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No. 91998-4

SUPREME COURT OF THE STATE OF WASHINGTON

CANDANCE NOLL, Individually and as Personal Representative
of the Estate of Donald Noll, Deceased,

Respondent,

v.

SPECIAL ELECTRIC COMPANY, INC.,

Petitioner,

American Biltrite, Inc., *et al.*,

Defendants.

FILED
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WASHINGTON STATE
SUPREME COURT

h/h

BRIEF OF AMICUS CURIAE
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

The Court of Appeals' decision in this case implicates applicable concerns for WDTL and for foreign defendants generally, who would benefit from a clear and reliable articulation of law on this vexing question of jurisdiction over a component part manufacturer, addressing not only the due process requirement but also the appropriate procedure and scope of discovery, for a trial court considering a 12(b)(2) motion to dismiss. For the reasons set forth below, WDTL respectfully requests that this Court reverse the Court of Appeals' decision.

II. STATEMENT OF THE CASE

WDTL relies upon the facts set forth in the Petition for Review and in Petitioner's briefing.

III. ARGUMENT

A. The Court of Appeals Applied the Wrong Test When It Determined Special Electric was Subject to Specific Jurisdiction.

Washington's long-arm statute, chapter 4.28 RCW, authorizes the court to exercise jurisdiction over a nonresident defendant to the extent permitted by the due process clause of the United States Constitution. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 766, 783 P.2d 78 (1989). To determine whether the exercise of specific jurisdiction over a foreign corporation will comport with due process, courts apply a three-part test:

(1) that purposeful "minimum contacts" exist between the defendant and the forum state; (2) that the plaintiff's injuries "arise out of or relate to" those minimum contacts; and (3) that the exercise of jurisdiction be reasonable, that is, that jurisdiction be consistent with notions of "fair play and substantial justice."

Grange Ins. Ass'n v. State, 110 Wn.2d 752, 758, 757 P.2d 933 (1988) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). Federal and state law requires that the defendant must have done some act by which it "purposefully avails itself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws." *Walker v. Bonney-Watson Co.*, 64 Wn. App. 27, 34, 823 P.2d 518 (1992) (citing *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)). Foreseeability of causing injury in another state is not a "sufficient benchmark" for exercising personal jurisdiction. *Burger King Corp.*, 471

U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980)). “Instead, ‘the foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.’” *Burger King Corp.*, 471 U.S. at 474. “[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State.” *Id.* at 474–75. “This ‘purposeful availment’ requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of ... the ‘unilateral activity of another party or a third person.’” *Id.* at 475 (internal citations omitted). “Jurisdiction is proper ‘where the contacts proximately result from actions by the defendant *himself* that create a ‘substantial connection’ with the forum State.” *Id.* (emphasis in original, citation omitted).

1. The Court of Appeals’ Decision Conflicts with Asahi, J. McIntyre, and General U.S. Supreme Court Case Law on Stream of Commerce and Specific Personal Jurisdiction.

In *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 1028, 94 L. Ed. 2d 92 (1987), the Supreme Court analyzed the stream of commerce theory in the case of a foreign manufacturer of a component part. The issue was “whether the mere awareness on the part of the foreign defendant that the components it manufactured, sold, and

delivered outside the United States would reach the forum State in the stream of commerce constitutes 'minimum contacts' between the defendant and the forum State[.]" *Id.* at 105. While the Supreme Court unanimously agreed that it was unreasonable to exercise personal jurisdiction over the component manufacturer, the reasoning split the Court into two plurality opinions of four justices each.

The first plurality opinion, authored by Justice O'Connor, concluded that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* at 112. Instead, Justice O'Connor concluded that mere awareness was not enough; that some "additional conduct" was required, which would indicate "an intent or purpose to serve the market in the forum State." *Id.* "[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* Under Justice O'Connor's approach, awareness is necessary but ultimately insufficient to sustain personal jurisdiction.

The second plurality opinion, authored by Justice Brennan, rejected Justice O'Connor's requirement of some "additional conduct." Justice Brennan reasoned that a defendant should be subject to jurisdiction

whenever “the regular and anticipated flow of products,” as opposed to “unpredictable currents or eddies,” leads the product to be marketed in the forum state. *Id.* at 117. “As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.” *Id.* Thus, Justice Brennan would not have required “something more” as Justice O’Connor did, but still required *at least* a defendant’s awareness that its product was being marketed in the forum state.

In addition to those four-justice pluralities, Justice Stevens concurred in the judgment but wrote separately, joined by Justices White and Blackmun, opining that the jurisdictional analysis could be “affected by the volume, the value, and the hazardous character of the components.” *Id.* at 122. Although *Asahi* left considerable confusion in its wake, the requirement common to both four-justice pluralities is that the defendant must at least be aware that its product was “being marketed in” the forum state.

The Supreme Court re-visited stream of commerce theory in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011). As in *Asahi*, however, the Court once again failed to garner a majority in favor of one approach or the other. In *J. McIntyre*, a British manufacturer sold its machines to an independent distributor in the

United States, which in turn marketed the machines throughout the country. *Id.* at 878. At most, four machines were sold by the distributor into New Jersey (where the lawsuit was filed), and plaintiff's complaint arose from a single allegedly malfunctioning machine. *Id.* Justice Kennedy, writing for a four-justice plurality, held there was insufficient evidence to support the exercise of personal jurisdiction over the manufacturer, adopting a position akin to Justice O'Connor's plurality opinion in *Asahi*, whereby "something more" than the mere placement of a product into the stream of commerce was required. *Id.* at 885-86.

Justice Breyer, joined by Justice Alito, declined to join the plurality opinion or adopt the "something more" requirement, but concurred in the judgment. *Id.* at 888-89. Justice Breyer considered the analyses in both the O'Connor and the Brennan concurrences from *Asahi*, and concluded that under either test, personal jurisdiction over J. McIntyre could not be established. *Id.* at 889. The "something more" that Justice O'Connor would have required was not present, but neither was there a "regular ... flow" or "regular course" of sales in New Jersey, nor proof that the defendant delivered its products into the stream of commerce with the expectation that they would be purchased by New Jersey users, to satisfy Justice Brennan's test. *Id.* Accordingly, Justice Breyer concluded that adherence to earlier Supreme Court precedent (such as *Asahi*, or

World-Wide Volkswagen) was sufficient to resolve the matter. *Id.* at 890. In his concurrence, Justice Breyer also explicitly rejected the more expansive or absolute approach proposed by the New Jersey Supreme Court, under which a manufacturer would be subject to personal jurisdiction based solely on the placement of its products in the stream of commerce “so long as it knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.” *Id.* at 890-91 (internal quotes omitted). Justice Breyer further noted that the New Jersey Supreme Court’s approach would constitute a break with the established due process inquiry of whether, “focusing upon the relationship between ‘the defendant, the *forum*, and the litigation,’ it is fair, in light of the defendant’s contacts *with that forum*, to subject the defendant to suit there.” *Id.* (emphasis in original; citations omitted).

2. The Test Applied by the Court of Appeals Constitutes a Dramatic Departure from Justice Breyer’s Analysis.

The instant case, like *Asahi* and *J. McIntyre*, involves a non-resident manufacturer of a component (Special Electric), and an intermediary third-party manufacturer (CertainTeed) positioned in the stream of commerce between the component manufacturer and the eventual plaintiff. While *J. McIntyre* and *Asahi* have failed to produce majority agreement on precisely what due process requires in order to

exercise specific personal jurisdiction over a non-resident component manufacturer, both decisions are clear in their requirement that the component manufacturer *at least* possess an *awareness* that its product is being marketed in the forum State – focusing on the connection between *the component manufacturer* and the forum. Both of the four-justice concurrences in *Asahi* require “awareness on the part of the foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce” as a basis for minimum contacts between the defendant and the forum state. *Asahi*, 480 U.S. at 111-12. (O’Connor plurality) (requiring “aware[ness]” that the product enters the forum state, as well as “something more”); *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment) (requiring “aware[ness] that the final product is being marketed in the forum State” but not the “something more”); *see also*, *World-Wide Volkswagen*, 444 U.S. at 298 (requiring “expectation” that product will end up in forum state). This is also true for both Justice Kennedy’s four-justice plurality in *J. McIntyre* and for Justice Breyer’s two-justice concurrence. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. at 885 (Kennedy plurality) (adopting a position consistent with Justice O’Connor’s opinion in *Asahi*); *Id.* at 890 (Breyer plurality) (holding that prior precedent, including the concurrences from *Asahi*, were sufficient to

find a lack of personal jurisdiction).

In this case, the Court of Appeals cited at length to *J. McIntyre*, and placed specific and considerable reliance on Justice Breyer’s plurality opinion, stating that that two-justice concurrence “is controlling because it resolved the issue on narrower grounds than the plurality’s.” *Noll v. Am. Biltrite, Inc.*, 188 Wn. App. 572, 581, 355 P.3d 279 (2015) (citing *State v. AU Optronics. Corp.*, 180 Wn. App. 903, 919, 328 P.3d 919 (2014)). Nevertheless, the actual test the Court of Appeals went on to apply looked nothing like what Justice Breyer articulated. His concurrence, first and foremost, amounted to a narrow adherence to preexisting precedent, meaning the four-justice concurrences in *Asahi*—both of which would have required at least awareness on the part of a defendant—remained applicable, and should have been dispositive here. Indeed, the Court of Appeals specifically acknowledged that Special Electric did not target Washington, and “may not have actually known” that its product was ending up in Washington at all. *Noll*, 188 Wn. App. at 576¹; see *J. McIntyre*, 564 U.S. at 890. Secondly, Justice Breyer’s concurrence rejected the New Jersey Supreme Court’s proposed test, under which a manufacturer could be subject to personal jurisdiction based solely on the

¹ The plaintiff did not allege in the complaint that Special Electric was aware that its asbestos was a component of an end product that was ending up in Washington, and also did not allege that Special Electric directed its products to Washington. CP 2.

placement of its products in the stream of commerce, coupled with actual or constructive knowledge that its products *might* end up being sold in any of the 50 states. *Id.* at 890-91. Yet, the Court of Appeals adopted a test that essentially mirrors the New Jersey Supreme Court's test, which was rejected in *J. McIntyre*. Finally, Justice Breyer also noted that the jurisdictional inquiry necessarily focuses instead on the relationship between the defendant, the forum, and the litigation. *Id.* at 891 (citations omitted). As discussed further below, Special Electric, and its alleged suit-related conduct, bore no relationship with Washington.

In other words, while purporting to rely on Justice Breyer's concurring opinion as the key basis for its assertion of personal jurisdiction over Special Electric, the test actually applied by the Court of Appeals looked nothing like Justice Breyer's. Rather than requiring awareness by the defendant that its product was being marketed into Washington, the Court of Appeals erroneously focused on the fact that "Special's product was a known hazardous material," one of the factors mentioned by Justice Stevens in *Asahi* as affecting the jurisdictional inquiry. *Noll*, 188 Wn. App. at 583. Justice Stevens' concurrence, however, has never been accepted by a majority of the U.S. Supreme Court or otherwise adopted, nor was it the narrowest basis for the Court's judgment in *Asahi*. Reliance on the hazardous character of the product, or

on any aspect of Justice Stevens' proposed test for was therefore improper.

The Court of Appeals' next based the assertion of personal jurisdiction over Special Electric on the fact that its product, distributed through existing channels of interstate commerce, arrived in the forum state as part of a regular flow or course of sales, and concluded that was sufficient. *Id.* This was clear error—Justice Breyer's concurrence relied on *Asahi* as precedent, but it did so without choosing either Justice O'Connor's or Justice Brennan's tests. *J. McIntyre*, 564 U.S. at 889–90. Indeed, this Court has recently confirmed as much. *State v. LG Elecs., Inc.*, 186 Wn.2d 169, 181, 375 P.3d 1035 (2016) (“Justice Breyer explicitly did not choose either test from *Asahi*.”) (citing *J. McIntyre*, 564 U.S. at 889–90). The Court of Appeals thus erred by applying Justice Brennan's test as dispositive. Moreover, even if it *was* proper to simply apply Justice Brennan's stream of commerce test, the Court of appeals failed to apply it correctly, or to acknowledge that it too contains an awareness requirement. Instead, the Court of Appeals found case-specific jurisdiction over Special Electric even as it explicitly recognized that Special Electric did not target Washington, and “may not have actually known” that its product was ending up in Washington at all. *Noll*, 188 Wn. App. at 576. That finding prevents the proper assertion of personal jurisdiction over Special Electric, under either of the tests set forth in

Asahi, or under Justice Breyer’s concurring opinion from *J. McIntyre*.

The Court of Appeals’ decision was also inconsistent with this Court’s recent decision in *LG Electronics*. The majority opinion, authored by Justice González, affirmed that foreign manufacturers of cathode ray tubes (“CRTs”) had sufficient purposeful minimum contacts with Washington to exercise personal jurisdiction over them. *State v. LG Elecs., Inc.*, 186 Wn.2d at 173. The State argued that those minimum contacts were established by the manufacturers’ placement of the “CRTs into the stream of commerce, with the *knowledge and intent* that their CRTs would be incorporated into products sold in massive quantities throughout the U.S., including in large numbers in Washington.” *Id.* at 178 (emphasis added). The manufacturers, in turn, argued a substantial volume of sales in Washington, alone, could not establish defendants’ purposeful availment, without some additional action specifically targeting Washington (such as forum-specific design or in-forum advertising). *Id.* In short, the manufacturers sought adoption of the “something more” test propounded by Justice O’Connor in *Asahi*, and by Justice Kennedy in *J. McIntyre*.

The majority opinion carefully examined first *Asahi* and then *J. McIntyre*, placing emphasis on Justice Breyer’s concurrence as the narrowest, and thus the controlling, opinion. *Id.* at 178-182 (citing *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)

for the proposition that a concurrence drawn on the narrowest of grounds may be viewed as the Court's holding). This Court distinguished *J. McIntyre*, where the complaint arose out of the malfunction of a single machine, and no more than four machines were sold into the State of New Jersey. *Id.* at 182. The CRTs, by contrast, were incorporated into millions of products sold across the U.S., including in large quantities in Washington, and the complaint alleged that flow of commerce occurred not only with the CRT manufacturers' knowledge, but with their actual intent. *Id.* The holding in *LG Electronics* thus recognizes the requirement, as articulated in both of the four-justice concurrences in *Asahi*, and reasserted in Justice Breyer's concurrence from *J. McIntyre*, that a component manufacturer must intend, or at the very least be aware of, the sale of its products into the forum state; simply placing a product into the stream of commerce cannot be equated with the component manufacturer purposefully directing its activities at the forum. In other words, this Court inherently recognized and adopted the awareness requirement that has long been a facet of U.S. Supreme Court case law on personal jurisdiction over component manufacturers. In the present case, under that requirement articulated now in both the U.S. and Washington State Supreme Courts, the Nolls' failure to even allege such awareness in the complaint, coupled with the Court of Appeals' finding that Special Electric may have lacked

such awareness, is dispositive: there cannot be specific personal jurisdiction in this case.

3. The Court of Appeals' Decision Failed to Limit Its Focus to Special Electric's Suit-Related Conduct, as Required Under *Walden v. Fiore*.

In addition to *J. McIntyre*, the U.S. Supreme Court has issued three recent opinions on personal jurisdiction. Although only *J. McIntyre* dealt specifically with product liability, each has served to tighten the personal jurisdictional requirements that must be met to satisfy due process. One of these cases concerned specific jurisdiction.² In *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014), a unanimous Court rejected the Ninth Circuit's "effects test" for specific jurisdiction.³ *Walden* is significant as the Court's most recent specific jurisdiction case.

In that case, the Ninth Circuit had reversed the trial court's dismissal for lack of jurisdiction, finding that because the Georgia-based

² The other two concerned general jurisdiction, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924, 131 S. Ct. 2846, 180 L.Ed.2d 796 (2011), held that general jurisdiction requires proof that a corporation is "fairly regarded as at home" in the forum State. *Daimler AG v. Bauman*, ___ U.S. ___, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), re-emphasized the "at home" requirement for general jurisdiction and rejected the Ninth Circuit's approach to agency.

³ Although *Walden* was an intentional tort case, it addressed principles of specific jurisdiction that are applicable to all cases. *Walden*, 134 S. Ct. at 1123. Later cases demonstrate, that *Walden's* re-emphasized focus on "whether the defendant's actions connect him to the forum...[.]" *id.* at 1124, is applied in a wide variety of litigation settings. See, e.g., *Picot v. Weston*, 780 F.3d 1206, 1215 (9th Cir. 2015)(tortious interference); *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 434 n.2 (5th Cir. 2014) (contract); *Pub. Impact, LLC v. Boston Consulting Grp., Inc.*, 15-CV-464, 2015 WL 4622028, at *8 (M.D.N.C. Aug. 3, 2015) (trademark infringement); *Presby Patent Trust v. Infiltrator Sys., Inc.*, 14-CV-542-JL, 2015 WL 3506517, at *3 (D.N.H. June 3, 2015) (patent infringement); *Sutcliffe v. Honeywell Int'l, Inc.*, CV-13-01029-PHX-PGR, 2015 WL 1442773 (D. Ariz. Mar. 30, 2015) (negligence).

defendant knew the plaintiffs had a residence in Nevada, he should have anticipated that the effects of his conduct would be felt there, despite the fact that none of the defendant's suit-related conduct occurred in Nevada. *Id.* at 1120. The Supreme Court found the Ninth Circuit's "approach to the 'minimum contacts' analysis impermissibly allows a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis." *Id.* at 1124-25. The Supreme Court ruled that "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id.* at 1123. Instead, "[f]or a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Id.* at 1121.⁴ *Walden* thus requires courts to focus on the defendant's suit-related, or, "challenged," conduct, and whether that conduct created a substantial connection with the forum.⁵ This comports with the Supreme Court's consistent rejection of "attempts to satisfy the defendant focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Id.* at 1122 (*citing*

⁴ "Suit-related conduct" means the defendant's "challenged conduct:" "[The Ninth Circuit's approach] also obscures the reality that *none of petitioner's challenged conduct had anything to do with Nevada itself.*" *Walden*, 134 S.Ct. at 1125 (emphasis added).

⁵ Courts in product liability cases have looked to *Walden* for guidance. See *Tile Unlimited, Inc. v. Blanke Corp.*, 47 F. Supp. 3d 750 (N.D. Ill. 2014); *Gutierrez v. N. Am. Cerruti Corp.*, No. CIV.A. 13-3012, 2014 WL 6969579 (E.D. Pa. Dec. 9, 2014); *Shrum v. Big Lots Stores, Inc.*, No. 3:14-CV-03135-CSBDGB, 2014 WL 6888446 (C.D. Ill. Dec. 8, 2014); *In re Methyl Tertiary butyl Ether (MTBE) Products Liability Litig.*, No. 07 CIV. 10470, 2014 WL 1778984 (S.D.N.Y. May 5, 2014).

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)).

The Court of Appeals nevertheless concluded that Washington sales by third party, *CertainTeed*, of a product that incorporated Special Electric's component part satisfied the minimum contacts inquiry. Under *Walden*, however, that inquiry should have been focused solely on Special Electric, *its* suit-related conduct, and whether *that conduct* created a substantial relationship between Special Electric and Washington. This inquiry is also consistent with Justice Breyer's analysis in *J. McIntyre*. Noll did not plead, and no evidence has established, that Special Electric was aware that the *CertainTeed's* finished product incorporating Special Electric's asbestos was sold or marketed by *CertainTeed* into Washington. CP 2; *see, generally*, CP 100-236. Similarly, the Nolls, who bear the burden of proof, *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 807, 292 P.3d 147 (2013), *aff'd*, 181 Wn.2d 272, 333 P.3d 380 (2014), offered no evidence that Special Electric was aware of *CertainTeed's* distribution or channels of sales, or that Special Electric knew of *CertainTeed* possessing any nationwide distribution network or intent to specifically sell finished products containing Special Electric's product into Washington State.

Instead, the Court of Appeals found personal jurisdiction solely through a speculative connection between Special Electric and Washington via the stream of commerce, by way of defendant's relationship with a third party, CertainTeed. But as *Walden* makes plain, neither a plaintiff's nor a third party's connections to the forum may be relied on to support personal jurisdiction. Special Electric's suit-related or challenged conduct is the manufacture of asbestos and/or its sale to CertainTeed at its plant in California. CP 131-34, 144-68, 170-73. While this conduct would create some connection with the state where the asbestos was manufactured and the state where it was sold to CertainTeed, Special Electric's suit-related conduct did not create *any* connection with Washington, let alone a substantial one, in the absence of pleading or proof that Special Electric was at least aware that CertainTeed was going to ship its final products (containing Special Electric's asbestos) into Washington. Otherwise the pleading and proof merely shows that Special Electric was willing to sell its product to CertainTeed, a manufacturer who then decided on its own how to incorporate the asbestos into its product, and where to ship and market its finished product.⁶ The Court of Appeals'

⁶ The Nolls' complaint contained no allegation that Special Electric was aware its products were marketed or sold in Washington. It alleged only that Special Electric placed its products into the stream of commerce. CP 2. In response, Special Electric submitted additional evidence demonstrating its lack of awareness of any connections with Washington, let alone connections substantial enough to support the exercise of

approach thus cannot be squared with *Walden*'s required focus on the defendant's suit-related conduct, just as it cannot be squared with *Asahi* or either of the four-justice concurrences therein. In short, Special Electric's suit-related conduct did not create a substantial connection between it and Washington.

IV. CONCLUSION

The Court of Appeals' decision contravenes the spirit of the personal jurisdiction analysis set forth in both *Walden* and in the complex chain of case law to come before it. Special Electric's challenged conduct—the sale of products to CertainTeed in California—is not even

personal jurisdiction. The Nolls did not contest or controvert that evidence in the evidentiary materials they submitted in response, and they did not request any jurisdictional discovery at that point or at all, until filing a reply brief in support of their motion for reconsideration. CP 339. At that point, it was too late. In a motion for reconsideration reliant upon the new evidence, the moving party must show, among other things, that such evidence could not have been discovered or submitted before trial by exercise of due diligence. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). But even if the Nolls were entitled to submit new jurisdictional evidence at that point, the evidence and argument they pursued at reconsideration did not address or reflect Special Electric's awareness—instead, it focused on sheer volume, under a theory based simply on Special Electric's placement of its products in the steam of commerce to support an argument about what Special Electric “should have known.”

The fact that the Nolls did not seek a jurisdictional evidentiary hearing before reconsideration, and ultimately did not present any evidence showing Special Electric's awareness, supports the trial court's decision to consider and rely upon the evidence Special Electric presented outside the pleadings. Indeed, such a process is logical and efficient for all parties, including plaintiffs—where a jurisdictional fact is supported by evidence outside the pleadings and undisputed, there is, in essence, an agreement by the parties on that issue, which the court is entitled to rely on. That the Nolls have since adopted a different argument addressing Special Electric's awareness on appeal does not undermine the fact that the trial court adopted the appropriate, as well as the reasonable and efficient, course of action by considering Special Electric's unrefuted evidence that it was not aware CertainTeed was selling its finished product into Washington.

alleged by the Nolls to have occurred in Washington. But more than this, the Court of Appeals' decision runs counter to the prevailing trend in U.S. Supreme Court case law to contract and limit those circumstances where courts may sweep far flung defendants under their authority. In the context of an increasingly interconnected and globalized world of commerce, exercising personal jurisdiction over defendants—even when their alleged suit-related conduct has no connection with the forum state—only serves to position Washington as a police officer to the world, exporting Washington law to defendants that could not have anticipated being haled into court here. The assertion of personal jurisdiction in this case violated Petitioners' due process rights and broke with established federal law. This Court should reverse the Court of Appeals decision.

Respectfully submitted this 2nd day of December, 2016.

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No. 91998-4

SUPREME COURT OF THE STATE OF WASHINGTON

CANDANCE NOLL, Individually and as Personal Representative
of the Estate of Donald Noll, Deceased,

Respondent,

v.

SPECIAL ELECTRIC COMPANY, INC.,

Petitioner,

American Biltrite, Inc., *et al.*,

Defendants.

**APPENDIX TO BRIEF OF AMICUS CURIAE
WASHINGTON DEFENSE TRIAL LAWYERS**

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APPENDIX OF UNPUBLISHED AUTHORITIES

Gutierrez v. N. Am. Cerruti Corp., No. CIV.A. 13-3012, 2014 WL 6969579 (E.D. Pa. Dec. 9, 2014)..... A1-A8

In re Methyl Tertiary butyl Ether (MTBE) Products Liability Litig., No. 07 CIV. 10470, 2014 WL 1778984 (S.D.N.Y. May 5, 2014) A9-A13

Presby Patent Trust v. Infiltrator Sys., Inc., 14-CV-542-JL, 2015 WL 3506517, at *3 (D.N.H. June 3, 2015)..... A14-A20

Pub. Impact, LLC v. Boston Consulting Grp., Inc., 15-CV-464, 2015 WL 4622028, at *8 (M.D.N.C. Aug. 3, 2015)..... A21-A30

Shrum v. Big Lots Stores, Inc., No. 3:14-CV-03135-CSBDGB, 2014 WL 6888446 (C.D. Ill. Dec. 8, 2014) A31-A38

Sutcliffe v. Honeywell Int'l, Inc., CV-13-01029-PHX-PGR, 2015 WL 1442773 (D. Ariz. Mar. 30, 2015)..... A39-A47

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United States District Court,
E.D. Pennsylvania.

Mynor GUTIERREZ, Plaintiff

v.

NORTH AMERICA CERRUTI
CORPORATION and Officine Meccaniche
Giovanni Cerutti, SpA, Defendants.

Civil Action No. 13-3012.

Signed Dec. 9, 2014.

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MEMORANDUM OPINION INTRODUCTION

NITZA I. QUIÑONES ALEJANDRO, District Judge.

*1 Before this Court is a *motion to dismiss Plaintiff's claims against Defendant set forth in the second amended complaint pursuant to Fed.R.Civ.P. 12(b)(2)* filed by Defendant Officine Meccaniche Giovanni Cerutti, SpA ("OMGC") for lack of personal jurisdiction. [ECF 28]. The underlying matter involves a product liability action filed by Mynor Gutierrez ("Plaintiff"), who seeks damages for personal injuries suffered when cleaning a printing press allegedly manufactured and distributed by Defendant OMGC, an Italian corporation, and by Defendant North American Cerutti Corporation ("NACC"), a Delaware corporation (collectively, "Defendants"). Plaintiff opposed the motion to dismiss, [ECF 29], Defendants filed reply briefs, [ECF 32, 33], and OMGC filed a supplemental reply memorandum. [ECF 34].

This matter has been fully briefed and for the reasons stated herein, this Court finds that it cannot exercise either

general or specific jurisdiction over Defendant OMGC since Defendant OMGC has not formed jurisdictionally relevant, continuous and systematic contacts with this forum, nor has it purposefully directed its activities in this forum to avail itself of the privilege of conducting activities here. Therefore, Defendant's motion to dismiss for lack of personal jurisdiction is granted.

BACKGROUND

The issue posed in the motion to dismiss is whether this Court has personal jurisdiction over Defendant OMGC, a foreign corporation. The relevant facts, construed in the light most favorable to Plaintiff, are as follows:¹

Plaintiff, a citizen of Pennsylvania, was employed by Wallquest, Inc., ("Wallquest"), a company that designs and manufactures, *inter alia*, wallpaper and decorative wall coverings.² Wallquest is located in Wayne, Pennsylvania.³ To do his work, Plaintiff used a printing press identified as a Cerutti Model PB330 Gravure Printing Press, Serial No. 1552 (the "Press").⁴ On June 22, 2011, Plaintiff was cleaning the Press when his left arm became caught in it, causing, *inter alia*, severe burns to his arm and post-traumatic stress disorder.⁵

Defendant OMGC is a corporation headquartered in Casale Monferrato, Italy.⁶ Defendant NACC is a Delaware corporation with its principal place of business in New Berlin, Wisconsin.⁷ According to Plaintiff, Defendants specialize in designing, manufacturing, advertising, marketing, distributing, repairing, supplying, and selling printing presses, including the Gravure Printing Press, and component parts for various printing applications, such as wallpaper printing.⁸

The Press involved in Plaintiff's complaint was manufactured by OMGC in 1975 and sold to a company called DITZEL in Bammental, Germany.⁹ Several years before Plaintiff was injured, Wallquest purchased the Press from a German publishing company in Germany and had the Press transported to its facility in Wayne, Pennsylvania.¹⁰ It is unclear whether DITZEL is the German publishing company from which Wallquest purchased the Press.

*2 Procedurally:

On May 30, 2013, Plaintiff filed a complaint against “Cerutti Group Officine Meccaniche Giovanni Cerutti SpA” and NACC, asserting claims for negligence, strict liability, and breach of express and implied warranties.¹¹ Consistent with a stipulation submitted by the parties and approved by this Court on January 17, 2014,¹² Plaintiff filed a second amended complaint pursuant to Federal Rule of Civil Procedure (Rule) 15(c)(1)(C), reflecting a change in the name but not the identity of OMGC.^{13, 14} On February 4, 2014, NACC filed an answer to the second amended complaint.¹⁵ On July 25, 2014, OMGC filed the instant motion to dismiss pursuant to Rule 12(b)(2) asserting the court’s lack of personal jurisdiction.¹⁶

LEGAL STANDARD OF REVIEW

When deciding a motion to dismiss under Rule 12(b)(2) for lack of personal jurisdiction, a court must accept all of the plaintiff’s allegations as true and construe disputed facts in favor of the plaintiff. *Metcalfe v. Renaissance Martne, Inc.*, 566 F.3d 324, 331 (3d Cir.2009); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3d Cir.2002). The burden of demonstrating the facts that establish personal jurisdiction falls on the plaintiff, *Pinker* at 368, and “[w]hile the Court can accept plaintiff’s allegation of jurisdiction as true for the purposes of a motion to dismiss, ‘once a defendant has raised a jurisdictional defense, the plaintiff bears the burden to prove, by a preponderance of the evidence, facts sufficient to establish personal jurisdiction.’” *Bohus v. Fleetwood Motor Homes of IN, Inc.*, 2012 WL 3579609, at *2 (M.D.Pa. Aug.17, 2012) (quoting *Carteret Sav. Bank, F.A. v. Shushan*, 954 F.2d 141, 147 (3d Cir.1992)); *Metcalfe*, 566 F.3d at 331 (citation omitted); *Simeone v. Bombardier–Rotax GmbH*, 360 F.Supp.2d 665, 669 (E.D.Pa.2005) (citing *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 257 (3d Cir.1998); *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1302 (3d Cir.1996)). A plaintiff, however, may not rest solely on the pleadings to satisfy this burden. *Simeone*, 360 F.Supp.2d at 669; *Carteret Sav. Bank*, 954 F.2d at 146. A Rule 12(b)(2) motion “requires resolution of factual issues outside the pleadings, *i.e.*, whether *in personam* jurisdiction actually lies.” *Boyd v. Allied Properties*, 2011 WL 1465454, at *1 (E.D.Pa. Apr.18, 2011) (citing *Clark v. Matsushita Elec. Indus. Co., Ltd.*, 811 F.Supp. 1061,

1064 (M.D.Pa.1993) (quoting *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 66 n. 9 (3d Cir.1984)).

A district court sitting in diversity may assert personal jurisdiction over a nonresident defendant to the extent allowed under the laws of the forum state. *Metcalfe*, 566 F.3d at 331. A state may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has “certain minimum contacts with [the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice,’” *Walden v. Fiore*, — U.S. —, 134 S.Ct. 1115, 1121, 188 L.Ed.2d 12 (2014) (quoting *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)), and its affiliations with the state are so “continuous and systematic” as to render them essentially at home in the forum state. *Daimler AG v. Bauman*, — U.S. —, 134 S.Ct. 746, 754, 187 L.Ed.2d 624 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. —, 131 S.Ct. 2846, 2853, 180 L.Ed.2d 796 (2011) (quotation marks omitted)). Thus, the relationship among the defendant, the forum, and the litigation must be reviewed. *Walden*, 134 S.Ct. at 1121; *Daimler AG*, 134 S.Ct. at 754 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977)).

*3 Generally, to review this relationship requires a two-step inquiry, *IMO Indus.*, 155 F.3d at 258–59; *to wit*: (1) does the forum state’s long-arm statute permit the exercise of personal jurisdiction over the defendant, *see Pennzoil Products Co. v. Colelli & Associates, Inc.*, 149 F.3d 197, 200 (3d Cir.1998) (holding that district court may assert personal jurisdiction “over nonresident defendants to the extent permissible under the law of the state where the district court sits”); and (2) does the exercise of jurisdiction comport with the due process clause of the Constitution. *IMO Indus.*, 155 F.3d at 259.

Here, Plaintiff filed his complaint in Pennsylvania, a state that permits courts to exercise personal jurisdiction over a nonresident to the constitutional limits of the due process clause of the Fourteenth Amendment. 42 Pa.C.S.A. § 5322,¹⁷ *Mellon Bank (East) PSFS, Nat. Ass’n v. Farino*, 960 F.2d 1217, 1221 (3d Cir.1992). Thus, under the due process clause, this Court may exercise personal jurisdiction over OMGC as long as there are certain minimum contacts between OMGC and the forum state “such that the maintenance of suit does not offend

traditional notions of fair play and substantial justice.” *International Shoe Co.*, 326 U.S. at 316; *see also Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir.2001). If OMGC “purposefully avails itself of the privilege of conducting activities within the forum State,” *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), “it has clear notice that it would be subject to suit here, and could act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.” *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). For the reasons to follow, this Court finds that OMGC has not purposefully availed itself of the privilege of conducting activities within this forum and, thus, this Court lacks authority to exercise personal jurisdiction over OMGC.

DISCUSSION

In response to the motion to dismiss, Plaintiff argues that, at this stage of litigation, he needs only to allege sufficient facts to establish a *prima facie* case of personal jurisdiction over OMGC. *See Farino*, 960 F.2d at 1223 (citing *Provident Nat. Bank v. California Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 437 (3d Cir.1987)). Plaintiff correctly notes that where a district court does not hold an evidentiary hearing (as is the case here), a plaintiff need only present a *prima facie* case for the exercise of personal jurisdiction with sworn affidavits or other competent evidence demonstrating, with reasonable particularity, a sufficient nexus between the defendant and the forum state. *Bohus*, 2012 WL 3579609, at *3 (citing *Southern Seafood Co. v. Holt Cargo Systems, Inc.*, 1997 WL 539763, at *8 (E.D.Pa. Aug.11, 1997)); *Eurofins Pharma U.S. Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 155 (3d Cir.2010); *Metcalf*, 566 F.3d at 331; *Farino*, 960 F.2d at 1223; *Carteret Sav. Bank*, 954 F.2d at 146. To establish the existence of personal jurisdiction over OMGC, Plaintiff relies on a *single* affidavit attested to by Mr. Jay vonCzoernig, Head of Production for Wallquest, which states, in pertinent part:

*4 • Wallquest purchased the Press from a German publishing company several years before Plaintiff's 2011 injury. Mr. vonCzoernig went to Germany on behalf of Wallquest to inspect and test run the Press.¹⁸

- Once the Press was re-assembled in Wallquest's Wayne, Pennsylvania, facility, an electric connection problem arose resulting from the different electricity standards between Germany/Europe and the U.S.,¹⁹ requiring Mr. vonCzoernig to personally communicate with OMGC's sales and service agents located in Chicago, Illinois, who advised that these concerns would be relayed to OMGC in Italy. It is attested that OMGC responded via telephone and email regarding a solution.²⁰ (However, Mr. vonCzoernig does not specify whether these responses originated from OMGC in Italy or from the Chicago sales and service agents).
- When a problem arose with the Press's automatic splicer, this concern was discussed with OMGC's sales and service agents (although not stated, were purportedly those agents in Chicago) but could not be resolved by phone. Mr. VonCzoernig stated that OMGC sent a service representative from Italy to Wayne, Pennsylvania, to troubleshoot the issue, and because the problem could not be resolved, no billing for the service call was generated and no paperwork regarding the service trip was found, presumably discarded in the ordinary course of business.²¹
- Lastly, Mr. VonCzoernig and other representatives of Wallquest have maintained a continuous working relationship with OMGC (again, without elaboration as to whether the working relationship is with OMGC in Italy or the agents in Chicago) with respect to other OMGC equipment regularly used by Wallquest; *e.g.*, via regular, direct communication with OMGC about service and purchase of parts and other components for different presses routinely and regularly used by Wallquest.²²

As stated, when a motion to dismiss asserts a lack of personal jurisdiction, district courts must accept plaintiff's facts as true, but are permitted to revisit the issue if it appears that the facts alleged to support jurisdiction are in dispute. *Metcalf*, 566 F.3d at 331. Even construing the facts attested to in favor of Plaintiff, this Court cannot find that Plaintiff has established, *with reasonable particularity*, that OMGC has the requisite “certain minimum contacts” with the forum state, such that “the maintenance of this lawsuit does not offend the traditional notions of fair play and substantial justice,” to support either specific *or* general jurisdiction over OMGC. Further, the

relationship alluded to in the affidavit must arise out of the contacts that OMGC *itself* creates with the forum state rather than contacts initiated by Plaintiff, *Walden*, 134 S.Ct. at 1122; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), and these contacts attested to clearly do not.

Guided by *Metcalf*, this Court finds that Plaintiff has not made a threshold showing in support of personal jurisdiction over OMGC. *See also Bohus*, 2012 WL 3579609, at *10 (“A *prima facie* case requires factual allegations that suggest ‘with reasonable particularity’ the possible existence of the requisite ‘contacts between [the party] and the forum state.’”). Mr. VonCzoemig’s affidavit is vague, its factual contentions are not supported by any evidence or documentation, and lacks reasonable particularity to impute this Court’s authority over OMGC. In its response, Defendant OMGC has offered several affidavits attesting that it never had any sales or service agent located in Chicago, Illinois,²³ has no record which indicates that it assisted anyone at the Wallquest facility in Wayne, Pennsylvania, regarding the Press, either by telephone or email,²⁴ and that NACC, located in New Berlin, Wisconsin, is the exclusive sales agent, spare parts distributor, and authorized provider of technical services for OMGC brand equipment located in North America.²⁵ Plaintiff has not directly refuted these attestations.

*5 To further elaborate, the due process clause requires that a foreign defendant have certain minimum contacts with the forum. Having the requisite contact with the forum state may subject the defendant to either general jurisdiction or specific jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–15, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). A state may subject a defendant to *general* jurisdiction only when the defendant’s activities in that state are “continuous and systematic,” *Helicopteros*, 466 U.S. at 416; *IMO Indus.*, 155 F.3d at 259 n. 2, and only when the corporation’s affiliations with that state are so constant and pervasive “as to render [it] essentially at home in the forum [s]tate.” *Daimler AG*, 134 S.Ct. at 751 (quoting *Goodyear*, 131 S.Ct. at 2851). Further, if general jurisdiction exists, the contacts between the defendant and the forum need not be specifically related to the underlying cause of action in order for an exercise of personal jurisdiction over the defendant to be proper.” *Simeone*, 360 F.Supp.2d at 673

(quoting *Pinker*, 292 F.3d at 368 n. 1); *see also Pennzoil Products Co., Inc.*, 149 F.3d at 200; *Farino*, 960 F.2 at 1221.

The inquiry for *specific* jurisdiction requires a three-prong test. First, the defendant must have “purposefully directed [its] activities” at the forum. *O’Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 317 (3d Cir.2007) (citing *Burger King Corp.*, 471 U.S. at 472 (quotation marks omitted)). Second, the litigation must “arise out of or relate to” at least one of those activities. *Helicopteros*, 466 U.S. at 414; *Grimes v. Vitalink Commcations Corp.*, 17 F.3d 1553, 1559 (3d Cir.1994). And third, if the prior two requirements are met, a court must consider whether the exercise of jurisdiction otherwise “comport[s] with ‘fair play and substantial justice.’” *Burger King Corp.*, 471 U.S. at 476, (quoting *International Shoe Co.*, 326 U.S. at 320). At a minimum, the defendant must have “purposefully avail[ed] itself of the privilege of conducting activities within the forum.” *O’Connor*, 496 F.3d at 317; *Hanson*, 357 U.S. at 253. Physical entrance is not required. *See Burger King Corp.*, 471 U.S. at 476; *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 482 (3d Cir.1993) (“Mail and telephone communications sent by the defendant into the forum may count toward the minimum contacts that support jurisdiction.”). What is necessary is the deliberate targeting of the forum; thus, the “unilateral activity of those who claim some relationship with a nonresident defendant” is insufficient. *See Hanson*, 357 U.S. at 253. Further, contacts with a state’s citizens that take place outside the state are not considered as purposeful contacts with the state itself. *See Gehling v. St. George’s School of Medicine, Ltd.*, 773 F.2d 539, 542–43 (3d Cir.1985).

General Jurisdiction

*6 As stated, this Court may exercise personal jurisdiction over OMGC as long as there are certain minimum contacts between OMGC and the forum state “such that the maintenance of suit does not offend traditional notions of fair play and substantial justice.” *International Shoe Co.*, 326 U.S. at 316. OMGC must have “continuous and systematic” contacts with the forum state regardless of whether those contacts are related to Plaintiff’s cause of action, *Metcalf*, 556 F.3d at 334, those contacts must be “extensive and pervasive,” *Brown & Brown, Inc. v. Cola*, 745 F.Supp.2d 588, 604 (E.D.Pa.2010)

(quoting *Reliance Steel Products Co. v. Watson, Ess, Marshall, & Enggas*, 675 F.2d 587, 589 (3d Cir.1982)), and they must arise out of contacts that the “defendant himself creates with the forum state. *Burger King Corp.*, 471 U.S. at 475. As attested to by Mr. vonCzoernig, Wallquest initiated all of the contacts between Wallquest and OMGC.

Further, *Goodyear* made clear that only a limited set of affiliations with a forum would render a defendant amendable to all-purpose jurisdiction. Generally, for a corporation, the paradigm forum for the exercise of general jurisdiction is one in which the corporation is fairly regarded “at home.” 131 S.Ct. at 2853–2854. That is, for a corporation the place of incorporation and the principal place of business are the paradigm bases for the exercise of general jurisdiction. Here, OMGC is incorporated and has its principal place of business in Italy.

Nonetheless, Plaintiff argues that OMGC's combined contacts and “direct, continuous, and substantial communication” with Pennsylvania,²⁶ is evidenced by OMGC's own declaration, which indicates that during the period of 2007–2011, OMGC sold certain products to entities located in Pennsylvania, and that such sales amounted to approximately 1.81% of OMGC's overall revenue.²⁷ Plaintiff also argues that OMGC's approximation of its sales, notwithstanding, is underestimated since it ignores the ongoing customer service and troubleshooting functions between OMGC and other Pennsylvania companies, additional evidence of OMGC's continuous and systematic contacts with Pennsylvania.²⁸ Plaintiff relies on Mr. vonCzoernig's references to the “continuous working relationship” and “regular, direct communication” between OMGC's Chicago-based sales and service agents. However, these references do not apply to OMGC of Italy, a distinct company, nor do they constitute “actual proof or a sufficient illustration of “constant and pervasive” contacts initiated by OMGC between OMGC and Pennsylvania. See *Rivera v. Bally's Park Place, Inc.*, 798 F.Supp.2d 611, 615 (E.D.Pa. July 12, 2011); *Time Share Vacation Club*, 735 F.2d at 66 (“Mere affidavits which parrot and do no more than restate plaintiff's allegations without identification of particular defendants and without factual content do not end the inquiry.”). Therefore, Plaintiff's contentions fail for lack of any factual support or actual proof, and are deemed mere allegations and/or

speculations pled for jurisdiction purposes. See *Time Share Vacation Club*, 735 F.2d at 66 n. 9 (“Once the motion is made, plaintiff must respond with actual proofs, not mere allegations.”).

*7 In addition, “the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense ‘continuous and systematic,’ it is whether that corporation's ‘affiliations with the State are so “continuous and systematic” as to render [it] essentially at home in the forum State.’ “ *Daimler*, 134 S.Ct. at 761 (quoting *Goodyear*, 131 S.Ct. at 2851) (emphasis added). Similar to the corporate defendants in *Daimler* and *Helicopteros*, OMGC is not incorporated in Pennsylvania, does not maintain a principal place of business in Pennsylvania, has not owned real estate or maintained an office or establishment in Pennsylvania, and is not registered, licensed, or otherwise authorized to do business in the Commonwealth of Pennsylvania.²⁹ These are similar factors considered by the Supreme Court to decline to find general jurisdiction over the defendant. *Daimler*, 134 S.Ct. at 761. Likewise, this Court will decline to exercise general jurisdiction over OMGC since the preponderance of the evidence does not support a finding that OMGC maintained the required minimum contacts with the forum state that would make OMGC “at home” in Pennsylvania for purposes of general jurisdiction. See *Daimler AG*, 134 S.Ct. at 751 (holding that 2.4% of foreign defendant's sales occurring in the forum state was insufficient to give rise to general jurisdiction); *Helicopteros* at 104 S.Ct. at 411; see also *Penco Products, Inc. v. WEC Manufacturing, LLC*, 974 F.Supp.2d 740, 748 (E.D.Pa.2013) (2% of annual sales in Pennsylvania was not considered substantial for purposes of demonstrating sufficient business contacts with the forum); *Simplicity, Inc. v. MTS Products, Inc.*, 2006 WL 924993, at *4 (E.D.Pa. Apr.6, 2006) (defendant's sales in Pennsylvania, totaling less than 5% of the company's total sales, were substantially below the continuous and systematic contacts requirement); *Romann v. Geissenberger Mgf. Corp.*, 865 F.Supp. 255, 261 (E.D.Pa.1994) (defendant's sales of 2–4% was “hardly reflective of the type of extensive and pervasive contact required by the *in personam* jurisdiction standard”) (quotations omitted).

Specific Jurisdiction

To reiterate, the Third Circuit employs a three-part analysis to determine specific jurisdiction consisting of whether: (1) the defendant purposefully directed its activities at Pennsylvania; (2) the litigation “arises out of or relates to” at least one of the defendant's activities in Pennsylvania; and (3) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *O'Connor*, 496 F.3d at 317. In other words, the inquiry is whether OMGC “purposefully availed itself of the privilege of conducting activities within Pennsylvania by deliberately targeting the forum by its conduct and connections so as to reasonably anticipate being haled into court.” *World-Wide Volkswagen Corp.*, 444 U.S. 297.

*8 Plaintiff claims that the single act of OMGC sending a representative from Italy to Pennsylvania to address the automatic splicer problem and the series of acts whereby Wallquest representatives maintained a “continuous working relationship” and direct communication with respect to other equipment used by Wallquest, constitute “deliberate targeting” of the forum state by OMGC for purposes of establishing specific jurisdiction. Plaintiff further argues that these acts comport with Pennsylvania's long-arm statute. *See* 42 Pa.C.S. § 5322(a)(i), (ii).

In response, NACC affirmed, through its Vice President of Operations and the Executive Vice President and Chief Operating Officer, that Vincenzo Pagano, an employee of NACC, was the individual who went to Wallquest's facility in early 2000.³⁰ At the time of his visit, Mr. Pagano was not employed by OMGC nor has he ever been employed by OMGC at any point after the visit, a fact confirmed by OMGC.³¹ As stated, Wallquest has no record, nor does OMGC, indicating that OMGC assisted anyone at Wallquest with the Press either personally, by telephone, or by email.³²

In this case, the event that gives rise to Plaintiff's cause of action, if proven, is the alleged defective Press, a product which was undisputedly manufactured in Italy. While Plaintiff would like this Court to consider the referenced alleged contacts OMGC had with Wallquest, *albeit* vaguely described and strongly disputed, made to address the concerns with the Press, as evidence of sufficient contacts to exercise personal jurisdiction, Plaintiff has failed in his efforts. These contacts, as alleged by Plaintiff, are unilateral activities initiated by Wallquest, and are insufficient to establish that OMGC purposefully

availed itself of the privilege of conducting activities within Pennsylvania or that it purposefully directed its activities at Pennsylvania. *See Walden*, 134 S.Ct. at 1122; *Helicopteros*, 466 U.S. at 414; *Grimes*, 17 F.3d at 1559. Under these assertions, Plaintiff has failed to present a *prima facie* case to establish that personal jurisdiction exists over OMGC. In addition, since Plaintiff has failed to meet the first and second prongs in the specific jurisdiction inquiry, particularly since the asserted underlying claim does not arise out of OMGC's contacts with Pennsylvania, this Court need not consider whether the exercise of jurisdiction “comports with fair play and substantial justice.” *Burger King Corp.*, 471 U.S. at 476, (quoting *International Shoe Co.*, 326 U.S. at 320).

Accordingly, construing as true the allegations and disputed facts relied on in favor of Plaintiff, this Court finds that Plaintiff has failed to establish a *prima facie* case to suggest “with reasonable particularity” a sufficient nexus between OMGC and the forum state, and/or the requisite minimum contacts between OMGC and Pennsylvania, to establish personal jurisdiction over OMGC. This Court finds that any additional discovery on this issue will not assist Plaintiff in discharging his *prima facie* burden of establishing personal jurisdiction over OMGC.

CONCLUSION

*9 For the reasons set forth herein, the motion to dismiss the second amended complaint for lack of personal jurisdiction is granted, and Defendant OMGC only, is dismissed from this action. An appropriate order follows.

ORDER

AND NOW, this 9th day of December 2014, upon consideration of Defendant Officine Meccaniche Giovanni Cerutti SpA's (“OMGC) *motion to dismiss Plaintiff's claims against Defendant set forth in the second amended complaint pursuant to Fed.R.Civ.P. 12(b) (2)*, [ECF 28], Plaintiff's response in opposition thereto, [ECF 29], Defendant North American Cerutti Corporation's reply, [ECF 32], Defendant OMGC's reply, [ECF 33], and Defendant OMGC's supplemental memorandum in support of its motion to dismiss, [ECF 34], it is hereby **ORDERED**, consistent with the accompanying memorandum opinion, that the motion to dismiss for lack

of personal jurisdiction is **GRANTED**, and Defendant
OMGC only is dismissed from this action.

All Citations

Not Reported in F.Supp.3d, 2014 WL 6969579

Footnotes

- 1 See *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3d Cir.2002) ("[I]n reviewing a motion to dismiss under Rule 12(b)(2), we 'must accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff.'").
- 2 2d Am. Compl. ¶ 7.
- 3 *Id.* at ¶ 6.
- 4 *Id.* at ¶ 8.
- 5 *Id.* at ¶ 11.
- 6 *Id.* at ¶ 2; Cerutti Aff. ¶¶ 3, 4.
- 7 2d Am. Compl. ¶ 3.
- 8 *Id.* at ¶ 9. OMGC admits that it designed and manufactured the Press, but it claims it did not sell or ship the Press to Wallquest. OMGC Brief 2.
- 9 Cerutti Aff. ¶¶ 14, 15.
- 10 VonCzoernig Aff. ¶¶ 4, 5, 9.
- 11 ECF 1.
- 12 ECF 17.
- 13 Rule 15(c)(1)(C) permits relation back in circumstances where the change of the name of a party who has received timely notice of the action will not be prejudiced in defending on the merits.
- 14 ECF 18.
- 15 ECF 19.
- 16 ECF 28.
- 17 (a) General rule.-A tribunal of this Commonwealth may exercise personal jurisdiction over a person ... who acts directly or by an agent, as to a cause of action or other matter arising from such person:
 - (1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:
 - (i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.
 - (ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.42 Pa.C.S.A. § 5322.
- 18 VonCzoernig Aff. ¶ 7.
- 19 *Id.* at ¶ 9.
- 20 VonCzoernig Aff. ¶¶ 10, 11.
- 21 *Id.* at ¶¶ 12, 13, 15.
- 22 *Id.* at ¶¶ 16, 17.
- 23 Cerutti Supp. Decl. ¶¶ 6-8.
- 24 *Id.* at ¶ 3.
- 25 Cappa Aff. ¶ 8.
- 26 Plt's Brief 14.
- 27 Cerutti Aff. ¶ 21.
- 28 Plt's Brief 13-14.
- 29 Cerutti Decl. ¶¶ 5-7.
- 30 Cappa Aff. ¶¶ 5, 6; Pessarelli Aff. ¶¶ 5, 6.
- 31 Cerutti Supp. Decl. ¶ 5.
- 32 *Id.* at p.

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2014 WL 1778984

Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

In re METHYL TERTIARY BUTYL ETHER
("MTBE") PRODUCTS LIABILITY LITIGATION.

This document relates to: Commonwealth
of Puerto Rico et. al., v. Shell Oil Co.
et al., 07 Civ. 10470 and 14 Civ. 1014.

Master File No. 1:00-1898.

|
MDL No. 1358 (SAS).

|
No. M21-88.

|
Singed May 5, 2014.

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OPINION AND ORDER

SHIRA A. SCHEINDLIN, District Judge.

I. INTRODUCTION

*1 This is a consolidated multi-district litigation ("MDL") relating to contamination—actual or threatened—of groundwater from various defendants' use of the gasoline additive methyl tertiary butyl ether ("MTBE") and/or tertiary butyl alcohol, a product

formed by the breakdown of MTBE in water. In this case, the Commonwealth of Puerto Rico ("the Commonwealth") alleges that defendants' use and handling of MTBE has contaminated, or threatened to contaminate groundwater within its jurisdiction. Familiarity with the underlying facts is presumed for the purposes of this Order.

Tauber Oil Company ("Tauber") now moves to dismiss the Commonwealth's complaints¹ for lack of personal jurisdiction.² For the following reasons, the motion is granted.

II. BACKGROUND³

Tauber is a Texas-based marketer of energy products.⁴ From 1985 to 1997, Tauber sold MTBE to Phillips Petroleum Company ("Phillips Petroleum"), Phillips 66 Company, and Phillips Chemical Company ("Phillips entities")—all located in Bartlesville, Oklahoma—in a series of "spot sales."⁵ Tauber had no distribution or agency agreements with any Phillips entity.⁶ Because all MTBE sales were governed by Free on Board contracts, title transferred from Tauber to the Phillips entities in Texas.⁷ Tauber had no title on the vessel that transported the MTBE and no involvement in determining the MTBE's ultimate destination.⁸

Instead, Phillips Petroleum independently arranged for the shipment of neat MTBE to Puerto Rico for gasoline blending at Phillips Chemical Puerto Rico Core facility ("Core facility").⁹ The Core facility sold gasoline to the wholesale market both in Puerto Rico and elsewhere.¹⁰ However, the gasoline was not always blended with MTBE.¹¹ The Core facility sometimes used other octane enhancers.¹²

Tauber never manufactured, marketed, traded, stored, sold, solicited, advertised, or otherwise handled finished gasoline, gasoline containing MTBE, or neat MTBE in Puerto Rico.¹³ Tauber was not involved in any decision by any Phillips entity to use or ship MTBE to Puerto Rico.¹⁴ Nor was Tauber's price for MTBE contingent on the ultimate destination of the MTBE.¹⁵

III. LEGAL STANDARD

A. Rule 12(b)(2) Motion to Dismiss

“The plaintiff bears the burden of establishing personal jurisdiction over the defendant.”¹⁶ “[W]here ... discovery has not begun, a plaintiff need only allege facts constituting a prima facie showing of personal jurisdiction to survive a Rule 12(b)(2) motion.”¹⁷ However, “[a]fter discovery, the plaintiff’s prima facie showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant.”¹⁸ Conclusory allegations are insufficient—“[a]t that point, the prima facie showing must be factually supported.”¹⁹ When a “defendant rebuts plaintiffs’ unsupported allegations with direct, highly specific, testimonial evidence regarding a fact essential to jurisdiction—and plaintiffs do not counter that evidence—the allegation may be deemed refuted.”²⁰

*2 To determine whether it has personal jurisdiction over a party, a court conducts a two-part analysis. “First, it must consider whether the state’s long-arm statute confers jurisdiction, and then it must determine whether such exercise comports with the Due Process Clause of the United States Constitution.”²¹

B. Specific Jurisdiction Under Puerto Rico’s Long Arm Statute

“Puerto Rico’s long-arm statute allows Puerto Rico courts to exercise jurisdiction over a non-resident defendant if the action arises because that person: (1) ‘[t]ransacted business in Puerto Rico personally or through an agent’; or (2) ‘participated in tortious acts within Puerto Rico personally or through his agent.’”²² “Puerto Rico’s long-arm statute is coextensive with the reach of the Due Process Clause.”²³ Thus, the present inquiry is guided by “whether the exercise of personal jurisdiction [] would abide by constitutional guidelines” of Due Process.²⁴

3. Due Process

The Supreme Court set forth the requirements of Due Process in *International Shoe v. Washington*: that a defendant “not present within the territory of the forum” have “certain minimum contacts with it such that the

maintenance of the suit does not offend traditional notions of fair play and substantial justice.”²⁵ This analysis requires both a “minimum-contacts” test and a “reasonableness” inquiry.

First, to satisfy minimum contacts for due process, the plaintiff must demonstrate that “the defendant purposely availed itself of the privilege of doing business in the forum and could foresee being haled into court there” and that “the claim arises out of, or relates to, the defendant’s contacts with the forum.”²⁶ As the Supreme Court recently explained, “the relationship [between the defendant and the forum state] must arise out of contacts that the ‘defendant *himself* creates with the forum State.”²⁷ Though “a defendant’s contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties[,] a defendant’s relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.”²⁸ “Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State.”²⁹ As such, 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.”³⁰

Second, if the defendant’s contacts with the forum state satisfy this test, the defendant may defeat jurisdiction only by presenting “a compelling case that the presence of some other considerations would render jurisdiction unreasonable.”³¹

IV. DISCUSSION

*3 The Commonwealth mentions Tauber by name only once in each of its complaints, stating that “Tauber is a Delaware corporation headquartered at 55 Waugh Drive, Suite 700 in Houston, Texas 77007.”³² No allegation in the pleadings links Tauber to the refining, supplying, marketing, or addition of MTBE to gasoline in Puerto Rico.

Nevertheless, the Commonwealth now contends that Tauber “knew that its MTBE was destined for Puerto Rico” where it would be “blended into gasoline [at the

Core facility] and distributed throughout the island.”³³ To support its contention, the Commonwealth cites assorted documents, including: (1) faxes and emails from Phillips' entities to Tauber that identify Puerto Rico as the destination for the vessels;³⁴ (2) Tauber invoices and bills of lading from the Core facility;³⁵ (3) various documents from non-party Tauber Petrochemical Company (“TPC”), Tauber's wholly owned subsidiary.³⁶

None show that Tauber “purposefully avail[ed] itself of Puerto Rico's laws.”³⁷ *First*, Tauber never solicited the destination information, and it was immaterial to Tauber's transactions with the Phillips entities.³⁸ Although the Phillips entities occasionally volunteered the destination information, they did so only *after* the parties had agreed on the terms of each transaction.³⁹ Even if Tauber knew that the Phillips entities were shipping the MTBE to Puerto Rico, “foreseeability” alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.⁴⁰ Instead, “[d]ue process requires that a defendant be haled into court in a forum State based on *his own* affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State.”⁴¹ Here, Tauber never manufactured, marketed, delivered, or sold its MTBE in Puerto Rico.⁴² Nor did it solicit or advertise its MTBE in Puerto Rico.⁴³ Instead, Tauber merely sold MTBE to the Oklahoma-based Phillips entities in a series of isolated “spot sales.”⁴⁴ The independent decision of the Phillips entities to ship the MTBE to Puerto Rico does not establish jurisdiction over Tauber.

Second, the Commonwealth's evidence fails to show that Tauber “knew its MTBE was blended into gasoline [at the Core facility] and then distributed” throughout Puerto Rico.⁴⁵ The Commonwealth cites to Tauber invoices as evidence that Tauber received payments from the Core facility.⁴⁶ In fact, these invoices indicate that the Phillips entities paid Tauber, and several months later, the Core facility paid the Phillips entities. There is no evidence that Tauber received payments from the Core facility or from any other Puerto Rico-based entity. In addition, the Commonwealth cites to bills of lading to show that the Core facility sometimes sold gasoline within

Puerto Rico, and that this gasoline may have contained Tauber's MTBE.⁴⁷ Even accepting this assumption, the Core facility's records—which Tauber did not see until discovery—do not track “whether a sale of gasoline contained MTBE or not, nor do they reference or identify the batch from which a sale was derived.”⁴⁸ As such, when Tauber transacted with the Phillips entities, it had no way of knowing whether its MTBE would ultimately be distributed within Puerto Rico.

*4 *Third*, the Commonwealth attempts to establish jurisdiction over Tauber based on the actions of Tauber's subsidiary, TPC.⁴⁹ The Commonwealth argues that TPC sold neat MTBE to Puerto Rico, knowing that it would be blended with gasoline and distributed throughout Puerto Rico.⁵⁰ However, “[t]he mere fact that a subsidiary company does business within a state does not confer jurisdiction over its nonresident parent, even if the parent is sole owner of the subsidiary.”⁵¹ Courts in the First Circuit require a “plus factor,” such as a finding of an agency relationship between the two corporations, the parent corporation exercising “greater than ... normal []” control over the subsidiary, or the subsidiary acting as “merely an empty shell” for the parent's operations.⁵² The Commonwealth asserts that TPC and Tauber share office space and three of the same employees.⁵³ But an overlap in office space or employees is within the bounds of normal corporate structure.⁵⁴ Because the Commonwealth has not demonstrated the existence of a “plus factor,” such as agency, extraordinary control, or shell, the Court cannot attribute TPC's actions to Tauber for jurisdictional purposes.⁵⁵

V. CONCLUSION

For the foregoing reasons, Tauber's motion is GRANTED. The Clerk of the Court is directed to close this motion (Doc. No. 364 in 07 Civ. 10470; Doc. No. 34 in 14 Civ. 1014).

SO ORDERED:

All Citations

Not Reported in F.Supp.3d, 2014 WL 1778984

Footnotes

- 1 Tauber moves to dismiss both the Third Amended Complaint ("TAC") in the 07 Civ. 10470 case ("*Puerto Rico I*") and the Complaint ("Compl.") in the 14 Civ. 1014 case ("*Puerto Rico II*").
- 2 Tauber styles its motion as a motion to dismiss but submitted a Local Rule 56.1 Statement. Because motions to dismiss for lack of personal jurisdiction are governed by Rule 12(b)(2), the Court will deem the motion brought pursuant to Rule 12(b)(2). However, Tauber's Local 56.1 Statement ("Def 56.1"), the Commonwealth's Opposition to Tauber's 56.1 Statement and Additional Facts ("Pl.56.1"), and Tauber's Amended Rule 56.1 Statement and Opposition to Plaintiffs' Rule 56.1 Statement ("Def. Reply 56.1") will nonetheless be considered because "a district court may [consider materials outside the pleadings] without converting a motion to dismiss for lack of personal jurisdiction into a motion for summary judgment." *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 86 (2d Cir.2013).
- 3 Where the parties have conducted jurisdictional discovery, a court may consider affidavits and other materials outside the pleadings. *See id.* at 85 ("[After discovery], the prima facie showing must be factually supported.").
- 4 *See* Declaration of Kevin Wilson ("Wilson Decl."), Vice President of Tauber, ¶ 4.
- 5 *See id.* ¶¶ 30, 33. A spot sale is a stand-alone agreement for a purchase of a specified quantity "on the spot," reflecting the current market price of the commodity. *See id.* ¶ 30 n. 1.
- 6 *See id.* ¶ 37.
- 7 *See id.* ¶ 44; 12/16/13 Deposition of Kevin Wilson ("Wilson Dep."), Ex. A to the Declaration of Michael A. Walsh, counsel for Tauber, ("Walsh Decl."), at 73:13–75:6. The only exception is a 1996 transaction where Tauber acquired MTBE through an intermediary in Venezuela and sold the MTBE to Phillips 66 in Oklahoma. In that transaction, title transferred in Venezuela. *See* Reply Declaration of Kevin Wilson ("Wilson Reply Decl.") ¶ 5.
- 8 *See* Wilson Dep. at 73:13–75:6, 133:13–23.
- 9 *See* Core Facility's Second Amended Objections and Responses to Plaintiffs' First Set of Interrogatories and Request for Production of Documents, Ex. B to the Walsh Decl., at 6.
- 10 *See* Declaration of Hector A. Marin ("Marin Decl."), Electrical Design Engineer at the Core facility, Ex. G to the Walsh Decl., ¶ 8.
- 11 *See id.* ¶ 3.
- 12 *See id.*
- 13 *See* Wilson Decl. ¶¶ 6, 7.
- 14 *See id.* ¶¶ 36, 39.
- 15 *See id.* ¶ 42.
- 16 *MacDermid, Inc. v. Deiter*, 702 F.3d 725, 727 (2d Cir.2012) (internal citations omitted).
- 17 *M & M Packaging, Inc. v. Kole*, 183 Fed. App'x 112, 114 (2d Cir.2006).
- 18 *Dorchester*, 722 F.3d at 85.
- 19 *Id.*
- 20 *In re Stillwater Capital Partners Inc. Litig.*, 851 F.Supp.2d 556, 567 (S.D.N.Y.2012) (internal citations omitted).
- 21 *Glenwood Sys., LLC v. Med-Pro Ideal Solutions, Inc.*, 438 Fed. App'x. 27, 28 (2d Cir.2011).
- 22 *Negron-Torres v. Verizon Commc'ns, Inc.*, 478 F.3d 19, 24 (1st Cir.2007) (quoting L.P.R.A., Tit. 32, App. III, Rule 4.7(a)(1)).
- 23 *Carreras v. PMG Collins, LLC*, 660 F.3d 549, 552 (1st Cir.2011) (citations omitted). *Accord Pritzker v. Yari*, 42 F.3d 53, 60 (1st Cir.1994) (citations omitted) (stating that Rule 4.7 "extends personal jurisdiction as far as the Federal Constitution permits").
- 24 *Gonzalez-Diaz v. Up Stage Inc.*, No. 11 Civ. 1689, 2012 WL 2579307, at *1 (D.P.R. July 3, 2012).
- 25 326 U.S. 310, 316 (1945) (quotation marks and citations omitted).
- 26 *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 127 (2d Cir.2002) (quotation marks and citations omitted).
- 27 *Walden v. Fiore*, — U.S. —, 134 S.Ct. 1115, 1122 (2014) (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985)).
- 28 *Id.* at 1123 (citations omitted).
- 29 *Id.* (quotation omitted).
- 30 *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984).
- 31 *Burger King*, 471 U.S. at 477. *Accord Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 173 (2d Cir.2010).

- 32 Compl. ¶ 81; TAC ¶ 64. In fact, Tauber is a Texas corporation. See Wilson Decl. ¶ 4.
- 33 Pl. Mem. at 7.
- 34 See Nomination Documents, Ex. 2 to the Declaration of Justin A. Arenas, counsel for the Commonwealth ("Arenas Decl.").
- 35 See Invoices, Ex. 10 to the Arenas Decl.; Bills of Lading, Ex. 9 to the Arenas Decl.
- 36 See, e.g., Faxes and Letters, Ex. 3 to the Arenas Decl.
- 37 *Goodyear Dunlop Tires Ops., S.A. v. Brown*, — U.S. —, 131 S.Ct. 2846, 2854 (2011) (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).
- 38 See Wilson Dep., Ex. A to the Walsh Decl., at 133:20–135:21.
- 39 See *id.* Only one agreement between Tauber and the Phillips entities referred to Puerto Rico. See Wilson Reply Decl. ¶ 5. There, Tauber purchased MTBE from Ecofuels and sold it to Phillips 66 in Venezuela, where the MTBE was retained for testing. See *id.* Title passed simultaneously from Ecofuels to Tauber to Phillips 66, and the shipment to Puerto Rico remained the responsibility of Ecofuels. See *id.* Tauber did not import the MTBE to Puerto Rico. See *id.* This transaction does not prove that Tauber had "minimum contacts" with Puerto Rico.
- 40 *World—Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).
- 41 *Walden*, 134 S.Ct. at 1123 (emphasis added). Accord *World—Wide Volkswagen*, 444 U.S. at 298 ("[T]he mere 'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.'").
- 42 See Wilson Decl. ¶ 6.
- 43 See *id.* ¶ 7.
- 44 See *id.* ¶ 30.
- 45 Pl. Mem. at 6.
- 46 See Pl. 56.1 ¶ 73 (citing Invoices, Ex. 10 to Arenas Decl.).
- 47 See Pl. Mem. at 6.
- 48 Marin Decl. ¶ 8.
- 49 See Pl. Mem. at 1.
- 50 See *id.*
- 51 *Negron—Torres*, 478 F.3d at 27 (quoting *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 905 (1st Cir.1980)).
- 52 *Donatelli v. National Hockey League*, 893 F.2d 459, 466 (1st Cir.1990) (quotation marks and citations omitted).
- 53 See Pl. 56.1 ¶¶ 68, 70.
- 54 See *Escude Cruz*, 619 F.2d at 905 (noting that allegations of interlocking directorates will not suffice to show that the activities of the subsidiary should be attributed to the parent); *In re Lupron Mktg. & Sales Practices Litig.*, 245 F.Supp.2d 280, 292 (D.Mass.2003) (holding that customary incidents of a parent-subsidiary relationship—ownership, common personnel, profits, and managerial oversight—are not suspect and are insufficient for vicarious jurisdiction); *Ferreira v. Unirubio Music Publ'g*, No. 02 Civ. 805, 2002 WL 1303112, at *2 (S.D.N.Y. June 13, 2002) (holding that evidence of shared office space, address, telephone, and fax number will not alone cause the Court to disregard corporate formalities).
- 55 See *Donatelli*, 893 F.2d at 465–66 (citations omitted). Although Tauber raised lack of personal jurisdiction in its first responsive pleadings in both *Puerto Rico I* and *Puerto Rico II*, the Commonwealth argues that Tauber failed to preserve the defense because it engaged in merits-based discovery and only advised the Commonwealth about its Rule 12(b)(2) motion on February 21, 2014. See Pl. Mem. at 10. However, Tauber only noticed a single deposition, which it never took, and served a set of interrogatories. Both were focused on jurisdictional facts. It also presented Wilson for deposition on questions related to Tauber's lack of knowledge that MTBE was being shipped to Puerto Rico. Conducting jurisdictional discovery does not constitute waiver. In fact, the Second Circuit has expressly stated that a motion to dismiss for lack of personal jurisdiction in an MDL case is timely where, as here, it is raised before a transferee court at any time during the pre-trial proceedings. See *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61–62 (2d Cir.1999) ("During the three years that this and similar cases were pending before the MDL, [defendant] could have raised its jurisdictional challenge before the transferee court.").

2015 WL 3506517
United States District Court,
D. New Hampshire.

PRESBY PATENT TRUST
v.
INFILTRATOR SYSTEMS, INC.

Civil No. 14-cv-542-JL.

Signed June 3, 2015.

Attorneys and Law Firms

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MEMORANDUM ORDER

JOSEPH N. LAPLANTE, District Judge.

*1 This case involves personal jurisdiction in the area of patent infringement, and specifically whether this court has either general or personal jurisdiction over defendant Infiltrator Systems, Inc. The plaintiff in this action, Presby Patent Trust, alleges that Infiltrator directly and indirectly infringes one or more claims of U.S. Patent No. 8,815,094. The # 094 patent issued on August 26, 2014, and claims a method of processing effluent, such as in a septic system. Presby alleges that Infiltrator directly infringes the #094 patent by making, using, importing, selling, and/or offering to sell Infiltrator's Advanced Treatment Leachfield ("ATL") in-ground septic system, and indirectly infringes the #094 patent by inducing others to do so and by contributing to the infringement of the #094 patent by others. This court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 (federal question) and 1338(a) (patents).

Infiltrator, which is incorporated and has its principal place of business in Connecticut, moves to dismiss for lack of personal jurisdiction and improper venue. See

Fed.R.Civ.P.12(b)(2), (3). After oral argument, the court grants the defendant's motion to dismiss. Infiltrator's contacts with New Hampshire are insufficient for this court to exercise personal jurisdiction over it in this action.

I. Applicable Legal Standard

"Personal jurisdiction implicates the power of a court over a defendant.... [B]oth its source and its outer limits are defined exclusively by the Constitution," namely, the due process clause of the Fourteenth Amendment. *Foster-Miller, Inc. v. Babcock & Wilcox Can.*, 46 F.3d 138, 143-44 (1st Cir.1995) (citing *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)); U.S. Const. Am. XIV. Whether a district court has personal jurisdiction over a defendant is a two-step inquiry: first, the long-arm statute of the forum state must provide for jurisdiction over the defendant and second, if it does, the court's exercise of that jurisdiction must comport with due process.¹ *Grober v. Mako Prods. Inc.*, 686 F.3d 1335, 1345 (Fed.Cir.2012). Where, as here, the applicable long-arm statute and federal due process limitations are coextensive, "the state limitation collapses into the due process requirement" and the two inquiries "coalesce into one." *Trintec Indus., Inc. v. Pedre Promotional Prods., Inc.*, 395 F.3d 1275, 1279 (Fed.Cir.2005); see also *Phillips Exeter Acad. v. Howard Phillips Fund*, 196 F.3d 284, 287 (1st Cir.1999) ("New Hampshire's long-arm statute reaches to the full extent that the Constitution allows.").

Due process requires that a defendant must have sufficient "minimum contacts" with the forum in question "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted). Consistent with the requirements of due process, a court may exercise one of two categories of personal jurisdiction: general and specific. General jurisdiction exists when "the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Daimler AG v. Bauman*, 134 S.Ct. 746, 751 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011)). Specific jurisdiction, on the other hand, "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear*, 131 S.Ct. at 2851 (internal quotations omitted). Infiltrator argues that this

court may exercise neither specific nor general jurisdiction in this case.

*2 Presby bears the burden of showing that Infiltrator has sufficient “minimum contacts” with New Hampshire to satisfy the requirements of due process. Where, as here, “the district court’s disposition of the personal jurisdictional question is based on affidavits and other written materials in the absence of an evidentiary hearing, a plaintiff need only to make a prima facie showing that defendants are subject to personal jurisdiction.” *Elec. for Imaging, Inc. v. Coyle*, 340 F.3d 1344, 1349 (Fed.Cir.2003). The plaintiff is not limited to its allegations in the complaint and may make this showing through affidavits attached to its opposition.² In determining whether a plaintiff has made a prima facie showing of personal jurisdiction, the court “accept[s] the uncontroverted allegations in the plaintiff’s complaint as true and resolve[s] any factual conflicts in the affidavits in the plaintiff’s favor.” *Id.*

II. Background

The relevant facts, construed in the light most favorable to Presby, are as follows. Infiltrator makes and sells septic systems, including the ATL system that Presby accuses of infringing the #094 patent. Though incorporated and with its principal place of business in Connecticut—where its president maintains an office—Infiltrator is present in New Hampshire. It sells septic systems in New Hampshire through its New Hampshire-based sales representative, resellers, and distributors; obtains approvals for its septic systems to be installed in New Hampshire through the New Hampshire Department of Environmental Services; provides New Hampshire-specific installation instructions to its customers; exhibits its products at trade shows in New Hampshire; hosts educational seminars about its septic systems in New Hampshire; and is an “affiliate member” of a New Hampshire-based trade association.

Despite Infiltrator’s several contacts with the state, at oral argument, Presby conceded that Infiltrator had neither marketed nor sold the accused ATL System in New Hampshire at the time Presby filed its complaint, and that Infiltrator only sells non-infringing systems in New Hampshire at this time. Nor has Infiltrator appointed an agent for service of process in New Hampshire.

III. Analysis

A. Specific Jurisdiction

Whether a district court has specific jurisdiction over a defendant in a patent case “entails a three-part test: (1) whether the defendant purposefully directs activities at the forum’s residents; (2) whether the claim arises out of or relates to those activities; and (3) whether assertion of personal jurisdiction is reasonable and fair.” *AFT-TG, LLC v. Nuvo-ton Tech. Corp.*, 689 F.3d 1358, 1361 (Fed.Cir.2012) (citing *Nuance Comm’ns, Inc. v. Abby Software House*, 626 F.3d 1222, 1231 (Fed.Cir.2010)). Because Presby has not shown that the claims it asserts in this action “arise[] out of or relate [] to” activities that Infiltrator purposefully directs to New Hampshire, the court does not have specific jurisdiction over Infiltrator.

*3 The parties conceded at oral argument, and the court agrees, that Infiltrator satisfies the first part of the test. Among other activities, as described *supra*, Infiltrator employs a sales representative in New Hampshire and sells septic systems into the state (both directly and through distributors). There is no question that Infiltrator purposefully directs these activities at residents of New Hampshire. The operative question for specific jurisdiction in this case, then, is the second part of the test—whether Presby’s claim “arises out of or relates to” those activities. It does not.

Presby’s cause of action is the alleged direct and indirect infringement of its patent. For this court to have specific jurisdiction over Infiltrator, Presby would have to allege that Infiltrator directly or indirectly infringed its patent in New Hampshire.³ *HollyAnne Corp. v. TFT, Inc.*, 199 F.3d 1304, 1308 & n. 4 (Fed.Cir.1999) (affirming dismissal for lack of personal jurisdiction where plaintiff conceded that defendant did not sell or offer to sell accused products in the forum). A party directly infringes a patent when it makes, uses, offers to sell or sells in the United States, or imports into the United States, any patented invention, without authorization from the patentee. 35 U.S.C. § 271(a). A party indirectly infringes a patent when it induces another to infringe or contributes to the infringement by another. 35 U.S.C. § 271(b), (c). Presby has not connected either of these claims to any conduct by Infiltrator in New Hampshire. Specifically, Presby does not allege—in its complaint or its opposition to Infiltrator’s motion to dismiss—that Infiltrator makes, sells, uses, or offers for sale its accused ATL system in New Hampshire, or that Infiltrator induces or contributes

to the infringement by others in New Hampshire. In fact, Presby concedes that the ATL system is neither sold nor marketed in New Hampshire. In the absence of those allegations, this court cannot exercise specific jurisdiction over Infiltrator on Presby's claims for patent infringement. *See Grober*, 686 F.3d at 1346–47 (affirming order dismissing defendants who did not engage in alleged infringing activity in the forum state); *F & G Research, Inc. v. Paten Wireless Tech., Inc.*, No.2007–1206, 2007 WL 2992480, at *3 (Fed.Cir. Oct. 15, 2007) (affirming dismissal for lack of personal jurisdiction where plaintiff did not allege that defendant sold infringing products in the forum in question).

Presby argues that the disjunctive nature of the standard—that its claims must “arise from or relate to” Infiltrator's activity—allows the court to find specific jurisdiction because Presby's claims generally “relate to” Infiltrator's septic system business. Infiltrator would not research and develop new, allegedly infringing products to meet the needs of its customers in other states, Presby contends, if it did not engage in a regular (and non-infringing) septic system business in New Hampshire. While some courts, including the Court of Appeals for the First Circuit, have suggested that the disjunctive language of the “arises from or relates to” standard may “portend [] added flexibility and signal[] a relaxation of the applicable standard,” *Ticketmaster–New York, Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir.1994), the Supreme Court has recently reiterated that it must be the defendant's “suit-related conduct” that “create[s] a substantial connection with the forum state,” *Walden v. Fiore*, 134 S.Ct. 1115, 1121 (2014).⁴ The suit-related conduct in a patent case is the alleged infringing activity, which must occur in the forum state for specific jurisdiction to exist. *See HollyAnne Corp.*, 199 F.3d at 1308. Presby has only alleged the most attenuated connection between Infiltrator's sale of non-infringing products, its research and development efforts, and the potential for infringing activities in New Hampshire. This is not enough to satisfy due process and establish specific jurisdiction. Therefore, this court lacks specific jurisdiction over Infiltrator.⁵

B. General Jurisdiction

*4 Having determined that it cannot exercise specific jurisdiction over Infiltrator, the court considers whether it can exercise general jurisdiction. For this court to do so, Infiltrator must have contacts with New Hampshire

that are “so ‘continuous and systematic’ as to render [it] essentially at home in” New Hampshire. *Daimler*, 134 S.Ct. at 749 (quoting *Goodyear*, 131 S.Ct. at 2851). Though the parties dispute whether *Daimler* applies to a situation where, as here, the parties are both located in the United States and the plaintiff is located in the forum,⁶ the court agrees with Infiltrator that *Daimler* controls here and that, under *Daimler*, the court cannot exercise general jurisdiction over Infiltrator on the facts alleged by Presby.

Prior to *Daimler*, courts found general jurisdiction over a defendant where the defendant had “continuous and systematic general business contacts” with the forum state. *AFTG–TG*, 689 F.3d at 1360 (internal quotations omitted). This is, essentially, the test that Presby asks the court to apply here.⁷ However, the Supreme Court in *Daimler* rejected this approach as “unacceptably grasping.” *Daimler*, 134 S.Ct. at 760.

In *Daimler*, the Supreme Court addressed the question of whether the United States District Court for the Northern District of California could exercise general jurisdiction over DaimlerChrysler Aktiengesellschaft (“Daimler”), a German corporation, for claims related to human rights abuses committed by Daimler's Argentinian subsidiary during Argentina's “Dirty War” between 1976 and 1983. *Daimler*, 134 S.Ct. 750. The plaintiffs, all Argentinian residents, argued that California could exercise general jurisdiction over Daimler because its subsidiary, Mercedes-Benz USA, LLC (“MBUSA”), a Delaware corporation with a principal place of business in New Jersey, maintained several corporate facilities there, and its California sales constituted 2.4% of Daimler's worldwide sales and over 10% of its sales in the United States. *Id.* at 751–52. After concluding that a subsidiary like MBUSA could not be considered an agent for jurisdictional purposes, the Court explained that, even if MBUSA were “at home” in California and even if its contacts with the forum were imputable to Daimler, “there would still be no basis to subject Daimler to general jurisdiction in California,” because Daimler's contacts with the state were insufficient. *Id.* at 760.

Under *Daimler*, then, it is no longer enough for the defendant to have “continuous and systematic” contacts with the forum state. *See Otsuka Pharm. Co. v. Mylan Inc.*, No. 14–4508, 2015 WL 1305764, at *5 (D.N.J. Mar. 23, 2015) (acknowledging *Daimler* as causing a shift in the general jurisdiction standard); *see also* Tanya

J. Monestier, *Where Is Home Depot at Home? Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 265–66 (2014) (discussing same). Those contacts must be of such a degree that they essentially render the defendant “at home” in the forum state. *Daimler*, 134 S.Ct. at 761. “[T]he paradigm forum for the exercise of general jurisdiction” for a corporation, the Supreme Court explained, is its “place of incorporation and principal place of business.” *Daimler*, 134 S.Ct. at 760 (quoting *Goodyear*, 131 S.Ct. at 2851). This promotes predictability, allowing corporations to “structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit” while, at the same time, affording plaintiffs “recourse to at least one clear and certain forum in which a defendant corporation may be sued on any and all claims.” *Id.* at 762 n. 20.

*5 The Supreme Court left open the possibility that “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State,” offering *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), as an example of such an exceptional case. *Daimler*, 134 S.Ct. at 761 n. 19. In *Perkins*, a corporation organized and with its principal place of business in the Philippines was forced to effectively relocate to Ohio when Japan occupied the Philippines during World War II. 342 U.S. at 447–48. The Supreme Court held that Ohio courts could exercise general jurisdiction over that defendant because, it later noted, “Ohio was the corporation’s principal, if temporary, place of business.” *Daimler*, 134 S.Ct. at 756.

Thus, *Daimler* cannot be read so narrowly, as Infiltrator suggests, as to restrict general jurisdiction over a defendant only to the forum where it is incorporated or has its principal place of business. But neither is its holding so broad as to support general jurisdiction over a defendant doing business in the forum state without some special circumstance that ties the defendant more particularly to the forum state. Rather, for a court to exercise general jurisdiction over the defendant in a forum that is not the defendant’s place of incorporation or principal place of business, *Daimler* requires at the very least that the defendant have systematic and continuous contacts with the forum that sets the forum apart from the other states where defendant may conduct business—contacts that render the forum in some manner equivalent

to a principal place of business. *See, e.g., Fed. Home Loan Bank of Boston v. Ally Financial, Inc.*, No. 11–10952, 2014 WL 4964506, at *2 (D.Mass. Sept. 30, 2014) (finding no general jurisdiction under *Daimler* where defendant’s contacts with forum were no more significant than with any other state); *Bulwer v. Mass. Coll. of Pharmacy & Health Sciences*, No. 13–521, 2014 WL 3818689, at *5 (D.N.H. Aug. 4, 2014) (McCafferty, J.) (same). *See also* Monestier, 66 HASTINGS L.J. at 266 (“Courts must evaluate ‘at home’ using a comparative approach, that is, by assessing a corporation’s contacts with the forum in relation to its contacts with other forums. ‘At home’ is seen as being a unique place akin to the corporation’s state of incorporation or its principal place of business.”).

Presby suggests that the test for general jurisdiction set forth in *Daimler* only applies in cases wherein both plaintiffs and defendants are foreign to, and the cause of action accrues outside of, the United States. This reading is also unsupportably narrow. The Supreme Court has explicitly defined a “foreign corporation” in the personal jurisdiction context to be one foreign to the state in which jurisdiction is invoked—not foreign to the United States. *See Goodyear*, 131 S.Ct. at 2851 (2011) (“A court may assert general jurisdiction over foreign (*sister-state or foreign-country*) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State.”) (emphasis added) (internal quotation marks omitted).

*6 Applying *Daimler* to the facts of this case, the court concludes that it cannot exercise general jurisdiction over Infiltrator. As an initial matter, Infiltrator is incorporated and has its principal place of business in Connecticut, rendering that state “the paradigm forum for the exercise of general jurisdiction” over Infiltrator. *See Daimler*, 134 S.Ct. at 760. The inquiry, then, is whether Presby has made a prima facie showing that this is an exceptional case. *Id.* at 761, n. 19. It has not.

The parties do not dispute that Infiltrator has several and continuous contacts with the state of New Hampshire. It employs a sales representative here. It markets and sells septic systems here. In connection with those activities, it attends trade shows, demonstrates its products, seeks approvals for its products, instructs users how to install its products, and has joined a trade organization, all in New Hampshire. But none of these

activities essentially render New Hampshire a surrogate for Infiltrator's principal place of business. Nor has Presby differentiated Infiltrator's activities here from its activities in Connecticut or any other state. In fact, these activities do not appear to surpass the level of activity that the Supreme Court rejected as insufficient to confer on California general jurisdiction over MBUSA. See *Daimler*, 134 S.Ct. at 761–72; see also *Loyalty Conversion Sys. Corp. v. American Airlines, Inc.*, No. 2:13–CV–655, 2014 WL 4352544, at *5 (E.D.Tex. Sept. 2, 2014) (Delaware corporation with headquarters in Hawaii not subject to general jurisdiction in Texas, where it maintained one employee and made sales to Texas residents). For the same reason, then, this court must find that it lacks general jurisdiction over Infiltrator in this case.

C. Jurisdictional Discovery

Although Presby did not raise or press this request at oral argument, it has requested the opportunity to conduct discovery into whether Infiltrator's activities confer specific jurisdiction over it on this court.⁸ It is true that “a diligent plaintiff who sues an out-of-state corporation and who makes out a colorable case for the existence of in personam jurisdiction may well be entitled to a modicum of jurisdictional discovery if the corporation interposes a jurisdictional defense.”⁹ *Negrón-Torres v. Verizon Comm'ns, Inc.*, 478 F.3d 19, 27 (1st Cir.2007) (quotation marks omitted). But Presby has not made a colorable case for personal jurisdiction over Infiltrator. In fact, as discussed *supra*, by conceding that Infiltrator did not sell or market its accused ATL systems in New Hampshire at the time Presby filed its complaint, Presby has conceded that this court does not have specific jurisdiction over Infiltrator on these claims. No amount of jurisdictional discovery can change that. See *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 626 (1st Cir.2001) (request for jurisdictional discovery was properly denied where plaintiff's “relatedness showing was unconvincing”).

*7 Even if Presby had not made that concession, none of the information that Presby requests is likely to substantiate Presby's claim of specific personal jurisdiction. Specifically, Presby asks for the opportunity to investigate Infiltrator's plans and preparations to market and sell its ATL system in New Hampshire in the future (including pursuit of regulatory approvals) and

Infiltrator's “activities in marketing and selling the ATL system nationwide.” Opp. to Mot. to Dismiss (document no. 10) at 13–14; Sur-reply (document no. 14) at 5. Invoking *Momenta Pharms., Inc. v. Amphastar Pharms., Inc.*, 841 F.Supp.2d 514, 520–22 (D.Mass.2012), Presby argues that jurisdictional discovery into Infiltrator's plans to market its ATL system in New Hampshire is appropriate because “[a]n infringing company's plan to sell an infringing product in a forum state can be the basis for a finding of specific personal jurisdiction.” Opp. to Mot. to Dismiss (document no. 10) at 13. But, as Presby admitted at oral argument, in *Momenta*, the plaintiff sought discovery into the defendant's offers to sell the accused products in the forum state—behavior that amounts to infringement under 35 U.S.C. § 271. A company's intention to sell a product, without an actual offer, does not constitute infringement, and cannot support a court's finding of specific jurisdiction. Nor can Infiltrator's plans to sell the ATL system in the future support specific jurisdiction. The relevant inquiry is whether the alleged infringing activity had occurred at the time the complaint was filed. See *Spectronics Corp. v. H.B. Fuller Co.*, 940 F.2d 631, 635 (Fed.Cir.1995), abrogated on other grounds by *Liquid Dynamics Corp. v. Vaughan Co., Inc.*, 355 F.3d 1361, 1370 (Fed.Cir.2004) (“[I]n personam and subject matter jurisdictional facts must be pleaded, and proved when challenged, and ... later events may not create jurisdiction where none existed at the time of filing.” (citing *Mollan v. Torrance*, 6 U.S. (1 Wheat.) 172, 173 (1824))). Here, as discussed *supra*, Presby admits that it had not.

Similarly, Infiltrator's sales of the accused system outside of New Hampshire cannot confer personal jurisdiction over Infiltrator in New Hampshire. Presby suggests that Infiltrator's updated website, which includes information about the accused system, amounts to an effort to promote that system nationwide—including to residents of New Hampshire. But a passive website through which anyone who has Internet access can obtain information about a product does not provide a basis for personal jurisdiction, *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (Fed. Cir.2000); cf. *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 513 n. 5 (Fed.Cir.2002) (a website through which customers in the forum state engage in transactions may confer personal jurisdiction where “essentially passive” websites do not). Presby's request for discovery into Infiltrator's nationwide marketing and sale of the ATL system is thus unlikely

to result in evidence that would allow this court to exercise specific jurisdiction. See *Crocker v. Hilton Int'l Barb., Ltd.*, 976 F.2d 797, 801 (1st Cir.1992) (affirming denial of jurisdictional discovery where appellants sought information, irrelevant to forum contacts, on solicitation of business and the provision of goods or services outside of the forum). And where, as here, the plaintiff has not shown that "it can supplement its jurisdictional allegations through discovery," *GTE*, 199 F.3d at 1351–52, jurisdictional discovery is not appropriate.

IV. Conclusion

*8 For the reasons set forth above, Presby's request for jurisdictional discovery is DENIED and Infiltrator's motion to dismiss the complaint for lack of personal jurisdiction and improper venue¹⁰ is GRANTED.¹¹ The clerk shall enter judgment accordingly and close the case.

SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 3506517, 2015 DNH 111

Footnotes

- 1 As the parties expressly agreed at oral argument, because personal jurisdiction in a patent case is "intimately involved with the substance of patent law," the law of the Federal Circuit governs this inquiry. *Grober*, 686 F.3d at 1345 (Fed.Cir.2012) (internal quotations omitted).
- 2 A court considering a motion to dismiss on personal jurisdiction grounds may properly consider documents attached to an opposition, even if they contain hearsay, so long as that evidence "bears circumstantial indicia of reliability." *Akro Corp. v. Luker*, 45 F.3d 1541, 1546–47 (Fed.Cir.1995); see also *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1562 (Fed.Cir.1994). At oral argument, counsel for Infiltrator confirmed that it does not dispute the accuracy of the exhibits attached to Presby's opposition for purposes of this motion and argues only that those exhibits should not be considered because they contain hearsay. Because these documents appear to be reliable, the court sees no reason to disregard them.
- 3 At oral argument, the parties agreed that *Avocent Huntsville Corp. v. Aten Intern. Co.*, 552 F.3d 1324 (Fed.Cir.2008) controls on the question specific jurisdiction. There, the Federal Circuit explained that, in an ordinary patent infringement suit, "for purposes of specific jurisdiction, the jurisdictional inquiry is relatively easily discerned from the nature and extent of the commercialization of the accused products or services by the defendant in the forum." *Id.* at 1332. Commercialization in this context is coextensive with the activities that constitute infringement under 35 U.S.C. § 271(a). See *id.* Because Presby concedes that Infiltrator has not engaged in any of those activities in New Hampshire, the outcome here is the same.
- 4 It is worth noting that neither the Court of Appeals nor the Supreme Court restricted its holding to a construction of "arising from" but not "relating to." The Supreme Court instead focused on the "relationship among the defendant, the forum, and the litigation." *Walden*, 134 S.Ct. at 1126. The Court of Appeals similarly concluded that "[w]e know to a certainty only that the [relatedness] requirement focuses on the nexus between the defendant's contacts and the plaintiff's cause of action." *Ticketmaster–New York*, 26 F.3d at 206.
- 5 Because the court concludes that Presby has not satisfied the second part of the three-part test, it need not address the third—whether assertion of personal jurisdiction in this action would be reasonable and fair to the defendant—which corresponds with the "fair play and substantial justice" prong of the *International Shoe* analysis. See *Grober*, 686 F.3d at 1346.
- 6 Presby attempts to distinguish *Daimler* on the grounds that, unlike the plaintiff in *Daimler*, Presby is a resident of the forum state and, as the patent-holder, it would be injured in New Hampshire if Infiltrator were allowed to continue marketing and selling its ATL systems (presumably, in other states). This argument runs afoul of the Supreme Court's decision in *Walden*, issued shortly after *Daimler*. There, the Court reaffirmed that the inquiry for general jurisdiction is whether the defendant—not the plaintiff—has the necessary "minimum contacts" with the forum to satisfy due process. *Walden*, 134 S.Ct. at 1122 ("We have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State.... Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.'" (quoting *Rush v. Savchuk*, 444 U.S. 320, 332 (1980))).

- 7 At oral argument, Presby's counsel argued that *Barriere v. Juluca*, No. 12–23510, 2014 WL 652831 (S.D.Fla. Feb. 19, 2014), supports its contention that, even under *Daimler*, a defendant's "continuous and systematic" contacts with the forum are sufficient to establish general jurisdiction. There, the District Court for the Southern District of Florida found that it could exercise general jurisdiction over an Anguillan corporation with its principal place of business in Anguilla on a claim that arose in Anguilla because the defendant had "such minimum contacts with Florida to be considered 'at home' " there. *Id.* at *8. For the reasons discussed below, the court is not persuaded.
- 8 Presby has not requested discovery into the court's general jurisdiction over Infiltrator.
- 9 Jurisdictional discovery is not an issue unique to patent law, and therefore is governed by the law of the First Circuit. *Augogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1021 (Fed.Cir.2009). However, Federal Circuit law governs whether the requested discovery is relevant to the case. *Commissariat a L'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F.3d 1315, 1323 (Fed.Cir.2005).
- 10 Document no. 8.
- 11 Because the court concludes that it cannot exercise personal jurisdiction over Infiltrator in this action, the court need not address whether venue in this district is proper.

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117 F.Supp.3d 732
United States District Court,
M.D. North Carolina.

PUBLIC IMPACT, LLC, Plaintiff,
v.
BOSTON CONSULTING GROUP, INC., Defendant.

No. 15-cv-464.

Signed Aug. 3, 2015.

Synopsis

Background: Education policy and management consulting firm brought action against competitor, alleging that competitor's use of its trademark on competitor's website and in internet activity, constituted infringement in violation of the Lanham Act. Firm moved for preliminary injunction and temporary restraining order, and competitor moved to dismiss for lack of personal jurisdiction.

Holdings: The District Court, Thomas D. Schroeder, J., held that:

[1] competitor's mere registration to do business in North Carolina did not confer general jurisdiction;

[2] contacts with North Carolina were insufficient for specific personal jurisdiction; and

[3] firm established good cause to seal documents.

Ordered accordingly.

Attorneys and Law Firms

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John M. Nading, DLA Piper LLP, Washington, DC, Alice Carmichael Richey, Parker Poe Adams & Bernstein LLP, Charlotte, NC, for Defendant.

MEMORANDUM OPINION AND ORDER

THOMAS D. SCHROEDER, District Judge.

**1 This is a trademark infringement case brought by Plaintiff Public Impact, LLC ("Public Impact"), against Boston Consulting Group, Inc. ("BCG"). Before the court are three motions: (1) Public Impact's motion for temporary restraining order and preliminary injunction (Doc. 6); (2) Public Impact's motion to seal (Doc. 11); and (3) BCG's motion to dismiss for lack of personal jurisdiction and, alternatively, to transfer venue (Doc. 20). For the reasons set forth below, Public Impact's motion to seal and BCG's motion to dismiss for lack of personal jurisdiction will be granted; Public Impact's motion for injunctive relief will therefore be denied without prejudice as moot.

I. BACKGROUND

The allegations of the complaint and supporting affidavits show the following:¹

*735 Public Impact is an education policy and management consulting firm, located in Carrboro, North Carolina. (Doc. 8 ¶¶ 3, 7.) Its clients include private foundations, government agencies, nonprofits, and education policy leaders. (*Id.* ¶ 13.) Public Impact owns a federally registered trademark, PUBLIC IMPACT, Registration No. 2,805,013, which has been used continuously since 1996 and was registered in 2006. (*Id.* ¶¶ 5-8; Doc. 8-1.) In 2009, the United States Patent and Trademark Office declared the registration incontestable, pursuant to 15 U.S.C. § 1065. (Doc. 8 ¶ 10; Doc. 8-2.) Public Impact uses its trademark on its publications, websites, Facebook account, and Twitter page. (Doc. 8 ¶¶ 15-16, 26-27.)

BCG is a global management consulting firm incorporated in Massachusetts and maintains its corporate offices in Boston, Massachusetts. (Doc. 22 ¶ 3.) It is registered to do business in North Carolina and in every other State that requires such registration. (*Id.* ¶ 5; Doc. 1-1.) BCG has previously initiated, solicited, and engaged in education-related business within North Carolina. In 2010, BCG representatives attended a North Carolina State Board of Education planning session. (Doc. 31-3.) In 2012, BCG and Public Impact exchanged

emails to discuss an education initiative. (Doc. 8 ¶ 32; Doc. 8–7.) In a 2010 publication, BCG listed its business accomplishments in North Carolina to include managing North Carolina's proposal for federal education funding and reorganizing North Carolina's Department of Public Instruction. (Doc. 31–4 at 7; *see also* Doc. 31–2; Doc. 31–5; Doc. 31–6.) BCG also lists North Carolina on its website as a state to which it has provided “recent [educational] efforts.” (Doc. 10–2 at 5.) From 2007 to 2014, BCG's North Carolina revenue comprised about 0.3% of its worldwide revenue, which amounts to tens of millions of dollars. (Doc. 22 ¶ 5; Doc. 30 at 6 (citing Doc. 31–7).) There is no indication, though, as to what percentage of that revenue derived from any education-related business activity by BCG in North Carolina. Finally, BCG helps host a consulting “Case Competition” every year at Duke University. (Doc. 31–1.)

****2** In June 2014, BCG created the “Centre for Public Impact: A BCG Foundation” (“CPI”). (Doc. 23 ¶ 3.) BCG owns the trademark, THE CENTRE FOR PUBLIC IMPACT: A BCG FOUNDATION, No. UK00003069013, in the United Kingdom, and owns several trademarks in other countries as well. (*Id.* ¶ 6.) BCG solely funds CPI, and CPI shares an office with BCG in London, where CPI is based. (*Id.* ¶ 3.) BCG publishes about CPI on its website. (*See, e.g.*, Doc. 10–7 at 4–6.)

CPI's mission is to “bring[] together world leaders to learn, exchange ideas and inspire each other to strengthen the public impact of their organizations.” (Doc. 10–1 at 46.) CPI describes itself as “a global forum where leaders can learn” by “[s]haring insights from around the world.” (*Id.*) Its officers include those who specialize in education. (*Id.* at 17, 19–20.) CPI, however, has no employees in the United States, and it is in the process of registering as a not-for-profit organization in Switzerland. (Doc. 23 ¶¶ 3–4.) CPI has conducted four events using its mark, all of which have occurred outside the United States, namely in London, England; New ***736** Delhi, India; and Jakarta, Indonesia. (Doc. 10–1 at 32–34, 46–47.)

CPI has a website, as well as Twitter and LinkedIn accounts. (Doc. 9–4; Doc. 9–5; Doc. 23 ¶ 7.) BCG owns CPI's website. (Doc. 9–2.) CPI has published at least one education-related article on its website and also tweets about education. (Doc. 9–5; Doc. 10–1 at 15–16.) CPI's website contains informational links titled “Who We Are” and “What We Do,” which describe CPI and its mission.

(Doc. 10–1 at 2.) The site also links to news articles and interviews relating to CPI—none of which is alleged to connect to North Carolina. (*Id.* at 15–16, 22–23, 32–39, 41–45.) The website also allows visitors to “Participate” but limits visitors' participation to signing up for news about CPI. (*Id.* at 40.)

On June 9, 2015, Public Impact filed its complaint against BCG, raising various claims regarding the use of Public Impact's registered trademark and claiming essentially that BCG is using CPI, and specifically the similarly-named “Centre for Public Impact” through CPI's website, to confuse and lure customers to BCG's consulting business that competes directly with Public Impact's. (Doc. 1) Contemporaneous with its complaint, Public Impact moved for temporary and preliminary injunctive relief and to seal certain documents filed in support. (Docs. 6, 11.) On June 16, 2015, BCG moved to dismiss the complaint for lack of personal jurisdiction and, alternatively, to transfer venue to Boston. (Doc. 20) The parties filed responding briefs (Docs. 24, 28), and the court held an adversarial hearing on Public Impact's motion for a temporary restraining order on June 17, 2015. Following the hearing, the parties filed supplemental briefing on BCG's motion to dismiss for lack of personal jurisdiction and, alternatively, to transfer venue. (Docs. 30, 32.) On July 6, 2015, BCG responded to Public Impact's motion for preliminary injunction and motion to seal. (Docs. 33, 36.)

****3** The motions are now ready for resolution.

II. ANALYSIS

A. Motion to Dismiss for Lack of Personal Jurisdiction

Public Impact bears the burden of establishing personal jurisdiction by a preponderance of the evidence. *See Universal Leather, LLC v. Koro AR, S.A.*, 773 F.3d 553, 558 (4th Cir.2014); *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 396 (4th Cir.2003); *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir.1989). “When, however, as here, a district court decides a pretrial personal jurisdiction motion without conducting an evidentiary hearing, the plaintiff need only make a prima facie showing of personal jurisdiction.”² *Carefirst*, 334 F.3d at 396; *see also Combs*, 886 F.2d at 676. “In deciding whether the plaintiff has proved a prima facie case of personal jurisdiction, the district court must draw all reasonable inferences arising from the proof, and

resolve all factual disputes, in the plaintiff's favor." *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 60 (4th Cir.1993); accord *Carefirst*, 334 F.3d at 396. If the existence of jurisdiction turns on disputed factual questions, the court may resolve the challenge on the basis of an evidentiary hearing or, if a prima facie demonstration of personal jurisdiction has been made, it can proceed "as if it has personal jurisdiction over th[e] matter, although factual determinations to the contrary may be made at trial." *Pinpoint *737 IT Servs., L.L.C. v. Atlas IT Exp. Corp.*, 812 F.Supp.2d 710, 717 (E.D.Va.2011) (citing 2 James Wm. Moore et al., *Moore's Federal Practice* ¶ 12.31 (3d ed.2011)); see also *Indus. Carbon Corp. v. Equity Auto & Equip. Leasing Corp.*, 737 F.Supp. 925, 926 (W.D.Va.1990) ("When conflicting facts are contained in the affidavits, they are to be resolved in the plaintiff's favor."). Nevertheless, either at trial or at a pretrial evidentiary hearing, the plaintiff must eventually prove the existence of personal jurisdiction by a preponderance of the evidence. *New Wellington Fin. Corp. v. Flagship Resort Dev. Corp.*, 416 F.3d 290, 294 n. 5 (4th Cir.2005).

"Under Federal Rule of Civil Procedure 4(k)(1)(A), a federal court may exercise personal jurisdiction over a defendant in the manner provided by state law." *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 710 (4th Cir.2002); see also *Daimler AG v. Bauman*, — U.S. —, 134 S.Ct. 746, 753, 187 L.Ed.2d 624 (2014) ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons."). To determine whether personal jurisdiction is proper, the court engages in a two-part inquiry: first, North Carolina's long-arm statute must provide a statutory basis for the assertion of personal jurisdiction, and, second, the exercise of personal jurisdiction must comply with due process. See *Carefirst*, 334 F.3d at 396; *Pan-Am. Prods. & Holdings, LLC v. R.T.G. Furniture Corp.*, 825 F.Supp.2d 664, 677 (M.D.N.C.2011).

**4 In *Christian Science Board of Directors of the First Church of Christ, Scientist v. Nolan*, 259 F.3d 209 (4th Cir.2001), the Fourth Circuit held that N.C. Gen.Stat. § 1-75.4(1)(d) runs coextensively with the Due Process Clause, thereby collapsing the two-step process "into a single inquiry" as to whether the nonresident defendant has such "minimal contacts" with North Carolina that exercising jurisdiction over the defendant does not offend "traditional notions of fair play and substantial justice."³ 259 F.3d at 215 (quoting *Int'l Shoe Co. v. Washington*,

326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)); see also *Cambridge Homes of N.C., LP v. Hyundai Const., Inc.*, 194 N.C.App. 407, 670 S.E.2d 290, 295 (2008) ("When personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry—whether defendant has the minimum contacts necessary to meet the requirements of due process." (quoting *Filmar Racing, Inc. v. Stewart*, 141 N.C.App. 668, 541 S.E.2d 733, 736 (2001))). The Fourth Circuit recently confirmed its interpretation of North Carolina's long-arm statute, holding that the issue of specific jurisdiction under N.C. Gen.Stat. § 1-75.4(1)(d) "merges" the two-prong test "into the single question" of whether a defendant has "sufficient contacts with North Carolina to satisfy constitutional due process." *Universal Leather*, 773 F.3d at 558-59. Thus, the single inquiry here is whether the exercise of personal jurisdiction over BCG "is consonant with the strictures of due process." *Tire Eng'g & Distribution, LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 301 (4th Cir.2012) (per curiam).

[1] Under the Due Process Clause, personal jurisdiction over a defendant may be either general or specific. See *738 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, — U.S. —, 131 S.Ct. 2846, 2851, 180 L.Ed.2d 796 (2011); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn. 8-9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); *Tire Eng'g & Distribution*, 682 F.3d at 301. Public Impact argues that this court may exercise both over BCG.

1. General Jurisdiction

[2] The Supreme Court has recently held that, aside from the "exceptional case," general personal jurisdiction over a corporation is usually only appropriate in the corporation's state of incorporation or principal place of business. See *Daimler*, 134 S.Ct. at 761 n. 19. There is no allegation that North Carolina is BCG's state of incorporation or its principal place of business.⁴ Instead, Public Impact argues that general jurisdiction exists because BCG is registered to do business in North Carolina. (Doc. 28 at 3-11; Doc. 30 at 1-2.)

Public Impact's argument is foreclosed by binding Fourth Circuit precedent. In *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745 (4th Cir.1971), the Fourth Circuit held that registration to do business in a forum does not confer personal jurisdiction over an out-of-state corporation.

Id. at 748. It reasoned, “The principles of due process require a firmer foundation than mere compliance with state domestication statutes.” *Id.* The Fourth Circuit recently reaffirmed *Ratliff*'s holding in *Rosenruist–Gestao E Servicos LDA v. Virgin Enters. Ltd.*, 511 F.3d 437 (4th Cir.2007), citing *Ratliff* for the proposition that “the designation of a statutory agent for service [is] insufficient to confer general jurisdiction over an out-of-state corporation.” *Rosenruist–Gestao*, 511 F.3d at 446 (citing *Ratliff*, 444 F.2d at 748).

**5 After *Ratliff*, lower courts in this circuit have routinely applied its holding. For example, in *Kuennen v. Stryker Corp.*, No. 1:13CV00039, 2013 WL 5873277 (W.D.Va. Oct. 30, 2013), the court held that a defendant's “business certificate and appointed agent ... are not independent support for general jurisdiction—‘the principles of due process require a firmer foundation than mere compliance with state domestication statutes.’” *Id.* at *4 (quoting *Ratliff*, 444 F.2d at 748); see also *Reynolds & Reynolds Holdings, Inc. v. Data Supplies, Inc.*, 301 F.Supp.2d 545, 551 (E.D.Va.2004) (citing and relying on *Ratliff* for the proposition that “complying with registration statutes and appointing an agent for service of process do not amount to consent to general personal jurisdiction”). Similarly, another decision from this district concluded, citing *Ratliff*, “A corporation's registration to do business in the state alone is not the deciding factor on which jurisdiction should be determined.” *Estate of Thompson ex rel. Thompson v. Mission Essential Pers., LLC*, No. 1:11CV547, 2013 WL 6058308, at *2 n. 1 (M.D.N.C. Nov. 14, 2013), report and recommendation adopted sub nom. *Estate of Thompson v. Mission Essential Pers., LLC*, No. 1:11CV547, 2014 WL 4745947 (M.D.N.C. Sept. 23, 2014). In sum, Fourth Circuit law forecloses Public Impact's argument that this court has general jurisdiction over BCG because it is registered to do business in this State.⁵

*739 Public Impact's arguments to the contrary are unpersuasive. First, Public Impact argues that the Supreme Court's decision in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982), abrogated the Fourth Circuit's decision in *Ratliff*. (Doc. 28 at 9–11.) The Fourth Circuit has recognized no such abrogation and, as noted, continues to rely on *Ratliff*, after *Insurance Corp. of Ireland*, for the proposition that “the designation of a statutory agent for service [is] insufficient to confer

general jurisdiction over an out-of-state corporation.” *Rosenruist–Gestao*, 511 F.3d at 446 (citing *Ratliff*, 444 F.2d at 748). Public Impact argues that *Insurance Corp. of Ireland* “endorsed jurisdiction by consent” (Doc. 28 at 10) but fails to explain how that endorsement—in a decision upholding the imposition of sanctions under Rule 37 of the Federal Rules of Civil Procedure—abrogated *Ratliff*. See *Ins. Corp. of Ireland*, 456 U.S. at 702–09, 102 S.Ct. 2099 (upholding district court's Rule 37 sanctions, which had the effect of assuming personal jurisdiction over certain defendants).

Second, Public Impact argues that the Supreme Court's century-old decision in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 37 S.Ct. 344, 61 L.Ed. 610 (1917), allows for general jurisdiction over a defendant who follows a state's registration statute. This argument is unconvincing. Most importantly, the Fourth Circuit's decision in *Ratliff* is binding on this court. Moreover, courts have recognized that Supreme Court decisions since *Pennsylvania Fire* “cast doubt on the continued viability” of that decision. *Cognitronics Imaging Sys., Inc. v. Recognition Research Inc.*, 83 F.Supp.2d 689, 692 (E.D.Va.2000). Most significant is the Supreme Court's landmark decision in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), where the Court held that to extend personal jurisdiction over a defendant, the defendant must “have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Id.* at 316, 66 S.Ct. 154 (internal quotation marks and citations omitted). As courts elsewhere have observed, “After *International Shoe*, the focus [of the personal jurisdiction inquiry] shifted from whether the defendant had been served within the state to whether the defendant's contacts with the state justified the state's assertion of jurisdiction.” *Cognitronics Imaging Sys.*, 83 F.Supp.2d at 692; see also *Shaffer v. Heitner*, 433 U.S. 186, 212, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (“[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”). More recently, in *Daimler*, the Supreme Court held that “continuous and systematic” business contacts with a State were insufficient for extending general jurisdiction unless those contacts were “so substantial and of such a nature as to render the corporation at home in [the forum] State.” 134 S.Ct. at 761–62 & n. 19. At least some courts have interpreted *Daimler* to

mean that a defendant's mere conformance with a State's business registration statute "cannot constitute consent to jurisdiction" and therefore is not sufficient for general jurisdiction. *AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F.Supp.3d 549, 556 (D.Del.2014), *motion to certify appeal granted sub nom. Astrazeneca AB v. Aurobindo Pharma Ltd.*, No. CV 14-664-GMS, 2014 WL 753913 (D.Del. Dec. 17, 2014); see also *740 *Cognitronics Imaging Sys.*, 83 F.Supp.2d at 692 (observing, before *Daimler*, that "[t]he Supreme Court has not yet addressed whether registration alone would be sufficient to confer general personal jurisdiction in light of its holding in *International Shoe*").

**6 Lastly, even taking Public Impact's argument at face value, it is unclear whether *Pennsylvania Fire* would apply in this case. In *Pennsylvania Fire*, the Supreme Court extended personal jurisdiction over an insurance company that was registered to do business in Missouri and, in further compliance with the law, had executed a power of attorney making service on an in-state representative "the equivalent of personal service." 243 U.S. at 94-95, 37 S.Ct. 344. The Court observed, "[W]hen a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts." *Id.* at 96, 37 S.Ct. 344. Following *Pennsylvania Fire*, the Court limited that decision's reach, noting strong "reasons for a limited interpretation of ... compulsory assent" by way of a State statute. *Robert Mitchell Furniture Co. v. Selden Breck Const. Co.*, 257 U.S. 213, 215-16, 42 S.Ct. 84, 66 L.Ed. 201 (1921) ("[W]hen a foreign corporation appoints one as required by statute it takes the risk of the construction that will be put upon the statute and the scope of the agency by the State Court."). In *Robert Mitchell Furniture*, the Court held that only when a "state law either expressly [extends] or by local construction" is interpreted to extend jurisdiction over an out-of-State defendant regarding out-of-State business should a federal court construe the State statute as such. *Id.*

Here, Public Impact fails to demonstrate how North Carolina's registration statute "expressly" extends personal jurisdiction over registering businesses like BCG. Public Impact's suggested interpretation of North Carolina's registration statute is not immediately obvious from the face of the statute. See N.C. Gen.Stat. § 55-15-05(b) ("[A] foreign corporation with a valid certificate of authority has the same but no greater rights and has the

same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character."). It also cites no decision—State or federal—construing North Carolina's registration statute to extend personal jurisdiction over registered businesses.

For all these reasons, Public Impact has not demonstrated that the court has general jurisdiction over BCG.

2. Specific Jurisdiction

[3] [4] [5] [6] Specific jurisdiction requires "that the relevant conduct have such a connection with the forum state that it is fair for the defendant to defend itself in that state." *CFA Inst. v. Inst. of Chartered Fin. Analysts of India*, 551 F.3d 285, 292 n. 15 (4th Cir.2009). A court may exercise specific jurisdiction when the cause of action "arises out of the defendant's contacts with the forum." *Saudi v. Northrop Grumman Corp.*, 427 F.3d 271, 276 (4th Cir.2005). The determination of whether jurisdiction is appropriate depends on the facts and circumstances of each case. See *Walden v. Fiore*, — U.S. —, 134 S.Ct. 1115, 1121, 188 L.Ed.2d 12 (2014) (holding that the specific jurisdiction inquiry necessitates a study of the interconnection between the defendant, the forum, and the litigation); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485-86, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Extension of specific jurisdiction requires consideration of three factors: "(1) the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the forum state; (2) whether the plaintiff's claims arise out of those *741 activities; and (3) whether the exercise of personal jurisdiction is constitutionally reasonable." *Tire Eng'g & Distribution*, 682 F.3d at 301-02; see also *Universal Leather*, 773 F.3d at 559. Each prong must be satisfied. See *Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 278-79 (4th Cir.2009).

**7 [7] [8] [9] The "purposeful availment" requirement ensures that "a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts." *Burger King*, 471 U.S. at 475, 105 S.Ct. 2174 (internal quotation marks omitted). Rather, a defendant's conduct and connection to the forum must be "such that [it] should reasonably anticipate being haled into court there." *Universal Leather*, 773 F.3d at 559 (quoting *Fed. Ins. Co. v. Lake Shore Inc.*, 886 F.2d 654, 658

(4th Cir.1989)). If a defendant has created a “substantial connection” to the forum, then it has purposefully availed itself of the privilege of conducting business there. *See Diamond Healthcare of Ohio, Inc. v. Humility of Mary Health Partners*, 229 F.3d 448, 450 (4th Cir.2000); *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir.1997) (holding that “contacts related to the cause of action must create a ‘substantial connection’ with the forum state, although this connection need not be as extensive as is necessary for general jurisdiction” (citation omitted)). The connection to the forum “must arise out of contacts that the defendant *himself* creates with the forum State.” *Walden*, 134 S.Ct. at 1122 (quoting *Burger King*, 471 U.S. at 475, 105 S.Ct. 2174) (internal quotation marks omitted).

[10] This purposeful availment inquiry is flexible and includes an evaluation of (1) “whether the defendant maintains offices or agents in the forum state”; (2) “whether the defendant owns property in the forum state”; (3) “whether the defendant reached into the forum state to solicit or initiate business”; (4) “whether the defendant deliberately engaged in significant or long-term business activities in the forum state”; (5) “whether the parties contractually agreed that the law of the forum state would govern disputes”; (6) “whether the defendant made in-person contact with the resident of the forum in the forum state regarding the business relationship”; (7) “the nature, quality and extent of the parties’ communications about the business being transacted”; and (8) “whether the performance of contractual duties was to occur within the forum.” *Consulting Eng’rs*, 561 F.3d at 278 (citations omitted).

To demonstrate purposeful availment, Public Impact cites the following facts as favoring the exercise of personal jurisdiction over BCG. As to the first factor, BCG has maintained a registered agent in North Carolina since 2007 because it holds a certificate of authority to transact business in North Carolina requiring it to do so. (Doc. 1–1.) Regarding the third and fourth factors, BCG has previously initiated, solicited, and engaged in education-related business within North Carolina. In a 2010 publication, BCG listed its business accomplishments in North Carolina to include managing North Carolina’s proposal for federal education funding and reorganizing North Carolina’s Department of Public Instruction. (Doc. 31–4 at 7; Doc. 31–2; Doc. 31–5; Doc. 31–6.) BCG also lists North Carolina as a State to which it has provided

“recent [educational] efforts.” (Doc. 10–2 at 5.) From 2007 to 2014, BCG’s North Carolina revenue comprised about 0.3% of its worldwide revenue, which amounts to tens of millions of dollars. (Doc. 22 ¶ 5; Doc. 30 at 7 (citing Doc. 31–7).) There is again no allegation, though, as to what percentage of that revenue, if any, came from education-related business activity by BCG in North Carolina. As to *742 the sixth and seventh factors, there is no allegation that BCG has made in-person contact with Public Impact in the forum State regarding any business relationship. BCG and Public Impact did exchange emails in 2012 to discuss an education initiative. (Doc. 8 ¶ 32; Doc. 8–7.) And, in 2010, BCG representatives attended a North Carolina State Board of Education planning session, but there is no allegation that Public Impact representatives were in attendance or any business relationship between them resulted from BCG’s presence. (Doc. 31–3.) Finally, BCG helps host a consulting “Case Competition” every year at Duke University. (Doc. 31–1.)

**8 [11] [12] Public Impact, however, fails to demonstrate how those contacts with North Carolina give rise to the claims in this case. *See Tire Eng’g & Distribution*, 682 F.3d at 301–03 (holding that a plaintiff’s claims must “arise out of” a defendant’s contacts with the forum state); *Saudi*, 427 F.3d at 276 (same). “Specific jurisdiction must rest on the *litigation-specific* conduct of the defendant in the proposed forum state.” *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 801 (7th Cir.2014), *as corrected* (May 12, 2014). Here, the complaint raises claims concerning BCG’s alleged use of Public Impact’s trademark. (Doc. 1 ¶¶ 49–82.) None of those activities cited above by Public Impact, however, gives rise to its claims of trademark infringement. *See Walden*, 134 S.Ct. at 1121 (“For a State to exercise jurisdiction consistent with due process, the defendant’s *suit-related* conduct must create a substantial connection with the forum State.” (emphasis added)); *Goodyear Dunlop Tires Operations*, 131 S.Ct. at 2851 (referring to specific jurisdiction as “case-linked” jurisdiction); *Advanced Tactical*, 751 F.3d at 801 (holding, in a trademark action, that “[t]he only sales” in a forum by a defendant “that [are] relevant are those that were related to [a defendant’s] allegedly unlawful activity”). None of BCG’s past activity in North Carolina relates to its alleged trademark infringement. In fact, all of BCG’s education-related business in North Carolina cited by Public Impact occurred well before Public Impact claims the trademark infringement began and CPI was created.

Public Impact attempts to tie BCG and the alleged trademark infringement to North Carolina through BCG's Internet activity. Notably, Public Impact does not allege that BCG has infringed its trademark in North Carolina other than through the Internet, namely through BCG's and CPI's websites, Twitter, and LinkedIn. (Doc. 1 ¶¶ 41–46.) Public Impact's allegations of trademark infringement, however, fail to sufficiently connect BCG to this State.

In *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir.2002), the Fourth Circuit addressed “when electronic contacts with a State are sufficient” to exercise personal jurisdiction over a defendant. *Id.* at 713. The *ALS Scan* decision expressly “adopt[ed] and adapt[ed]” the model established in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D.Pa.1997). The *Zippo* model created a “sliding scale” for examining personal jurisdiction in the context of electronic contacts with a forum state. *ALS Scan*, 293 F.3d at 713. Outlining this “sliding scale,” the *Zippo* Court explained:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature

of the exchange of information that occurs on the Web site.

**9 *Id.* at 713–14 (quoting *Zippo*, 952 F.Supp. at 1124). Applying *Zippo*, the Fourth Circuit held,

[A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.

Id. at 714. Elucidating this three-prong test, the Fourth Circuit further instructed, “Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received.” *Id.*

Applying that test to a case involving claims of trademark infringement, the Fourth Circuit in *ALS Scan* found that the alleged Internet activity “was, at most, passive” and no personal jurisdiction existed because the defendant “did not select or knowingly transmit” the infringing material “specifically to” the forum State “with the intent of engaging in business or any other transaction” in the forum State. *Id.* at 714–15.

Two Fourth Circuit decisions have since applied *ALS Scan's* three-prong test. In *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir.2002), the Fourth Circuit found that a district court lacked specific jurisdiction over a Virginia libel suit against two Connecticut newspapers. *Id.* at 261–64. The newspapers in question had posted an article about a Virginia prison on their websites. *Id.* at 259. Examining the website in question, the Fourth Circuit concluded that “neither newspaper's website contain[ed] advertisements aimed at a Virginia audience” and that the newspapers posted their articles with an intent to target a Connecticut—not Virginia—audience. *Id.* at 263–64. As a result, the Fourth Circuit held, “[T]he newspapers do not have sufficient Internet contacts with Virginia to permit the district court to exercise specific jurisdiction over them.” *Id.* at 264.

The second case—*Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390 (4th Cir.2003)—was a trademark infringement case. There, a Maryland corporation had sued an Illinois corporation in Maryland because of alleged trademark infringement on the Illinois corporation's website. *Id.* at 393–95. The Fourth Circuit examined whether the Illinois corporation, through its website, “expressly aimed its trademark-infringing conduct at the forum state” and determined that the corporation had not done so. *Id.* at 398, 401. In reaching its conclusion, the Fourth Circuit found persuasive that (1) the website was “semi-interactive,” containing “features that make it possible for a user to exchange information with the host computer,” with little “concrete evidence” of exchanges between Maryland *744 residents and the Illinois corporation; and (2) the content on the website had “a strongly local character.” *Id.* at 400–01.

**10 “These cases demonstrate that the Fourth Circuit has been notably reluctant to extend personal jurisdiction to out-of-state defendants based on little more than their presence on the Internet.” *Rao v. Era Alaska Airlines*, 22 F.Supp.3d 529, 539 (D.Md.2014). Applying the reasoning of *ALS Scan* and its progeny to the facts in this case, the court finds that BCG's use of its and CPI's website, as well as Twitter and LinkedIn, fails to support the extension of specific jurisdiction over BCG.

First, CPI's website is, at best, “semi-interactive” and could more appropriately be described as “minimally interactive.” *Christian Sci.*, 259 F.3d at 218 n. 11 (applying this description to a website that “invited visitors ... to e-mail questions and information requests” to the out-of-state defendant). Most of CPI's website does “little more than make information available to those who are interested in it.” *ALS Scan*, 293 F.3d at 714 (quoting *Zippo*, 952 F.Supp. at 1124). For example, CPI's website contains informational links titled “Who We Are” and “What We Do,” which describe CPI and its mission. (Doc. 10–1.) The site also links to news articles and interviews relating to CPI—none of which is alleged to connect to North Carolina. (*Id.*) The website also allows visitors to “Participate,” but presently limits visitors' participation to signing up for news about CPI. (*Id.*) Moreover, similar to the facts in *Carefirst*, there is no evidence of exchanges, of any nature, between North Carolina residents and BCG or CPI through the site. 334 F.3d at 400–01. CPI's remaining Internet presence is

largely “passive,” consisting of occasional informational articles posted to BCG's webpage, a Twitter page, and a LinkedIn account. ⁶ (*Id.*; Doc. 10–7.)

Second, nothing about CPI's website suggests that it is specifically directed at North Carolina. See *ALS Scan*, 293 F.3d at 714–15. Although not “decidedly local” as in *Young*, 315 F.3d at 263, BCG's CPI website is broadly directed toward a “global” audience. According to the website, CPI “is a global forum where leaders can learn” by “[s]haring insights from around the world.” (Doc. 10–1 at 46.) The website further describes CPI as “bring[ing] together world leaders” through “global forums.” (*Id.*) As Public Impact admits, BCG's only alleged trademark infringement beyond its electronic presence has occurred outside the United States, namely in London, England; New Delhi, India; and Jakarta, Indonesia. (*Id.*) This content and BCG's conduct abroad provide nothing to suggest the BCG is using CPI's website to specifically target North Carolina. ⁷

Third, BCG's online use of CPI manifests no intent to target North Carolina. In its brief, Public Impact argues that BCG launched CPI as “a marketing tool *745 for BCG's education-related consulting work in North Carolina.” (Doc. 30 at 7.) In support of its assertion, Public Impact notes that BCG's “thought leadership” marketing strategy involves “distributing its ideas freely” and cites BCG's past education-related activity in North Carolina. (*Id.* at 4–7; Doc. 31–8.) Even inferring that BCG uses CPI as part of its marketing strategy despite CPI's status as a soon-to-be non-profit organization, Public Impact fails to show that BCG manifested an intent to use CPI via the Internet to engage in business or other interactions within North Carolina. Also, while it may perhaps be reasonable to infer that BCG intends to continue education-related business in North Carolina (despite little evidence of education-related work within the State in several years), the presented evidence permits no reasonable inference that BCG intends to somehow use CPI to specifically target North Carolina. There is no allegation that BCG has used Public Impact's trademark in North Carolina (other than via the Internet), nor does it appear that BCG has specifically used the trademark to establish any contact with a North Carolina resident or the State of North Carolina itself. See *ALS Scan*, 293 F.3d at 714–15 (finding no personal jurisdiction where plaintiff failed to show defendant's knowing transmission of infringing material specifically to the forum State “with

the intent of engaging in business or any other transaction in” the forum State); 6 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:38.40 (4th ed. 2004) (“A claim of trademark infringement takes place where the allegedly infringing sales occur.”).

****11 [13]** Under Public Impact's theory, specific jurisdiction would exist in any forum with Internet access in which BCG previously conducted education-related business because that past activity has the potential to give rise to speculative, future infringing use of its trademark within that forum. However, “[a] plaintiff cannot establish personal jurisdiction by relying solely on the basis of [its] own conclusory, speculative assertions.” *Luellen v. Gulick*, No. 1:10CV203, 2012 WL 1029577, at *5 (N.D.W.Va. Mar. 26, 2012); see also *Carefirst*, 334 F.3d at 402 (“When a plaintiff offers only speculation or conclusory assertions about contacts with a forum state, a court is within its discretion in denying jurisdictional discovery.”). Public Impact's speculative assertion here is unpersuasive.

In conclusion, the court finds that it lacks specific, as well as general, jurisdiction over BCG and will grant BCG's motion to dismiss on that basis.

B. Motion to Seal

[14] Public Impact has also moved to seal both its unredacted brief (Doc. 14) filed in support of its underlying motion for preliminary injunction and temporary restraining order (Doc. 6) and the unredacted declaration of Bryan Hassel (Doc. 15). (Doc. 11.) BCG does not oppose the motion. (Doc. 36.)

[15] [16] [17] The public enjoys a right to access documents filed in connection with a dispositive motion in a civil case. *ATI Indus. Automation, Inc. v. Applied Robotics, Inc.*, 801 F.Supp.2d 419, 427 (M.D.N.C.2011) (citing *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252–53 (4th Cir.1988)). However, a district court has discretion to seal documents when the “public's right of access is outweighed by competing interests.” *In re Knight Publ'g Co.*, 743 F.2d 231, 235 (4th Cir.1984). Before sealing documents, a district court must “(1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific *746 reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives.” *Ashcraft v. Conoco, Inc.*, 218

F.3d 288, 302 (4th Cir.2000) (citations omitted). The burden falls on the party seeking to keep the information sealed. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir.2004).

Public Impact has met its burden here by redacting only a small portion of material concerning two proprietary financial figures. Public notice of Public Impact's request to seal was provided on June 09, 2015, when Public Impact filed its “First MOTION to Seal,” seeking to file its unredacted brief and declaration under seal. (Doc. 11.) The motion has now been pending for over a month without any objection having been raised. The court has also considered less drastic alternatives to sealing the unredacted brief and declaration. Public Impact has also filed redacted versions of both documents. (Docs. 7–8.) After a careful comparison of the redacted and unredacted documents, the court sees no less drastic alternative to the redaction of the two financial figures. (Docs. 7–8, 14–15.) Finally, the limited financial information redacted in Public Impact's brief and declaration is proprietary and its public release would negatively affect Public Impact's business. See *Bayer Cropscience Inc. v. Syngenta Crop Prot., LLC*, 979 F.Supp.2d 653, 656–57 (M.D.N.C.2013) (holding that “certain marketing [and] sales” information should be sealed as it was “not ordinarily public” and would cause “harm[] by public disclosure”); *Harrell v. Duke Univ. Health Sys., Inc.*, No. CIV.A. 7:07–813, 2007 WL 4460429, at *1 (D.S.C. Dec. 18, 2007) (approving the sealing of an entire exhibit because of the potential disclosure of proprietary information). The court, therefore, will grant Public Impact's motion to seal its unredacted brief and declaration (Docs. 14–15).

III. CONCLUSION

****12** For the reasons stated,

IT IS THEREFORE ORDERED that Public Impact's motion to seal (Doc. 11) is GRANTED.

IT IS FURTHER ORDERED that BCG's motion to dismiss for lack of personal jurisdiction (Doc. 20) is GRANTED. As a result, Public Impact's motion for temporary restraining order and preliminary injunction (Doc. 6) is DENIED WITHOUT PREJUDICE AS MOOT, and this action is DISMISSED WITHOUT PREJUDICE.

All Citations

117 F.Supp.3d 732, 2015 WL 4622028

Footnotes

- 1 The court may consider supporting affidavits when determining whether a plaintiff has made a prima facie showing of personal jurisdiction. *Universal Leather, LLC v. Koro AR, S.A.*, 773 F.3d 553, 558 (4th Cir.2014) ("When a district court considers a question of personal jurisdiction based on the contents of a complaint and supporting affidavits, the plaintiff has the burden of making a prima facie showing in support of its assertion of jurisdiction.").
- 2 By the time of the June 17, 2015 hearing on Public Impact's motion for temporary restraining order, the parties lacked the opportunity to have fully briefed the issue of personal jurisdiction or gather evidence.
- 3 BCG makes no argument that Public Impact fails to cite a statutory provision supporting personal jurisdiction. See *Danner v. Int'l Freight Sys. of WA, L.L.C.*, No. CIVA RDB-09-3139, 2010 WL 2483474, at *3 (D.Md. June 15, 2010) (analyzing personal jurisdiction despite plaintiffs' failure to cite a long-arm statutory provision).
- 4 Nor does Public Impact argue that BCG's contacts with North Carolina—outside of BCG's registration—are "so substantial and of such a nature as to render the corporation at home in [North Carolina]." *Daimler*, 134 S.Ct. at 761 n. 19.
- 5 Outside of this circuit, courts are split on this issue. Compare *Senju Pharm. Co. v. Metrics, Inc.*, No. CIV.A. 14-3962, 96 F.Supp.3d 428, 436-40 & n. 7, 2015 WL 1472123, at *5-8 & n. 7 (D.N.J. Mar. 31, 2015), with *AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F.Supp.3d 549, 554-56 (D.Del.2014), *motion to certify appeal granted sub nom. Astrazeneca AB v. Aurobindo Pharma Ltd.*, No. CV 14-664, 2014 WL 7533913 (D.Del. Dec. 17, 2014).
- 6 Public Impact makes no allegation that BCG, through CPI, has had any interaction with North Carolina residents through Twitter or LinkedIn.
- 7 Citing *Cable News Network L.P., L.L.L.P. v. CNNNews.com*, 177 F.Supp.2d 506 (E.D.Va.2001), *aff'd in part, vacated in part sub nom. Cable News Network, LP, LLLP v. CNNNews.com*, 56 Fed.Appx. 599 (4th Cir.2003), Public Impact argues, "American courts routinely adjudicate Lanham Act cases involving extraterritorial uses of federally registered trademarks that cause a likelihood of confusion in the United States." (Doc. 30 at 12.) In that case, however, the district court exercised in rem jurisdiction over the allegedly infringing domain name because a Virginia corporation served as the domain name's registrar and registry. *Id.* at 512-14. The court did not find that it had personal jurisdiction over the domain name's owner.

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Testosterone Replacement Therapy Products
Liability Litigation Coordinated Pretrial Proceedings, N.D.Ill., October
10, 2016

2014 WL 6888446

Only the Westlaw citation is currently available.
United States District Court,
C.D. Illinois,
Urbana Division.

Mackenzie Shrum, Plaintiff,

v.

Big Lots Stores, Inc., Lohia Group of Industries
a/k/a Lohia Business Group a/k/a Lohia Group,
Designco Overseas Private Limited a/k/a Designco
India a/k/a Designco, and Bureau Veritas
Consumer Products Services, Inc., Defendants.

Case No. 3:14-cv-03135-CSB-DGB

Signed December 8, 2014

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Defendants.

OPINION

COLIN S. BRUCE, U.S. DISTRICT JUDGE

*1 This case is before the court for ruling on the Motion to Dismiss Plaintiff's Amended Complaint (# 6) filed by defendant Bureau Veritas Consumer Products Services, Inc. (BVCPS). This court has carefully considered the arguments of and the documents provided by the parties. Following this careful and thorough review, Defendant's Motion to Dismiss Plaintiff's Amended Complaint (# 6) is GRANTED.

FACTS

This is a products-liability case. Mackenzie Shrum (Plaintiff), a minor, filed a Complaint (# 1) on May 6, 2014,¹ alleging that, on May 18, 2013, a Mosaic Glass Tabletop Torch (torch) that her father, Jarrod Shrum, bought along with citronella fuel from defendant Big Lots exploded when she tried to extinguish its flame by blowing on the wick, covering her with burning fuel and causing her to suffer third degree burns to forty percent of her body.

Plaintiff states that defendants Lohia Group of Industries and Designco Overseas Private Limited (together, Designco) designed, manufactured, labeled, supplied, and distributed the torch, while Big Lots purchased for resale, labeled, marketed, distributed, and sold the torch. Plaintiff only alleges that BVCPS tested the torch for safety and compliance prior to its labeling, marketing, importation, distribution, sale, and resale. Plaintiff is asserting the following causes of action against Designco, Big Lots, and BVCPS: (1) strict products liability, design defect; (2) strict products liability, manufacturing defect; (3) strict products liability, marketing defect; and (4) negligence. Plaintiff is also asserting a cause of action against Designco and Big Lots for breach of implied warranty.

Plaintiff is a resident and citizen of Illinois. Big Lots is an Ohio corporation that has its headquarters and principal place of business in Ohio. Lohia Group of Industries and Designco Overseas Private Limited are India corporations that have their principal place of business in India. BVCPS is a Massachusetts corporation that has its headquarters and principal place of business in New York. This court sits in diversity.

BVCPS has over 100 offices and laboratories around the world and a presence in every major sourcing and selling territory. It performs product inspection, product certification, and factory assessment services, but its main business is the laboratory testing of pre-production samples of consumer products to client-specified standards. BVCPS' primary laboratory is in New York, but it has a second laboratory in Massachusetts.

BVCPS filed a Motion to Dismiss (# 6) pursuant to Federal Rule of Civil Procedure 12(b)(2), a Brief in

Support (# 7), and an Affidavit in Support (# 9) on July 7, 2014. On September 10, 2014, Plaintiff filed a Response to Motion to Dismiss (# 26) and Memorandum in Opposition to Motion to Dismiss (# 27), with attached exhibits. On September 17, 2014, BVCPS filed a Motion for Leave to Reply to Plaintiff's Opposition to Motion to Dismiss (# 28) and Brief in Support (# 29), followed by a Reply in Further Support of Motion to Dismiss (# 30) on September 29, 2014. Plaintiff then filed a Motion for Leave to File Surreponse (# 31) on October 8, 2014, and a Surreponse to Motion to Dismiss (# 33) on October 31, 2014. An evidentiary hearing has not been held. Instead, both parties have submitted affidavits supporting their positions.

BVCPS' Contacts with Illinois

*2 BVCPS has numerous contacts with Illinois. In determining BVCPS' contacts, this court will accept as true BVCPS' uncontested assertions relating to those contacts and draw all inferences in Plaintiff's favor if BVCPS contests relevant facts. *N. Grain Mktg.*, 743 F.3d at 491 (citations omitted); *Cent. States*, 440 F.3d at 878; *Crawley*, 2006 WL 2331143, at *1 (citations omitted).

BVCPS has the following contacts with Illinois:

1. BVCPS tests products manufactured in Illinois. The torch, however, was not manufactured in Illinois.
2. BVCPS maintains a registered agent in Illinois for the service of process.
3. BVCPS inspects products in Illinois. In 2013, BVCPS conducted 0.98% of all the inspections it performed in Illinois. During the first seven months of 2014, it conducted 0.39% of all of the inspections it performed in Illinois.
4. BVCPS performs factory assessments in Illinois. In 2013, BVCPS performed 1.41% of all the assessments it conducted in Illinois. During the first seven months of 2014, it performed 3.33% of all of the assessments it conducted in Illinois.
5. BVCPS filed Form BCA 13.15—an application to transact business in Illinois—with the Illinois Secretary of State, although it could have filed Form BCA 4.25, which specifically states that a foreign

corporation is “not transacting business in the State of Illinois at this time.”

6. BVCPS employs several Illinois residents. As of the first quarter of 2013, BVCPS had three Illinois employees who were collectively paid approximately \$423,000. The three employees were an account manager who left BVCPS for another job in July 2013, BVCPS' president and director who has been stationed overseas for more than five years, and an information systems technician who does not interact with BVCPS' clients. As of the first quarter of 2014, BVCPS had two employees in Illinois who were collectively paid approximately \$343,000. The decrease in employees and gross payroll expenses is the result of the account manager leaving for other employment.
7. In the process of pursuing new clients, BVCPS solicits business in Illinois. Illinois clients generated 5.2% of BVCPS' total revenue in 2013 and 4.1% of BVCPS' total revenue for the first five months of 2014.
8. Big Lots has designated BVCPS as its testing provider and imposes on it estimated testing turnaround times.
9. The Massachusetts Secretary of the Commonwealth has on file a UCC Form 1 stating that a secured party claims a security interest in imaging equipment used by BVCPS in Downers Grove, Illinois.
10. BVCPS is identified as doing business on several public websites that are accessible in Illinois. On one website, BVCPS has a brochure containing a world map identifying an office in Chicago, Illinois.
11. While Plaintiff claims, Big Lots admits, and BVCPS denies it, this court will assume that BVCPS tested the type of torch in question.

ANALYSIS

BVCPS' argues that it should be dismissed from the case because this court lacks personal jurisdiction over it. Plaintiff disagrees.

I. STANDARD

Motion to Dismiss

A motion to dismiss under Rule 12(b)(2) of the Federal Rules of Civil Procedure challenges whether it is consistent with due process for a court to assert personal jurisdiction over a defendant. *See* Fed.R.Civ.P. 12(b)(2). A complaint does not need to include facts demonstrating personal jurisdiction; however, when a defendant challenges personal jurisdiction, the plaintiff bears the burden of proving that it exists. *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782 (7th Cir.2003) (citations omitted). Where, as here, a determination of jurisdiction is based on the submission of written materials instead of an evidentiary hearing, a plaintiff “need only make out a *prima facie* case of personal jurisdiction.” *Id.* (citations and internal quotation marks omitted); *see also N. Grain Mktg., LLC v. Greving*, 743 F.3d 487, 491 (7th Cir.2014). In determining whether the plaintiff has satisfied this standard, a court must resolve all relevant factual disputes in the plaintiff’s favor and “read the complaint liberally, in its entirety, and with every inference drawn in favor” of the plaintiff. *N. Grain Mktg.*, 743 F.3d at 491 (citations omitted); *Cent. States, Se. and Sw. Areas Pension Fund v. Phencorp Reinsurance Co., Inc.*, 440 F.3d 870, 878 (7th Cir.2006) (citations and internal quotation marks omitted). A court may, however, “accept as true those facts presented in defendant’s affidavit that remain uncontested.” *Crawley v. Marriott Hotels, Inc.*, No. 05–CV–05805, 2006 WL 2331143, at *1 (N.D.Ill. Aug. 10, 2006) (citing *Purdue*, 338 F.3d at 783; *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1275 (7th Cir.1997)).

Personal Jurisdiction

*3 In a diversity-jurisdiction case such as this, a court will have personal jurisdiction over a defendant if the plaintiff files a waiver of service or serves summons on a defendant and “the defendant is subject to the jurisdiction of a court ... in the state where the district court is located—here, Illinois.” *N. Grain Mktg.*, 743 F.3d at 491 (citing Fed.R.Civ.P. 4(k)(1)(A)). In this case, service is not at issue. However, BVCPS claims that it would not be subject to the jurisdiction of Illinois courts.

In order to determine whether BVCPS would be subject to the jurisdiction of Illinois courts, this court must first turn to Illinois’ long-arm statute. The Illinois long-arm statute

permits its courts to exercise jurisdiction for any reason permitted by the Illinois and United States Constitutions. 735 Ill. Comp. Stat. 5/2–209 (a)(2), (b)(4), (c) (West 2014). Because of this, the due process requirements and the Illinois long-arm statute are coextensive. *Madison Miracle Prods., LLC v. MGM Distribution Co.*, 978 N.E.2d 654, 668 (Ill.App.Ct.2012). Therefore, Illinois’ long-arm statute will be satisfied when due process concerns are satisfied. *Id.*

The Illinois and Federal Constitutions’ due process guarantees “are not necessarily coextensive.” *KM Enters., Inc. v. Global Traffic Techs., Inc.*, 725 F.3d 718, 732 (7th Cir.2013). To the extent that the tests diverge, “the Illinois constitutional standard is likely more restrictive than its federal counterpart.” *Id.* Consequently, if a defendant is not subject to personal jurisdiction under the federal constitutional standard, a court “need not worry whether jurisdiction is also proper under the Illinois Constitution.” *Id.* Accordingly, this court will base its determination of jurisdiction on whether exercising personal jurisdiction over BVCPS comports with federal due process requirements.²

Under the federal due process requirements, personal jurisdiction may be exercised if the court has either general or specific personal jurisdiction. *Id.* General jurisdiction requires that a defendant’s contacts with a forum state be sufficiently “‘continuous and systematic’ as to render [them] essentially at home in the forum State.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011) (citations omitted); *N. Grain Mktg.*, 743 F.3d at 492 (citations omitted); *see also Daimler AG v. Bauman*, 134 S.Ct. 746, 751 (2014). “Specific jurisdiction requires that the plaintiff’s cause of action relate [directly] to the defendant’s contact with the forum.” *KM Enters.*, 725 F.3d at 732–33 (citations omitted); *see also N. Grain Mktg.*, 743 F.3d at 492 (citations omitted).

*4 In order for this court to have personal jurisdiction over BVCPS, it must conclude that either specific or general jurisdiction exists. Such jurisdiction must be “determined as of the date of the filing of the suit.” *Wild v. Subscription Plus, Inc.*, 292 F.3d 526, 528 (7th Cir.2002); *see Cent. States*, 440 F.3d at 877.

III. SPECIFIC JURISDICTION

Plaintiff asserts that this court has specific jurisdiction over BVCPS because BVCPS committed a tortious act within Illinois, since the state in which Plaintiff's injury occurred is the state in which the tort occurred. BVCPS, however, maintains that this court lacks specific jurisdiction because Plaintiff's claims against BVCPS do not arise from BVCPS' contacts with Illinois and the Seventh Circuit has abrogated the line of cases upon which Plaintiff relies. This court agrees with BVCPS.

In determining whether there are sufficient minimum contacts to create specific jurisdiction, courts "focus[] on 'the relationship among the defendant, the forum, and the litigation.'" *Walden v. Fiore*, 134 S.Ct. 1115, 1121 (2014) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)). "Specific jurisdiction requires that the plaintiff's cause of action relate [directly] to the defendant's contact with the forum." *KM Enters.*, 725 F.3d at 732–33 (citations omitted); see also *N. Grain Mktg.*, 743 F.3d at 492 (citations omitted). Such jurisdiction exists if: "(1) the defendant has purposefully directed his activities at the forum state or purposefully availed himself of the privilege of conducting business in that state, and (2) the alleged injury arises out of the defendant's forum-related activities." *N. Grain Mktg.*, 743 F.3d at 492 (quoting *Tamburo*, 601 F.3d at 702) (internal quotation marks omitted). Nonetheless, a court's exercise of specific jurisdiction cannot violate "traditional notions of fair play and substantial justice." *Id.* (citing *Tamburo*, 601 F.3d at 702). That is, the minimum contacts must "make personal jurisdiction reasonable and fair under the circumstances." *RAR*, 107 F.3d at 1277.

A. BVCPS Has No Claims-Related Contacts With Illinois.

While BVCPS maintains multiple contacts with Illinois, none of those contacts are related to Plaintiff's claims. A defendant's contacts with a forum state are not all relevant to determining whether a plaintiff's claims relate to or arise out of a defendant's contacts; only those contacts that "bear on the substantive legal dispute between the parties or relate to the operative facts of the case" are relevant. *GCIU-Emp'r Ret. Fund v. Goldfarb Corp.*, 565 F.3d 1018, 1024 (7th Cir.2009); see also *uBid, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 429 (7th Cir.2010); *RAR*, 107 F.3d at 1277–78. Thus, the plaintiff's cause of action "must directly arise out of the specific contacts between the defendant and the forum state." *GCIU*, 565

F.3d at 1024 (emphasis in original) (citation and internal quotation marks omitted).

Despite the laundry list of contacts that BVCPS maintains with Illinois, no contact is relevant to Plaintiff's claims. Plaintiff admits that BVCPS had no involvement in the labeling, marketing, distribution, sale, and resale of any torch. Therefore, BVCPS' alleged tortious actions would be in its testing of the torch and its communications of the results with its co-defendants, making only those contacts associated with those actions relevant.

*5 First, BVCPS' assertion that no communications over any testing on the torch occurred in Illinois is uncontroverted and must therefore be taken as true. As for the testing, Plaintiff's claim that BVCPS tested the type of torch in question must be taken as true. However, that does not create a contact with Illinois because, as Plaintiff concedes, that testing occurred outside of the United States prior to any torch's importation. And BVCPS' assertions that it never tested the particular torch injuring Plaintiff and that none of BVCPS' employees residing in Illinois were involved in any testing are uncontroverted and must be taken as true. Accordingly, no claims-related conduct connects BVCPS to Illinois.

B. BVCPS Has Not Purposefully Directed Its Activities At or Purposefully Availed Itself of the Privilege of Conducting Business in Illinois.

Even if, in testing the torch, BVCPS had contacts with Illinois, BVCPS did not purposefully direct its suit-related conduct to Illinois or purposefully avail itself of the privilege of conducting business in Illinois. Due process requires that a "defendant's suit-related conduct" create a sufficiently "substantial connection with the forum State" that it is "reasonable for the defendant to anticipate that he could be haled into court there." *Walden*, 134 S.Ct. at 1121; *N. Grain Mktg.*, 743 F.3d at 492 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)). For there to be a "substantial connection," the relationship between the defendant and the forum State "must arise out of contacts that the defendant *himself* creates." *Walden*, 134 S.Ct. at 1122 (emphasis in original) (quoting *Burger King*, 471 U.S. at 475) (internal quotation marks omitted). Accordingly, contacts between a forum state and a third party or plaintiff—no matter how significant—cannot satisfy minimum contacts. *Walden*, 134 S.Ct. at 1122 (quoting *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)); see *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466

U.S. 408, 417 (1984); *World-Wide Volkswagen Corp.*, 444 U.S. 286, 298 (1980); *Hanson v. Denckla*, 357 U.S. 235, 253–54 (1958).

Moreover, “‘foreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.” *World-Wide Volkswagen*, 444 U.S. at 295. In products liability cases, “it is the defendant’s purposeful availment that makes jurisdiction consistent with ‘traditional notions of fair play and substantial justice.’” and, “as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.” *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780, 2787–88 (2011). When, as in *World Wide Volkswagen*, products end up in a state due to “the ‘unilateral activity’ of a third party, rather than the defendant’s distribution scheme,” the scenario will doom the plaintiff’s case. *Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 551 (7th Cir.2004) (citations omitted).

Here, BVCPS did not test the torches in Illinois. And BVCPS had no control over where, or even if, the torches would be distributed or sold because it was not involved in the torch’s labeling, marketing, distribution, sale, or resale. Rather, the torch in question was in Illinois because Designco and Big Lots distributed it to Illinois and Big Lots sold it there. Consequently, the torches’ presence in Illinois was entirely the result of the unilateral actions of third parties. And, even if BVCPS knew that the torches would be distributed and sold, it would be difficult for it to foresee that the torches would end up in Illinois, as opposed to any other state or even another nation, because Designco is a large, foreign export company and Big Lots is a multinational corporation with stores nationwide. Further, there is no indication that BVCPS tested the torches to meet any Illinois-specific standards. In any event, foreseeability was foreclosed because BVCPS did not know that the torches would even be sold or distributed. Accordingly, BVCPS did not purposefully direct its suit-related conduct to Illinois or purposefully avail itself of the privilege of conducting business in Illinois.

C. Plaintiff’s Injury in Illinois Cannot Confer Jurisdiction.

*6 This court is also not persuaded by Plaintiff’s claim that it has jurisdiction over BVCPS because BVCPS performed a tortious act or omission that injured Plaintiff in Illinois. Specific jurisdiction’s guiding principles apply even in the case of a tortfeasor. *Walden*, 134 S.Ct. at

1123; *Wallace*, 778 F.2d at 395; *Kellogg Brown*, 2014 WL 4948136, at *5 (citing *Medallion Prods.*, 2007 WL 3085913, at *6) (“The effects of an alleged tort are part of, not a substitute for, the analysis of a defendant’s minimum contacts with the forum.”). As the Supreme Court unanimously held in *Walden v. Fiore*, the basis for jurisdiction is a defendant’s intentional conduct that creates requisite contacts with the forum state. 134 S.Ct. at 1123 (citations omitted). “The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant’s conduct connects him to the forum in a meaningful way.” *Id.* at 1125. And, when the Seventh Circuit addressed the question of “whether harming a plaintiff in the forum state creates sufficient minimum contacts,” the court held that “after *Walden* there can be no doubt that ‘the plaintiff cannot be the only link between the defendant and the forum.’” *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802 (7th Cir.2014) (citations omitted). In other words, “[e]xperiencing the effects of an injury in a forum on its own is insufficient under a tort theory absent ‘something more directed at that [jurisdiction].’” *Kellogg Brown*, 2014 WL 4948136, at *5 (citing *Tamburo*, 601 F.3d at 706).

As the Supreme Court and Seventh Circuit have made clear, then, regardless of whether Plaintiff was harmed in Illinois, Plaintiff cannot be the sole link between BVCPS and Illinois. *See Walden*, 134 S.Ct. at 1123; *Advanced Tactical*, 751 F.3d at 802. Therefore, Plaintiff cannot rely upon prior cases holding that courts in a state where a tort and injury occur have jurisdiction over tortfeasors. *See, e.g., Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir.1997); *Russell v. SNFA*, 965 N.E.2d 1 (Ill.App.Ct.2011), *aff’d*, 987 N.E.2d 778 (Ill.2013). As an Illinois state appellate court has recognized, such arguments are “completely without merit” given both *Walden* and the abrogation of *Janmark* recognized by *Advanced Tactical Stoller v. Herbert*, No. 1–12–2876, 2014 WL 3953933, at*3 (Ill.App.Ct. Aug. 13, 2014) (unpublished). It is therefore unsurprising that Plaintiff eventually concedes that her residence, standing alone, does not confer jurisdiction. Since BVCPS has no claims-related contacts with Illinois, Plaintiff’s residence stands alone and is an insufficient basis to confer specific jurisdiction upon this court.

Because no special rule applies when torts are involved, BVCPS never purposefully directed claims-related activities at Illinois nor purposefully availed itself

of the privilege of conducting business in Illinois, and no claims-related conduct connects BVCPS to Illinois, this court cannot exercise specific personal jurisdiction over BVCPS.

IV. GENERAL JURISDICTION

Plaintiff also argues that this court has general jurisdiction over BVCPS because, as can be seen by BVCPS' contacts with Illinois, BVCPS is doing business in a continuous and systematic fashion in Illinois. BVCPS, however, argues that it does not have sufficient contacts to allow this court to exercise general jurisdiction because it: (1) is headquartered in New York and incorporated in Massachusetts; (2) has no current office in Illinois and at most maintained a single employee at another company's office long before the Plaintiff filed suit; (3) has no real property in Illinois; (4) only employs two Illinois residents: one is stationed overseas; the other never interacts with clients; (5) maintains a website primarily for information purposes; (6) does not advertise its services specifically in Illinois; and (7) conducts only a limited amount of business in Illinois. This court agrees with BVCPS.

The general jurisdiction threshold is “high” and “‘considerably more stringent’ than that required for specific jurisdiction.” *Abelesz v. OTP Bank*, 692 F.3d 638, 654 (7th Cir.2012) (quoting *Purdue*, 338 F.3d at 787); *Tamburo*, 601 F.3d at 701. Defendants are subject to general jurisdiction—and can therefore be haled into court for any action, even one unrelated to a defendant's contacts with a forum state—if their contacts with a state are sufficiently “‘continuous and systematic’ as to render [them] essentially at home in the forum State.” *Goodyear*, 131 S.Ct. at 2851 (citations omitted); *N. Grain Mktg.*, 743 F.3d at 492 (citations omitted); see also *Daimler*, 134 S.Ct. at 751. This inquiry is not analogous to determining whether a defendant's “in-forum contacts can be said to be in *some* sense ‘continuous and systematic.’” *Daimler*, 134 S.Ct. at 761 (emphasis added) (citations omitted). While a business is deemed at home in its place of incorporation and principal place of business, beyond these locations, “contacts must be sufficiently extensive and pervasive to approximate physical presence.” *Abelesz*, 692 F.3d at 654 (citing *Goodyear*, 131 S.Ct. at 2853–54); *Tamburo*, 601 F.3d at 701 (citations omitted). However, even physical presence may not be sufficient to exercise personal jurisdiction over corporations because

“the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts.” *Daimler*, 134 S.Ct. at 762 & n.20. Rather, a court must assess a corporation's entire activities—nationwide and worldwide—and cannot deem a corporation to be “at home” in every place they operate. *Id.* To be sure, mere “isolated or sporadic contacts” or maintaining a public website certainly cannot, without more, establish general jurisdiction. *Tamburo*, 601 F.3d at 701 (citations omitted).

*7 Although BVCPS' contacts with Illinois are fairly extensive and deliberate, they do not satisfy the general jurisdiction standard because this court must assess the entirety of BVCPS' activities—not just the magnitude of its contacts with Illinois—in determining general jurisdiction. In *Daimler AG v. Bauman*, 134 S.Ct. at 760–762, the U.S. Supreme Court unanimously held that a company that was not incorporated in a state and did not have its principal place of business there was not subject to general jurisdiction, even were it to impute to the corporation its subsidiary's extensive contacts with the state. These contacts included having multiple facilities throughout the state, “continuous[ly] interact[ing] with customers throughout” the state, and “direct[ly] distribut[ing] ... thousands of products accounting for billions of dollars in sales.” *Id.* at 752; *id.* at 764 (Sotomayor, J., concurring). Like the corporation in *Daimler*, BVCPS is neither incorporated in the forum state nor has its principal place of business there. And compared to the contacts of the corporation in *Daimler*, BVCPS' contacts with Illinois are slim.

First, BVCPS has well over 100 offices and laboratories throughout the world, but it has no physical presence or office in Illinois. BVCPS does not own any real property in Illinois. While its online brochure contains a world map identifying an office in Chicago, Illinois, BVCPS states that it actually has no office there. Plaintiff does not contravene this assertion. And, while BVCPS' webpage listed a consulting office for BVCPS in Lisle, Illinois, when Plaintiff filed suit, the office actually belonged to an affiliated company and BVCPS' tie to that office—a sole employee—had long left its employ. But, even if this office were imputed to it, BVCPS would have less than one percent of its physical facilities located in Illinois.

Second, BVCPS has only an agent for the service of process in Illinois and two Illinois residents in its employ. BVCPS' maintenance of an agent for the service of

process “does not rise to the level of ‘continuous and systematic’ contacts needed for the court to exercise general jurisdiction.” *Rawlins*, 2014 WL 1657182, at *5; see also *Crochet v. Wal-mart Stores, Inc.*, Civ. No. 6:11–01404, 2012 WL 489204, at *4 (W.D.La. Feb. 13, 2012); *Davis v. Quality Carriers, Inc.*, Nos. 08–4533(SRC), 08–6262(SRC), 2009 WL 3335860, at *3 (D.N.J. Oct. 15, 2009); *Hodges v. Deltic Farm & Timber Co., Inc.*, Civ. A. No. 90–3998, 1991 WL 42577, at *2 (E.D.La. Mar. 28, 1991); *Palmer v. Kawaguchi Iron Works, Ltd.*, 644 F.Supp. 327, 331 (N.D.Ill.1986). As for BVCPS’ employees, BVCPS only had one employee stationed in Illinois and one Illinois resident stationed overseas at the time of this lawsuit’s filing. Even though one employee was the corporation’s president and director, he had been stationed overseas for more than five years. The other employee is an information systems technician who has no contact with customers. And “the presence of a service representative” cannot “ordinarily confer jurisdiction over the corporation as to matters unrelated to those activities.” *Palmer*, 644 F.Supp. at 331. Further, as a matter of fundamental fairness, BVCPS could not reasonably expect that, by employing one Illinois resident as a technician, it was exposing itself to defending in Illinois any claim from any party who filed suit in the State. Moreover, because BVCPS has over 100 facilities worldwide that must be staffed by employees, two Illinois employees constitute a small percentage of BVCPS’ total employees.

Third, while BVCPS does conduct business in Illinois, it transacts only a small percentage of its overall business in the State. It is true that BVCPS filed form BCA 13.15 so that it could transact business in Illinois, solicits business in Illinois, owns imaging equipment in Downers Grove, Illinois, tests products manufactured in Illinois, and inspects products and performs factory assessments in Illinois. But, as the Supreme Court cautioned in *Daimler*, “[n]othing in *International Shoe* and its progeny suggests that a particular quantum of local activity should give a State authority over a far larger quantum of ... activity having no connection to any in-state activity.” *Daimler*, 134 S.Ct. at 762 n.20 (citations and internal quotation marks omitted). And the Seventh Circuit held that, even when a company had “hundreds of thousands” of Illinois customers that “delivered many millions of dollars in revenue” to the company, the company did not have sufficient contacts with Illinois to satisfy the “demanding” general jurisdiction standard. *uBid*, 623 F.3d at 424, 426.

Here, BVCPS conducted a small quantum of its overall activities in Illinois. During the first seven months of 2014, BVCPS conducted 0.39% of all of the inspections it performed and 3.33% of all of the factory assessments it performed in Illinois. And Illinois clients generated just 4.1% of BVCPS’ total revenue for the first five months of 2014. Therefore, BVCPS’ activities appear to be even less than those found insufficient in *uBid*, and BVCPS conducts a far larger quantum of activities outside of Illinois than inside it.

*8 Finally, while BVCPS is identified as doing business on several public websites that are accessible in Illinois, as well as worldwide, these websites primarily provide information about the company. The Seventh Circuit has consistently held that “the maintenance of a public Internet website” is not “sufficient, without more, to establish general jurisdiction.” *Tamburo*, 601 F.3d at 701. And “limited contacts ... through the Internet do not make defendants essentially at home in the state and subject to general personal jurisdiction.” *Snodgrass v. Berklee Coll. of Music*, 559 Fed.Appx. 541, 542 (7th Cir.2014). As a result, courts could not exercise general jurisdiction over a “web-based company which earned millions of dollars annually from Illinois customers and deliberately and successfully exploited [the] Illinois market” and a “company which utilized multiple interactive websites to market cigarettes that were sold and shipped to Illinois customers.” *Snodgrass*, 559 Fed.Appx. at 543 (citing *uBid*, 623 F.3d at 426–29; *Illinois v. Hemi Group LLC*, 622 F.3d 754, 757–59 (7th Cir.2010)). Unlike those websites, the websites in question here are primarily designed to provide information about BVCPS’ services and do not specifically target Illinois. As a matter of fact, BVCPS does not advertise its services specifically in Illinois through its website, or any other medium. Accordingly, BVCPS utilized its website as a means of doing business in Illinois to a lesser degree than the companies in both *uBid* and *Hemi Group*. Just as in those cases, then, BVCPS’ website does not make it essentially at home in Illinois.

Ultimately, despite BVCPS’ having significant contacts with Illinois as of the date of the filing of this suit, these contacts cannot satisfy the high general jurisdiction standard because this court must assess the entirety of BVCPS’ activities—not just the magnitude of its contacts with Illinois. BVCPS conducts business worldwide and has well over 100 offices and laboratories worldwide. It has no physical presence or office in Illinois. It has only

one agent for the service of process in Illinois and two Illinois residents in its employ: one has no contact with customers; the other has been stationed overseas for years. It acquired less than 5% of its total revenues from Illinois clients. And the public websites identifying BVCPS as doing business in Illinois are primarily designed to provide information about the company and do not specifically target Illinois. Accordingly, BVCPS activities in Illinois, when viewed in light of its out-of-forum activities, are not sufficiently systematic and continuous as to render it at home in Illinois, which precludes this court from exercising general personal jurisdiction.

Moreover, because no special rule applies when torts are involved, BVCPS never purposefully directed claims-related activities at Illinois nor purposefully availed itself of the privilege of conducting business in Illinois, and no claims-related conduct connects BVCPS to Illinois, this

court cannot exercise specific personal jurisdiction over BVCPS.

Consequently, this court lacks personal jurisdiction over BVCPS, and BVCPS must be dismissed from this action.

IT IS THEREFORE ORDERED THAT:

- (1) BVCPS' Motion to Dismiss Plaintiff's Amended Complaint (# 6) is GRANTED.
- (2) BVCPS is terminated as a party in this action.
- (3) This case is referred to Magistrate Judge David G. Bernthal for further proceedings.

All Citations

Not Reported in F.Supp.3d, 2014 WL 6888446

Footnotes

- 1 Plaintiff filed an amended complaint (# 3) on May 22, 2014.
- 2 Plaintiff's jurisdictional arguments are based on BVCPS committing a tortious act in Illinois and "doing business" within the State: either action would bring BVCPS under Illinois courts' jurisdiction under 735 Ill. Comp. Stat. 5/2209 (a)(2), (b)(4). However, "[t]he effects of an alleged tort are part of, not a substitute for, the analysis of a defendant's minimum contacts with the forum." *United States v. Kellogg Brown & Root Servs., Inc.*, No. 4:12-CV-4110-SLD-JAG, 2014 WL 4948136, at *5 (C.D.Ill. Sept. 30, 2014) (citing *Medallion Prods., Inc. v. H.C.T.V., Inc.*, No. 06-C-2597, 2007 WL 3085913, at *6 (N.D.Ill. Oct. 18, 2007); see also *Wallace v. Herron*, 778 F.2d 391, 395 (7th Cir.1985). And the long-arm statute's "doing business" standard is "virtually identical to the federal requirement for general personal jurisdiction that a party maintain continuous and systematic business contacts with the forum." *Cent. States, Se. and Sw. Areas Pension Fund v. Phencorp Reinsurance Co., Inc.*, 530 F.Supp.2d 1008, 1016 (N.D.Ill.2008). Therefore, Plaintiff's arguments are adequately addressed by this court's analysis of whether exercising general or specific personal jurisdiction over BVCPS would comport with federal due process requirements.

2015 WL 1442773

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

Cameron SUTCLIFFE, et al., Plaintiffs,

v.

HONEYWELL INTERNATIONAL,
INC., et al., Defendants.

No. CV-13-01029-PHX-PGR.

Signed March 30, 2015.

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ORDER

PAUL G. ROSENBLATT, District Judge.

*1 Pending before the Court is Defendants Airbus Military, S.L.'s and EADS Construcciones Aeronauticas S.A.'s Motion to Dismiss the Second Amended Complaint for Lack of Personal Jurisdiction Pursuant to Fed.R.Civ.P. 12(b)(2) (Doc. 38). Having considered the parties' memoranda in light of the relevant record, the Court finds the motion should be granted pursuant to Fed.R.Civ.P. 12(b)(2) because the Court lacks personal jurisdiction over either Airbus Military, S .L. or EADS Construcciones Aeronáuticas S.A.¹

Background

This action arises from the crash of a CASA C212-CC40, a twin engine aircraft ("the Aircraft"), in Saskatoon, Saskatchewan, Canada on April 1, 2011. On the day of the crash, the Aircraft, owned by non-party Fugro Aviation Canada Ltd., was being used to conduct an

aerial geophysical survey near Saskatoon. On board the Aircraft were two pilots, Cameron Sutcliffe and Brock Gorrell, and an equipment operator, Iaroslav Gorokhovski. Approximately three hours into the flight, the Aircraft's right engine failed and the pilots attempted to return to the Saskatoon airport but could not do so because the Aircraft's left engine failed about fourteen minutes later while the Aircraft was on its final approach to the airport and the Aircraft ended up crashing into a noise abatement wall next to a street in Saskatoon. Both pilots were injured in the crash, and Gorokhovski was killed. The Second Amended Complaint ("SAC"), filed by plaintiffs Sutcliffe and Gorell and Galina Gorokhovskaia, in her personal capacity and on behalf of Gorokhovski's beneficiaries, alleges a separate claim of negligence against each of three groups of defendants: Honeywell International, Inc., alleged to be the successor to Garrett, the company that designed, manufactured and distributed the Aircraft's TPE331 turboprop engines; EADS Construcciones Aeronáuticas, S.A. ("EADS CASA") and Airbus Military S.L. ("Airbus Military"), both alleged to be the manufacturer of the C212 aircraft, with Airbus Military alleged to be the successor to EADS CASA; and Shimadzu Corporation and Shimadzu Precision Instruments, Inc., alleged to be suppliers of components used in the Aircraft's engines.²

More specifically, Count Three of the SAC alleges that EADS CASA and Airbus Military, without distinguishing between them, "failed to meet the duties [of care to pilots and passengers in CASA C-212 aircraft] required of them as the designer, manufacturer, type certificate holder, and distributor of the Aircraft" (§ 49), and that their acts of negligence did or could include the following (§ 50):

- A. Failing to conduct adequate test[ing] to ensure the Aircraft could be safely operated with one engine inoperative;
- B. Designing a fuel system which was incapable of supplying the collector tank with sufficient fuel when the Aircraft was flown banked in the operating engine;
- C. Failing to include screens on the ejector pumps;
- D. Specifying inspection techniques and intervals that were unable to detect foreign objects in ejector pumps and fuel tanks;

*2 E. Failing to have an effective system in place to identify and report engine failures caused by low fuel levels in collector tanks, including failures identified in service difficulty, incident and accident reports, warranty claims, and communications with engine and fuel pump manufacturers, operators, repair stations, pilots, mechanics, transportation safe[ty] boards, and military and civil aviation authorities;

F. Failing to apply state of the art ergonomics and human factors principles in the design of the cockpit, including the annunciator panel;

G. Designing the annunciator panel with lights grouped by system rather than engine;

H. Specifying inadequate emergency procedures to engine failures;

I. Failing to warn that single engine operations could lead to fuel starvation of the operating engine; and

J. Failing to warn of the risks of debris injection by ejector pumps.

The SAC alleges that the named plaintiffs, Sutcliffe, Gorrell and Galina Gorokhovskaia, are all residents of Canada, as was decedent Gorokhovski, and that his beneficiaries are also residents of Canada with the exception of his parents who are alleged to be citizens of the United States residing in Georgia. None of the plaintiffs are alleged to have any connection with Arizona. Defendant Honeywell is alleged to be an Arizona corporation with its principal place of business in Arizona, and defendants EADS CASA and Airbus Military are alleged to be Spanish corporations with their principal places of business in Madrid, Spain.

*Personal Jurisdiction-Related Evidence*³

The defendants have supported their motion with two declarations from Pedro Blanco, EADS CASA's head of legal affairs.⁴ The plaintiffs, whose SAC contains no personal jurisdiction allegations, have supported their opposition to the motion with the declaration of Jamie Thornback, a Canadian attorney associated with the plaintiffs who specializes in aviation accidents, and various website documents submitted by Thornback.

There is no dispute that both engines that were in the Aircraft at the time of the crash in April 2011 had been originally purchased by Construcciones Aeronáuticas SA ("CASA"), a predecessor to EADS CASA, from co-defendant Honeywell's predecessor in Arizona in 1980 (left engine) and 1981 (right engine). There is also no dispute that the crash-related engines were not the engines that had been originally installed on the Aircraft by CASA at the time of its manufacture in 1980; the right engine was installed in the Aircraft in January 2005 by a non-party and the left engine was installed in August 2010 by a non-party.

A. EADS CASA's evidence

According to the evidence submitted on behalf of EADS CASA by its declarant Blanco, CASA was renamed EADS CASA in 1999 when it became a subsidiary of the European Aeronautic Defense and Space Company ("EADS"); EADS CASA became a subsidiary of EADS N.V. in April 2009, which was renamed Airbus Group N.V. in June 2014. EADS CASA designs, manufactures, assembles and sells certain aircraft, including the C-212 and its variants. The Aircraft was delivered in 1981 to American Casa Distributor, Inc., a California company that is independent from EADS CASA, and thereafter EADS CASA did not determine or play any role in who purchased or used the Aircraft. The Aircraft was extensively modified by its owner in 1989 and received a Canadian type limited certificate; EADS CASA was not involved in those modifications.

*3 Blanco also declares that the C-212 aircraft and all of its variants were designed, manufactured, assembled, tested, distributed, and sold in Spain, and decisions about the issuance of warnings, operational procedures, and emergency procedures to customers and operators were and are made in Spain. He also states that none of the specific acts of negligence alleged against EADS CASA in Count Three of the SAC were committed in Arizona by it or any corporate affiliate or predecessor.

Blanco further declares that EADS CASA has not made any direct sales to Arizona customers in the previous ten years, and that it and its predecessors make a limited number of purchases from Arizona companies. He also states that EADS CASA North America, which was previously owned as a subsidiary of EADS CASA, had sales of approximately \$47,881 to customers in Arizona between July 2008 and October 2011, and that EADS

CASA North America is now a subsidiary of Airbus Group, Inc., which is a corporation wholly owned by Airbus Group, N.V.

Blanco also declares that in the past ten years EADS CASA has not maintained any offices, employees, or representatives, including sales personnel, in Arizona; that it has not had any subsidiaries or affiliates with offices, employees or agents in Arizona; that it has not advertised any aircraft, parts, equipment, or services in Arizona or to any customer whose principal place of business is in Arizona; that it has not owned any property or maintained any bank accounts in Arizona; that it has not sued or previously been sued in Arizona; and it has not been registered to do business in Arizona.

B. Airbus Military's evidence

According to the evidence submitted by declarant Blanco on behalf of Airbus Military, the company was founded in 2002 for the sole purpose of designing, manufacturing, assembling and selling a single aircraft, the A400M, and the company has never played any role in the design, manufacture, assembly, sale, or after-sale support of the CASA C-212-CC40 aircraft, its engines, or any of its components.

Blanco also declares that Airbus Military has never maintained any offices, employees, or representatives, including sales personnel, in Arizona; that it has never had any subsidiaries or affiliates with offices, employees or agents in Arizona; that it has never sold aircraft, parts, or equipment to, or provided any services to any customer in Arizona; that it has never advertised any aircraft or parts, equipment or services in Arizona or to any customer whose principal place of business is in Arizona; that it has never owned any property, maintained any bank accounts, or paid any taxes in Arizona; that it has never sued or previously been sued in Arizona; and that it has never been registered to do business in Arizona. Blanco further declares that Airbus Military has never had any offices, employees, property or representatives in the United States.

C. The plaintiffs' evidence

The plaintiffs, through its declarant Jamie Thornback, has submitted research information that Thornback obtained from several websites, including Airbus-related websites and Honeywell's website. Thornback states in

his declaration that he has investigated and litigated other accidents involving TPE331 engines, and that he conducted research regarding the Aircraft's crash and potentially responsible parties both before and after this action was filed. Based on his research, Thornback states that 477 C212 aircraft were manufactured between 1971 and 2013, which means that Airbus Military/EADS CASA and their predecessors have purchased at least 954 TPE331-10 engines from Garrett/Honeywell; he also states that 13,000 TPE331 engines have shipped from Honeywell's Arizona facility since 1961, which means that Airbus Military/EADS CASA have purchased at least 7% of the TPE331 engines manufactured by Honeywell. He further states that in 2009 the general procurement activities of Airbus, Airbus Military Astrium, EADS, EADS Defense & Security and Eurocopter were merged into a single department, the EADS General Procurement share service, which is hosted by Airbus; that Airbus has purchased materials from several Arizona companies, that Airbus contributed \$165 million in Arizona in 2009, working with sixteen suppliers, and that Honeywell has a longstanding relationship with Airbus and has been a part of every aircraft Airbus has developed.

Discussion

*4 EADS CASA and Airbus Military ("the defendants") have moved to dismiss the negligence claim alleged against them pursuant to Fed.R.Civ.P. 12(b)(2) for lack of personal jurisdiction; they argue that the Court has neither general nor specific personal jurisdiction over them. The burden of proof is on the plaintiffs to show that personal jurisdiction is appropriate, and they need to make that showing as to both of the defendants. *Walden v. Fiore*, —U.S.—, —, 134 S.Ct. 1115, 1123, 188 L.Ed.2d 12 (2014). Since the Court is only considering the parties' pleadings and their submitted written materials, the plaintiffs need only make a prima facie showing of jurisdictional facts to defeat the motion to dismiss, *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1066 (9th Cir.2014), *i.e.*, they need only demonstrate facts that if true would support jurisdiction over the defendants. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir.1995).

Where, as here, there is no applicable federal statute governing personal jurisdiction, the Court applies the law of the state in which it sits. *Martinez*, at 1066. Arizona's long-arm statute provides that an Arizona court may exercise personal jurisdiction over a nonresident defendant to the maximum extent permitted under the

Due Process Clause of the United States Constitution. Ariz.R.Civ.P. 4.2(a); *A. Uberti and C. v. Leonardo*, 181 Ariz. 565, 892 P.2d 1354, 1358 (Ariz.1995). The Constitution permits courts to exercise personal jurisdiction over nonresident defendants if there are at least “minimum contacts” with the forum such that the exercise of jurisdiction “does not offend traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (internal quotation marks omitted). The “‘minimum contacts’ inquiry principally protects the liberty of the nonresident defendant, not the interests of the plaintiff.” *Walden v. Fiore*, 134 S.Ct. at 1125 n. 9.

A. General Jurisdiction

The plaintiffs argue in part that the Court possesses general personal jurisdiction over the defendants. General jurisdiction allows a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world. *Martinez v. Aero Caribbean*, 764 F.3d at 1066. The Supreme Court has made it clear that general jurisdiction “requires affiliations so continuous and systematic as to render the foreign corporation essentially at home in the forum State, *i.e.*, comparable to a domestic enterprise in that State.” *Daimler AG v. Bauman*, — U.S. —, — n. 11, 134 S.Ct. 746, 758 n. 11, 187 L.Ed.2d 624 (2014) (internal quotation marks, brackets, and citation omitted). This standard is a “demanding” one, *Martinez*, at 1070, and the paradigm fora for general jurisdiction over a corporation are its place of incorporation and its principal place of business, *Daimler*, at 760, and only in an “exceptional case” will general jurisdiction be available anywhere else. *Id.* at 761 n. 19; *Martinez*, at 1070. It is undisputed that Arizona is neither the place of incorporation nor the primary place of business of either EADS CASA or Airbus Military.

*5 The Court, reviewing the evidence of record in the light most favorable to the plaintiffs, concludes that the plaintiffs have failed to establish a prima facie showing of general jurisdiction over either EADS CASA or Airbus Military because their factual showing is insufficient as a matter of law to render these defendants “essentially at home” in Arizona.

The plaintiffs' argument that the “numerous contacts” between the defendants and Arizona are sufficient to establish general jurisdiction is simply untenable. First, the plaintiffs' theory of general jurisdiction is not

based solely on the Arizona-related contacts of the defendants, but rather on the aggregate in-state activities of unspecified Airbus-connected entities affiliated or related to them. This single enterprise contention, whether it be grounded in an agency or alter ego theory, and it's not clear whether the plaintiffs are invoking one or both theories, is insufficient to establish general personal jurisdiction. As to the former, the Supreme Court essentially rejected an agency theory of general jurisdiction in *Daimler*: “The Ninth Circuit's agency theory appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep even the sprawling view we rejected in *Goodyear [Dunlop Tires Operations, S.A. v. Brown]*, — U.S. —, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011)”. As to the latter, the plaintiffs have not made any showing sufficient to establish that either defendant is the alter ego of some other unspecified Airbus-related entity with Arizona contacts. Under Arizona law, corporate status is not to be lightly disregarded, *Chapman v. Field*, 124 Ariz. 100, 602 P.2d 481, 483 (Ariz.1979), and alter ego status is not demonstrated absent proof of both (1) unity of control and (2) that the observance of corporate form would sanction a fraud or promote injustice. *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 821 P.2d 725, 728 (Ariz.1991). The Court agrees with the defendants that the isolated examples of cooperation among Airbus-related entities that the plaintiffs identify from declarant Thornback's internet research do not amount to any evidence of the injustice or fraud requirement necessary to pierce the corporate veil.

Secondly, and more importantly, general personal jurisdiction would not exist here even if all of the Arizona-based contacts by any Airbus-related entity mentioned by the plaintiffs are attributed to the defendants. For purposes of this motion, the Court accepts that purchases of aerospace-related products from Arizona companies by Airbus-related entities are systematic, continuous, and substantial. But those procurement activities alone are insufficient because the proper inquiry is not, as the plaintiffs seem to suggest, whether a defendant's contacts in the aggregate in the forum state are extensive. The Supreme Court has now made it clear that since a corporation is normally at home for purposes of general personal jurisdiction only at its place of incorporation and its principal place of business, an argument that a foreign corporation is subject to general jurisdiction in any state in which it conducts a systematic, continuous and

substantial course of business is “unacceptably grasping.” *Daimler AG v. Bauman*, 134 S.Ct. at 761. This is so because the inquiry into general jurisdiction is not solely focused on the magnitude of the foreign defendant's in-state contacts, but on “an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, ‘at home’ would be synonymous with ‘doing business’ tests framed before specific jurisdiction evolved in the United States.” *Id.* at 762. *See also, Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) (“[W]e hold that mere purchases even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.”)

*6 The plaintiffs have simply not made the requisite showing that this is an exceptional case permitting general personal jurisdiction over defendants incorporated and headquartered in Spain and the Court concludes that subjecting the defendants to general jurisdiction in Arizona is incompatible with due process. *See Helicopteros*, at 417–18 (Supreme Court concluded that a Colombian corporation that owned a helicopter that crashed in Peru killing a U.S. citizen was not subject to general personal jurisdiction in a wrongful death action brought in Texas. In so deciding, the Supreme Court noted that the defendant had no place of business in Texas and had never been licensed to do business there. It further noted that the defendant's contacts with Texas, which included that its CEO had gone to Texas to negotiate a contract for transportation services with the plaintiffs' employers, it had deposited checks drawn on a Texas bank, it had made significant purchases from Bell Helicopter in Texas, and had sent its personnel to Texas for training at Bell's facilities there, were insufficient to satisfy due process requirements. *See also, Martinez v. Aero Caribbean*, 764 F.3d at 1070 (Ninth Circuit concluded that a foreign aircraft manufacturer sued for wrongful death in California over an airplane crash in Cuba was not subject to general personal jurisdiction in California. In so determining, the court noted that this was not an exceptional case permitting general personal jurisdiction because the defendant was organized and had its principal place of business in France, it had no offices, staff or other physical presence in California, it was not licensed to do business in California, and its California

contacts were minor compared to its worldwide activities. While the defendant did have numerous contacts with California, including that it had contracts worth between \$225 and \$450 million to sell airplanes to a California corporation, it had contracts with eleven California component suppliers, it had sent company representatives to California to attend industry conferences, promote its products, and meet with its suppliers, its aircraft were being used in California, and it had advertised in trade publications with distribution in California, these contacts were insufficient to make the defendant at home in California.)

B. Specific Jurisdiction

The plaintiffs also argue that the Court has specific jurisdiction over the defendants, basically because the engines that were on the Aircraft at the time of the crash were purchased by EADS CASA's corporate predecessor in Arizona. The inquiry into whether a forum state may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation. *Walden v. Fiore*, 134 S.Ct. at 1121. A three-part is used to determine whether a defendant has sufficient contacts with the forum state to be subjected to specific personal jurisdiction: (1) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or a forum resident, or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the nonresident 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. *Picot v. Weston*, — F.3d —, 2015 WL 1259528, at *3 (9th Cir. March 19, 2015). All three factors must exist for personal jurisdiction to apply. *Omehuk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir.1995). The plaintiffs have the burden of proving the first two prongs, and if they do so, the burden shifts to the defendants to set forth a compelling case that the exercise of jurisdiction would not be reasonable. *Picot*, at *4.

(1) Purposeful Availment

*7 The first prong of the test is analyzed under either a purposeful availment standard or a purposeful direction standard, which are two distinct concepts.

Washington Shoe Co. v. A-Z Sporting Goods Inc., 704 F.3d 668, 672 (9th Cir.2012). While the Ninth Circuit generally applies a “purposeful direction” or “effects” test for claims sounding in tort, *id.*, it has, at least in some cases, limited the use of that test to claims involving intentional torts. See *Holland America Line Inc. v. Wärtsilä North America, Inc.*, 485 F.3d 450, 460 (9th Cir.2007) (“[I]t is well established that the *Calder* [purposeful direction] test applies only to intentional torts, not to the breach of contract and negligence claims[.]”); accord, *Marlyn Nutraceuticals v. Improvita Health Products*, 663 F.Supp.2d 841, 850 (D.Ariz.2009) (Court applied the purposeful availment test to a negligent misrepresentation claim). Since the sole claim against the defendants is a negligence claim, a non-intentional tort, the Court will apply the purposeful availment standard.⁵

This standard focuses on whether a nonresident defendant's conduct and connection with the forum are such that it should reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). It is based on the presumption that it is reasonable to require a defendant to be subject to the burden of litigating in a state in which it conducts business and benefits from its activities in that state. *Brainerd v. Governors of the University of Alberta*, 873 F.2d 1257, 1259 (9th Cir.1989). This requirement is met if the contacts proximately result from actions by the defendant itself that create a substantial connection with the forum, such as where the defendant has deliberately engaged in significant activities within the forum or has created continuing obligations between itself and forum residents. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–76, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). But the defendant may not be haled into a jurisdiction as a result of the defendant's random, fortuitous, or attenuated contacts with the forum. *Id.* at 474.

The plaintiffs argue in part that EADS CASA purposely availed itself of the rights and privileges of Arizona law via its purchase of the Aircraft's engines in Arizona from Honeywell.⁶ The Court, viewing the evidence in a light most favorable to the plaintiffs, concludes that the plaintiffs have met this prong because they have sufficiently established that the defendants have deliberately engaged in commercial activities within Arizona that cannot be said to be merely attenuated.

(2) Arising Out Of

In order for the defendants' purposeful activities in Arizona to support specific jurisdiction, the plaintiffs' claims against them must arise out of those activities. The Ninth Circuit relies on a “but for” test to determine whether a particular claim arises out of forum-related activities. *Ballard v. Savage*, 65 F.3d at 1500. The question presented here is whether but for the defendants' contacts with Arizona would the plaintiffs' claims against them have arisen. *Id.* The plaintiffs' contention is that “‘but for’ EADS CASA's purchase of engines from Honeywell there would be no action against EADS CASA in Arizona.”

*8 The Court is unpersuaded that this factor has been met because it concludes that the “arising out of” issue cannot be reduced to the simplistic and sweeping approach taken by the plaintiffs given the facts of record. The causation element requires a more direct relationship between the relevant forum contact, the mere purchase of the engines, and the actual negligence claim brought against the moving defendants in the SAC. As the defendants correctly point out, the plaintiffs do not allege that the purchase of the engines in Arizona constituted a negligent act on the defendants' part, nor do they allege that any of the specific acts of negligence raised against the defendants in ¶ 50 of Count Three of the SAC, *i.e.*, the design of the C-212 aircraft's fuel system, the design of its cockpit and instrument panel, the testing of the aircraft, the specification of inspection techniques for the aircraft, and decisions about whether and what warnings to issue, occurred in Arizona. While the design and/or manufacture of the engines themselves underlies the plaintiffs' negligence claim against Honeywell, and their negligence claim against the former Shimadzu defendants, it does not appear to directly underlie their negligence claim against the moving defendants.

(3) Reasonableness

But even if the first two prongs of the specific jurisdiction test are met, the assertion of personal jurisdiction against the defendants is unreasonable if it does not comport with fair play and substantial justice. The Court must consider and balance seven factors in determining the reasonableness of its exercise of personal jurisdiction, none of which are dispositive in itself. *Terracom v. Valley National Bank*, 49 F.3d 555, 561 (9th Cir.1995).

The first reasonableness factor is the extent of the defendants' purposeful interjection into Arizona. Notwithstanding the Court's conclusion that the plaintiffs have satisfied the purposeful availment prong, this factor tilts at least somewhat in the defendants' favor given that the defendants' relevant connections with Arizona are sparse. See *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1488 (9th Cir.1993) (Ninth Circuit noted that since the foreign defendants' contacts with the forum were attenuated, this first factor weighed in their favor, but that it did not weigh heavily in their favor given the court's assumption that those contacts were sufficient to meet the purposeful availment prong.)

The second factor is the burden on the defendants of defending this action in Arizona. This factor favors the defendants because they are Spanish businesses headquartered in Spain with no physical presence in Arizona, and there is no evidence of record that any of the specific allegations of negligence against them took place anywhere other than in Spain. "The Supreme Court has recognized that defending a lawsuit in a foreign country can impose a substantial burden on a nonresident alien. 'The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.' " *Core-Vent*, at 1488 (quoting *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 114, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)); see also, *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1125-26 (9th Cir.2002) (Ninth Circuit, in assessing this second factor, noted that the burden on the foreign defendant to defend a suit in California "appears great, given that it is incorporated in India, owns no property in the forum, and has no employees or persons authorized to act on its behalf there. Moreover, its potential witnesses and evidence are likely half a world away.")

*9 The third factor is the extent to which the exercise of jurisdiction would conflict with the sovereignty of the defendants' state. This factor favors the defendants. The Ninth Circuit has recognized that where the nonresident defendant "is from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction." *Glencore Grain Rotterdam*, at 1126.

The fourth factor is the forum state's interest in adjudicating the dispute. This factor weighs in the defendants' favor because Arizona's interest in this action, at least as to the negligence claim against these defendants, is at best very slight for the following reasons: none of the plaintiffs are Arizona residents and none of them were harmed in Arizona; while the Aircraft's engines were purchased from an Arizona company, those purchases occurred in 1980 and 1981, over 30 years prior to the crash of the Aircraft; the specific allegations of negligence raised against these defendants occurred outside of Arizona; the Aircraft was not built or sold in Arizona, and there is no evidence that it was ever operated in Arizona. See *Asahi Metal Industry Co.*, 480 U.S. at 114 ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished.")

The fifth factor considers what forum is the most efficient judicial resolution of the controversy, which is evaluated by looking at where the witnesses and the evidence are likely to be located. *Terracom v. Valley National Bank*, 49 F.3d at 561. This is essentially a neutral factor here because witnesses and evidence will likely be located in Arizona, Canada, and Spain.

The sixth factor is the importance of the forum to the plaintiffs' interest in convenient and effective relief. Notwithstanding the plaintiffs' statement that they filed suit in Arizona for a variety of reasons, including their enhanced ability to obtain discovery in this forum, particularly against Honeywell, this factor is essentially insignificant in this case given that Arizona is neither the plaintiffs' place of residence nor the location of the crash. See *Core-Vent Corp.*, 11 F.3d at 1490 (Ninth Circuit noted that "neither the Supreme Court nor our court has given much weight to inconvenience to the plaintiff" and that "a mere preference" on the plaintiff's part for its chosen forum does not affect the balancing.)

The seventh factor is the existence of an alternative forum. This factor weighs in the defendants' favor because the plaintiffs, who bear the burden of proving the unavailability of an alternative forum, *id.*, have not sufficiently established that they would be precluded from effectively litigating their negligence claim against these defendants in Canada or Spain.

In summary, the Court, having balanced all of the reasonableness-related factors, concludes that the moving

defendants have presented a sufficiently compelling argument that the exercise of personal jurisdiction over them by this Court would be improper because it would offend the traditional notions of fair play and substantial justice.

C. Jurisdictional Discovery

*10 The plaintiffs request that if the Court fails to summarily deny the defendants' motion that they be afforded the opportunity to conduct formal jurisdictional discovery related to the internal relationships among the various Airbus-related entities and those entities' contacts with Arizona. They state that such discovery will show, for example, that the defendants' purchases of Honeywell's products are systematic, continuous, and substantial.

The Court agrees with the defendants that no such discovery is warranted here because, based on the sufficiently developed record already presented by the parties, the requested discovery would not reveal facts sufficient to constitute a basis for either general or specific personal jurisdiction. *See Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir.2006) (“[W]here a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants, the Court need not permit even limited discovery[.]”); *Martinez v. Aero Caribbean*, 764 F.3d at 1070 (Ninth Circuit concluded that it is not an abuse of discretion to refuse to grant jurisdictional

discovery when it is clear that additional discovery would not demonstrate facts sufficient to constitute a basis for personal jurisdiction.); *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir.2008) (Ninth Circuit noted that the denial of jurisdictional discovery is not an abuse of discretion when the plaintiffs' request is based only on their belief that discovery will enable them to demonstrate sufficient forum business contacts to establish the court's personal jurisdiction.) Therefore,

IT IS ORDERED that Defendant Shimadzu Corporation's Motion to Amend Caption (Doc. 40) is granted to the extent that the caption of this action is amended to reflect that the sole remaining named defendant is Honeywell International, Inc.

IT IS FURTHER ORDERED that Defendant Airbus Military, S.L.'s and EADS Construcciones Aeronauticas S.A.'s Motion to Dismiss the Second Amended Complaint for Lack of Personal Jurisdiction Pursuant to Fed.R.Civ.P. 12(b)(2) (Doc. 38) is granted to the extent that the Second Amended Complaint (Doc. 12) is dismissed as to defendants Airbus Military, S.L. and EADS Construcciones Aeronáuticas S.A. pursuant to Fed.R.Civ.P. 12(b)(2) for lack of personal jurisdiction.

All Citations

Not Reported in F.Supp.3d, 2015 WL 1442773

Footnotes

- 1 Although the moving defendants, without the joinder of the plaintiffs, have requested oral argument, the Court concludes that oral argument would not significantly aid the decisional process.
The Court notes that it has intentionally not discussed every argument raised by the parties and that those arguments not discussed were considered by the Court to be unnecessary to its resolution of the pending motion.
The Court further notes that it is exercising its discretion to resolve the personal jurisdiction issue prior to resolving the pending issue of whether it has subject matter jurisdiction over this action based on diversity of citizenship. *See Ruhrgas AG v. Marathon Oil*, 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999).
- 2 Both Shimadzu defendants were previously dismissed from this action.
- 3 The plaintiffs contend at least twice in their response that the defendants' motion to dismiss, which has been brought pursuant to Rule 12(b)(2), must be treated as a motion for summary judgment pursuant to Fed.R.Civ.P. 12(d) because evidentiary matters outside of the pleadings have been presented to the Court. This contention is baseless because Rule 12(d), by its very terms, mandates such a conversion only as to motions brought pursuant to Fed.Civ.P. 12(b) (6) and 12(c).
- 4 The Court notes that it has not relied on any disputed evidence set forth in Blanco's supplemental declaration filed with the defendants' reply brief.
- 5 The Court notes that if the purposeful direction standard were to be applied here, the Court would conclude that no specific personal jurisdiction exists because the plaintiffs failed to meet their burden as to the first prong. This is because one element of that standard is that the defendants caused harm that they knew would be likely to be suffered in the forum

state, *Washington Shoe Co.*, 704 F.3d at 673, and the plaintiffs, who have not alleged that they have any connection at all with Arizona, clearly have not alleged that they suffered any harm in Arizona.

- 6 Although the Court recognizes that the Arizona-related contacts at issue are those of EADS CASA or of its corporate predecessor CASA, the Court treats the defendants as being a single entity for purposes of the specific jurisdiction analysis given the plaintiffs' allegation and evidence that Airbus Military is the successor to EADS CASA.

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Dear Ms. Carlson:

Pursuant to the Court's prior permission, please find attached WDTL's Amicus Curiae Brief in the above matter.

I am hereby contemporaneously serving electronically, by copy of this message, counsel for the parties, and to the Washington State Association for Justice Foundation who by agreement have accepted this method of service.

Thank you,
Stew
Chair, WDTL Amicus Committee

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