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SUPREME COURT

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SUPREME COURT OF THE STATE OF WASHINGTON

DONALD R. SWANK, Individually and as Personal Representative
of the ESTATE OF ANDREW F. SWANK, and PATRICIA A. SWANK,

Petitioners,

v.

VALLEY CHRISTIAN SCHOOL, a Washington State Non-Profit
Corporation, JIM PURYEAR, MIKE HEDEN, and DERICK TABISH,
individually, and TIMOTHY F. BURNS, M.D., individually,

Respondents.

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

Christopher W. Nicoll, WSBA #20771
Noah S. Jaffe, WSBA #43454
Nicoll Black & Feig PLLC
1325 Fourth Avenue, Suite 1650
Seattle, WA 98101
Telephone: (206) 838-7555
Facsimile: (206) 838-7515
cnicoll@nicollblack.com

Stewart A. Estes, WSBA #15535
Keating Bucklin &
McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
Telephone: (206) 623-8861
Facsimile: (206) 223-9423
sestes@kbmlawyers.com

Attorneys for Amicus Curiae Washington Defense Trial Lawyers

 ORIGINAL

APPENDIX OF UNPUBLISHED AUTHORITIES

Green v. United States, 14-CV-119-NJR-DGW, 2016 WL 6248281 (S.D. Ill. Oct. 26, 2016)..... A1-A4

Presby Patent Trust v. Infiltrator Sys., Inc., 14-CV-542-JL, 2015 WL 3506517, at *3 (D.N.H. June 3, 2015)..... A5-A11

Ruhe v. Bowen, 2:15-CV-03792-DCN, 2016 WL 5372555, at *4 (D.S.C. Sept. 26, 2016)..... A12-A18

Sutcliffe v. Honeywell Int'l, Inc., CV-13-01029-PHX-PGR, 2015 WL 1442773 (D. Ariz. Mar. 30, 2015)..... A19-A27

2016 WL 6248281

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

Nathaniel Green, Plaintiff,

v.

United States of America, Timothy
Adesanya, Mike Varnum, Nurse Goldstein,
and Dr. Jack R. Oak, Defendants.

Case No. 14-CV-119-NJR-DGW

|
Signed 10/26/2016

Attorneys and Law Firms

Catherine E. Goldhaber, Anastasios T. Foukas, Segal, McCambridge Singer & Mahoney, Ltd., Ashley Simone Anderson Jackson, Sedgwick, LLP, Chicago, IL, for Plaintiff.

David J. Pfeffer, Assistant U.S. Attorney, Fairview Heights, IL, Kenneth M. Burke, Brown & James, Belleville, IL, for Defendants.

MEMORANDUM AND ORDER

ROSENSTENGEL, District Judge

*1 Now pending before the Court is the Motion for Reconsideration and Alternative Motion for Leave to File Interlocutory Appeal filed by Defendant Jack R. Oak, M.D. ("Defendant Oak") (Doc. 81). On June 29, 2016, the undersigned *sua sponte* reconsidered its ruling on the Motion for Leave to Conduct Jurisdictional Discovery (Docs. 62 and 76) filed by Plaintiff Nathaniel Green ("Green") and granted Green leave to propound five interrogatories under Rule 33 and five requests to produce under Rule 34 upon Defendant Oak relating to personal jurisdiction (*See* Doc. 91). In light of those discovery responses, and for the reasons set forth below, the Court grants Defendant Oak's Motion for Reconsideration.

Introduction

On February 3, 2014, Green initiated this action *pro se*, pursuant to the Federal Tort Claims Act ("FTCA"), alleging that healthcare providers at Greenville Federal Correctional Institution ("FCI Greenville") failed to adequately treat his peripheral artery disease, causing him to undergo an above-the-knee leg amputation. On August 13, 2014, the Court appointed attorney Catherine E. Goldhaber to represent Green in this matter. The Court granted Green leave to file an amended complaint and, on July 2, 2015, Green filed his Second Amended Complaint (*see* Doc. 42), which is the operative complaint in this matter. Currently, Green is proceeding against the United States of America on two negligence claims, a deliberate indifference claim against Defendants Timothy Adesanya, Nurse Goldstein, and Mike Varnum, and a medical malpractice claim against Defendant Oak.

On October 20, 2015, Defendant Oak filed a Motion to Dismiss for Lack of Personal Jurisdiction (Doc. 60), which this Court denied (*see* Doc. 76). Following the Court's Order, Defendant Oak filed the Motion for Reconsideration now before the Court (Doc. 81). In his motion, Defendant Oak asks the Court to reconsider its ruling on his Motion to Dismiss pursuant to Rule 59(e) of the Federal Rules of Civil Procedure asserting that the Court's reasoning was not in accord with binding Supreme Court precedent. In the alternative, Defendant Oak asks the Court for leave to file an interlocutory appeal to resolve the issue. Green timely responded to Defendant Oak's motion (Doc. 89).

On June 29, 2016, the undersigned, recognizing that discovery may be necessary to ascertain additional information on the circumstances surrounding Defendant Oak's treatment of Green, *sua sponte* reconsidered its ruling on Green's Motion for Leave to Conduct Jurisdictional Discovery (Docs. 62 and 76) and granted Green leave to propound five interrogatories under Rule 33 and five requests to produce under Rule 34 upon Defendant Oak relating to personal jurisdiction (*See* Doc. 91). This discovery was limited to the following topics initially suggested by Green: how Defendant Oak was located, who at FCI Greenville spoke with Defendant Oak, whether Defendant Oak entered into a contract or agreement with FCI Greenville to treat Green and/or other prisoners, and how and by whom Defendant Oak was compensated for his treatment of Green and/or other FCI Greenville prisoners.

*2 After engaging in discovery, on August 23, 2016, Defendant Oak filed a "Supplemental Memorandum Re Motion to Reconsider" (Doc. 96). On August 26, 2016, Green filed a Supplemental Response in Opposition to Defendant Oak's Motion for Reconsideration (Doc. 97). On September 9, 2016, Defendant Oak filed a Reply to Green's Supplemental Response in Opposition to Defendant Oak's Motion for Reconsideration (Doc. 98). The reply brief properly set forth exceptional circumstances that justify the filing of a reply brief in accordance with Local Rule 7.1(c). Accordingly, Defendant Oak's reply brief will be considered by the Court.

Legal Standard

Although Defendant Oak brings his motion for reconsideration citing to Federal Rule of Civil Procedure 59(e), the motion is governed by Rule 54(b) because the order denying the motion to dismiss did not adjudicate all claims and final judgment has not been entered. FED. R. CIV. P. 54(b) (Non-final orders "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."); *see also Encap, LLC v. Scotts Co., LLC*, No. 11-C-685, 2014 WL 6386910, at *1 (E.D. Wis. Nov. 14, 2014) ("Fed. R. Civ. P. 59(e) is not applicable here since no final judgment has been entered."). Regardless, "motions to reconsider an order under Rule 54(b) are judged by largely the same standard as motions to alter or amend a judgment under Rule 59(e)." *Woods v. Resnick*, 725 F. Supp. 2d 809, 828 (W.D. Wisc. 2010).

A motion to reconsider is proper where the Court has misunderstood a party, where the Court has made a decision outside the adversarial issues presented to the Court by the parties, where the Court has made an error of apprehension (not of reasoning), where a significant change in the law has occurred, or where significant new facts have been discovered. *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). The Court has the inherent power to reconsider non-final orders, as justice requires. *Akzo Coatings, Inc. v. Aigner Corp.*, 909 F. Supp. 1154, 1160 (N.D. Ind. 1995) ("[A] motion to reconsider an interlocutory order may be entertained and granted as justice requires"). A motion to reconsider "essentially enables a district court to correct its own errors, sparing the parties and the appellate

courts the burden of unnecessary appellate proceedings." *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995). "Disposition of a motion for reconsideration is entrusted to the district court's discretion." *Hamzah v. Woodman's Food Market, Inc.*, No. 13-cv-491-wmc, 2016 WL 3248608, at *2 (W.D. Wisc. Jun. 13, 2016) (citing *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996)).

Discussion

In conducting a specific personal jurisdiction analysis, the Court initially found that it could exercise personal jurisdiction over Defendant Oak because it appeared that "Defendant Oak accepted [Green] as a patient and treated [Green] knowing that [Green] was a federal inmate housed at FCI Greenville, located in Illinois." (Doc. 76, p. 6). The Court also emphasized that it appeared that Defendant Oak "effectively entered into an agreement with FCI Greenville, a facility located in Illinois, to treat an Illinois resident." (*Id.*).

Discovery has since revealed, however, that Defendant Oak first became aware of Green "when the office staff [at St. Louis Surgical Consultants] set up an appointment." (Doc. 96-1, pp. 1). Defendant Oak elaborated that he "had no direct contact with anyone at the prison at anytime prior to seeing the patient." (*Id.*). After Defendant Oak met with Green, he cannot recall whom he spoke with or whether he had any communication with anyone at FCI Greenville, however, he states that it is generally his "practice to call back the referring entity/person and likely to send the referring entity/person a copy of his office note." (Doc. 96-1, p. 2). Additionally, Defendant Oak has no knowledge of how this specific treatment was paid for, but he believes that a bill would have been sent to the prison facility and it would have been paid by the facility or its insurer (*Id.*).

*3 Defendant Oak also indicated that he never personally entered into a verbal agreement or written contract with anyone at FCI Greenville or the Bureau of Prisons to treat inmates at the FCI Greenville facility (*Id.*). Defendant Oak was unable to provide any items responsive to Green's Request for Production, indicating that he is unaware of any written agreements or contracts concerning the treatment of Green or inmates at FCI Greenville (Doc. 96-2, p. 1). Defendant Oak is no

longer employed with St. Louis Surgical Consultants, and he states that he does not have access to any past correspondence, records, or bills relating to this case (Doc. 96-2, p. 2).

Defendant Oak cites to the Supreme Court decision of *Walden v. Fiore*, 134 S. Ct. 1115 (2014), to argue that the Court lacks personal jurisdiction over him because he did not create the contact with Illinois. In *Walden*, the Supreme Court considered whether the defendant police officer who seized the plaintiff's property in Georgia could be hauled into court in Nevada. 134 S. Ct. 1115 (2014). More specifically, the defendant-officer in *Walden* seized a large amount of cash from the plaintiffs while they were in a Georgia airport awaiting a flight to Nevada. *Id.* at 1119. After the plaintiffs returned to their Nevada residence, the defendant-officer helped draft a probable cause affidavit in support of the funds' forfeiture and forwarded it to a United States Attorney's Office in Georgia. *Id.* The plaintiffs filed suit against the defendant-officer in Nevada, which the district court dismissed for lack of personal jurisdiction, and the Ninth Circuit reversed. *Id.* at 1120.

The Supreme Court reversed the Ninth Circuit. In finding that Nevada could not assert personal jurisdiction over the defendant-officer, the Supreme Court reiterated that in order "[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," and said relationship "must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Id.* at 1121-22 (citation omitted). Further, the Supreme Court clarified that the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* at 1122 (citations omitted).

The recent discovery reveals that Defendant Oak did not purposefully direct his activities to Illinois. There is no evidence that Defendant Oak solicited patients from Illinois or initiated the contact with Green. The office staff of St. Louis Surgical Consultants added Green's name to Defendant Oak's schedule following a referral from Defendant Adesanya. Defendant Oak then received Green as a patient when he first treated him on October 14th.

Further, there is no evidence that Defendant Oak had any sort of contract with FCI Greenville or the Bureau of Prisons to receive inmate patients. Instead, the only contact Defendant Oak had with Illinois was the possible phone call to FCI Greenville concerning Defendant Oak's office note. But this does not amount to the minimum contacts necessary for personal jurisdiction to exist. See *Unterreiner v. Pernikoff*, 961 N.E.2d 1, 3 (Ill. App. Ct. 2011) (the defendant's follow-up consultation to the plaintiff over the phone while the plaintiff was in Illinois did not amount to minimum contacts necessary for personal jurisdiction); see generally *Fisher v. A.C.J. Chaston*, No. 95 C 3127, 1995 WL 571400, at *2 (N.D. Ill. Sept. 25, 1995) (telephone communications by themselves are generally not enough to establish minimum contacts with Illinois). The only other thing tying Defendant Oak to Illinois is the fact that Green lives there, but this alone cannot support the exercise of personal jurisdiction over Defendant Oak. *Walden*, 134 S. Ct. at 1122 ("the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.").

*4 To the extent Green argues that Defendant Oak has changed his story over the course of discovery, the Court disagrees. The Court has compared Defendant Oak's original affidavit (Doc. 61-2) with his discovery responses (Docs. 96-1 and 96-2), and the Court does not see any inconsistencies, just further elaboration on the circumstances surrounding Defendant Oak's treatment of Green. Nor is the Court convinced by Green's argument that convenience and efficiency warrant this Court's exercise of jurisdiction over a defendant who has no contacts, ties, or relations to Illinois.

Thus, upon reconsideration, and with the benefit of discovery, the Court finds that it does not have jurisdiction over Defendant Oak in this action.

Conclusion

For the reasons set forth above, the Court **GRANTS** Defendant Oak's Motion for Reconsideration (Doc. 81). The Court **VACATES** the original Order dated April 22, 2016 and **GRANTS** Defendant Oak's Motion to Dismiss for Lack of Personal Jurisdiction (Doc. 60). Defendant

Oak is **DISMISSED** without prejudice pursuant to Rule 12(b)(2) for lack of personal jurisdiction.

DATED: October 26, 2016.

IT IS SO ORDERED.

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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

David W. Rayment, William B. Pribis, Cleveland Waters & Bass PA, Concord, NH, Stephen Finch, Finch & Maloney, PLLC, Manchester, NH, for Presby Patent Trust.

Peter S. Cowan, Sheehan Phinney Bass & Green PA, Manchester, NH, Robert Ashbrook, Dechert LLP, Philadelphia, PA, for Infiltrator Systems, Inc.

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-Müller, 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.” *Elecs. 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. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1361 (Fed.Cir.2012) (citing *Nuance Comm’n’s, 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 unacceptably 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 Commc'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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Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina, Charleston Division.

Jan Ruhe, individually, and Paul B. Ferrara,
III, as personal representative of the Estate
of Clayton Mac White, deceased, Plaintiffs,

v.

Bruce K. Bowen, individually, and Sopris
Medical Practice, P.C., Defendants.

No. 2:15-cv-03792-DCN

|
Signed 09/26/2016

Attorneys and Law Firms

Paul B. Ferrara, III, Ferrara Law Firm, North
Charleston, SC, for Plaintiffs.

Benson Hall Driggers, Sweeny Wingate and Barrow,
Hartsville, SC, Mark Steven Barrow, Sweeny Wingate and
Barrow, Columbia, SC, for Defendants.

ORDER

DAVID C. NORTON, UNITED STATES DISTRICT
JUDGE

*1 This matter is before the court on plaintiffs Paul B. Ferrara, III ("Ferrara"), personal representative of the Estate of Clayton Mac White ("White"), and Jan Ruhe's ("Ruhe") (collectively, "plaintiffs") motion for default judgment, ECF No. 11, as well as defendants Bruce K. Bowen, MD ("Dr. Bowen") and Sopris Medical Practice, P.C.'s ("Sopris Medical") (collectively, "defendants") motion to dismiss for lack of personal jurisdiction and venue, ECF No. 20. For the reasons set forth below, the court grants defendants' motion to dismiss and finds plaintiffs' motion for default judgment to be moot.

I. BACKGROUND

The instant dispute arises out of a medical malpractice and wrongful death action that plaintiffs filed against defendants on September 22, 2015 regarding Dr. Bowen's

allegedly negligent treatment of White. Am. Compl. ¶ 28. Ruhe is a citizen and resident of Florida, *id.* ¶ 1, and Ferrara is the personal representative of White's estate which is located in South Carolina. *Id.* ¶ 2. Sopris Medical is a business organized and existing under the laws of Colorado, with its principal place of business in Eagle, Colorado. *Id.* ¶ 31; Bowen Aff ¶ 2. Dr. Bowen, a physician at Sopris Medical, is a citizen and resident of Colorado, which is the only state where he is licensed to practice medicine. Am. Compl. ¶ 4; Bowen Aff. ¶ 1.

Plaintiffs allege that Dr. Bowen began treating White on or about June 1, 2011, for chronic back pain, and that despite his knowledge of White's addiction and misuse of opioids, Dr. Bowen continued to overprescribe White opioids that ultimately led to White's fatal overdose from opioid and benzodiazepine intoxication on September 22, 2013. Am. Compl. ¶ 10–23. When Dr. Bowen cared for White, White lived primarily in Basalt, Colorado. Bowen Aff. ¶ 4.

On September 22, 2015, plaintiffs filed the present action against Dr. Bowen and Sopris Medical, bringing the following two causes of action: (1) negligence and medical malpractice against Dr. Bowen; and (2) vicarious liability for Dr. Bowen's negligence against Sopris Medical. Am. Compl. ¶ 25–40. Plaintiffs seek actual, consequential, incidental, economic and non-economic damages, including conscious pain and suffering, emotional distress and punitive damages, and attorneys' fees and costs. *Id.* ¶ 31, 40. Plaintiffs contend that the court has general and specific personal jurisdiction over Dr. Bowen and Sopris Medical under South Carolina's long arm statute, S.C. Code § 36-2-803. *Id.* ¶ 6.

Plaintiffs filed the present motion for default judgment against Sopris Medical Practice, P.C. on December 2, 2015. Defendants filed a response on January 19, 2016. Defendants filed the present motion to dismiss for lack of personal jurisdiction and venue on January 18, 2016. Plaintiffs filed a response on February 18, 2016. Defendants filed a reply on February 26, 2016. The motions have been fully briefed and are now ripe for the court's review.

II. STANDARD

A. Motion to Dismiss for Lack of Personal Jurisdiction and Improper Venue

*2 When the defendant challenges personal jurisdiction, the plaintiff has the burden of showing that jurisdiction exists. See In re Celotex Corp., 124 F.3d 619, 628 (4th Cir. 1997). When the court decides a personal jurisdiction challenge without an evidentiary hearing, the plaintiff must prove a prima facie case of personal jurisdiction. See Mylan Labs, Inc. v. Akzo, N.V., 2 F.3d 56, 60 (4th Cir. 1993). “In considering the challenge on such a record, the court must construe all relevant pleading allegations in the light most favorable to the plaintiff, assume credibility, and draw the most favorable inferences for the existence of jurisdiction.” In re Celotex Corp., 234 F.3d at 628 (quoting Combs v. Bakker, 886 F.2d 673, 676 (4th Cir. 1989)). However, the court need not “credit conclusory allegations or draw farfetched inferences.” Masselli & Lane, PC v. Miller & Schuh, PA, 215 F.3d 1320 (4th Cir. 2000).

B. Motion for Default Judgment

Default judgments are governed by Rule 55 of the Federal Rules of Civil Procedure, which provides for entry of a default “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules.” Fed. R. Civ. P. 55(a). Entry of a default judgment is left to the discretion of the court. CT & TEV Sales, Inc. v. 2AM Grp., LLC, No. 7:11-1532, 2012 WL 1576761, at *2 (D.S.C. May 2, 2012). A court must “exercise sound judicial discretion” in deciding whether to enter default judgment, and “the moving party is not entitled to default judgment as a matter of right.” Id. A party, however, may oppose entry of a default judgment and “[f]or good cause shown the court may set aside an entry of default.” Fed. R. Civ. P. 55(c).

III. DISCUSSION

Defendants move to dismiss plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(2), arguing the court lacks personal jurisdiction over them and that venue is improper. Def.'s Mot. 1. Plaintiffs assert that jurisdiction is proper under South Carolina's long-arm statute and that the court should grant limited discovery on the jurisdictional issue. Pl.'s Resp. 1. The court finds that it lacks personal jurisdiction over this case and that

venue is improper. As a result, plaintiffs' motion for default judgment is moot.

A. Motion to Dismiss Pursuant to FRCP 12(b)(2) for Lack of Personal Jurisdiction

In evaluating a challenge to personal jurisdiction under a state's long-arm statute, the court engages in a two-step analysis. Ellicott Mach. Corp. v. John Holland Party Ltd., 995 F.2d 474 (4th Cir. 1993). First, the long-arm statute must authorize the exercise of jurisdiction under the facts presented. Id. Second, if the statute does authorize jurisdiction then the court must determine if the statutory assertion of personal jurisdiction is consistent with due process. Id. South Carolina's long-arm statute extends to the outer limits allowed by the Due Process Clause. Foster v. Arletty 3 Sarl, 278 F.3d 409, 414 (4th Cir. 2002). Consequently, the only question before the court is whether the exercise of personal jurisdiction would violate due process. ESAB Grp., Inc. v. Centricut, LLC, 34 F. Supp. 2d 323, 328 (D.S.C. 1999).

The due process test for personal jurisdiction involves two components: minimum contacts and fairness. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Under the minimum contacts test, a nonresident defendant must have certain minimum contacts such that the suit does not offend “traditional notions of fair play and substantial justice.” International Shoe Co., 326 U.S. at 316. Due process is satisfied if the courts asserts personal jurisdiction over a defendant who “purposefully avails itself of the privilege of conducting activities within the forum state,” Hanson v. Denckla, 357 U.S. 235, 253 (1958), such that it “should reasonably anticipate being haled into court there.” World-Wide Volkswagen, 444 U.S. at 297. After a showing of the defendant's purposeful availment, the reasonableness inquiry balances any burden on the defendant against countervailing concerns such as the plaintiffs' interest in obtaining relief and the forum state's interest in the controversy. See id. at 292.

*3 Personal jurisdiction over a nonresident defendant can be either specific or general. ESAB Group, Inc., 126 F.3d at 623–24. General jurisdiction arises when a suit is unrelated to the defendant's contacts with the forum state, and can be exercised upon a showing that the defendant's contacts are of a “continuous and systematic nature.” See S.C. Code Ann. § 36–2–802; Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984). Specific

jurisdiction arises when a cause of action is related to the defendant's activities within the forum state. See S.C. Code Ann. § 36-2-803; Helicopteros, 466 U.S. at 414.

Defendants allege that the court has neither general nor specific personal jurisdiction over Dr. Bowen or Sopris Medical. Def.'s Mot. 6-10. In response, plaintiffs argue for limited jurisdictional discovery. Pl.'s Resp. 3. The court addresses each argument in turn.

1. Personal Jurisdiction over Dr. Bowen and Sopris Medical

Although unclear from plaintiffs' briefing on the matter, it appears that plaintiffs believe that the court has general jurisdiction over Dr. Bowen because he treated White while White was visiting and residing in South Carolina, and specific jurisdiction because Dr. Bowen prescribed White narcotics electronically to pharmacies in South Carolina. Pl.'s Resp. 3. The court finds both of these arguments to be in error.

When analyzing general jurisdiction, the forum state for an individual is the individual's domicile. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011). Dr. Bowen is licensed to practice medicine in Colorado and practiced only in Colorado during the time that he cared for White. Bowen Aff. ¶ 1. Therefore, Dr. Bowen is domiciled in Colorado for purposes of jurisdiction. Where the defendant is not present in the forum state, for a court to have general jurisdiction over him he must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" International Shoe Co., 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457 (1940)). The threshold level of minimum contacts required for general jurisdiction calls for a defendant to be engaged in longstanding business in the forum state such as maintaining an office or marketing products. ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707 (4th Cir. 2002).

Federal law is controlling on the issue of due process, Amba Marketing Systems, Inc. v. Jobar International, Inc., 551 F.2d 784, 789 (9th Cir. 1977), but because South Carolina's long arm statute is coextensive with federal due process, a recent South Carolina Supreme Court decision finding no personal jurisdiction against a non-resident physician and fertility clinic, Coggeshall

v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 655 S.E.2d 476 (2007), is persuasive additional authority for this court's decision. In Coggeshall, South Carolina residents brought an action against a North Carolina-based fertility clinic and physician, alleging that the clinic's practice of referring patients to South Carolina healthcare providers and sending bills to South Carolina established sufficient minimum contacts for general jurisdiction. Id., 655 S.E.2d at 479. The court disagreed, finding that "unsolicited patient contacts" and "tangential business dealings with vendors" were insufficient to support general jurisdiction. Id. at 480. Compared to the physician and fertility clinic in Coggeshall, Dr. Bowen and Sopris Medical have far fewer contacts with South Carolina. Neither Dr. Bowen nor Sopris Medical established an office in the South Carolina or systematically searched out patients in the state. Dr. Bowen practices only in Colorado, and Sopris Medical does business and operates exclusively in Colorado. Bowen Aff. ¶ 1-2. All of the prescriptions that Dr. Bowen wrote for White were written in Colorado, and all of the care that Dr. Bowen provided for White through Sopris Medical occurred in Colorado. Bowen Aff. ¶ 5-7. Therefore, the court finds there is no general jurisdiction over Dr. Bowen or Sopris Medical.

*4 Defendants next argue that the court has no specific jurisdiction. The Fourth Circuit applies a three-part test when evaluating the propriety of exercising specific jurisdiction: (1) whether and to what extent the defendant purposely availed itself of the privileges of conducting activities in the forum state, and thus invoked the benefits and protections of its laws; (2) whether the plaintiffs' claims arise out of those forum-related activities; and (3) whether the exercise of jurisdiction is constitutionally "reasonable." Christian Sci. Bd. of Dirs. of the First Church of Christ v. Nolan, 259 F.3d 209, 215-216 (4th Cir. 2001) (citing Helicopteros, 466 U.S. at 414-16; Burger King, 471 U.S. at 472, 476-77).

The first prong of the Nolan test for specific jurisdiction concerns whether a defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877 (2011) (quoting Hanson, 357 U.S. at 253). The "purposeful availment" element ensures that a defendant will not be haled into court in a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts or the unilateral activity of another person or

third party. Burger King, 471 U.S. at 475. Even a single contact with the forum state can constitute purposeful availment sufficient to satisfy due process requirements. Id. at 475 n.18 (“So long as it creates a ‘substantial connection’ with the forum, even a single act can support jurisdiction.”). The Fourth Circuit has held that a “single transaction is a sufficient contact to satisfy [due process] if it gives rise to the liability asserted in the suit.” Hardy v. Pioneer Parachute Co., 531 F.2d 193, 195 (4th Cir. 1976).

Due to the nature of medical services, courts generally decline to exert jurisdiction over out-of-state physicians unless there are countervailing circumstances indicating that the physician purposefully availed himself of the forum state. See e.g., Allegiant Physicians Servs., Inc. v. Sturdy Mem'l Hosp., 926 F. Supp. 1106 (N.D. Ga. 1996) (Nonresident physicians lacked minimum contacts with forum state for exercise of personal jurisdiction), Cossaboon v. Maine Med. Ctr., 600 F.3d 25 (1st Cir. 2010) (Maine hospital had insufficient contacts with New Hampshire to permit exercise of general personal jurisdiction in New Hampshire); Ashton v. Floral Mem'l Hosp., No. 2:0:CV:226, 2006 WL 2864413 (M.D. Ala. Oct. 5, 2006) (no personal jurisdiction in Alabama over a Florida-based ophthalmologist even though he accepted Alabama patients). A defendant's mere knowledge that a plaintiff will suffer negative effects in a given forum is insufficient to support jurisdiction; the defendant's intentional contacts must connect it with the forum state. Walden v. Fiore, 134 S. Ct. 1115, 1126 (2014) (“[T]he mere fact that his conduct affected plaintiffs with connection to the forum State does not suffice to authorize jurisdiction.”). Here, Dr. Bowen had no such intentional contacts with South Carolina that would allow this court could exercise general or specific jurisdiction over him.

Plaintiffs allege that this court has specific jurisdiction because Dr. Bowen prescribed narcotics to White through pharmacies located in South Carolina, Am. Compl. ¶ 21, and Dr. Bowen or another member of the Sopris Medical staff spoke with a pharmacy in South Carolina about White's prescriptions. Pl.'s Resp. 3. However, this conduct is not sufficient to find jurisdiction over Dr. Bowen because it does not demonstrate that he “personally availed himself of the forum state.” Tortious injury occurs in the forum state where the physician gave medical treatment, not where the patient resides. See Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972). To find otherwise would subject non-resident physicians to litigation in

every state where a patient happens to move to after treatment.

*5 In Wright, the Ninth Circuit found that the District of Idaho had no personal jurisdiction in a medical malpractice case where the plaintiff moved to Idaho and filled a prescription issued by South Dakota doctor. Similarly, the district court in Boyd v. Green, 496 F. Supp. 2d 691 (W.D. Va. 2007) ruled that a plaintiff in a wrongful death action could not use the jurisdiction where prescriptions were filled as a means to establish personal jurisdiction over a physician in that jurisdiction when it was the plaintiffs' action that led to prescriptions being filled in that state, even when the doctor called in the prescriptions to a pharmacy. Applying the holdings in Wright and Boyd, here Dr. Bowen's alleged prescription of narcotics to pharmacies in South Carolina is not sufficient to find jurisdiction over Dr. Bowen because it does not demonstrate that he personally availed himself of South Carolina.

In Gelineau v. New York Univ. Hosp., 375 F. Supp. 661 (D.N.J. 1974), the court found that medical services are personal services that are “not directed to impact on any particular place, but are directed to the needy person himself...it would be fundamentally unfair to permit a suit in whatever distant jurisdiction the patient may carry out the consequences of his treatment.” Following this reasoning, it would be “fundamentally unfair” to allow a suit against Dr. Bowen or Sopris Medical in South Carolina simply because White chose to fill his prescriptions in South Carolina. In Sanders v. Buch, 938 F. Supp. 532 (W.D. Ark. 1996) the district court found that a Texas doctor who treated a then-Texas resident in Texas was not subject to personal jurisdiction in Arkansas after the patient moved to Arkansas. Similarly, Dr. Bowen only provided care for White in Colorado. Bowen Aff. ¶ 5. Even if, as plaintiffs allege, Dr. Bowen or another member of the Sopris Medical staff spoke with the pharmacy in South Carolina to electronically prescribe White narcotics, Pl.'s Resp. 3, this is not enough for personal jurisdiction. It was White's, not Dr. Bowen's, actions that brought Dr. Bowen into contact with South Carolina—had White not moved to South Carolina, Dr. Bowen would have no reason to be in contact with South Carolina. Wright, Boyd, and Sanders all support this court's conclusion that it has no specific personal jurisdiction over Dr. Bowen.

Plaintiffs also contend that the Court has personal jurisdiction over Sopris Medical pursuant to the South Carolina long-arm statute. Am. Compl. ¶6. The jurisdictional analysis for Sopris Medical is similar to that for Dr. Bowen.

The forum for a corporation is one in which “the corporation is fairly regarded as at home.” Goodyear, 564 U.S. at 924. Sopris Medical is a Colorado Professional Corporation that has its principal place of business in Eagle County, Colorado. Am. Compl. ¶3, Bowen Aff. ¶2. For all practical purposes, Sopris is limited to serving the patients of the Roaring Fork Valley and the immediately surrounding areas in Colorado. Bowen Aff. ¶12. Sopris Medical cannot be regarded as “at home” in South Carolina under the Goodyear test.

Where the defendant is not present in the forum state, for a court to have general jurisdiction over him he must have “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’ ” International Shoe, 326 U.S. at 316. The threshold level of minimum contacts required for general jurisdiction calls for a defendant to be engaged in longstanding business in the forum state such as maintaining an office or marketing products. ALS Scan, Inc., 293 F.3d 707.

In Boyd, the court ruled that it had personal jurisdiction in Virginia over a Tennessee-based medical practice because one of the practice's physicians had patients in Virginia who she saw with a “degree of regularity and continuity.” Boyd, 496 F. Supp. 2d at 707. However, there are no physicians at Sopris that supply care or any other services to anyone in South Carolina. Bowen Aff. ¶9–10. Sopris Medical is more like the hospital in Wolf v. Richmond Cty. Hosp. Auth., 745 F.2d 904 (4th Cir. 1984), where the Fourth Circuit found that there was no personal jurisdiction over a Georgia hospital in South Carolina even though the hospital received one-fifth of its income from South Carolina residents because the hospital did not advertise for or solicit South Carolina patients. Similarly, Sopris Medical does not knowingly derive any revenue from South Carolina, and does not engage in any advertising or solicitation in the state. Bowen Aff. ¶9–10. Therefore, Sopris Medical does not possess minimum contacts with South Carolina for the purpose of personal jurisdiction.

*6 The court finds that plaintiffs have failed to establish any grounds for specific or general jurisdiction over defendants. Neither Dr. Bowen nor Sopris Medical has the “substantial, continuous, and systematic contacts” with South Carolina necessary for general jurisdiction. Plaintiffs have also made no showing that defendants purposefully availed themselves of South Carolina. Plaintiffs base their entire jurisdictional argument on the premise that White's unilateral activity of moving to South Carolina gives the court personal jurisdiction over defendants. However, under the Due Process Clause, it is the defendant, not the plaintiff, that must initiate the conduct with the forum State. Walden, 134 S. Ct. at 1122. Neither Dr. Bowen nor Sopris Medical created any conduct with South Carolina. Therefore, the court does not have personal jurisdiction here.

2. Jurisdictional Discovery

Finally, plaintiffs argue that even if the court finds that he has failed to make a prima facie showing that personal jurisdiction over defendants is proper, the court should permit limited discovery on the jurisdictional issue. Pl.'s Response 1. Plaintiffs believe that discovery will “establish that Dr. Bowen prescribed narcotics electronically to pharmacies in South Carolina for use by the deceased, despite Dr. Bowen's knowledge that Mr. White's prescriptions were still active and not yet fully expired.” Id. at 3. However, as explained above, even if Dr. Bowen or another member of the Sopris Medical staff spoke with a pharmacy in South Carolina about White's prescriptions this is not enough to demonstrate that Dr. Bowen purposefully availed himself of the laws of South Carolina.

Plaintiffs argue that other evidence of personal jurisdiction may exist, and discovery is necessary “to determine the nature and extent of Dr. Bowen's relationship with the deceased while he was in South Carolina and the extent Dr. Bowen transacted business in South Carolina.” Pl.'s Resp. 4. The Fourth Circuit has stated that “[w]hen a plaintiff offers only speculation or conclusory assertions about contacts with a forum state, a court is within its discretion in denying jurisdictional discovery.” Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 402 (4th Cir. 2003) (citing McLaughlin v. McPhail, 707 F.2d 800, 806 (4th Cir. 1983)). Allowing jurisdictional discovery where plaintiffs' claim of personal jurisdiction is based on bare allegations that the defendants had significant contacts with South

Carolina would lead to a fishing expedition conducted “in the hopes of discovering some basis of jurisdiction.” Base Metal Trading, Ltd. v. OJSC, 283 F.3d 208, 216 n.3 (4th Cir. 2002). This court is within its discretion in denying jurisdictional discovery.

B. Motion to Dismiss for Lack of Venue

Defendants assert that venue is improper in the District of South Carolina under Federal Rule of Civil Procedure 12(b)(3) and the case should be dismissed. Def.'s Mot. 11. Having found that the court lacks personal jurisdiction over defendants, the court declines to dismiss this action and instead, exercises its discretion to transfer venue pursuant to 28 U.S.C. § 1406(a). See, e.g., Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1201 (4th Cir. 1993) (finding that the decision to transfer venue pursuant to § 1406(a) rests within the sound discretion of the district court); Harley v. Chao, 503 F.Supp.2d 763, 774 (M.D.N.C. 2007); (“Rather than dismissing for improper venue, courts favor finding that it is in the interest of justice to transfer venue.”); Gov't of Egypt Procurement Office v. M/V ROBERT E. LEE, 216 F.Supp.2d 468, 473–74 (D. Md. 2002); Jennings v. Entre Computer Ctrs., Inc., 660 F.Supp. 712, 714 (D. Me. 1987).

Under 12(b)(3), a party may move to dismiss a case for “improper venue.” Fed. R. Civ. P. 12(b)(3). The question of whether venue is “improper” in a civil case is governed by 28 U.S.C. § 1391, Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 577 (2013), which states that a civil action may be brought in

*7 (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b).

The District of South Carolina does not fall into any of the categories set out in § 1391(b). First, none of the defendants reside in South Carolina. Bowen Aff. at ¶¶ 1–2. Second, almost all of the events and omissions giving rise to this action took place in Colorado. Plaintiffs argue that venue is proper in the District of South Carolina because “the decedent was domiciled in South Carolina at the time of his death, the decedent's estate is in the State of South Carolina, and Plaintiff Janet Ruhe and all other witnesses are located in South Carolina and Florida.” Am. Compl. ¶ 7. However, the venue analysis focuses on whether venue is fair for the defendants, not the plaintiffs. While South Carolina may be a convenient forum for the plaintiffs and plaintiffs' witnesses, Dr. Bowen states that defending this case in South Carolina would be “difficult and involve significant costs to [Sopris Medical] and myself.” Bowen Aff. ¶ 2. Therefore, venue is improper in District of South Carolina.

Plaintiffs also attempt to use 28 U.S.C.A. § 1404 to argue that venue is proper. Am. Compl. ¶ 7. However, 28 U.S.C.A. § 1404 addresses change of venue, not the appropriate forum for the initial filing, and is therefore irrelevant to the analysis of whether the District of South Carolina is a proper venue for this case.

Having determined that venue is improper in South Carolina, defendants argue that the case in South Carolina should be dismissed and that “if the plaintiffs wish to do so” they can seek to refile it in Colorado. Def.'s Mot. 14. However, plaintiffs contend that if the court were to dismiss this action without prejudice then plaintiffs would be unable to successfully refile in Colorado due to the shortened two-year statute of limitations under Colorado law. Pl.'s Resp. 4.

When the court determines that venue is improper, it is within its discretion to transfer the case to the proper district if the court deems it to be “in the interest of justice.” 28 U.S.C. § 1406(a). Section 1406(a) “authorizes the transfer of a case to any district, which would have had venue if the case were originally brought there, for any reason which constitutes an impediment to a decision on the merits in the transferor district but would not be an impediment in the transferee district.” Porter v. Groat, 840 F.2d 255, 258 (4th Cir. 1988). Here, defendant has indicated it will consent to a transfer of venue to the

District of Colorado. Def.'s Mot. 11 (“Under Section 28 U.S.C. 1391, Venue is Proper in Colorado, Not South Carolina.”). Venue is proper in the District of Colorado under § 1391(a)(1), as Dr. Bowen and Sopris Medical are both residents of Colorado and almost all of the events giving rise to plaintiffs' claim occurred in Colorado. Since venue is proper in the District of Colorado, and the plaintiffs allege that they would be barred from refiling the case in Colorado due to Colorado's statute of limitations, the court deems it to be “in the interest of justice” to transfer it to the District of Colorado, Grand Junction division as opposed to dismissing it altogether.

*8 Therefore, the court transfers Plaintiffs' case to the District of Colorado, Grand Junction division. See 28 U.S.C. § 1391(b)(1).

C. Motion for Default Judgment

As the court finds that it does not have personal jurisdiction over this case and that venue is improper in

the District of South Carolina, the plaintiffs' motion for default judgment is moot.

IV. CONCLUSION

For the foregoing reasons, the court finds that it cannot exercise jurisdiction over Defendant. However, rather than dismissing this action, the court transfers the action to the District of Colorado, Grand Junction division. It also finds that the plaintiffs' motion for default judgment is thereby **MOOT**.

AND IT IS SO ORDERED.

September 26, 2016.

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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.

Attorneys and Law Firms

Stephen M. Hopkins, Hopkins Law Offices PLC,
Phoenix, AZ, for Plaintiffs.

Aaron Stephen Welling, Perkins Coie LLP, Mark G
Worischek, Shanks Leonhardt, Sanders & Parks Pc,
Phoenix, AZ, Vernon L. Woolston, Perkins Coie LLP
Seattle, WA, David J Weiner, Arnold & Porter LLP,
Washington, DC, Thad T. Dameris, Arnold & Porter
LLP, Houston, TX, for Defendants.

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. *Omeluk v. Langsten Slip & Batbyggeri AIS*, 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.

End of Document

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Cc: 'Valerie McOmie (valeriemcomie@gmail.com)'; 'danhuntington@richter-wimberley.com'; 'Bryan Harnetiaux'; 'collin@markamgrp.com'; 'mark@markamgrp.com'; 'Miller, Greg'; 'George Ahrend'; 'sstocker@ssslawfirm.com'; 'pjc@winstoncashatt.com'; 'wcs@ksblit.legal'; 'ed@bruyalawfirm.com'; 'Chris Nicoll'; 'Melissa O'Loughlin White'; 'Norgaard, Cathy'; 'Ed Bruya'; 'Cunningham, Melissa J.'; 'gkobluk@ksblit.legal'
Subject: RE: Swank v. Burns, et al. - WSC No. 93282-4

Mr. Estes:

We corrected the case number from 90733-1 to 93282-4 on the Brief of Amicus Curiae and the Appendix to Brief of Amicus Curiae by writing it in on the documents. We will let you know if we need corrected pages sent.

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Sent: Friday, December 16, 2016 3:22 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'Valerie McOmie (valeriemcomie@gmail.com)' <valeriemcomie@gmail.com>; 'danhuntington@richter-wimberley.com' <danhuntington@richter-wimberley.com>; 'Bryan Harnetiaux' <bryanpharnetiauxwsba@gmail.com>; 'collin@markamgrp.com' <collin@markamgrp.com>; 'mark@markamgrp.com' <mark@markamgrp.com>; 'Miller, Greg' <miller@carneylaw.com>; 'George Ahrend' <gahrend@ahrendlaw.com>; 'sstocker@ssslawfirm.com' <[sstocker@ssslawfirm.com](mailto:ssstocker@ssslawfirm.com)>; 'pjc@winstoncashatt.com' <pjc@winstoncashatt.com>; 'wcs@ksblit.legal' <wcs@ksblit.legal>; 'ed@bruyalawfirm.com' <ed@bruyalawfirm.com>; 'Chris Nicoll' <cnicoll@nicollblack.com>; 'Melissa O'Loughlin White' <MWhite@cozen.com>; 'Norgaard, Cathy' <Norgaard@carneylaw.com>; 'Ed Bruya' <ed@bruyalawfirm.com>; 'Cunningham, Melissa J.' <cunningham@carneylaw.com>; 'gkobluk@ksblit.legal' <gkobluk@ksblit.legal>
Subject: RE: Swank v. Burns, et al. - WSC No. 93282-4

Dear Clerk:

I apologize for the confusion.

A number of the briefs filed earlier use No. 90733-1. But, the BRIEF OF RESPONDENTS VALLEY CHRISTIAN SCHOOL AND DERICK T ABISH, filed May 8, 2015 appears to change the cause number to 93282-4 (see cover page).

[http://www.courts.wa.gov/content/Briefs/A08/932824%20COA%20-%20Resp%20Brief%20\(Valley%20Christian%20and%20Tabish\).pdf#search=swank](http://www.courts.wa.gov/content/Briefs/A08/932824%20COA%20-%20Resp%20Brief%20(Valley%20Christian%20and%20Tabish).pdf#search=swank)

We updated the reference line in this email, but not on the brief. Should we file a corrected brief using 93282-4?

Thanks, Stew

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Sent: Friday, December 16, 2016 2:59 PM

To: Stewart A. Estes <sestes@kbmlawyers.com>

Cc: 'Valerie McOmie' (valeriemcomie@gmail.com) <valeriemcomie@gmail.com>; danhuntington@richter-wimberley.com <danhuntington@richter-wimberley.com>; 'Bryan Harnetiaux' <bryanpharnetiauxwsba@gmail.com>; collin@markamgrp.com <collin@markamgrp.com>; mark@markamgrp.com <mark@markamgrp.com>; 'Miller, Greg' <miller@carneylaw.com>; 'George Ahrend' <gahrend@ahrendlaw.com>; sstocker@ssslawfirm.com <sstocker@ssslawfirm.com>; pjc@winstoncashatt.com <pjc@winstoncashatt.com>; wcs@ksblit.legal <wcs@ksblit.legal>; ed@bruyalawfirm.com <ed@bruyalawfirm.com>; 'Chris Nicoll' <cnicoll@nicollblack.com>; 'Melissa O'Loughlin White' <MWhite@cozen.com>; 'Norgaard, Cathy' <Norgaard@carneylaw.com>; 'Ed Bruya' <ed@bruyalawfirm.com>; 'Cunningham, Melissa J.' <cunningham@carneylaw.com>; gkobluk@ksblit.legal <gkobluk@ksblit.legal>

Subject: RE: Swank v. Burns, et al. - WSC No. 93282-4

We noticed the e-mail reference says case number 93282-4 but the Brief of Amicus Curiae, Washington Defense Trial Lawyers says No. 90733-1. Please advise.

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Sent: Friday, December 16, 2016 2:53 PM

To: 'Stewart A. Estes' <sestes@kbmlawyers.com>

Cc: Valerie McOmie (valeriemcomie@gmail.com) <valeriemcomie@gmail.com>; danhuntington@richter-wimberley.com; Bryan Harnetiaux <bryanpharnetiauxwsba@gmail.com>; collin@markamgrp.com; mark@markamgrp.com; Miller, Greg <miller@carneylaw.com>; George Ahrend <gahrend@ahrendlaw.com>; sstocker@ssslawfirm.com; pjc@winstoncashatt.com; wcs@ksblit.legal; ed@bruyalawfirm.com; Chris Nicoll

<cnicoll@nicollblack.com>; Melissa O'Loughlin White <MWhite@cozen.com>; Norgaard, Cathy <Norgaard@carneylaw.com>; Ed Bruya <ed@bruyalawfirm.com>; Cunningham, Melissa J. <cunningham@carneylaw.com>; gkobluk@ksblit.legal

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From: Stewart A. Estes [<mailto:sestes@kbmlawyers.com>]

Sent: Friday, December 16, 2016 2:47 PM

To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>

Cc: Valerie McOmie (valeriemcomie@gmail.com) <valeriemcomie@gmail.com>; danhuntington@richter-wimberley.com; Bryan Harnetiaux <bryanpharnetiauxwsba@gmail.com>; collin@markamgrp.com; mark@markamgrp.com; Miller, Greg <miller@carneylaw.com>; George Ahrend <gahrend@ahrendlaw.com>; ssstocker@ssslawfirm.com; pic@winstoncashatt.com; wcs@ksblit.legal; ed@bruyalawfirm.com; Chris Nicoll <cnicoll@nicollblack.com>; Melissa O'Loughlin White <MWhite@cozen.com>; Norgaard, Cathy <Norgaard@carneylaw.com>; Ed Bruya <ed@bruyalawfirm.com>; Cunningham, Melissa J. <cunningham@carneylaw.com>; gkobluk@ksblit.legal

Subject: Swank v. Burns, et al. - WSC No. 93282-4

Dear Ms. Carlson:

Pursuant to the Court's prior permission, please find attached WDTL's *Amicus Curiae Brief and Appendix* 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

STEW ESTES

Keating, Bucklin & McCormack, Inc., P.S.

800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175



(206) 623-8861 desk
(206) 719-6831 cell

Firm Website

Personal Bio

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