiction?

IV. ARGUMENT

IMG correctly notes that this court reviews the issue of jurisdiction *de novo*. The amount of any fees awarded under RCW 4.28.185(5) is reviewed for an abuse of discretion. Similarly, the decision to dismiss a case based upon the doctrine of *forum non conveniens* is reviewed for abuse of discretion. While IMG also correctly notes that the burden of establishing jurisdiction falls upon Schumacher, where the court relies only on affidavits and discovery materials without an evidentiary hearing, uncontroverted allegations in the complaint must be taken as true and conflicts between the affidavits must be resolved in Schumacher's favor. *Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287 F.3d 1182, 1187 (9th Cir. 2002).

Also, it should be noted that the exercise of specific jurisdiction is a three part analysis and the burden shifts to IMG on the third prong. If Schumacher establishes the first two elements: (1) purposeful availment and (2) the action arises out of IMG's forum-related activities; then the burden shifts to IMG to "present a compelling case" that maintaining jurisdiction would not comport with fair play and substantial justice. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir.

2004). In evaluating this third element the Court considers the following factors: (1) extent of defendant's purposeful interjection; (2) burden on the defendant in defending in the forum; (3) extent of conflict with the sovereignty of defendant's state; (4) forum state's interest in adjudicating the dispute; (5) most efficient judicial resolution of the controversy; (6) importance of the forum to plaintiff's interest in convenient and effective relief; and (7) existence of an alternative forum. *Core-Vent Corp. v. Nobel Industries, A.B.*, 11 F.3d 1482, 1487-88 (9th Cir.1993). "None of the factors is dispositive in itself; [courts] must balance all seven." *Id.* at 1488. As outlined below, Schumacher has put forth sufficient evidence to support both IMG's purposeful availment of this forum and it is clear that this dispute arises out of that purposeful availment. Because the exercise of jurisdiction over IMG comports with due process and is reasonable, the Court should reverse the trial court and find that jurisdiction exists over IMG under RCW 4.28.185.

A. IMG Purposefully Availed Itself of the Washington Forum Because It Contracted with a Washington Resident, Knowing He Was Performing Substantial Work under the Contract in Washington.

Washington's Long Arm Statute, RCW 4.28.185(1), provides in relevant part that:

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 said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

- (a) The transaction of any business within this state;
- (b) The commission of a tortious act within this state;
- (c) The ownership, use, or possession of any property whether real or personal situated in this state;

Long-arm jurisdiction standards are less stringent than those necessary to establish general jurisdiction. *Bartusch v. Oregon State Bd. of Higher Educ.*, 131 Wn. App. 298, 126 P.3d 840 (2006). Personal jurisdiction under the Long Arm Statute need not be predicated on defendant's presence in the forum state; instead jurisdiction may be asserted where defendant's out-of-state conduct causes harm in the forum state. *Huebner v. Sales Promotion, Inc.*, 38 Wn. App. 66, 684 P.2d 752 (1984).

It is undisputed that Schumacher, as agent for IMG transacted business in this state, used property in this state, and essentially had Schumacher working out of his home office in Washington part of the time because IMG failed to provide him with a workplace. IMG was a start up and trying to save itself money by hiring its R&D team to work from their respective homes, except when traveling to certain sites for

projects.¹ While IMG claims that it did not solicit Schumacher, a party who does not initiate business contact is not thereby immune from personal jurisdiction of Washington courts if a business relationship subsequently arises. *Sorb Oil Corp. v. Batalla Corp.*, 32 Wn. App. 296, 299, 647 P.2d 514 (1982), citing *Cofinco of Seattle Ltd. v. Weiss*, 25 Wn. App. 195, 605 P.2d 794 (1980). See also *Barer v. Goldberg*, 20 Wn. App. 472, 582 P.2d 868 (1978) (If a transaction is initiated outside the state in contemplation that some phase of it will take place in this state, this meets the requirement that there be a transaction of business within this state).

Whether a contract with a Washington resident signifies necessary purposeful availment of opportunity to do business in Washington depends upon additional factors, including contemplated future consequences, along with the terms of the parties' contract and the parties' actual course of dealing. *Van Steenyk v. Interamerican Management Consulting Corp.*, 834 F. Supp. 336, 340 (E.D. Wash. 1993). IMG hired a Washington resident that it flew in to interview in Utah. While that alone would not be enough to exercise jurisdiction over IMG, when IMG hired Schumacher it was fully aware and contemplated that Schumacher would be performing a substantial portion of his work in Washington. It was contemplated that Schumacher would continue to work in Washington

¹ The fact that IMG claims some work was done elsewhere is not dispositive. It cannot dispute Schumacher's declaration which explains that he worked in Washington – and, even if it did dispute this that fact it must be viewed in Schumacher's favor.

until IMG determined when and where it would build a facility to house the R&D work he was to perform.

IMG's contemplation that some work by Schumacher would be performed in Washington is enough: "it is sufficient if a transaction is initiated outside the state in contemplation that some phase of it will take place in the forum state." *Barer v. Goldberg*, 20 Wn. App. 472, 478, 582 P.2d 868, 872 (1978) (citing *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wn.2d 679, 430 P.2d 600 (1967)). Even if not contemplated, it is undisputed that Schumacher actually performed work in Washington for IMG and IMG paid the State of Washington Department of Employment Security and Labor and Industries, recognizing that he was a Washington employee. Determining whether a nonresident defendant purposefully established minimum contacts with the state includes consideration of whether that defendant purposefully derived benefit from interstate activities or purposefully availed itself of privilege of acting within Washington, thereby invoking benefits and protections of its laws. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 599-600, 849 P.2d 669 (1993). Clearly, IMG availed itself of Washington's employment security laws and knew full well it was employing Schumacher in Washington and that Schumacher performed testing in Washington for IMG at WSU.

This is consistent with the analysis in *Van Steenwyk*, 834 F. Supp. at 341-42, which found no purposeful availment of the Washington forum by a defendant employer who hired plaintiff to perform work entirely in Indonesia. However, in cases where some portion of the future work under the contract will be performed in the forum state, courts have held that this was sufficient for the exercise of specific jurisdiction. *See e.g., Roth v. Garcia Marquez*, 942 F.2d 617, 622 (9th Cir. 1991) (contract that would have generated some portion of the future work in California was sufficient to find that the defendant had purposefully availed himself of the privilege of doing business in California).

B. Schumacher's Claim Arises Out of IMG's Forum Related Activities.

The second element Schumacher must establish is that his claims against IMG arise out of IMG's Washington activities. *Byron Nelson Co. v. Orchard Management Corp.*, 95 Wn. App. 462, 468, 975 P.2d 555 (1999) ("Specific jurisdiction is established under RCW 4.28.185 if the cause of action arises from or is connected to the foreign entity's purposeful conduct in Washington."). It is clear that the claims asserted by Schumacher relate entirely to IMG's failure to honor its promises to him relating to his employment, specifically its failure to provide certain compensation promised under the contract that he substantially performed

in the State of Washington. Clearly, this issue “arises from” the described contacts with Washington.

C. IMG Fails to Present a Compelling Case that Jurisdiction would Not Comport with Due Process.

This “reasonableness,” test requires the court to consider the following factors: (1) extent of defendant's purposeful interjection; (2) burden on the defendant in defending in the forum; (3) extent of conflict with the sovereignty of defendant’s state; (4) forum state’s interest in adjudicating the dispute; (5) most efficient judicial resolution of the controversy; (6) importance of the forum to plaintiff's interest in convenient and effective relief; and (7) existence of an alternative forum. *Core-Vent Corp. v. Nobel Industries, A.B.*, 11 F.3d 1482, 1487-88 (9th Cir. [Wash.] 1993). “None of the factors is dispositive in itself; [courts] must balance all seven.” *Id.* at 1488; *State of Washington, Dept. of Revenue v. WWW.Dirtcheapcig.com, Inc.*, 260 F.Supp.2d 1048 (W.D. Wash. 2003).

Under RCW 4.28.195, due process does not require that the act or transaction in this state out of which the action has arisen be either extensive or physical. It is only necessary that there be substance to the contact within this state, and that the impact within the state of the nonresident’s activity is foreseeable. *International Sales & Lease, Inc. v. Seven Bar Flying Service, Inc.*, 12 Wn.App. 894, 533 P.2d 445 (1975).

Review of the applicable factors does not suggest that the exercise of jurisdiction over IMB would be unreasonable:

(1) Extent of defendant's purposeful interjection.

Defendant IMG hired a Washington resident as an employee and knew he was performing work in Washington. It paid the Department of Employment Security and Labor and Industries contributions in relation to this employment, purposefully availing itself of the laws of this State.

(2) Burden on the defendant in defending in the forum.

The burden of the defendant in defending here is not substantial. IMG hired employees throughout the country, saved money by not providing them with a work facility, and cannot be surprised that it is being haled into court in Washington in a dispute with its Washington employee.

(3) Extent of conflict with the sovereignty of defendant's state.

No conflict between Utah or Washington law was identified or appears to exist.

(4) Forum state's interest in adjudicating the dispute.

Utah has no greater interest than Washington in resolving this dispute. In the context of employment matters, Washington courts, as a matter of public policy, have a strong interest in ensuring that Washington employees are treated fairly.

(5) Most efficient judicial resolution of the controversy.

Nothing suggests that Utah is any more efficient a forum than Washington for this dispute.

(6) Importance of the forum to plaintiff's interest in convenient and effective relief.

This forum would provide plaintiff with a more convenient and effective means of resolution than being forced to travel to Utah to resolve this employment contract dispute.

(7) Existence of an alternative forum.

An alternate forum exists in Utah, but that alone is not dispositive.

Ultimately, no one factor controls and in light of IMG's purposeful availment of the laws of Washington by having an employee located here and working in Washington. There is a strong interest in having this matter resolved by a Washington court.

D. The Award of Fees and Costs Should be Reversed.

The award of fees and costs was entirely premised upon the trial court's erroneous determination that there was no basis to exercise personal jurisdiction under IMG under RCW 4.28.195. Because that decision was in error the fees should be reversed. Further, there has been a compelling argument made that the amount of the fees (over \$33,000) for one motion, involving two short declarations from the same witness, was excessive. While there is no Washington case exactly involving these

facts, the principles and cases involved are not so complex as to suggest that the amount of hours and time expended were reasonable. Perkins Coie charges extremely high rates for its services, and judging by the strong qualifications of its lawyers, some efficiencies should be realized. That was not the case and the amount of fees was sufficiently high to constitute an abuse of discretion even if the court finds that an award of fees was appropriate under RCW 4.28.195(5). CP 228-236.

More importantly, any award of attorneys' fees required that the trial court engage in an analysis and determine an appropriate lodestar fee calculation. No such findings or analysis are in the record or in the order. CP 270-71. Thus, it is impossible to determine whether or how the trial court abused its discretion, because no findings are on record to justify the exorbitant award. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 652 (1998) ("Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.")

V. CONCLUSION

For the foregoing reasons, Appellant Jim Schumacher asks the court to reverse the trial court, find that personal jurisdiction exists and remand this case. In conjunction with this reversal the award of fees under RCW 4.28.185(5) should also be reversed. Alternatively, should the court not reverse the trial court's decision that there is no personal jurisdiction

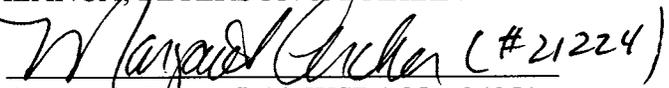
under the long arm statute, the court should reverse the award of fees,
which were exorbitant and an abuse of discretion by the trial court.

Respectfully submitted this 19 day of December, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 19th day of December, 2009, she placed for mailing via U.S. first class mail a true and correct copy of the Reply Brief for Appellant for delivery to counsel of record:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


Gina A. Mitchell