

1 DAVID B. FARKAS (SBN 257137)
2 david.farkas@us.dlapiper.com
3 DLA PIPER LLP (US)
4 2000 Avenue of the Stars
5 Suite 400 North Tower
6 Los Angeles, California 90067-4704
7 Tel: (310) 595-3412
8 Fax: (310) 595-3312

6 JOHN K. LYONS (*Pro Hac Vice*)
7 john.lyons@us.dlapiper.com
8 JEFFREY S. TOROSIAN (*Pro Hac Vice*)
9 jeffrey.torosia@us.dlapiper.com
10 JOSEPH A. ROSELIUS (*Pro Hac Vice*)
11 joseph.roselius@us.dlapiper.com
12 DLA PIPER LLP (US)
13 444 West Lake Street, Suite 900
14 Chicago, Illinois 60606-0089
15 Tel: (312) 368-4000
16 Fax: (312) 236-7516

17 Attorneys for Jonathan D. King as Chapter 7 Trustee

18 **UNITED STATES BANKRUPTCY COURT**
19 **CENTRAL DISTRICT OF CALIFORNIA**
20 **LOS ANGELES DIVISION**

21 In re:
22 ZETTA JET USA, INC., a California corporation,
23 Debtor.

24 Lead Case No.: 2:17-bk-21386-SK
25 Chapter 7
26 Jointly Administered With:
27 Case No.: 2:17-bk-21387-SK

28 In re:
29 ZETTA JET PTE, LTD., a Singaporean
30 corporation,
31 Debtor.

32 Adv. Proc. No. 2:19-ap-01383-SK

33 JONATHAN D. KING, solely in his capacity as
34 Chapter 7 Trustee of Zetta Jet USA, Inc. and Zetta
35 Jet PTE, Ltd.,
36 Plaintiff,

37 **APPENDIX OF UNPUBLISHED**
38 **OPINIONS CITED IN TRUSTEE'S**
39 **MOTION FOR LIMITED**
40 **JURISDICTIONAL DISCOVERY**
41 **AND INCORPORATED**
42 **MEMORANDUM OF LAW**

43 v.
44 YUNTIAN 3 LEASING COMPANY
45 DESIGNATED ACTIVITY COMPANY f/k/a
46 YUNTIAN 3 LEASING COMPANY LIMITED,
47 YUNTIAN 4 LEASING COMPANY
48 DESIGNATED ACTIVITY COMPANY f/k/a
49 YUNTIAN 4 LEASING COMPANY LIMITED,
50 MINSHENG FINANCIAL LEASING CO., LTD.,
51 MINSHENG BUSINESS AVIATION LIMITED,
52 EXPORT DEVELOPMENT CANADA, LI QI,
53

54 Next Hearing:
55 Date: August 11, 2021
56 Time: 9:00 a.m. (PDT)
57 Place: Courtroom 1575
58 255 East Temple Street
59 Los Angeles, CA 90012

1 UNIVERSAL LEADER INVESTMENT
2 LIMITED, GLOVE ASSETS INVESTMENT
3 LIMITED, and TRULY GREAT GLOBAL
4 LIMITED,

5 WELLS FARGO BANK NORTHWEST, N.A., in
6 its capacity as trustee to Yuntian 3 Trust dated
7 September 20, 2016 (formed and administered in
8 Utah) and its capacity as trustee of Yuntian 4 Trust
9 dated September 20, 2016 (formed and
administered in Utah); TVPX ARS, INC., in its
capacity as trustee to Zetta MSN 9688 Statutory
Trust dated September 20, 2016 (formed as
Wyoming statutory trust), Zetta MSN 9606
Statutory Trust dated September 20, 2016 (formed
as Wyoming statutory trust), collectively Nominal
Defendants,

Defendants.

11
12 In accordance with Local Bankruptcy Rule 9013-2(b)(4), the Trustee hereby submits copies
13 of unpublished judicial opinions cited in Trustee's Motion for Limited Jurisdictional Discovery and
14 Incorporated Memorandum of Law (the "Motion"). The unpublished judicial opinions cited in the
15 Motion are attached hereto as follows:

- 16 1. Exhibit 1: *Boddy v. Pourciau*, 2018 WL 4637380 (W.D. Wash. Sept. 27, 2018)
- 17 2. Exhibit 2: *Crystal Cruises, Inc. v. Moteurs Leroy-Somer S.A.*, 2011 WL 2604886 (C.D. Cal.
18 July 1, 2011)
- 19 3. Exhibit 3: *Delacruz v. Serv. Corp. Int'l*, 2018 WL 2287962 (E.D. Cal. May 18, 2018)
- 20 4. Exhibit 4: *Fin. Express LLC v. Nowcom Corp.*, 2008 WL 11342755 (C.D. Cal. Mar. 6,
21 2008)
- 22 5. Exhibit 5: *FTC - Forward Threat Control, LLC v. Dominion Harbor Enters., LLC*, 2020
23 WL 5545156 (N.D. Cal. Sept. 16, 2020)
- 24 6. Exhibit 6: *L.A. Terminals, Inc. v. City of Los Angeles*, 2020 WL 8028241 (C.D. Cal. Dec.
25 21, 2020)
- 26 7. Exhibit 7: *Maple Leaf Adventures Corp. v. Jet Tern Marine Co.*, 2016 WL 3063956 (S.D.
27 Cal. Mar. 11, 2016)

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- 8. Exhibit 8: *Pinkerton Tobacco Co., LP v. The Art Factory AB*, 2021 WL 541441 (C.D. Cal. Jan. 28, 2021)
- 9. Exhibit 9: *Sugar Factory, LLC v. Glossy Pops, LLC*, 2019 WL 2994202 (C.D. Cal. July 8, 2019)

Respectfully submitted,

DATED: June 3, 2021

DLA PIPER LLP (US)

By: /s/ John K. Lyons
DAVID B. FARKAS (SBN 257137)
JOHN K. LYONS (*Pro Hac Vice*)
JEFFREY S. TOROSIAN (*Pro Hac Vice*)
JOSEPH A. ROSELIUS (*Pro Hac Vice*)

Attorneys for the Chapter 7 Trustee

Exhibit 1

2018 WL 4637380

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Kyle BODDY, et al., Plaintiffs,
v.
Brent POURCIAU, et al., Defendants.

CASE NO. C18-1046JLR
|
Signed 09/27/2018

Attorneys and Law Firms

Tyler C. Peterson, Peterson Baker PS, Seattle, WA, for Plaintiffs.

Matthew L. Devereaux, The Bezou Law Firm, Covington, LA, Matthew R. Hale, Attorney at Law, Seahurst, WA, for Defendants.

ORDER DENYING MOTION TO DISMISS
OR TRANSFER AND GRANTING
JURISDICTIONAL DISCOVERY

JAMES L. ROBART, United States District Judge

I. INTRODUCTION

*1 Before the court is Defendants Brent Pourciau and Top Velocity, LLC’s (“Top Velocity”) (collectively, “Defendants”) motion to dismiss or, in the alternative, transfer. (Mot. (Dkt. # 8).) Plaintiffs Kyle Boddy and Driveline Baseball Enterprises, LLC (“Driveline”) (collectively, “Plaintiffs”) filed a response. (Resp. (Dkt. # 17).) As part of Plaintiffs’ response, Plaintiffs request jurisdictional discovery if the court does not have sufficient facts to determine personal jurisdiction at this time. (See *id.* at 5 n.15.) Defendants did not file a reply. (See generally Dkt.) The court has considered the parties’ submissions in support of and in opposition to the motion, the relevant portions of the record, and the applicable law. Being fully advised,¹ the court concludes that additional information would be helpful to resolving the issue of personal jurisdiction. The court GRANTS Plaintiffs’ request for jurisdictional discovery as specified herein and DENIES without prejudice to refile, if appropriate, Defendants’ motion to dismiss for lack of personal jurisdiction or, in the

alternative, transfer pending the conclusion of jurisdictional discovery. The court also DENIES Defendants’ motion to dismiss based on improper venue.

¹ The parties do not request oral argument on the motion (*see* Mot. at 1; Resp. at 1), and the court determines that oral argument would not be helpful to its disposition of the motion *see* Local Rules W.D. Wash. LCR 7(b)(4).

II. BACKGROUND

A. Parties

Driveline is a Washington limited liability company that “provides hitting and pitching training to amateur and professional baseball players, and produces, markets, and sells related baseball training equipment and training programs.” (SAC (Dkt. # 10) ¶ 2.)² Driveline coaches players from a variety of levels at its training facility in Kent, Washington. (*Id.*) In addition, Driveline works with high schools, colleges, and professional teams across the country. (*Id.*) Driveline also ships training products to customers, including customers in Louisiana. (*See* Rathwell Decl. (Dkt. # 18) ¶ 4.) Driveline’s 26 employees are all located in Kent, Washington, as are Driveline’s warehouse, corporate offices, and many of Driveline’s clients. (*See id.* ¶¶ 2, 4, 9.)

² Although Plaintiffs’ second amended complaint (Dkt. # 10) was filed after Defendants’ motion (Dkt. # 8), the court previously determined that the motion applies to the second amended complaint (*see* Order (Dkt. # 16) at 2-3).

Mr. Boddy is a resident of King County, Washington. (SAC ¶ 1.) He is the founder and co-owner of a baseball performance training system that is used at Driveline, “which uses a data-driven approach to improve baseball performance for pitchers and hitters and improve conditioning.” (*Id.*) Mr. Boddy is currently the Director of Research and Development at Driveline. (*Id.*)

Mr. Pourciau is a resident of St. Tammany Parish, Louisiana, and is the owner, manager, officer, and sole member of Top Velocity. (*Id.* ¶ 3; Supp. Not. of Rem. (Dkt. # 13) at 3.) Top Velocity is a Louisiana limited liability company with its principal place of business in St. Tammany Parish, Louisiana. (SAC ¶¶ 3-4; Supp. Not. of Rem. at 3.) Top Velocity markets and sells baseball training programs on its website that are

2018 WL 4637380

designed to enhance pitching performance and speed. (SAC ¶ 4.) Top Velocity also promotes its services and products on social media, such as YouTube, Twitter, and Facebook. (*Id.*)

*2 Mr. Pourciau has an affiliate relationship with Big League Edge, which is another baseball training facility in Kent, Washington. (Resp. at 5.) Mr. Pourciau recently visited Washington to provide clinics and conduct business that is related to this affiliate relationship. (*Id.*) Due to these contacts with Washington, as well as Driveline's and Top Velocity's national reach, Plaintiffs argue that the parties are competitors in the baseball training industry. (*Id.* at 1-2.)

B. Statements at Issue

On or about November 8, 2017, Mr. Pourciau created the Twitter user account @crh81497267, that was entitled "Chris C." (SAC ¶ 11.) It was unknown at that time that Mr. Pourciau controlled the Chris C account. (*Id.* ¶ 20.) That evening, Mr. Pourciau "tweeted" from the Chris C account that "there is a lot you guys don't know about DL [Driveline] that needs to be exposed." (*Id.* ¶ 12.) Included in the tweet were alleged screenshots of text message conversations, one of which involved Mr. Boddy encouraging a client to take performance enhancing drugs ("PEDs") and portraying that Driveline regularly gave its clients PEDs. (*Id.*) Mr. Pourciau's original tweet from the Chris C account was directed at 10 Twitter users. (*See* SAC, Ex. A (Dkt. # 10-1) ("Replying to @JasonOchart @Parqman40 and 3 others," and sent to "@TCDriller99 @tscho341 @clongbaseball @brett_lawrence @ian_walshl 1".)) Like all of the tweets discussed below, this tweet was posted publicly and was accessible to all Twitter users. (*See* SAC ¶ 13.)

Fifteen minutes later, Mr. Pourciau used his @TopVelocity Twitter account to reply to Chris C's tweet, and said, "[w]ow is this real?" (*Id.* ¶ 14, Ex. B (Dkt. # 10-2) at 2.) Mr. Pourciau's reply was directed at nine specific Twitter users. (*See id.* ("Reply to @CoachKsAcademy @crh81497267 and 7 others").) On November 28, 2017, Mr. Pourciau again replied to the original Chris C tweet, this time providing a link to the screenshots and saying, "I am blown about by the sh[* *] that comes from DL. Coaches that blantly [sic] lie about WB studies and recent rumor of PED." (*Id.* at 3.) The November 28, tweet was sent as a reply to @coach_aubin17 and @Hooker1993. (*Id.*)

On November 29, 2017, Driveline's CEO, Michael Rathwell, emailed Mr. Pourciau in part to inform him that the steroid allegation posted on the Chris C Twitter account was false,

and the text message screenshots were "clearly forged." (SAC ¶ 18, Ex. E (Dkt. # 10-5) at 2.) Later that day, Mr. Pourciau responded, "[t]his new rumor of PED use is just the icing on the cake and I have no idea if it is true and I don't care." (*Id.*) On November 30, Mr. Rathwell responded, "I am in receipt of this email. To reiterate, the allegation of steroid use is not true. I understand from your email that you do not care about the truthfulness of the claim despite obvious errors." (*Id.* at 3.) Mr. Pourciau did not respond. (*See id.*)

About one week later, on December 8, 2017, Mr. Pourciau again posted the text message screenshots from the Chris C Twitter account, this time with the caption: "How does this fall into the DL products and services?" (SAC ¶ 15, Ex. C (Dkt. # 10-3) at 2.) This tweet was sent as a reply to @DrivelineBB and @TopVelocity. (*Id.*) That same day, Mr. Pourciau replied to three Twitter users (@90degreeEngle, @Clantl015, and @JackRoes) by retweeting Chris C's original tweet, and saying, "[w]ell sense [sic] you are so informed about DL. Is this true?" (SAC ¶ 16, Ex. D (Dkt. # 10-4) at 2.)

C. Investigation

*3 Because of the harmful nature of the Chris C tweets that associated Driveline with PED use, on November 9, 2017, one day after the original tweet, Driveline initiated the present lawsuit in Washington State Superior Court for King County, alleging a cause of action for libel. (SAC ¶ 20; *see also* Compl. (Dkt. # 8-1) at 4.) Driveline initially brought suit against John Doe defendants with the intention of amending the complaint as soon as it discovered who was responsible. (SAC ¶ 20; Compl. at 1.)

On November 10, 2017, Plaintiffs served a subpoena on Twitter, Inc., in order to gain information about the Chris C account. (SAC ¶ 21.) Twitter's subpoena response revealed that the Chris C account was created with the email address chris@chriscretinconstruction.com. (*Id.*) Plaintiffs then discovered that the domain name chriscretinconstruction.com is registered to Mr. Pourciau, and Chris Cretin is a former business associate of Mr. Pourciau. (*Id.* ¶¶ 21-22, Ex. G (Dkt. # 10-7) at 2-5.) Twitter also provided Plaintiffs with the Internet Protocol ("IP") addresses that were used to access the Chris C account. (SAC ¶ 21.) Using the IP addresses, Plaintiffs were able to determine that Mr. Pourciau registered the Chris C account from his home in Louisiana. (*Id.* ¶¶ 24-26, Ex. H (Dkt. # 10-8) at 3.)

2018 WL 4637380

Plaintiffs therefore amended their state court complaint on June 20, 2018, to identify Mr. Pourciau and Mr. Cretin as defendants, as well as add a claim for unfair competition. (SAC ¶ 27; *see also* FAC (Dkt. # 1-1) at 1, 4, 12.) After receiving the amended complaint, Mr. Cretin contacted Plaintiffs' counsel and explained that he had no personal knowledge of Driveline or Mr. Boddy. (SAC ¶ 27.) Mr. Cretin also said that Mr. Pourciau had recently contacted him to explain that Mr. Pourciau had used Mr. Cretin's old email address to register the Chris C Twitter account. (*Id.*) Mr. Pourciau admitted to Mr. Cretin that he used the Chris C account to post statements about Driveline and Mr. Boddy. (*Id.*) Mr. Cretin told Plaintiffs' counsel that Mr. Pourciau took these actions without Mr. Cretin's knowledge or consent. (*Id.* ¶¶ 27-28, Ex. I (Dkt. #10-9) at 2-4.)

D. Present Motion

Defendants removed this matter to this court on July 17, 2018. (*See* Not. of Rem. (Dkt. #1).) After removal, Plaintiffs amended their complaint to include a claim for false light. (*See* SAC ¶¶ 36-40.) Defendants now move to dismiss this case for lack of personal jurisdiction and improper venue. (Mot. at 1-4.) In the alternative, Defendants ask the court to transfer this case to the United States District Court for the Eastern District of Louisiana, where Defendants are located. (*Id.* at 4-5.) In response, Plaintiffs request an opportunity to conduct jurisdictional discovery if the court does not have sufficient facts to determine personal jurisdiction at this time. (Resp. at 5 n. 15.) The court addresses these issues in turn.

III. ANALYSIS

A. Standard

When a defendant brings a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2), the plaintiff bears the burden of establishing personal jurisdiction. *See Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011). Where a district court decides such a motion without an evidentiary hearing, “the plaintiff need only make a prima facie showing of the jurisdictional facts.” *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). Uncontroverted allegations in the complaint are taken as true, and any factual dispute contained in affidavits and declarations are resolved in the plaintiff's favor. *Id.* The court, however, may not “assume the truth of allegations in a pleading which are contradicted by affidavit.” *Mavrix*, 647 F.3d at 1223 (citation omitted).

B. Personal Jurisdiction

*4 “Federal courts apply state law to determine the bounds of their jurisdiction over a party.” *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1020 (9th Cir. 2017) (citing Fed. R. Civ. P. 4(k)(1)(A)). Washington's long-arm statute, RCW 4.28.185, “extends jurisdiction to the limit of federal due process.” *Shute v. Carnival Cruise Lines*, 783 P.2d 78, 82 (Wash. 1989). The due process clause grants the court jurisdiction over defendants who have “certain minimum contacts ... such that 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).

Personal jurisdiction can be based on either general jurisdiction or specific jurisdiction. *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). Here, Plaintiffs do not allege that Defendants are subject to general jurisdiction.³ (*See* Resp. at 4-5, 5 n. 15.) Thus, only specific jurisdiction is at issue.

³ Plaintiffs note that Top Velocity has an affiliate relationship with another baseball training facility in Kent, Washington, and that Mr. Pourciau has recently visited Washington to provide clinics and conduct business. (Resp. at 5.) Plaintiffs aver that these facts alone are not enough to provide general jurisdiction. (*Id.*) The court agrees that, as currently pleaded, Defendants do not have Washington contacts “of the sort that approximate physical presence,” which is necessary for general jurisdiction. *Bancroft*, 223 F.3d at 1086 (citation omitted).

“The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant ‘focuses on the relationship among the defendant, the forum, and the litigation.’” *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017) (quoting *Walden v. Fiore*, 571 U.S. 277, 283-84 (2014)). Two principles guide this inquiry: First, this relationship must arise from contacts that the “defendant *himself*” creates with the forum state. *Walden*, 571 U.S. 284 (emphasis in original). In other words, plaintiffs' or third parties' contacts with the forum state cannot be the basis for jurisdiction over the defendant. *Id.* This is because due process in this context “principally protect[s] the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties.” *Id.* Second, the “ ‘minimum contacts’ analysis looks to the defendant's contacts with the

2018 WL 4637380

forum State itself, not the defendant’s contacts with persons who reside there.” *Id.* at 285. Put simply, “the plaintiff cannot be the only link between the defendant and the forum.” *Id.* Moreover, “random, fortuitous, or attenuated” contacts with a forum state are insufficient for specific jurisdiction. *Id.* at 286 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

The Ninth Circuit applies a three-part test to determine whether the exercise of specific jurisdiction over a nonresident defendant is appropriate: (1) the defendant has either purposefully directed his activities toward the forum or purposely availed himself of the privileges of conducting activities in the forum; (2) the claims arise out of the defendant’s forum-related activities; and (3) exercise of jurisdiction is reasonable. *Axiom*, 874 F.3d at 1068. Plaintiffs bear the burden of satisfying the first two prongs. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). The burden then shifts to defendant to make a “compelling case” that the exercise of jurisdiction would not be reasonable. *Id.*

*5 Where, as here, the case sounds in tort, the court considers for part one of the above-stated test whether the defendant has purposefully directed his activities at the forum state, even if the acts took place elsewhere.⁴ *Axiom*, 874 F.3d at 1069. To meet this threshold, the defendant must have “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Mavrix*, 647 F.3d at 1228.

⁴ A plaintiff relying on specific jurisdiction “must establish that jurisdiction is proper for ‘each claim asserted against a defendant.’ ” *Picot*, 780 F.3d at 1211 (quoting *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004)). Because all of Plaintiffs’ claims sound in tort and rely on a “common nucleus of operative facts,” the court’s following analysis applies to all of Plaintiffs’ claims. *See id.*

Plaintiffs have alleged that Defendants committed an intentional act by publishing false statements on the internet with the intention of harming Plaintiffs. (See SAC ¶¶ 29-45.) Thus, the first prong of the test is met. *See Axiom*, 874 F.3d at 1069 (finding that adding a logo to a newsletter and sending the newsletter to recipients was “unquestionably an intentional act”).

The heart of the analysis lies with prong two and whether Defendants expressly aimed their conduct at Washington. “The exact form of our analysis varies from case to case and ‘depends, to a significant degree, on the specific type of tort or other wrongful conduct at issue.’ ” *Picot*, 780 F.3d at 1214 (quoting *Schwarzenegger*, 374 F.3d at 807). In this case, Plaintiffs claim libel, false light, and unfair competition, all of which arise out of Defendants’ tweets. The court therefore asks whether Defendants aimed these allegedly tortious tweets at the state of Washington. *See Picot*, 780 F.3d at 1214.

Plaintiffs argue that the express aiming requirement is met because Defendants directed the statements toward Plaintiffs—a Washington resident and company—when they published the statements on Twitter. (Resp. at 5.) Plaintiffs also claim that the tweets were published in Washington via Twitter and were directed at Washington residents. (*Id.* at 5, 7.) Moreover, Defendants were aware that the harm suffered by Plaintiffs would occur in Washington. (*Id.* at 7.) This is especially so, Plaintiffs allege, because Mr. Pourciau traveled to Washington to give lectures and work with Driveline’s competitors. (*Id.*) The court finds that Plaintiffs have not provided sufficient facts to establish Defendants’ personal jurisdiction in this forum.

To the extent that Plaintiffs’ focus on their own connections with Washington, Plaintiffs are misguided. Again, as clarified in *Walden*, the personal jurisdiction inquiry does not center on Plaintiffs’ contacts with the forum state. *Walden*, 571 U.S. at 284-85 (“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.” (internal citation omitted)). Rather, Defendants’ conduct must connect them to the forum—not just to Plaintiffs—in a substantial and meaningful way, and Defendants’ relationship with Plaintiffs cannot alone serve as the basis for specific personal jurisdiction. *See id.* at 284-86.

In addition, the court does not agree that Defendants “published” the tweets in Washington. Rather, the Defendants published the tweets on the internet, from devices located in Louisiana. (See SAC ¶ 26.) To hold that Defendants are subject to this court’s jurisdiction simply because the tweets were viewable in Washington would open Defendants to being haled into every court in the country. This would violate *Walden*’s directive that a “defendant’s suit-related conduct must create a substantial connection with the forum State.” *Walden*, 571 U.S. at 284. The court recognizes that

2018 WL 4637380

the internet has blurred the specific personal jurisdiction analysis, but the central question remains at this stage whether Defendants “expressly aimed” their tweets at Washington. Internet postings that randomly or fortuitously make their way into Washington are insufficient for specific jurisdiction. See *Burger King*, 471 U.S. at 475.

*6 That said, because Plaintiffs have alleged libel, Defendants' intended audience and the place of Plaintiffs' reputation play a role in the jurisdiction analysis. See *Walden*, 571 U.S. at 287-88 (distinguishing between a plaintiff's residence and where a plaintiff's reputation is harmed). For example, in *Colder v. Jones*, a California actress brought suit against two nonresident defendants in a California court based on an article that the defendants wrote in the National Enquirer. 465 U.S. at 784-86. At the time, the National Enquirer sold about 600,000 copies in California, which was almost twice the level of the next highest state. *Id.* at 785. The Supreme Court held that it had personal jurisdiction over these nonresident defendants. *Id.* at 791. The Court in *Walden* clarified *Colder*'s finding of personal jurisdiction:

The crux of *Colder* was that the reputation-based “effects” of the alleged libel connected the defendants to California, not just to the plaintiff. The strength of that connection was largely a function of the nature of the libel tort. However scandalous a newspaper article might be, it can lead to a loss of reputation only if communicated to (and read and understood by) third persons. Accordingly, the reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens. Indeed, because publication to third persons is a necessary element of libel, the defendants' intentional tort actually occurred in [C]alifornia. In this way, the “effects” caused by the defendants' article—*i.e.*, the injury to the plaintiff's reputation in the estimation of the California public—connected the defendants' conduct

to *California*, not just to a plaintiff who lived there. That connection, combined with the various facts that gave the article a California focus, sufficed to authorize the California court's exercise of jurisdiction.

Walden, 571 U.S. at 287-88 (internal citations omitted) (emphasis in original).

In this case, Plaintiffs have not shown that Washington is the “focal point of the ... harm suffered” to their reputation. *Walden*, 571 U.S. at 287 (quoting *Colder*, 465 U.S. at 789). To the contrary, Driveline performs business across the country, including in Louisiana. (See Rathwell Decl. ¶ 4.) Thus, to the extent Plaintiffs have alleged anything about their reputations, it appears that they extend beyond Washington. (See SAC ¶ 17 (not specifying where Plaintiffs' reputations will be harmed).) The national scope of both Plaintiffs' and Defendants' business also undermines Plaintiffs' contention that Defendants sent the tweets to gain a competitive edge in the Washington market. (See Resp. at 1-2, 7.) Rather, the parties' competition appears to extend nationwide, without a focus on a particular forum.

In addition, Plaintiffs claim that Defendants' statements were purposefully directed to Washington readers, but Plaintiffs provide no support for that assertion. (See Resp. at 5; see also SAC ¶ 17.) Plaintiffs cannot “simply rest on the bare allegations of [their] complaint, but rather [are] obligated to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction.” *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977). Courts in the Ninth Circuit have explained that, when analyzing personal jurisdiction over a defendant in a case involving social media posts, the plaintiff should provide the residence of the posts' audience. See, e.g., *Sec. Alarm Fin. Enter., L.P. v. Nebel*, 200 F. Supp. 3d 976, 985 (N.D. Cal. 2016) (finding that social media posts are insufficient to establish personal jurisdiction because the plaintiff “offered no evidence, and the Court finds none, that [the defendant's] Facebook and Instagram posts were in any way directed or targeted at California or a California audience.”); *McGibney v. Retzlaff*, No. 14-cv-01059-BLF, 2015 WL 3807671, at *5 (N.D. Cal. June 18, 2015) (explaining that “more direct virtual contacts present a closer question on personal jurisdiction”). Here, Plaintiffs' produced pictures of the disputed tweets, which show some of the Twitter users that Mr. Pourciau directed his comments

toward. It could be argued that Defendants “expressly aimed” their tweets at these Twitter users. But Plaintiffs did not provide any information about the tweets’ audience. For example, Mr. Pourciau sent his original reply tweet to “@CoachKsAcademy @crh81497267 and 7 others.” (SAC, Ex. B at 2.) The court does not know the residence or identity of @CoachKsAcademy, let alone the “7 others,” or if the tweets were in some way tailored for a Washington audience. Plaintiffs failed to provide these facts. (*See generally* SAC; Resp.)

*7 The court notes that simply showing that some members of the tweets’ audience are connected to Washington may not be enough to establish specific personal jurisdiction. Rather, Plaintiffs must show that the tweets’ audience, combined with other case-related facts, reveals that Defendants expressly aimed their tweets at Washington. For example, in *Axiom Foods, Inc. v. Acerchem International, Inc., California and Arizona plaintiffs filed suit against a foreign defendant*. 874 F.3d at 1066-67. The parties were competitors in the field of health and food products. *Id.* at 1067. The defendant sent a newsletter to 343 email addresses that contained the plaintiffs’ logos. *Id.* Most of the recipients were located in Western Europe, but the plaintiffs were able to show that around ten recipients were located in California. *Id.* The plaintiffs filed suit in the Northern District of California alleging copyright infringement. *Id.* In upholding the district court’s finding that it did not have personal jurisdiction over the defendant, the Ninth Circuit explained that because the vast majority of the newsletter recipients were not in California, “[i]t can hardly be said that ‘California [wa]s the focal point both of the [newsletter] and of the harm suffered.’ ” *Id.* at 1070 (quoting *Walden*, 571 U.S. at 287) (alterations in original).

In short, without knowing the residence of Defendants’ targeted audience, or the central location of Plaintiffs’ reputation, the court cannot find that Washington was the “focal point” of the tweet and of the harm suffered. More broadly, on the facts pleaded, Plaintiffs have not shown that Defendants purposefully directed their activities toward Washington. Accordingly, the court finds that Plaintiffs have thus far failed to demonstrate personal jurisdiction over Defendants. The court therefore denies Defendants’ motion without prejudice to refile following jurisdictional discovery for the reasons stated below. *See infra* § III.E.

C. Venue

The Defendants also move to dismiss this case for improper venue as specified in 28 U.S.C. § 1391. (Mot. at 3-4) (citing

Fed. R. Civ. P. 12(b)(3).) The court denies this motion. This case was originally filed in Washington State Superior Court for King County. (*See* Compl.) Defendants then removed the complaint to this court. (*See* Not. of Rem.) When a plaintiff brings an action in state court, which is removed by a defendant, the requirements of the venue statute, 28 U.S.C. § 1391, do not apply. Rather, 28 U.S.C. § 1441(a) governs the venue of a removed action. *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665-66 (1953); *see also Nw. Pipe Co. v. Thyssenkrupp Steel USA, LLC*, No. C13-5342RBL, 2013 WL 3716677, at *2 (W.D. Wash. July 12, 2013) (“Section 1391 is inapplicable to determine whether venue is proper because this case was removed, and the venue for a removed action is governed by 28 U.S.C. § 1441(a).”). Section 1441(a) of Title 28 provides that the proper venue of a removed action is “the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a). Thus, the Western District of Washington is the proper venue.

D. Transfer

Defendants also request that the court transfer this case to the Eastern District of Louisiana “[f]or the convenience of the parties and witnesses, [and] in the interest of justice.” (Mot. at 4-5 (citing 28 U.S.C. § 1404(a)); *see also* Supp. Memo (Dkt. # 14) at 5-6.) A defendant seeking transfer “must make a strong showing of inconvenience to warrant upsetting the plaintiff’s choice of forum.” *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). In determining whether to transfer venue pursuant to § 1404(a), the Ninth Circuit has articulated several factors the court should consider, including: “(1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff’s choice of forum, (4) the respective parties’ contacts with the forum, (5) the contacts relating to the plaintiff’s cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof.” *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000). The court also weighs relevant public policy considerations of the forum state. *Id.* at 499.

*8 Defendants provide a one-paragraph conclusory and contradictory argument that transfer is appropriate, which is largely based on factors that also relate to personal jurisdiction. (*See* Mot. at 5 (requesting transfer because “Defendants have no contacts with the state of Washington”

2018 WL 4637380

and Defendants' contacts with Washington do not give this court general jurisdiction over Defendants.) Without articulating its conclusions on the nine factors, the court finds that Defendants have not made the necessary "strong showing of inconvenience" to warrant transfer. *Decker*, 805 F.2d at 843; see also *Textainer Equip. Mgmt. (U.S.) Ltd. v. TRS Inc.*, No. C 07-01519 WHA, 2007 WL 2900405, at *1 (N.D. Cal. Oct. 3, 2007) (concluding whether transfer was appropriate without expressly considering each factor). However, as explained below, see *infra* § III.E, because the court finds that further discovery is needed to resolve the question of personal jurisdiction, the court denies Defendants' motion to transfer without prejudice. Defendants may refile this motion, if appropriate, at the close of jurisdictional discovery.

E. Jurisdictional Discovery

A district court has broad discretion to permit or deny discovery to determine whether it has in personam or subject matter jurisdiction. See *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977). When a party requests discovery to respond to a motion to dismiss on jurisdictional grounds, the court ordinarily should grant discovery "where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Laub*, 342 F.3d at 1093 (quoting *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986)) (discussing discovery in the context of standing). On the other hand, "a refusal to grant discovery to establish jurisdiction is not an abuse of discretion when 'it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction.'" *Laub*, 342 F.3d at 1093 (quoting *Wells Fargo*, 556 F.2d at 430 n.24).

"It is well-established that '[t]he burden is on the party seeking to conduct additional discovery to put forth sufficient facts to show that the evidence sought exists.'" *Gager v. United States*, 149 F.3d 918, 922 (9th Cir. 1998) (quoting *Conkle v. Jeong*, 73 F.3d 909, 914 (9th Cir. 1995)). However, a plaintiff seeking jurisdictional discovery need not "first make a prima facie showing that jurisdiction actually exists.'" *Hall v. United States*, No. 16-CV-02395-BAS-RBB, 2017 WL 3252240, at *4 (S.D. Cal. July 31, 2017) (quoting *NuboNau, Inc. v. NB Labs, Ltd.*, No. 10-cv-2631-LAB-BGS, 2011 WL 5237566, at *3 (S.D. Cal. Oct. 31, 2011)). "Such a showing is necessary to survive a motion to dismiss, and '[i]t would ... be counter intuitive to require a plaintiff, prior to conducting discovery, to meet the same burden that would be required in

order to defeat a motion to dismiss.'" *NuboNau, Inc.*, 2011 WL 5237566, at *3 (quoting *Orchid Biosciences, Inc. v. St. Louis Univ.*, 198 F.R.D. 670, 673 (S.D. Cal. 2001)).

For example, the court in *Orchid Biosciences* ordered jurisdictional discovery at the motion to dismiss stage after finding that the defendant's affidavits may not have revealed all of its contacts with the state. See 198 F.R.D. at 673-74. The court further explained that, because the defendant had numerous contacts with the forum—albeit insufficient for personal jurisdiction as pleaded—discovery may uncover additional information bearing on the jurisdictional inquiry. *Id.* at 674. Ultimately, the court held that the plaintiff "should be allowed explore the quality, quantity and nature of all of Defendant's contacts with this forum" to argue whether the defendant should be subject to personal jurisdiction in the court. *Id.*

In this case, it is undisputed that Defendants have contacts with the state of Washington. (See Resp. at 5, 7; Supp. Memo at 3-4 (Defendants admitting that they have a certified pitching coach in Washington).) Moreover, Defendants do not deny that they have an affiliate relationship with another baseball training facility in Kent, Washington, or that Mr. Pourciau has repeatedly traveled to Washington to provide clinics and conduct business in direct competition with Plaintiffs. (See Mot.; see generally Dkt.) Although these contacts alone do not provide general jurisdiction in Washington, discovery may reveal that Defendants' contacts in Washington are "of the sort that approximate physical presence." See *Bancroft*, 223 F.3d at 1086 (internal citations omitted).

*9 Moreover, further discovery into the audience of Defendants' tweets may show that Defendants are subject to specific jurisdiction in this forum. As stated above, Plaintiffs did not provide enough information about the tweets to show that Defendants expressly aimed their conduct at Washington. Defendants directed their tweets at a number of individuals, but almost all of the recipients are unidentified. Further discovery into the identities of the tweets' audience should provide the court with the necessary facts to determine whether it has personal jurisdiction over Defendants.

In short, this is not a case where "it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction." *Wells Fargo*, 556 F.2d at 430 n.24. To the contrary, the court finds that "a more satisfactory showing of the facts is necessary" to determine whether the

court has personal jurisdiction over Defendants, *Laub*, 342 F.3d at 1093, and that Plaintiffs have presented sufficient facts to establish that the evidence sought exists, *see Hall*, 2017 WL 3252240, at *4. The court therefore GRANTS Plaintiffs request for jurisdictional discovery.

The court has broad discretion to limit discovery otherwise permissible under the Federal Rules of Civil Procedure. On a motion or on its own, the court must limit the frequency or extent of discovery after considering a number of factors, including “the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1)-(2). “When a defendant raises jurisdictional objections, the court may stay discovery proceedings generally and limit discovery to matters relevant to the court’s jurisdiction.” *Orchid Biosciences*, 198 F.R.D. at 675 (citing 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2040 (2d ed. 1994)). Courts have “routinely stayed discovery on the merits altogether while challenges to jurisdiction are pending.” *Progressive N. Ins. Co. v. Fleetwood Enterprises, Inc.*, No. C04-1398MAT, 2005 WL 2671353, at *5 (W.D. Wash. Oct. 18, 2005) (citation omitted).

Accordingly, the court denies without prejudice Defendants' motion to dismiss to allow Plaintiffs the opportunity to conduct jurisdictional discovery on the issues of specific and general personal jurisdiction. The court specifically limits Plaintiffs to requesting documents that relate to personal jurisdiction. The court concludes that allowing discovery beyond jurisdictional issues at this juncture would place a

burden on Defendants that far exceeds any benefit Plaintiffs would derive.

The court grants Plaintiffs 90 days in which to conduct their jurisdictional discovery. The parties must file any related discovery motions within 60 days of the filing date of this order—30 days prior to the jurisdictional discovery cutoff. Although the court is available to resolve intractable disputes, the court encourages the parties to work cooperatively to implement this order and to expeditiously complete the discovery authorized herein. If, however, discovery disputes arise that require court intervention, the court requires the parties to utilize the procedures set forth in Local Rule LCR 7(i) before resorting to formal motions practice. *See* Local Rules W.D. Wash. LCR 7(i). After Plaintiffs have conducted jurisdictional discovery limited to the issue of personal jurisdiction, Defendants may renew their motion to dismiss and motion to transfer if appropriate.

IV. CONCLUSION

For the reasons stated herein, the court DENIES Defendants' motion to dismiss based on improper venue (Dkt. # 8), DENIES without prejudice Defendants' motion to dismiss for lack of personal jurisdiction or, in the alternative, transfer (Dkt. # 8), and GRANTS Plaintiffs' request for jurisdictional discovery (Dkt. #17).

All Citations

Not Reported in Fed. Supp., 2018 WL 4637380

Exhibit 2

2011 WL 2604886

Only the Westlaw citation is currently available.

United States District Court,
C.D. California.

CRYSTAL CRUISES, INC. et al.

v.

MOTEURS LEROY-SOMER S.A. et al.

No. CV 10-8736 PSG (JCx).

|
July 1, 2011.

Attorneys and Law Firms

George J. Fowler, III, Norman C. Sullivan, Jr., New Orleans, LA, Kelly L. Kress, William L. Robinson, Nixon Peabody LLP, Los Angeles, CA, for Plaintiffs.

Thomas H. Case, Hennelly and Grossfeld, Marina Del Rey, CA, for Defendants.

Proceedings: (In Chambers) Order Granting Plaintiffs' Request to Conduct Limited Discovery, Continuing Defendants' Motions to Dismiss and Setting a Status Conference

The Honorable PHILIP S. GUTIERREZ, District Judge.

*1 Wendy K. Hernandez, Deputy Clerk.

Pending before the Court are Defendants' Motions to Dismiss for lack of personal jurisdiction. The Court heard argument on the Motions on June 6, 2011. After considering the moving and opposing papers, as well as the arguments made at the hearing, the Court grants Plaintiffs' request to conduct limited discovery, continues the motions to dismiss and sets a status conference.

I. Background

On November 15, 2010, Plaintiffs Crystal Cruises, Inc. and Crystal Ship Three (Bahamas) Limited (collectively "Plaintiffs") sued Moteurs Leroy-Somer S.A., Leroy-Somer, and Emerson Electric Company (collectively, "Defendants") for (1) negligence, (2) breach of implied warranty of merchantability, (3) breach of implied warranty of fitness for a particular purpose, (4) breach of express warranty, and (5) negligent misrepresentation and concealment. *See*

First Amended Compl. ("FAC") ¶¶ 23-68. Plaintiffs Crystal Cruises, Inc. ("Crystal") operates a fleet of luxury ships and contracted with a shipbuilder to construct a new ship to be called Crystal Serenity (the "Ship") and owned by Crystal Ship Three (Bahamas) Limited ("CST"). *See FAC* ¶¶ 2, 6. The shipbuilder selected Leroy-Somer to manufacture and install six generators on the Ship to provide power to the propulsion system. *FAC* ¶ 8. Crystal questioned the "experience and capability of Leroy-Somer to supply the generators," but came to trust that Leroy-Somer had the "requisite experience [to adequately] design[] and manufacture[e] the generators to be used on the vessel." *FAC* ¶ 10. It is alleged that all of the generators were defective, leading Plaintiffs to file this suit to recover damages associated with those defects. *See, e.g., FAC* ¶ 14.

According to the Complaint, Defendant Moteurs Leroy-Somer S.A. ("MLS") is a foreign corporation with its principal place of business in France. *FAC* ¶ 3(a). Defendant Leroy-Somer is also a foreign corporation with its principal place of business in France. *FAC* ¶ 3(b). Emerson Electric Company ("Emerson") is a foreign corporation with its principal place of business in St. Louis, Missouri. *FAC* ¶ 3(c). Questioning whether the power of the Court can reach them, Defendants MLS and Leroy-Somer (collectively, "Moving Defendants"), but not Emerson, filed [Federal Rule of Civil Procedure 12\(b\)\(2\)](#) Motions to Dismiss for Lack of Personal Jurisdiction. *See* Dkts. # 21, 24.

In the Motions, the Moving Defendants argue that neither defendant has "employees, officer or agents in California," neither defendant does "any business, or [has] an agent designated for service of process" in California, neither defendant has "offices, bank accounts or other tangible property in California," and therefore, the Moving Defendants are not subject to personal jurisdiction in California. *See MLS Mot.* at 1; *Leroy-Somer Mot.* # 24 at 1. In opposing the Motions, Plaintiffs point to the portions of the Complaint alleging that Defendants are "each the alter egos of one another ... act[ing] as a single corporate entity, disregarding corporate distinctions, failing to observe corporate formalities, and sharing common ownership and directorships," and contend that Defendant Emerson's ties to California are sufficient to confer personal jurisdiction to MLS and Leroy-Somer as alter egos of Emerson, or as parties to an agency relationship with Emerson whereby each performs functions in furtherance of the other's business. *See Opp'n* 4:13-6:13. Plaintiffs concede, however, that they are unable to make a sufficient showing that MLS and Leroy-

Somer are subject to this Court's jurisdiction until further discovery is permitted. *See Opp'n* 5:24–6:3 (“Due to the complex nature of Emerson's business structure[,] discovery is necessary to determine the exact inter-relationship between [the] Leroy–Somer entities, as well as their relationship with Emerson.”). For the reasons that follow, the Court CONTINUES the [Rule 12\(b\)\(2\)](#) Motions to Dismiss for Lack of Personal Jurisdiction and GRANTS Plaintiffs' request to conduct discovery limited to jurisdictional facts.

II. Legal Standard

A. Personal Jurisdiction

*2 In order for this Court to assert personal jurisdiction over a defendant, the exercise of jurisdiction must be authorized under California's “long-arm” jurisdictional statute and comport with constitutional due process limitations. *Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir.1974); *see Fed.R.Civ.P. 4(k)(1)(A)*. Because California authorizes jurisdiction to the full extent of the Constitution, the only question before the Court is whether the exercise of *in personam* jurisdiction in this case is consistent with due process. *See Cal.Code Civ. Proc. § 410.10* (2002); *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1317 n. 2 (9th Cir.1998). In the absence of a traditional basis for asserting jurisdiction (i.e., physical presence, domicile or consent), due process requires that a non-resident defendant 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.’ ” *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). A defendant is subject to “specific jurisdiction” in California where (1) the defendant has purposefully availed himself of the privilege of conducting activities in California, thereby invoking the benefits and protections of its laws; (2) the cause of action arises out of the defendant's California-related activities; and (3) the exercise of jurisdiction would be reasonable.¹ *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir.1995); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). If the defendant's contacts are of a sufficient magnitude, it is subject to “general jurisdiction”—that is, subject to suit on any matter, including those not arising out of the in-forum activity. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447–48, 72 S.Ct. 413, 96 L.Ed. 485 (1952).

1 At this stage of the litigation, the Court uses the term purposeful availment as shorthand for either purposeful availment or purposeful direction. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir.2004) (using the term purposeful availment to describe both availment and direction, and explaining the difference between the two). However, the Court notes that, although some of Plaintiffs' causes of action sound in tort, this case arises out of the alleged contractual relationship between the parties and the purposeful availment test applies. *See McDevitt v. Guenther*, No. CV 06–0216, 2006 WL 2092385, at *5 (D.Haw. July 25, 2006) (“Plaintiff's claims (even though some sound in tort) arise out of his alleged contractual relationship with defendant—that she would provide him with legal services related to the drafting of a prenuptial agreement—so the Court will apply this *Burger King* and *Sher* purposeful availment analysis.”).

Plaintiff has the burden of establishing that jurisdiction exists over the defendants. *Cabbage v. Merchant*, 744 F.2d 665, 667 (9th Cir.1984). The plaintiff need only make a prima facie showing of jurisdiction to survive a jurisdictional challenge on a motion to dismiss where a court has not heard testimony or made findings of fact. *Ziegler*, 64 F.3d at 473; *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 268 (9th Cir.1995); *Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir.1977). For purposes of a motion to dismiss, factual allegations are taken as true, though it is appropriate when considering jurisdictional issues to look beyond the pleadings to any evidence before the Court. *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1019 (2d Cir.1993). All factual conflicts must be resolved in the plaintiff's favor. *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir.2003).

*3 In order to obtain discovery on jurisdictional facts, the plaintiff must at least make a “colorable” showing that the Court can exercise personal jurisdiction over the defendant. *Mitan v. Feeny*, 497 F.Supp.2d 1113, 1118–19 (C.D.Cal.2007) (citing *Central States, S.E. & S.W. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir.2000)). This “colorable” showing should be understood as something less than a prima facie showing, and could be equated as requiring the plaintiff to come forward with “some evidence” tending to establish personal jurisdiction over the defendant. *See eMag Solutions, LLC v. Toda Kogyo Corp.*, 2006 WL 3783548, at *2 (N.D.Cal.Dec.21, 2006); *see also*

Orchid Biosciences, Inc. v. St. Louis Univ., 198 F.R.D. 670, 672–73 (S.D.Cal.2001) (“It would ... be counterintuitive to require a plaintiff, prior to conducting discovery, to meet the same burden that would be required to defeat a motion to dismiss.”).

Even if the plaintiff prevails in making a prima facie showing at the 12(b)(2) stage, the Court must ultimately determine whether the showing can be met by a preponderance of the evidence—whether at a pre-trial evidentiary hearing or at trial itself. See *Metro. Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1064 n. 1 (9th Cir.1990). Where the Court conducts an evidentiary hearing, the plaintiff must prove the existence of personal jurisdiction by a preponderance of the evidence. *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 587 n. 3 (9th Cir.1993). The Court should then issue findings of fact upon which personal jurisdiction depended. See *Credit Lyonnais Securities (USA), Inc. v. Alcantara*, 183 F.3d 151, 154 (2d Cir.1999). If it so chooses, the Court can proceed immediately to the evidentiary hearing “stage” of deciding the personal jurisdiction question. *Data Disc., Inc.*, 557 F.2d at 1285.

B. Exceptions to the Parent–Subsidiary Rule Precluding Personal Jurisdiction over the Subsidiary Based on the Parent's Contacts

It is well-established that a parent-subsidiary relationship alone is insufficient to attribute the contacts of the subsidiary to the parent for jurisdictional purposes. *Doe v. Unocal Corp.*, 248 F.3d 915, 925 (9th Cir.2001); *Transure, Inc. v. Marsh and McLennan, Inc.*, 766 F.2d 1297, 1299 (9th Cir.1985). Two exceptions to that general rule exist, however; a subsidiary's contacts may be imputed to the parent where the subsidiary is the parent's alter ego, or where the subsidiary acts as the general agent of the parent. *Doel*, 248 F.3d at 928–30; *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1405–06 (9th Cir.1994); *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177–78 (9th Cir.1980); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 422–24 (9th Cir.1977).

To satisfy the alter ego exception to the general rule that a subsidiary and the parent are separate entities, the plaintiff must make out a prima facie case “(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice.” *Doe*, 248 F.3d at 926 (alterations in original) (quoting *AT & T Co.*, 94 F.3d at 591). The plaintiff must show that the parent exercises such control over the subsidiary so as to “render the latter the mere instrumentality of the former.”

Id. at 926 (quoting *Calvert v. Huckins*, 875 F.Supp. 674, 678 (E.D.Cal.1995)). Several factors are relevant in applying the alter ego doctrine, including:

*4 “[c]ommingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; ... the treatment by an individual of the assets of the corporation as his own; ... the failure to obtain authority to issue stock or to subscribe to or issue the same; ... the holding out by an individual that he is personally liable for the debts of the corporation; ... the failure to maintain minutes or adequate corporate records ...; sole ownership of all of the stock in a corporation by one individual or the members of a family; ... the failure to adequately capitalize a corporation; the total absence of corporate assets, and undercapitalization; ... the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; ... the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities; ... the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; ... the use of the corporate entity to procure labor, services or merchandise for another person or entity; ... the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; ... the contracting with another with intent to avoid performance by use of a corporate

entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; ... and the formation and use of a corporation to transfer to it the existing liability of another person or entity.”

Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, LLP, 69 Cal.App.4th 223, 249–50, 81 Cal.Rptr.2d 425 (Cal.Ct.App.1999) (quoting *Associated Vendors, Inc. v. Oakland Meat Co.* 210 Cal.App.2d 825, 838–40, 26 Cal.Rptr. 806 (Cal.Ct.App.1962)). It should be noted that “[t]his long list of factors is not exhaustive. The enumerated factors may be considered ‘[a]mong’ others ‘under the particular circumstances of each case.’ ” *Id.*

To satisfy the agency test, the plaintiff must make a prima facie showing that the subsidiary represents the parent corporation by performing services “sufficiently important to the [parent] corporation that if it did not have a representative to perform them, the [parent] corporation ... would undertake to perform substantially similar services.” *Chan*, 39 F.3d at 1405 (quoting *Wells Fargo & Co.*, 556 F.2d at 423). The agency test permits the imputation of contacts where the subsidiary was “either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself.” *Chan*, 39 F.3d at 1405–06 n. 9 (quoting *Gallagher v. Mazda Motor of America, Inc.*, 781 F.Supp. 1079, 1083 (E.D.Pa.1992)).

III. Discussion

*5 In this case, Plaintiffs offer, *inter alia*, the following evidence to meet its burden of establishing a “colorable

showing” of personal jurisdiction sufficient to warrant further fact discovery: (1) a presentation where Emerson and Leroy–Somer “marketed themselves as a single corporate entity,” *Opp'n*, Ex. B; and (2) a report listing Emerson and Leroy–Somer’s “combined sales revenue and combined number of worldwide employees,” *Opp'n*, Ex. B. In their Motions, Moving Defendants have squarely placed the jurisdictional facts at issue and have gone beyond the allegations in the pleadings. Moreover, Plaintiffs have already submitted requests for production of documents related to this very jurisdictional inquiry. *See Opp'n*, Ex. A. Accordingly, the Court GRANTS Plaintiffs’ request to conduct limited discovery and CONTINUES the Motions to Dismiss for Lack of Personal Jurisdiction to a date to be set by the Court in the future.

At the June 6, 2011, hearing on this matter, the Court asked both parties about a proposed discovery plan, if limited discovery on personal jurisdiction issues is allowed. The parties agreed to be bound by reasonable limitations on written discovery and depositions, and also agreed that they would work out the scope of such discovery amongst themselves, with any discovery disputes to be resolved by the magistrate judge. With this in mind, the Court permits Plaintiffs a combination of 10 interrogatories or requests for production, and two depositions. All discovery disputes are to be resolved by the magistrate judge. A status conference is set for **October 3, 2011 at 1:30 pm**, at which point the Court will schedule the hearing on the pending Motions.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 2604886

Exhibit 3

2018 WL 2287962

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

Rosalinda DELACRUZ, on behalf of herself
and all others similarly situated, Plaintiff,

v.

SERVICE CORPORATION
INTERNATIONAL, Defendant.

1:18-cv-00154-LJO-EPG

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Signed 05/17/2018

|
Filed 05/18/2018

Attorneys and Law Firms

Christopher J. Moreland, Pro Hac Vice, Halunen Law,
Minneapolis, MN, Jeffrey Douglas Kaliel, Kaliel PLLC,
Washington, DC, for Plaintiff.

Candace H. Shirley, Gurnee Mason & Forestiere LLP,
Roseville, CA, for Defendant.

**MEMORANDUM DECISION AND
ORDER RE MOTION TO DISMISS FOR
LACK OF PERSONAL JURISDICTION**

ECF No. 6

Lawrence J. O'Neill, UNITED STATES CHIEF DISTRICT
JUDGE

I. INTRODUCTION

*1 On January 28, 2018, Plaintiff, Rosalinda Delacruz, filed the instant class action complaint individually and on behalf of others similarly situated against Service Corporation International (“SCI” or “Defendant”), alleging that she was the victim of Defendant’s deceptive and misleading marketing practices. ECF No. 1, Complaint (“Compl.”) at 5. Plaintiff alleges that in July of 2014 she was induced to purchase an expensive funeral package from the Lisle Funeral Home, which was owned and operated by Defendant SCI, following the death of her fiancé. On March 8, 2018, SCI filed the instant motion to dismiss for lack of personal jurisdiction,

pursuant to [Federal Rule of Civil Procedure 12\(b\)\(2\)](#). ECF No. 6 (“Motion”). On April 18, 2018, Plaintiff filed her opposition to the motion. ECF No. 10 (“Opp.”). On April 25, 2018, Defendant filed a reply in support of his motion. ECF No. 11 (“Reply”). This matter is now ripe for review and is suitable for disposition without oral argument. *See* Local Rule 230(g).

II. BACKGROUND

In support of its motion to dismiss, SCI submits a declaration from Janet S. Key, Secretary of SCI Shared Resources, LLC, and Corporate Secretary of SCI California Funeral Services, Inc. (“SCI Cal”), both subsidiaries of Defendant SCI. ECF No. 6–3 (“Key Declaration”) ¶ 1. Key testifies that Lisle Funeral Home, the entity that Plaintiff contracted with, is owned and operated by SCI Cal, not SCI. *Id.* ¶ 3. She further avers that SCI is a publicly-held Texas corporation that has no employees. *Id.* ¶ 4. Rather, it is a holding company that “conducts no business in the State of California.” *Id.* ¶ 5. She states that SCI is not a party to any contracts or business relationships with Plaintiff. *Id.* ¶ 8. Further, she states that SCI does not manage the business activities of any funeral establishment, cemetery, or other local facility in the State of California that is owned or operated by any direct or indirect subsidiary, including SCI Cal and the Lisle Funeral Home. *Id.* ¶¶ 10, 12.

Key testifies that SCI “does not hire or fire employees working at locations owned and operated by SCI Cal, does not promulgate their work rules or assignments, and does not set their compensation, benefits, schedules, or rates or methods of payment” and that it is “not involved in the supervision or discipline of employees working at SCI Cal locations.” *Id.* ¶ 15. She also indicates that SCI Cal’s finances are maintained separately from SCI and that the two entities have separate corporate documents that are separately maintained. *Id.* ¶¶ 17–20. In short, Key avers that “SCI does not own, supervise, manage or otherwise control any of the funeral, cemetery or crematoria locations owned and operated by SCI Cal, including Lisle Funeral Home.” *Id.* ¶ 23.

In response, Plaintiff asserts that SCI Cal is not truly a legally separate entity from SCI, but rather that it operates as SCI’s alter ego or agent in the forum. Therefore, Plaintiff posits, SCI Cal’s activity in the forum—which unquestionably gives rise to jurisdiction over SCI Cal—can be imputed to SCI.

In support of their agency and alter ego theories of personal jurisdiction, Plaintiff asserts the following facts:

- *2 • a Google search for “California Funeral Services, Inc.,” leads directly to the website for Defendant SCI International;
- SCI markets the Lisle Funeral Home under its uniform, nationwide “Dignity Memorial” brand; (Kaliel Decl. Ex. 2, Printouts from SCI Int’l Website);
- SCI Cal and the Lisle Funeral Home use a form sales agreement that discovery will almost certainly confirm was drafted or approved for use by SCI;
- SCI and SCI Cal (and the Lisle Funeral Home) share corporate offices (See ECF No. 6–4, Def. RJN Ex. 3, Printout from website for Office of the Secretary of State of Texas for SCI; ECF No. 6–4, Def. RJN Ex. 1, Fictitious Business Name information for SCI Cal; Kaliel Decl. Ex. 3, Cal. Sec. of State Business Search—Entity Detail re: Lisle Funeral Home);
- while SCI purports to be a “holding company only” with “no employees,” it represents itself to the world as having “24,000 dedicated employees” who work “from a network of 2,000 funeral homes and cemeteries [sic]” (Kaliel Decl. Ex. 2 Printouts from SCI Website (emphasis added));
- SCI purports to provide d[sic] its “24,000 dedicated employees” with “the finest training and development system in the industry” (*id.*);
- SCI maintains a “Careers” page on its website, where it recruits on its own behalf and seeks employees to fill job openings at funeral homes across the country, including many in California and at least one at the Lisle Funeral Home (*id.*); and
- SCI has a “Code of Conduct and Ethics for Officers and Employees” that governs the conduct of “all officers and employees of Service Corporation International and its affiliated companies,” and that allows it to take “disciplinary action” against any employee at any of its funeral homes in the event of a violation, “up to and including termination of employment.”

ECF No. 10 at 12–13.

III. LEGAL STANDARD

On a motion to dismiss for lack of personal jurisdiction brought pursuant to Fed. R. Civ. P. 12(b)(2), the plaintiff bears the burden of demonstrating that the court’s exercise of jurisdiction is proper. *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011). When the court’s determination is based on written materials rather than an evidentiary hearing, “the plaintiff need only make a prima facie showing of jurisdictional facts.” *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008 (quotation marks and citation omitted)). In resolving the motion on written materials, the court must “only inquire into whether [the plaintiff’s] pleadings and affidavits make a prima facie showing of personal jurisdiction.” *Id.* (alteration in original) (quotation marks omitted) (quoting *Caruth v. Int’l Psychoanalytical Ass’n*, 59 F.3d 126, 128 (9th Cir. 1995)). “That is, the plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant.” *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). A plaintiff cannot solely rest on the bare allegations of its complaint, but uncontroverted allegations in the complaint must be taken as true. *Boschetto*, 539 F.3d at 1015. “Conflicts between the parties over statements contained in affidavits must be resolved in the plaintiff’s favor.” *Id.* (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004)). In addition, “[t]he court may consider evidence presented in affidavits to assist it in its determination and may order discovery on the jurisdictional issues.” *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). However, “conflicts between the facts contained in the parties’ affidavits must be resolved in [plaintiff’s] favor for purposes of deciding whether a prima facie case for personal jurisdiction exists.” *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir.), *supplemented*, 95 F.3d 1156 (9th Cir. 1996).

IV. DISCUSSION

A. Personal Jurisdiction

*3 Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons. *See Fed. R. Civ. P. 4(k)(1)(A)*. Under California’s long-arm statute, courts may exercise personal jurisdiction “on any basis not inconsistent with the Constitution of this state or of the United States.” Cal. Civ. Proc. Code Ann. § 410.10 (2004). Because California’s long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution,

2018 WL 2287962

the question here is whether assertion of personal jurisdiction over SCI comports with the limits imposed by federal due process. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464 (1985). It is well established that the Fourteenth Amendment’s Due Process Clause limits the power of a court to exercise jurisdiction over out-of-state defendants who do not consent to jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011). There are two kinds of personal jurisdiction that a court may exercise over a foreign defendant. *Id.* at 919. The first, known as “general jurisdiction,” exists if the defendant’s contacts with the forum are “so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.” *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). The second, known as “specific jurisdiction,” exists where the litigation is derived from obligations that “arise out of or are connected with the [company’s] activities within the state.” *Id.* at 319.

General jurisdiction permits the court to hear all claims against a defendant whose affiliations with the forum state are “so ‘continuous and systematic’ as to render [it] essentially at home in the forum State. i.e., comparable to a domestic enterprise in that State.” *Daimler AG v. Bauman*, 571 U.S. 117, 138–39 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

The touchstone for asserting specific jurisdiction over a nonresident defendant is “the relationship among the defendant, the forum, and the litigation.” *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (citation omitted). “The proper question is whether the defendant’s conduct connects him to the forum in a meaningful way.” *Id.* at 1125. The Ninth Circuit has established a three-prong test for analyzing a claim of specific personal jurisdiction: (i) the defendant must “purposefully direct his activities or consummate some transaction with the forum or resident thereof”; (ii) the cause of action must “arise[] out of or relate[] to the defendant’s forum-related activities”; and (iii) “the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). The plaintiff bears the burden of satisfying the first two prongs of the test. *Id.* Once the plaintiff carries this burden, the defendant must come forward with a “compelling case” that the exercise of jurisdiction would not be reasonable. *Id.*

Plaintiff does not specify in the Complaint or in her opposition brief whether she believes that the Court has

general or specific jurisdiction over Defendant SCI. In the Complaint, Plaintiff asserts only that “[t]his Court has personal jurisdiction over Defendant SCI for reasons including but not limited to the following: Plaintiff’s claims against Defendant SCI arise out of its conduct within the State of California, including its dissemination within the State of California of the false and misleading representations with respect to its funeral products and services.” Compl. ¶ 11. Defendant argues that SCI and SCI Cal are entirely distinct corporate entities, and the SCI has no contacts with the forum sufficient to justify the exercise of general or specific jurisdiction over it. Therefore, Defendant moves to dismiss the Complaint for lack of personal jurisdiction.

In her opposition brief, Plaintiff argues that SCI Cal is effectively SCI’s alter ego and agent, such that the two are not legally distinct corporate entities. The Court will address the alter ego and agency theories of personal jurisdiction as they apply to both general and specific jurisdiction.

1. General Jurisdiction

Plaintiff does not assert that SCI itself had “continuous and systematic” affiliations with the forum, but rather that the distinction between SCI and SCI Cal was virtually non-existent such that SCI Cal’s contact with the forum could be imputed to SCI directly, thereby conferring jurisdiction on it.

a. Agency And Alter Ego Tests

*4 However, the Ninth Circuit has “permitted a plaintiff to pierce the corporate veil for jurisdictional purposes and attribute a local entity’s contacts to its out-of-state affiliate under one of two separate tests: the ‘agency’ test and the ‘alter ego’ test.” *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1071 (9th Cir. 2015). Although each test allows the Court to impute jurisdiction, the theoretical underpinnings behind each test differ in important respects. As a Nevada court explained:

The alter ego theory allows plaintiffs to pierce the corporate veil to impute a subsidiary’s contacts to the parent company by showing that the subsidiary and the parent are one and the same....The rationale behind this theory is that the alter ego subsidiary is the same entity as its parent, and thus, the jurisdictional contacts of the subsidiary are also jurisdictional contacts of the parent. *Patin*, 294 F.3d at 653. Unlike with the alter ego theory, the corporate identity of the parent company is preserved under the agency theory; the parent nevertheless “is held for the

acts of the [subsidiary] agent” because the subsidiary was acting on the parent’s behalf. *F. Hoffman–La Roche, Ltd. v. Superior Court*, 130 Cal.App.4th 782, 30 Cal.Rptr.3d 407, 418 (2005) (internal quotation marks omitted); *Wesley–Jessen Corp. v. Pilkington Visioncare, Inc.*, 863 F.Supp. 186, 188–89 (D.Del.1993) (“This [agency] theory does not treat the parent and subsidiary as one entity, but rather attributes specific acts to the parent because of the parent’s authorization of those acts.”).

Viega GmbH v. Eighth Jud. Dist. Ct., 328 P.3d 1152, 1157 (Nev. 2014) (citations omitted).

b. Agency Theory Of General Jurisdiction

Prior to the Supreme Court’s decision in *Daimler*, the Ninth Circuit recognized an agency theory of general jurisdiction. See *Unocal Corp.*, 248 F.3d at 928–29. Under that theory, a subsidiary’s activity in a forum could be imputed to the parent company where the subsidiary acted as the parent’s agent. *Id.* In *Daimler*, the Supreme Court rejected the agency test for purposes of general jurisdiction, holding that a foreign corporation cannot be subject to general jurisdiction based on an agency relationship through its subsidiary’s contacts with the forum. Since Plaintiff does not allege any direct contact by SCI with the forum—never mind “continuous and systematic” conduct—Plaintiff fails to assert that this Court has general jurisdiction over SCI. However, because the Supreme Court explicitly reserved the question of whether an agency analysis might be relevant to the specific jurisdiction context, the Court analyzes the agency theory only in the specific jurisdiction context below. See *Daimler*, 571 U.S. at 135 n.13 (“Agency relationships, we have recognized, may be relevant to the existence of *specific* jurisdiction”) (emphasis in original). After *Daimler*, the alter ego theory could still suffice to confer either specific or general jurisdiction over SCI. The Court will also discuss that theory as it relates to this case below.

2. Alter Ego Analysis

To survive a [Rule 12\(b\)\(2\)](#) motion on an alter ego theory a plaintiff must make a *prima facie* showing that both: (1) there is a unity of interest and ownership between the corporations such that their separate personalities do not actually exist, and (2) treating the corporations as separate entities would result in injustice. *Ranza*, 793 F.3d at 1073 (quoting *Unocal*, 248 F.3d at 926). The first prong of the alter ego test requires “a showing that the parent controls the subsidiary to such a

degree as to render the latter the mere instrumentality of the former.” *Id.* (quoting *AT & T Co.*, 94 F.3d at 591). It requires such “pervasive control” that it can only be met where a parent corporation “dictates every facet of the subsidiary’s business—from broad policy decisions to routine matters of day-to-day operation.” *Id.* The Ninth Circuit has emphasized that “[t]otal ownership and shared management personnel are alone insufficient to establish the requisite level of control.” *Id.* (citing *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003)). Nor can the first prong be met by only showing “an active parent corporation involved directly in decision-making about its subsidiaries’ holdings” where the corporations “observe all of the corporate formalities necessary to maintain corporate separateness.” *Unocal*, 248 F.3d at 928. Courts consider nine factors when assessing the first prong of the alter ego test:

- *5 [1] the commingling of funds and other assets of the entities, [2] the holding out by one entity that it is liable for the debts of the other, [3] identical equitable ownership of the entities, [4] use of the same offices and employees, [5] use of one as a mere shell or conduit for the affairs of the other, [6] inadequate capitalization, [7] disregard of corporate formalities, [8] lack of segregation of corporate records, and [9] identical directors and officers.

Stewart v. Screen Gems–EMI Music, Inc., 81 F. Supp. 3d 938, 954 (N.D. Cal. 2015) (quoting *Sandoval v. Ali*, 34 F. Supp. 3d 1031, 1040 (N.D. Cal. 2014)).

In support of her assertion that SCI Cal is SCI’s alter ego, Plaintiff offers the following information in her opposition brief:

- A Google search for “California Funeral Services, Inc.,” leads directly to the website for Defendant SCI International;
- SCI markets the Lisle Funeral Home under its uniform, nationwide “Dignity Memorial” brand;

- SCI Cal and the Lisle Funeral Home use a form sales agreement that discovery will almost certainly confirm was drafted or approved for use by SCI;
- SCI and SCI Cal (and the Lisle Funeral Home) share corporate offices[;]
- while SCI purports to be a “holding company only” with “no employees” it represents itself to the world as having “24,000 dedicated employees” who work “from a network of 2,000 funeral homes and cemeteries”;
- SCI purports to provided [sic] its “24,000 dedicated employees” with “the finest training and development system in the industry”
- SCI maintains a “Careers” page on its website, where it recruits on its own behalf and seeks employees to fill job openings at funeral homes across the country, including many in California and at least one at the Lisle Funeral Home; and
- SCI has a “code of Conduct and Ethics for Officers and Employees” that governs the conduct of “all officers and employees of Service Corporation International and its affiliated companies,” and that allows it to take “disciplinary action” against any employee at any of its funeral homes in the event of a violation, “up to an including termination of employment.”

ECF No. 10 at 12–13 (citations omitted).

Plaintiff’s evidence (as opposed to unsupported allegations), taken in the light most favorable to her, appears to implicate the fourth, fifth, and eighth factors of the first prong of the alter ego analysis. Accepting Plaintiff’s factual assertions as true, Plaintiff asserts that the corporations share officers, employees, and corporate office space, that they market themselves as an integrated company on their website, and that SCI is involved in some of SCI Cal’s business affairs, including the branding of services and employment decisions. Taken as a whole, these factors are insufficient to state a prima facie case that there is a “unity of interest and ownership” between the entities.

First, the fact that the corporations share officers and offices is not sufficient to demonstrate that SCI Cal is SCI’s alter ego. See *Harris Rutsky & Co. Ins. Servs.*, 328 F.3d at 1135 (a parent and its subsidiary sharing offices and leadership, even where parent holds 100% stock ownership in subsidiary,

is not sufficient to satisfy the unity of interest test); *Payoda, Inc. v. Photon Infotech, Inc.*, No. 14–CV–04103–BLF, 2015 WL 4593911, at *3 (N.D. Cal. July 30, 2015) (concluding that the unity of interest was not met even where parent and subsidiary “share common leadership and office space”) (citations omitted).

*6 Second, the marketing of SCI as an integrated company on its website is not sufficient evidence that SCI Cal is a mere conduit for SCI, nor that the entities have disregarded corporate formalities. See *Corcoran*, 169 F. Supp. 3d at 984 (“courts recognize that separate corporate entities presenting themselves as one online does not rise to the level of unity of interests required to show companies are alter egos”) (collecting cases); *Payoda*, 2015 WL 4593911, at *3 (“marketing puffery” on a shared website “carries no weight in establishing whether a parent and its subsidiary are in fact alter egos”); *Moody v. Charming Shoppes of Delaware, Inc.*, No. C 07–06073, 2008 WL 2128955, at *3 (N.D. Cal. May 20, 2008) (“[g]eneric language on [a company’s] website and in its press releases simply do not rise to the day-to-day control required to impute the subsidiary’s contacts to the parent”).

Third, SCI’s alleged involvement in some of SCI Cal’s business activities, such as its implementation of a policy governing hiring and disciplining employees and advertising employment opportunities on its website, are insufficient to show the requisite level of control over the subsidiary.¹ This type of general oversight over a subsidiary’s operations does not rise to the level of pervasive and direct control required for the assertion of personal jurisdiction. See *Tahaya Misr Inv., Inc.*, 2016 WL 9024808, at *6 (“all of the evidence produced by plaintiff merely suggests that Helwan is the subsidiary of SCC and Italcementi and that, at most, these companies exercise broad oversight over Helwan’s operations”); *Weisler v. Cmty. Health Sys., Inc.*, No. CIV. 12–0079 MV/CG, 2012 WL 4498919, at *13 (D.N.M. Sept. 27, 2012) (recruiting and hiring policy, which required parent’s leadership to approve the subsidiary’s new hires at the management level was “not sufficiently detailed or pervasive to constitute domination over the Hospital’s day-to-day operations”) (collecting cases).

¹ Plaintiff also states its suspicion that SCI drafted some version of the form sales agreement signed by Plaintiff. Plaintiff’s evidence of that does not rise above the speculative level and therefore is insufficient to state a prima facie case. Even if some version of the sales agreement were disseminated to SCI’s subsidiaries by the parent corporation, it

would not necessarily be evidence, absent more, of the type of day-to-day control necessary for an alter ego designation.

The areas of overlap between the parent and subsidiary, even taken together, are insufficient to demonstrate a “unity of interest” sufficient for a determination of alter ego. Nothing alleged in the Complaint or asserted by Plaintiff in connection with this motion to dismiss indicates that the legal distinction between SCI and SCI Cal is effectively a sham or that SCI directs all of SCI Cal’s business activities. *See Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980) (finding no alter ego or agency relationship was created where parent company guaranteed loans for the subsidiary, reviewed and approved major decisions, placed several of its directors on the subsidiary’s board, and was closely involved in the subsidiary’s pricing decisions); *Compagnie Bruxelles Lambert*, 94 F.3d at 591 (concluding that jurisdiction could not be imputed where evidence showed a “normal parent-subsidiary relationship”). The evidence set forth by Plaintiff falls far short of what is required to make a prima facie case that SCI maintains “pervasive control” over SCI Cal or that it “dictates every facet of [SCI Cal’s] business—from broad policy decisions to routine matters of day-to-day operation.” *Ranza*, 793 F.3d at 1073; *Stewart*, 81 F. Supp. 3d at 956 (finding that a showing of the third, fourth, and ninth factors “even when considered together, are not sufficient to support a finding of unity of interest among” the defendants); *In re W. States Wholesale Nat. Gas Antitrust Litig.*, No. 2:03–CV–01431–PMP–PAL, 2009 WL 455653, at *5 (D. Nev. Feb. 23, 2009) (“a parent may review and approve major decisions, place its own directors on the subsidiary’s board, and share offices and staff with its wholly owned subsidiary without being considered its alter ego”).

*7 Moreover, Plaintiff offers no evidence to support the second prong of the alter ego test. Plaintiff does not explain why treating SCI and SCI Cal as separate entities would result in injustice to this Plaintiff.² *See Tahaya Misr Inv., Inc. v. Helwan Cement S.A.E.*, No. 2:16–CV–01001–CAS–AFMX, 2016 WL 9024808, at *6 (C.D. Cal. May 23, 2016) (citing *Ranza*, 793 F.3d at 1073).

² Generally, the injustice prong requires a showing that the entities involved abused the corporate form, such as through under-capitalization or by acting in bad faith to avoid creditors. *See Kingsburg Apple Packers, Inc. v. Ballantine Produce Co.*, No. 1:09–CV–901–AWI–JLT, 2010 WL 2817056, at *4

(E.D. Cal. July 16, 2010) (“[I]t is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up such an unhappy circumstance as proof of an ‘inequitable result.’” (citations omitted)). Plaintiff has not set forth *any* evidence that would meet the second prong of the alter ego test.

Plaintiff fails to make a prima facie showing that SCI Cal is SCI’s alter ego, and therefore fails to establish at this stage that this Court has personal jurisdiction over Defendant SCI.

3. Agency Analysis

In rejecting the agency theory for general jurisdiction purposes, the Supreme Court expressly reserved the possibility that the agency relationship between related entities could confer specific jurisdiction on a parent or holding company. *Daimler*, 571 U.S. at 135 n.13 (“Agency relationships, we have recognized, may be relevant to the existence of *specific* jurisdiction”) (emphasis in original). However, the Court’s reasoning in *Daimler* suggests that the use of such relationships to impute jurisdiction from one legal entity to another is limited. As the *Daimler* court noted, the agency inquiry “stacks the deck, for it will always yield a pro-jurisdiction answer.” *Id.* at 136. That reasoning would seem to apply with equal force in the specific jurisdiction context, as several other courts in this circuit have recognized. *See Los Gatos Mercantile, Inc. v. E.I. DuPont De Nemours and Co.*, No. 13–cv–01180–BLF, 2015 WL 4755335, at *5 (N.D. Cal. Aug. 11, 2015) (“the rationale set forth in *Daimler*—that the Ninth Circuit’s agency test inappropriately ‘stacks the deck’—would seem to undermine application of the [Ninth Circuit’s agency test] even in specific jurisdiction cases”); *Corcoran*, 169 F. Supp. 3d 970, 982 (N.D. Cal. 2016) (agreeing with the reasoning in *Los Gatos Mercantile*). Indeed, the Ninth Circuit has recognized that its own formulation of the agency test as set forth in *Unocal* is “clearly irreconcilable” with *Daimler*’s holding. *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1024 (9th Cir. 2017). Assuming that a more limited version of the agency test is still viable after *Daimler*, the relevant question is whether Plaintiff has set forth evidence that SCI Cal acted on behalf of SCI *and* was subject to its control in the forum. *Id.* “[U]nder any standard for finding an agency relationship, the parent company must have the right to substantially control its subsidiary’s activities.” *Id.* at 1024–25.

In support of its agency theory, Plaintiff sets forth the same facts that the Court considered with respect to its alter

ego analysis. As the Ninth Circuit noted in *Williams*, the “[f]undamental of agency theory require that an agent ‘act on the principal’s behalf and subject to the principal’s control.’” 851 F.3d at 1024 (quoting *Restatement (Third) of Agency* § 1.01 (2006)). As explained above, Plaintiff failed to set forth facts demonstrating that SCI “ha[d] the right to substantially control its subsidiary’s activities.” *Id.* (citations omitted). At most, the facts set forth by Plaintiff indicated that SCI held itself out as operating an integrated network of funeral homes where it had some high level control over employment policies and marketing and branding policies. Therefore, even assuming that the agency theory of specific personal jurisdiction is still valid, Plaintiff fails to establish a prima facie case for jurisdiction over SCI.³

³ Previously, the Ninth Circuit recognized that a subsidiary’s activity in the forum cannot be imputed to its parent when the parent functions as a holding company that treats the subsidiary merely as its investment. In *Doe v. Unocal Corp.*, the Ninth Circuit recognized that:

[w]here a holding company is nothing more than an investment mechanism [, i.e.,] a device for diversifying risk through corporate acquisitions[,] the subsidiaries conduct business not as its agents but as its investments. The business of the parent is the business of investment, and that business is carried out entirely at the parent level.

248 F.3d 915, 929 (9th Cir. 2001) (citations omitted), *overruled on other grounds by Daimler*, 571 U.S. 117; *see also Sarafian v. Wright Med. Tech., Inc.*, No. 2:15–CV–09397–CAS–KSX, 2016 WL 1305087, at *5–7 (C.D. Cal. Apr. 1, 2016) (“even though [subsidiary] acts as the ‘operating entity’ of [parent], it does so “not as [parent’s] agent...but as its investment....” (internal quotation marks and citations omitted)); *Sukonik v. Wright Medical Technology, Inc.*, Case No. 2:14–cv–08278–BRO–MRW, 2015 WL 10682986, at *12 (C.D. Cal. Jan. 26, 2015) (holding that in light of “evidence that [parent] is a holding company with no employees, and that it conducts no business in California...there is no basis to conclude that [parent] functions as [subsidiary’s] agent.”). It is not clear the extent to which this portion of the test was altered by the Ninth Circuit’s decision in *Williams*, 851 F.3d at 1024; however, the Court notes that applying *Unocal’s* holding company/

parent distinction here would also militate in SCI’s favor. Here, Defendant avers that SCI is merely a holding company with no employees of its own. It operates SCI Cal as its investment. Therefore, under the Ninth Circuit’s agency analysis, SCI Cal is not SCI’s agent, and the agency theory of personal jurisdiction does not apply.

B. Jurisdictional Discovery

*8 Plaintiff requests permission to conduct jurisdictional discovery in the event that the Court finds that she has not made a prima facie showing of personal jurisdiction. Because the Court concludes that Plaintiff has not set forth evidence—neither in her Complaint nor in connection with this motion—that makes a prima facie case for personal jurisdiction, the Court turns to the alternative question of jurisdictional discovery.

Jurisdictional discovery “may be appropriately granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.” *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). “District courts have a significant amount of leeway in deciding whether to grant plaintiffs leave to conduct jurisdictional discovery while a motion to dismiss is pending.” *Barantsevich v. VTB Bank*, 954 F. Supp. 2d 972, 996 (C.D. Cal. 2013) (internal quotation marks and citation omitted). The Ninth Circuit has adopted a liberal standard for granting jurisdictional discovery, noting that it should “ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.” *Butcher’s Union Local No. 498, United Food & Commercial Workers v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (internal quotation marks and citations omitted). However, “[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 defendants, the Court need not permit even limited discovery.” *Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 562 (9th Cir. 1995) (citations omitted). “In other words, limited discovery should not be permitted to conduct a fishing expedition.” *Johnson v. Mitchell*, No. CIV S–10–1968 GEB, 2012 WL 1657643, at *7 (E.D. Cal. May 10, 2012) (internal quotation marks and citations omitted).

This case presents a close call. On one hand, the evidence that Plaintiff sets forth in support of her alter ego theory is legally insufficient to support an alter ego or agency theory. Plaintiff contends that SCI holds itself out to be an integrated company

with employees, that it markets its “Dignity Memorial” brand through its subsidiaries, and that it maintains employment and other policies that exist across its subsidiaries. As explained above, none of these contentions supports Plaintiff’s theory that SCI and SCI Cal share such a unity of interest that “the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former.” *Ranza*, 793 F.3d at 1073 (citations omitted). Nor do any of Plaintiff’s contentions suggest that SCI Cal and SCI have done away with corporate formalities, as would be required to pierce the corporate veil for jurisdictional purposes. Plaintiff has not demonstrated that SCI and SCI Cal’s parent-subsidary relationship was out of the ordinary, and, as Plaintiff readily concedes, the existence of a parent-subsidary relationship standing alone does not demonstrate the existence of an agency or alter ego relationship. See ECF No. 10 at 14; *Companie Bruxelles Lambert*, 94 F.3d at 590.

On the other hand, the threshold for granting jurisdictional discovery is low. See *Harris Rutsky & Co. Ins. Servs.*, 328 F.3d at 1135 (jurisdictional discovery was warranted where evidence set forth by plaintiff adduced that parent officer had drafted one of the subsidiary’s key agreements with plaintiff, a fact which “might well be properly characterized as inconsistent with the parent corporation’s investor status, and more like control over day-to-day activities”). Plaintiff correctly points out that some of the facts set forth in the Key Declaration at least appear to contradict SCI’s own corporate filings, governing documents, and public representations. ECF No. 10 at 7–8. For example, although the Key Declaration insists that SCI is not involved in hiring, firing, or discipline, SCI represents on its website and in corporate filings, that it employs thousands of individuals and promulgates a Code of Conduct for Officers and Employees that governs disciplinary issues. Likewise, although Key claims that SCI is “not involved” in the supervision or discipline of employees, SCI does promulgate a code of conduct for employees, which is posted on its website and mentioned in its corporate filings. While these discrepancies may well not be an indication that corporate formalities between SCI and SCI Cal are not properly observed, it does point to issues regarding SCI’s involvement in the operations of SCI Cal that could be clarified in discovery. *Harris Rutsky & Co. Ins. Servs.*, 328 F.3d at 1135 (remanding to the district court after concluding that “[f]urther discovery on this issue might well demonstrate facts sufficient to constitute a basis for jurisdiction”).

*9 Similarly, SCI emphasizes its “transcontinental branding strategy...intended to emphasize our seamless national network of funeral service locations and cemeteries” in its corporate filings. See SCI, Annual Report (Form 10-K) (Feb. 13, 2015), available at <https://www.sec.gov/Archives/edgar/data/89089/000008908916000035/sci-12312015x10k.htm>.⁴ The record lacks evidence on the crucial question of the level of control that SCI exercises over SCI Cal’s day-to-day operations—particularly when it comes to the allegedly deceptive marketing and sales practices central to the allegations in this case. *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) (noting that jurisdictional discovery “may be appropriately granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary”); see also *Twentieth Century Fox Int’l Corp. v. Scriba*, 385 Fed.Appx. 651, 652-53 (9th Cir. 2010) (reversing denial of jurisdictional discovery, noting that “the court below erred by ruling on an incomplete record”).

⁴ See *Dreiling v. Am. Exp. Co.*, 458 F.3d 942, 946 n.2 (9th Cir.2006) (SEC filings subject to judicial notice).

Although these types of statements fall far short of showing that SCI exercises control over its subsidiaries, they do at least raise a viable question about SCI’s involvement in the relevant issues of marketing and branding at SCI Cal and the Lisle Funeral Home. See *Salas v. Facultatieve Techs. the Americas, Inc.*, No. 1:17-CV-00335-LJO-BAM, 2017 WL 4844366, at *7 (E.D. Cal. Oct. 26, 2017) (granting jurisdictional discovery where the court concluded that additional discovery “could yield additional facts about the relationship between [defendant] and the product at issue in this case”). The Complaint alleges that SCI sets nationwide marketing and branding standards for funeral homes under its control. At this stage in the litigation, the Court accepts that allegation as true. Therefore, the Court believes that some very limited jurisdictional discovery is appropriate in this case.

Because there is only minimal evidence in this case to support jurisdictional discovery, the Court finds it appropriate to allow only very limited discovery. The subject matter of the discovery is limited to SCI’s dealings with SCI Cal as it relates to the allegedly deceptive marketing practices implicated in allegations in the Complaint. Jurisdictional discovery is also limited to the issue of personal jurisdiction based on

the theory of an alter ego relationship, or specific personal jurisdiction based on an agency theory. With respect to the agency theory, Plaintiff should bear in mind that the scope of the agency theory has been significantly curtailed by recent Supreme Court and Ninth Circuit case law; Plaintiff must demonstrate at a minimum that the parent actually controlled the activity of the subsidiary as it relates to the alleged deceptive practices in this case to demonstrate jurisdiction.

V. CONCLUSION AND ORDER

For the foregoing reasons, SCI's motion to dismiss is DENIED WITHOUT PREJUDICE, subject to limited jurisdictional discovery.

Discovery shall be limited to:

1. Ten document requests;

2. Twenty interrogatories; and

3. One Rule 30(b)(6) deposition not to last longer than 4 hours.

Jurisdictional discovery shall be completed within 60 days of the entry of this order. Plaintiff will then have 20 days after the close of jurisdictional discovery to supplement its opposition. Within 14 days of the filing of the supplemental opposition, Defendant may file a supplemental reply. The Court refers the parties to Magistrate Judge Grosjean for purposes of any discovery disputes, disputes this Court does not expect to occur.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 2287962

End of Document

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Exhibit 4

2008 WL 11342755

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

FINANCE EXPRESS LLC

v.

NOWCOM CORPORATION, et al.

Case No. SACV 07-01225-CJC(ANx)

|
Signed March 6, 2008

Attorneys and Law Firms

[Clifford H. Pearson](#), Pearson Simon Warshaw and Penny LLP, Sherman Oaks, CA, [James A. Sedivy](#), [Jeffrey F. Gersh](#), Sara Amy Craven, The Gersh Law Firm, Encino, CA, for Plaintiff.

[Elizabeth L. Brann](#), [James V. Fazio, III](#), Paul Hastings Janofsky and Walker, San Diego, CA, [John C. Holmes](#), [Michael A. S. Newman](#), [Richard B Hopkins, II](#), Barger and Wolen LLP, Los Angeles, CA, for Defendants.

PROCEEDINGS: (IN CHAMBERS) ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS AND FOR A MORE DEFINITE STATEMENT [filed 01/17/08]

HONORABLE [CORMAC J. CARNEY](#), UNITED STATES DISTRICT JUDGE

*1 Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* [FED. R. CIV. P. 78](#); LOCAL RULE 7-15. Accordingly, the hearing set for March 10, 2008 at 1:30 p.m. is hereby vacated and off calendar.

Background

Plaintiff Finance Express LLC (“Finance Express”) is in the business of providing software to automate and facilitate credit relationships between used automobile dealers and lenders. Finance Express operates the Finance Express Dealer Management System, an Internet-based technology platform that enables auto dealers to obtain financing for their inventory. Finance Express also offers a product known as the Tracker Dealer Management Software (“Tracker DMS”) that it purchased from a competitor, Manheim Interactive, Inc. The Tracker DMS product is a dealer management

database solution that allows automobile dealers to track their profitability, manage their inventory, conduct sales, and perform other services. Finance Express alleges that it is the owner of several trademarks at issue: Finance Express®, Tracker™, and Tracker DMS™. Finance Express further asserts that Defendants have infringed on their marks by undertaking an advertising campaign that uses the Tracker™ marks and Finance Express' name in order to divert current and potential customers of Finance Express to Defendants' competing product, Dealer Desktop. Specifically, Finance Express contends that Defendant Rufus Hankey, the president of Nowcom Corp. (“Nowcom”), registered at least two websites, <trackerdmsonline.com> and <financeexpressdms.com>, to Nowcom that featured a “Press Release” that purported to have been issued by Finance Express. The press release encourages site visitors to “seamless[ly] migrat[e] from Tracker to Nowcom's Dealer Desktop product. Finance Express alleges that such conduct constitutes trademark infringement, false advertising, and false designation of origin under the Lanham Act and that it also violates the Anticybersquatting Consumer Protection Act and various state laws. Finance Express not only named Nowcom, the registered owner of the allegedly infringing websites, as a Defendant, but also named Nowcom's sister companies, Westlake Services, Inc., Hankey Investment Company, and the Hankey Group, an unincorporated association. Finally, Finance Express also named Don and Rufus Hankey as defendants, the father and son directors of the defendant companies.

Defendants Westlake Services, Inc., Hankey Investment Company, Hankey Group and Don Hankey now move to dismiss all claims against them pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) on the grounds that Defendants cannot be held liable under an agency or alter ego theory and that Hankey Group is a non-existent entity. Defendants also move for a more definite statement. Because the Court finds that the First Amended Complaint (“FAC”) alleges sufficient facts to support theories of alter ego or agency liability for the moving parties, Defendants' motion to dismiss is DENIED. Moreover, the Court finds that the trademark infringement allegations are sufficiently clear and therefore Defendants' motion for a more definite statement is also DENIED.

Standard on a Motion to Dismiss

*2 A motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) tests the legal sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for failure to state a claim is not whether the claimant will

ultimately prevail but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 1370, 1374 (9th Cir. 1997). When evaluating a Rule 12(b)(6) motion, the Court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Mayo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994). Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. FED. R. CIV. P. 8(a)(2). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, — U.S. —, 127 S.Ct. 1955, 1974 (2007). In keeping with this liberal pleading standard, the district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

Analysis

A. Alter Ego Theory

Finance Express concedes that Nowcom is the only Defendant that registered the allegedly infringing and cybersquatting domain names at issue. Finance Express asserts that Rufus Hankey, the president of Nowcom, registered the domain names and that Nowcom owned and operated the allegedly infringing websites. However, Finance Express avers that Nowcom's various sister-companies as well as their majority shareholder, Don Hankey, should also be held liable because Nowcom, Westlake, Hankey Investment, and Hankey Group¹ are merely alter egos of Don Hankey. (FAC, ¶¶ 43–45, 69, 79, 109, 121.) Defendants, on the other hand, argue that Finance Express is unable to allege facts sufficient to support an alter ego theory of liability because each Defendant is a separate, individually-managed entity.

¹ Defendants also argue that Hankey Group cannot be sued because it is not an incorporated entity, but just a collection of companies. The Court finds that Finance Express has the better understanding of California law, under which an unincorporated association may be sued by the name in which it is known or holds itself out to be. See *Cal. Code. Civ. Proc. § 369.5* (“A partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name

it has assumed or by which it is known.”) Here, the Hankey Group's website stated that “Hankey Group has been in business since 1972” and that its “companies include financial, real estate, insurance, and technology services companies as well as rental car and dealership operations.” (FAC, ¶ 33.) A group of affiliated companies that share a common purpose and function under a common name has the legal capacity to be sued.

Federal Rule of Civil Procedure 8 only requires a “short and plain statement of the claim showing that the pleader is entitled to relief.” In keeping with the liberal standard of notice pleading, motions to dismiss for failure to state a claim are generally disfavored. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). Finance Express has pled the facts necessary to meet the requirements of Rule 8 with respect to its alter ego theory of liability. Ordinarily, a corporation is regarded as a legal entity separate from its stockholders, officers, and directors. *Robbins v. Blecher*, 52 Cal. App. 4th 886, 892 (1997). “The law allows corporations to organize for the purpose of isolating liability of related corporate entities. Only in unusual circumstances will the law permit a parent corporation to be held either directly or indirectly liable for the acts of its subsidiary... Mere ownership of a subsidiary does not justify the imposition of liability on a parent.” *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1234–35 (N.D. Cal. 2004) (citations and quotations omitted).² Under the alter ego doctrine, however, a court may disregard the corporate entity and treat the corporation's acts as if they were done by the persons controlling the corporation if the corporation was used by the individuals to perpetrate fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose. *Robbins*, 52 Cal. App. 4th at 892. The Ninth Circuit applies the law of the forum state with respect to the alter ego doctrine. See *Sec. & Exch. Comm'n v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003). California law recognizes an alter ego relationship, such that a corporation's liabilities may be imposed on an individual or a related corporation, only when two conditions are met: (1) there is such a unity of interest and ownership that the individuality of the said person and corporation has ceased; and (2) an adherence to the fiction of the separate existence of the corporation would sanction a fraud or promote injustice. See *id*; *Ministry of Defense v. Gould*, 969 F.2d 764, 769, n.3 (9th Cir. 1992).

² The Court agrees with Defendants that although this case involves the liability of a corporation for

the conduct of its sister corporation rather than the liability of a parent for its subsidiary, the distinction is not significant for purposes of the alter ego and agency analyses. See *Nichols v. Pabtex, Inc.*, 151 F. Supp. 2d 772, 780 (E.D. Tex. 2001). Accordingly, the Court may properly rely on cases involving liability of a parent for the conduct of its subsidiary in its analysis here.

*3 Here, in order to properly plead alter ego liability, Finance Express needed to plead facts showing that (1) there is such a unity of interest and ownership between Nowcom, its sister companies, and Don Hankey that the individuality of Nowcom and the other Defendants has ceased; and (2) an adherence to the fiction of the separate existence of the eight sister companies would sanction a fraud or promote injustice. Finance Express has done so. The FAC alleges that Hankey Group consists of nine sister companies all controlled and directed by Don R. Hankey. (FAC, ¶ 11.) The FAC also alleges that the nine sister companies do business as a single integrated and coordinated entity. (FAC, ¶¶ 33, 37–38, 45.) The FAC also alleges that the companies allegedly share bank accounts, lines of credit, offices, employees, directors and outside counsel. (FAC, ¶¶ 12, 33, 37, 40–42.) The FAC also alleges that Don Hankey and Hankey Group all use Nowcom to own, register and operate the companies' websites. (FAC, ¶ 39.) Most importantly, the FAC alleges that the alleged infringement, cybersquatting and false advertising were committed under the direction, with the approval and for the benefit of Don Hankey and the companies comprising Hankey Group. (FAC, ¶¶ 44–45.) Simply stated, the FAC sufficiently alleges that there is such a unity of interest and ownership forming the Hankey Group that the individuality of each entity has ceased to exist.

With respect to the fraud or injustice prong of the alter ego analysis, Finance Express alleges “[f]raud, injustice, and inequity would result if the corporate forms of Defendants NOWCOM, WESTLAKE, and HANKEY INVESTMENT were recognized for purposes of this lawsuit.” (FAC, ¶ 43.) For the purposes of this motion, the Court must accept as true Plaintiff’s allegations that Defendants have failed to observe corporate formalities and that they are in fact one entity controlled by Don Hankey. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). If indeed Defendants are one integrated and coordinated entity engaging in trademark infringement, then injustice would result if Don Hankey is permitted to evade liability by adhering to the fiction of separate corporate existences.³

3 Because the facts regarding other evidence supporting alter ego theory, such as commingling of funds, undercapitalization of a corporation, or failure to maintain adequate corporate records are exclusively within Defendants control and the parties have not yet commenced discovery, it would be inappropriate for the Court to grant Defendants’ motion without allowing Finance Express an opportunity to obtain discovery as to those other factors.

B. Agency Theory

Defendants also argue that Finance Express’ agency theory of liability is deficient because only Nowcom and Rufus Hankey were involved in the allegedly infringing activity. “To establish actual agency a party must demonstrate the following elements: (1) there must be a manifestation by the principal that the agent shall act for him; (2) the agent must accept the undertaking; and (3) there must be an understanding between the parties that the principle is to be in control of the undertaking.” *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1239 (N.D. Cal. 2004) (citations omitted). To establish a parent corporation’s liability for acts or omissions of its subsidiary on an agency theory, a plaintiff must show more than mere representation of the parent by the subsidiary in dealings with third persons. *Monaco v. Liberty Life Assur. Co.*, 2007 U.S. Dist. LEXIS 31298, *20 (N.D. Cal. 2007). The showing required is that “a parent corporation so controls the subsidiary as to cause the subsidiary to become merely the agent or instrumentality of the parent.” *Id.*

The Court finds that the same facts alleged in the FAC that support Finance Express’ alter ego theory are sufficient to support an agency theory of liability. The FAC alleges that Hankey Group holds itself out as a single entity that is controlled and directed by Don Hankey. More importantly, the FAC alleges that the alleged infringement, cybersquatting and false advertising were all committed under the direction, with the approval and for the benefit of Hankey Group and Don Hankey. Nothing further need be alleged to defeat a motion to dismiss.⁴

4 The agency cases which Defendants rely on are procedurally inapposite because they were not decided at the pleadings stage, but instead were decided at summary judgment. See, e.g., *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 1229 (N.D. Cal. 2004); *M2 Software, Inc. v. Madacy*

Entm't, 421 F.3d 1073 (9th Cir. 2005). Whether Don Hankey and the other moving Defendants exercised sufficient control to cause Nowcom to become their agent is a factual question that is more appropriately decided in the context of a summary judgment motion

*4 Defendants' motion for a more definite statement is also DENIED. When a party's pleading may be so vague or ambiguous that the adversary cannot respond, the court may, in its discretion, grant a [Rule 12\(e\)](#) motion for a more definite statement. *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996). However, motions for a more definite statement are disfavored in light of the liberal pleading standards of [Rule 8](#), and should not be granted unless the moving party "literally cannot frame a responsive pleading." *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1461 (C.D. Cal. 1996). Indeed, a [Rule 12\(e\)](#) motion is only proper where the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted. See *Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F. Supp. 940, 949 (E.D. Cal. 1981); *Cellars*

v. Pac. Coast Packaging, Inc., 189 F.R.D. 575, 578 (N.D. Cal. 1999); *Davison v. Santa Barbara High Sch. Dist.*, 48 F.Supp.2d 1225, 1228 (C.D. Cal. 1998). Defendants argue that Finance Express' FAC must be amended because it incorporates each preceding paragraph into each claim. The Court does not find that this practice creates such ambiguity that Defendants cannot understand the allegations or respond to them. Defendants also argue that the FAC generally attacks Defendants' "Six Reasons" Advertising campaign, and in doing so, Finance Express seeks to restrain valid, comparative advertising. While the FAC may indeed attack advertising that will be determined to be valid by the fact-finder, this goes to the merits of the claim rather than to the issue of whether the FAC is vague and ambiguous. The allegations of cybersquatting and trademark infringement are sufficient to meet the notice-pleading standard of [Rule 8](#).

All Citations

Not Reported in Fed. Supp., 2008 WL 11342755

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Exhibit 5

2020 WL 5545156

Only the Westlaw citation is currently available.
United States District Court, N.D. California,
San Jose Division.

**FTC - FORWARD THREAT
CONTROL, LLC**, Plaintiff,

v.

DOMINION HARBOR ENTERPRISES, LLC;
Dominion Harbor Group, LLC; Monument
Patent Holdings, LLC; Monument IP Fund
1, LLC; and FTC Sensors, LLC, Defendants.

Case No. 5:19-cv-06590-EJD

|
Signed 09/16/2020

Attorneys and Law Firms

Ryan Tyz, Ciara N. McHale, Tyz Law Group PC, San Francisco, CA, Gregg Aaron Myers, PMRK Law, LLP, Larkspur, CA, for Plaintiff.

John J. Edmonds, Edmonds & Schlather, PLLC, Los Angeles, CA, for Defendants.

ORDER DENYING DEFENDANTS DOMINION HARBOR ENTERPRISES, LLC, DOMINION HARBOR GROUP, LLC, MONUMENT PATENT HOLDINGS, LLC AND MONUMENT IP FUND 1, LLC'S MOTION TO DISMISS; AUTHORIZING JURISDICTIONAL DISCOVERY

Re: Dkt. No. 32, 51

EDWARD J. DAVILA, United States District Judge

*1 This is a suit for breach of contract. Plaintiff FTC-Forward Threat Control, LLC (“Forward Threat”) agreed to assign its patents to Defendant FTC Sensors, LLC (“FTC Sensors”) and in turn, FTC Sensors agreed to pay Forward Threat licensing revenues. Forward Threat did not receive the contractually agreed upon payments, and this lawsuit ensued. Presently before the Court is Defendants Dominion Harbor Enterprises, LLC (“DHE”), Dominion Harbor Group, LLC (“DHG”), Monument Patent Holdings, LLC (“MPH”) and Monument IP Fund 1, LLC's (“MIPF”) (collectively “Movants”) motion to dismiss pursuant to Rule 12(b)(2) for

lack of personal jurisdiction. Dkt. No. 32. Movants, who are not parties to the contract, represent that they are Texas LLCs with offices and operations in Texas, and that they lack the requisite minimum contacts with California to confer this Court with personal jurisdiction. Movants’ jurisdictional facts are presented primarily through the declaration of Matthew DelGiorno, President of DHE. Forward Threat opposes the motion and requests leave to conduct jurisdictional discovery. Dkt. No. 34. Pursuant to Civil Local Rule 7-1(b), the Court finds it appropriate to take this matter under submission for decision on the basis of the briefing filed by the parties, without oral argument. For the reasons discussed below, Movants’ motion will be denied without prejudice to renew the motion after Forward Threat has completed jurisdictional discovery.

I. BACKGROUND

A. The Agreement

Plaintiff Forward Threat is a small business formed and owned by Frank Zajac (“Zajac”). Compl. ¶ 2. Zajac (along with two others) is the named inventor of a group of six patents relating to threat sensor technology. *Id.* These patents were assigned to Forward Threat (the “Patents”). *Id.* Defendant DHG is in the business of monetizing patents by, among other things, acquiring patents and forming separate entities for the primary purposes of owning the patents and obtaining compensation for infringement. *Id.* ¶ 34.

Between April and July of 2015, Zajac¹ and David Pridham (“Pridham”), Chief Executive Officer of DHG, negotiated a Patent Purchase Agreement (the “Agreement”). *Id.* ¶¶ 3, 64. Initially, Zajac proposed to sell the Patents. *Id.* ¶ 62. Later, Zajac and Pridham negotiated a “promissory note structure tied to monetization” and guaranteed minimum payments over two years. *Id.* On or about July 31, 2015, Pridham, in his capacity as CEO of DHG, sent Forward Threat a proposed agreement marked “DHG DRAFT OF 07/31/2015” that incorporated these payment terms. *Id.* ¶ 66; Ans. ¶ 66. During the negotiations, the drafts of the Agreement left blank the name of the entity that would acquire the Patents. DelGiorno Decl. ¶¶ 9, 17.

¹ Zajac's counsel communicated with Pridham via email. DelGiorno Decl. ¶ 7.

The Agreement was executed on August 11, 2015. Compl. ¶ 70, Ex. 1. As set forth in the Agreement, Forward Threat agreed to assign the Patents to Defendant FTC Sensors, an

entity Pridham had created four days prior. *Id.* ¶¶ 5, 71. FTC Sensors had previously been named Monument Tech Rho (“MTR”). DelGiorno Decl. ¶ 5. FTC Sensors is a Texas limited liability company with its principal place of business in Plano, Texas. Compl. ¶ 47.

*2 The Agreement attached and incorporated by reference a Patent Assignment, which provided in pertinent part that Forward Threat “does hereby sell, transfer, convey, assign and deliver to Assignee all of Assignor’s right, privilege, title and interest in, to and under the Patents ... to be held by Assignee for Assignee’s own use and enjoyment” and for the use and enjoyment of Assignee’s “legal representatives.” Dkt. No. 9-1 at 16. In exchange, FTC Sensors agreed to, among other things, pay Forward Threat (a) 20% of gross recoveries received from licensing and litigation on a quarterly basis commencing with the calendar quarter ending September 30, 2015, and (b) “Guaranteed ... Future Cash Payment[s]” of \$500,000 per year for the first two years (for the periods of July 1, 2015 to June 30, 2016, and July 1, 2016 to June 30, 2017), with “true up payments” due no later than October 15, 2016 and October 15, 2017, respectively. Compl. ¶ 72. The Agreement included a provision requiring FTC Sensors to maintain complete records for the computation and confirmation of payments due to Forward Threat and allowing Forward Threat “to examine and audit” all of FTC Sensors’s records and accounts “as may contain information bearing on the amounts payable” to Forward Threat. *Id.* ¶ 81. The Agreement required FTC Sensors to return the Patents to Forward Threat after two years upon written demand by Forward Threat. *Id.* ¶ 8.

The Agreement included a forum selection clause providing that California courts shall have “sole and exclusive jurisdiction in any dispute or controversy arising out of or relating to” the Agreement. Agreement § 8.6. Further, the Agreement specified that the performance and interpretation of the Agreement “shall be governed by the substantive law of the State of Delaware, USA, exclusive of its choice of law rules.” *Id.*

Pridham, in his role as CEO of DHG, approved virtually all of the material terms of the Agreement before he created FTC Sensors. Compl. ¶¶ 9, 47.

B. The Alleged Breach of Agreement

FTC Sensors allegedly breached the Agreement in three respects. *Id.* ¶ 97. First, FTC Sensors failed to make the contractually required payments. *Id.* ¶ 16. FTC Sensors made

only two payments to Forward Threat in 2016: \$6,921.40 on May 3rd and \$16,000.00 on September 1st. *Id.* ¶ 75. FTC Sensors failed to make the “true-up” payment for 2016. *Id.* ¶ 76. FTC Sensors made no payments in 2017. *Id.* ¶¶ 77-78.²

² FTC Sensors admits that it did not make “true-up” payments and did not make payments in 2017. Answer ¶¶ 75-78, 129. Movants assert, however, that Forward Threat agreed in writing that it had released the claim for further payments, and therefore FTC Sensors owes Forward Threat nothing. Reply at 8.

Second, FTC Sensors refused to account for the money due to Forward Threat and would not allow Forward Threat to examine and audit FTC Sensors’s records. *Id.* ¶ 82. FTC Sensors acknowledges that Forward Threat asked for copies of FTC Sensors’s license and settlements agreements. Answer ¶ 82. FTC Sensors maintains, however, that the agreements have confidentiality provisions that prohibit them from being provided to Forward Threat. *Id.* ¶ 83.

Third, FTC Sensors refused to transfer the Patents back to Forward Threat. *Id.* ¶ 87. When Forward Threat demanded the return of the Patents, “FTC Sensors refused to return them and instead held them hostage in an effort to force [Forward Threat] to forfeit its right to review licensing records and the payments it was owed under the Agreement.” *Id.* ¶ 17.³

³ There has been no return transfer of the Patents. According to Movants, Forward Threat has reneged on its agreement to sign the Transfer Agreement. Reply at 8.

Forward Threat asserts claims against each of the Defendants named in this action, individually and collectively, for breach of contract, conversion, accounting, unjust enrichment, and quantum meruit.⁴ Although FTC Sensors is the only Defendant who signed the Agreement, Forward Threat alleges that all of the other Named Defendants are alter egos of FTC Sensors, or alternatively, are vicariously liable for FTC Sensors’s actions. *Id.* ¶¶ 59, 60.

⁴ Pridham is not named as a Defendant.

C. Jurisdictional Allegations

Forward Threat alleges that this Court has specific personal jurisdiction over the Movants pursuant to the Agreement’s California forum selection provision because (a) they are alter

egos of FTC Sensors; (b) they are intended beneficiaries of the Agreement; (c) their conduct is so closely related to the contractual relationship between Forward Threat and FTC Sensors that it was foreseeable they would be bound by the forum selection provision; (d) DHG negotiated and accepted the forum selection provision in the course of negotiating the Agreement; and (e) Defendants created and undercapitalized FTC Sensors and caused it to agree to the forum selection provision in an attempt to fraudulently and unfairly deprive Forward Threat of the ability to recover damages and other relief for breach of the Agreement. *Id.* ¶ 28.

*3 When negotiations over the Agreement began, only DHG and Defendant MPH existed. MPH is a “litigation affiliate” of DHG. *McHale Decl.*, Exs. 1, 7-8. In May 2015, while negotiations over the Agreement were ongoing, MPH formed MTR, with Pridham as CEO and MPH as MTR's sole manager. *Id.*, Ex. 12. MTR was to acquire a patent portfolio when the appropriate opportunity presented itself and was not capitalized at its founding. *DelGiorno Decl.* ¶¶ 25, 28. In early August 2015, which was after the \$1 million guaranteed payment and forum selection clause had been added to the Agreement, MTR was renamed to FTC Sensors and designated by Pridham to hold Forward Threat's Patents. *Id.* ¶¶ 23, 26. Pridham is the CEO of DHG, MPH and FTC Sensors. *Answer* ¶ 51.

Approximately five months after the Agreement was executed, DHG became the wholly owned subsidiary of Defendant DHE, a holding company. *McHale Decl.*, Exs. 16, 19. DHE, in turn, formed MIPF. *Id.*, Ex. 20. Pridham is the CEO and sole managing member of DHE. *Id.* Exs. 16, 19; *Answer* ¶ 51. DHE next became the sole managing member and parent entity for DHG, MPH and MIPF. *Id.* In May 2019, more structural changes were made. This time, FTC Sensors ceased to be wholly owned and managed by MPH and became wholly owned and managed by MIPF. *Id.*, Exs. 15, 21. In turn, MIPF became wholly owned and managed by MPH. *Id.* Although the corporate relationships among the Defendants has changed over time, Pridham has kept a role in each entity:

- DHE, as its CEO and managing member;
- DHG, as its Chairman, CEO and managing member;
- MPH, as its CEO and through his position as a managing member of DHE;
- MIPF, as its CEO and through his position as a managing member of MPH; and

- FTC Sensors, as its CEO and through his position as a managing member of MPH and current managing member of MIPF.

Id., Exs. 1-21. Forward Threat alleges that the Defendants collectively “orchestrated, directed and controlled the theft of the Patents.” *Compl.* ¶ 28.

Forward Threat alleges that Movants are the alter ego of FTC Sensors because, on information and belief, (a) the parent and subsidiary companies commingle funds and other assets; (b) the parents own 100% of their respective subsidiaries; (c) the parents and subsidiaries use the same offices, equipment, and employees; (d) the parents have used the subsidiaries, in particular FTC Sensors, as a mere shell, instrumentality, agency, or conduit for their affairs; (e) FTC Sensors was not adequately capitalized for the corporate undertaking at any time during its existence; (f) the parents and/or subsidiaries disregarded corporate formalities such as holding board meetings, keeping corporate records, and acting through votes of the corporate board; (g) the parents and subsidiaries commingle their corporate records; (h) the parents and subsidiaries have identical managers and officers; (i) the parents diverted the subsidiaries’ assets to the parents’ uses; and (j) any FTC Sensors funds were entirely siphoned off by its parents. *Compl.* ¶ 59.

Alternatively, Forward Threat alleges that this Court has general personal jurisdiction over the Movants because they purchased patents from California residents, marketed and licensed patents to California residents, entered credentialed relationships with California-based licensees, and filed patent litigations in California. *Id.* ¶ 29. According to Forward Threat, the Movants regularly appear as parties to litigation in California federal courts, having litigated patents in more than 20 actions in California in the last two and a half years alone, including ten cases in the Northern District. *Id.* ¶ 29.

II. FORWARD THREAT'S ADMINISTRATIVE MOTION

Approximately two months after the Movants filed their reply brief, Forward Threat filed an administrative motion for leave to file supplemental evidence and a surreply. *Dkt.* No. 51. The supplemental evidence consists of evidence obtained through discovery which Forward Threat now offers to support jurisdictional allegations in the Complaint. The surreply contains legal arguments to rebut points Movants purportedly raised for the first time in their reply. Movants

oppose the motion for two reasons. First, Movants contend the motion is untimely, having been filed over two months after they filed their reply brief and over two weeks after the motion to dismiss was taken under submission by the Court. Second, Movants contend that there is no good cause to warrant consideration of the supplemental evidence and arguments.

*4 The administrative motion for leave to file supplemental evidence obtained through discovery is granted. The supplemental evidence was not produced until April 2 and 3, 2020, after briefing on the motion to dismiss was completed. The supplemental evidence is relevant to the jurisdictional issues raised in the motion to dismiss and Forward Threat was reasonably diligent in filing its administrative motion to bring this new evidence to the Court's attention. The administrative motion to file a surreply is denied, as is Movants' request to file a brief in response to the surreply. The Court does not require any additional briefing on the legal arguments at this time.

III. STANDARDS

Federal Rule of Civil Procedure 12(b)(2) allows a party to challenge the Court's personal jurisdiction over another party. "In opposition to a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper." *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008) (citing *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990)). If a court decides the motion without an evidentiary hearing, "the plaintiff need only make a prima facie showing of the jurisdictional facts." *Id.* (quoting *Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 127–28 (9th Cir. 1995)); see also *Pelican Commc'ns v. Schneider*, No. 14-4371 EMC, 2015 WL 527472, at *2 (N.D. Cal. Feb. 6, 2015). In such cases, the inquiry is whether the plaintiff's pleadings and affidavits make "a prima facie showing of personal jurisdiction." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). A prima facie showing means that a plaintiff demonstrates facts that, if true, would support jurisdiction over the defendant. *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003). Uncontroverted allegations in the plaintiff's complaint must be taken as true, and any conflicts between the parties over statements contained in affidavits must be resolved in the plaintiff's favor. *Schwarzenegger*, 374 F.3d at 800; see also *Pelican Commc'ns*, 2015 WL 527472, at *2 (court may not assume the truth of allegations in a complaint which are contradicted by affidavit).

A court's power to exercise jurisdiction over a party is limited by both statutory and constitutional considerations. First, a long-arm statute must confer jurisdiction over a defendant. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154–55 (9th Cir. 2006) (citing *Fireman's Fund Ins. Co. v. Nat'l Bank of Coops.*, 103 F.3d 888, 893 (9th Cir. 1996)). California's long arm statute is coextensive with the limits of due process. *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014). Therefore, the jurisdictional analyses under California law and federal law are the same. *Nuance Comm'ns v. Abbyy Software House*, 626 F.3d 1222, 1230 (Fed. Cir. 2010).

Second, for a court to exercise personal jurisdiction over a nonresident defendant consistent with due process, that defendant must have "certain minimum contacts" with the relevant forum such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Schwarzenegger*, 374 F.3d at 801 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 109 (1987) ("[T]he constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established 'minimum contacts' in the forum State.") (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)).

Under the minimum contacts test, personal jurisdiction can be either "general" or "specific." *Doe v. Unocal Corp.*, 248 F.3d 915, 923 (9th Cir. 2001) (per curiam), *abrogated on other grounds by Daimler AG v. Bauman*, 571 U.S. 117 (2014). "A court may exercise specific jurisdiction where the cause of action arises out of or has a substantial connection to the defendant's contacts with the forum." *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002) (citing *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). "Alternatively, a defendant whose contacts are substantial, continuous, and systematic is subject to a court's general jurisdiction even if the suit concerns matters not arising out of his contact with the forum." *Id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.9 (1984)).

IV. DISCUSSION

*5 Forward Threat asserts three bases for this Court to exercise personal jurisdiction over the Movants. First, Forward Threat contends that under Ninth Circuit precedent, *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d

509, 514 n. 5 (9th Cir. 1988), the forum selection clause binds the Movants even though they are not signatories to the Agreement. Second, Forward Threat contends that the Movants are subject to the Court's jurisdiction as alter egos of FTC Sensors. Third, Forward Threat argues that Movants are subject to the Court's general jurisdiction because they are effectively at home here. Forward Threat reasons that Movants, through their patent holding subsidiaries, are in the business of regularly litigating patents against California companies in California courts. Forward Threat also requests the opportunity to conduct jurisdictional discovery.

A. Applicability of Forum Selection Clause to Nonsignatories Under *Manetti-Farrow*

Forward Threat contends that Movants are bound by the forum selection clause in the Agreement, even though they are not signatories to the Agreement. In doing so, Forward Threat relies on a collection of cases that stand for the general proposition that “[a] forum-selection clause in an agreement extends to ‘a range of transaction participants, parties and non-parties.’” *Ultratech, Inc. v. Ensure NanoTech (Beijing), Inc.*, 108 F. Supp. 3d 816, 822 (N.D. Cal. 2015) (quoting *Manetti-Farrow*, 858 F.2d at 514 n. 5).

In *Manetti-Farrow*, the plaintiff filed suit in the United States against a domestic corporation, its European parent corporation and various officers and directors of the corporate entities. The plaintiff alleged that defendants had unlawfully interfered with plaintiff's exclusive dealership agreement with the domestic corporation. The district court dismissed the case, holding that a forum selection clause in the exclusive dealership agreement designating Florence, Italy as the forum applied to all defendants. On appeal, the plaintiff argued among other things, that the forum selection clause only applied to the subsidiary as the signatory to the agreement and not the parent corporation. *Manetti-Farrow*, 858 F.2d at 514, n.5. The Ninth Circuit rejected the argument, reasoning that the alleged conduct of the parent corporation was “so closely related to the contractual relationship that the forum selection clause applie[d] to all defendants.” *Id.*

In response, Movants argue that the choice of law provision in the Agreement specifies that the substantive law of Delaware, not California, governs the performance and interpretation of the Agreement, and that the Third Circuit (which encompasses Delaware) rejected *Manetti-Farrow* in *Dayhoff v. H.J. Heinz*, 86 F.3d 1287, 1296 (3d Cir. 1996). In *Dayhoff*, the Third Circuit held that a forum selection clause in a distribution agreement “can be enforced only by the

signatories to those agreements ... and we decline to follow the reasoning of ... the Ninth Circuit in *Manetti-Farrow*.” *Id.* This holding, however, was not based on Delaware law. As such, *Dayhoff* does not govern the outcome in this case.

In any event, the Ninth Circuit's *Manetti-Farrow* decision does not govern this case for a different reason. The plaintiff in *Manetti-Farrow* was a signatory to a forum selection clause. Plaintiff sought to avoid, not to enforce, the clause against a non-signatory parent corporation. The non-signatory parent corporation succeeded in enforcing the forum selection clause against plaintiff. Personal jurisdiction over the non-signatory parent corporation was not at issue. In contrast, Forward Threat is relying on a forum selection clause as a basis for this Court to exercise personal jurisdiction over Movants even though they are not signatories to the Agreement. As such, this case is clearly distinguishable from *Manetti-Farrow*.

*6 Although personal jurisdiction was at issue in *Ultratech*, that case is also distinguishable from the instant action. In *Ultratech*, the court held that a corporate officer who signed a contract on behalf of his company was subject to the forum selection clause contained therein. *Ultratech*, 108 F. Supp. 3d at 823. The *Ultratech* court reasoned that the forum selection could be enforced against the officer in his individual capacity because the claims against the officer related to the contractual relationship and the officer was accused of subverting the very agreement he signed. *Id.* The *Ultratech* court concluded that because the officer was subject to the forum selection cause, the officer had consented to personal jurisdiction in the designated forum, regardless of the scope of his contacts with that forum. *Id.* Here, Pridham, who is not a named Defendant, signed the Agreement on behalf of FTC Sensors, not the Movants. Dkt. No. 9-1 at 13. Therefore, *Ultratech* is not controlling.

The instant action is also distinguishable from the myriad of other cases relied on by Forward Threat: not one of them involved a signatory to a forum selection clause affirmatively bringing suit in the specified forum against a nonsignatory that was not otherwise subject to personal jurisdiction in that forum. In *Key Equip. Fin. v. Barrett Bus. Servs.*, No. 19-5122 RBL, 2019 WL 2491893 (W.D. Wash. June 14, 2019), the plaintiff sued the defendant in the state where it was headquartered. Personal jurisdiction was thus not at issue. Instead, the defendant moved to dismiss for *forum non conveniens*. The *Key Equip. Fin.* court held that the plaintiff was bound by a forum selection clause even as a non-signatory to the agreement and accordingly granted

defendant's motion. Personal jurisdiction was also not at issue in *Home Sav. of Am. v. FTI Consulting, Inc.*, No. 11-2641 IEG, 2012 WL 13175961 (S.D. Cal. Feb. 1, 2012). There, the defendants relied on a forum selection clause to obtain dismissal for improper venue. Likewise, in *Univ. Ops. Risk Mgmt., LLC v. Global Rescue LLC*, No. 11-5969 SBA, 2012 WL 2792444 (N.D. Cal. Jul. 6, 2012), personal jurisdiction over the defendant was not at issue. Rather, the defendant sought to enforce a forum selection clause against the plaintiff. The court granted the motion, reasoning that the plaintiff was bound by a forum selection clause, despite being a non-signatory, because plaintiff's conduct was "closely related to the contractual relationship" of the individual plaintiffs and defendant. *Id.* In *White Knight Yacht, LLC v. Certain Lloyd's at Lloyd's London & Other London Mkt. Insurers*, 407 F. Supp. 3d 931 (S.D. Cal. 2019), the plaintiff sought to avoid a forum selection clause, arguing that it was not a signatory to the agreement. Likewise, in *Sharp Elecs. Corp. v. Hitachi Ltd. (In re Cathode Ray Tube (CRT) Antitrust Litig.)*, No. 07-5944 SC, 2014 WL 1047207 (N.D. Cal. Mar. 13, 2014), it was the plaintiff, not defendant, who sought to avoid a forum selection clause specifying the Osaka District Court as the court of competent jurisdiction. Defendant Toshiba successfully moved to dismiss the case under the doctrine of *forum non conveniens*. *Id.* at *5. In *Oregon-Idaho Utils., Inc. v. Skitter Cable TV, Inc.*, No. 16-228 E.J.L., 2017 WL 3446290 (D. Id. Aug. 10, 2017), the plaintiff filed suit in a forum other than the one specified in a forum selection clause. The court granted the non-signatory defendants' motion to transfer the case consistent with the forum selection clause. *Id.* at 9. Forward Threat has not cited to, and this Court has not found, any case holding that a non-signatory to a forum selection clause can be haled into a forum that does not have personal jurisdiction over the non-signatory.

The only analogous case cited by the parties is *Wescott v. Reisner*, No. 17-6271 EMC, 2018 WL 2463614, at *3 (N.D. Cal. June 1, 2018). In *Westcott*, the plaintiff entered into a partnership agreement with defendant that designated California as the forum for any disputes arising out of the agreement. The former spouse of the defendant was named as a co-defendant and moved to dismiss the action for lack of personal jurisdiction. The *Wescott* court held that because the former spouse was not a party to the agreement, "she cannot be said to have consented to the forum selection clause; thus, she did not submit to the jurisdiction of California courts." *Id.* at *3. The same reasoning applies in the instant action. Movants did not sign the Agreement, did not consent to the

forum selection clause, and therefore are not subject to the jurisdiction of California courts absent other countervailing considerations.

B. Alter Ego Allegations

*7 Forward Threat next contends that Movants are the alter egos of FTC Sensors and, therefore, are subject to the forum selection clause. If a corporation is the alter ego of another corporation, courts may "pierce the corporate veil" jurisdictionally and attribute contacts of one corporation to the other for purposes of personal jurisdiction. *Certified Bldg. Prods., Inc. v. NLRB*, 528 F.2d 968, 969 (9th Cir. 1976); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 546-548 (5th Cir. 2014); *see also Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1069 n.17 (9th Cir. 2000) ("where the parent totally controls the actions of the subsidiary so that the subsidiary is the mere alter ego of the parent, jurisdiction is appropriate over the parent as well"). "The standard for personal jurisdiction under an alter ego theory is lower than the standard for liability under an alter ego theory." *Television Events & Mkt., Inc. v. Amcon Distrib. Co.*, 416 F. Supp. 2d 948, 962 (D. Haw. 2006) (citing *San Mateo County Transit District v. Dearman, Fitzgerald and Roberts, Inc.*, 979 F.2d 1356, 1358 (9th Cir. 1992)). Nevertheless, at the pleading stage, conclusory allegations that a corporate entity is the alter ego of a defendant are insufficient to survive a motion to dismiss. *RAE Systems, Inc. v. TSA Systems, Ltd.*, No. 04-2030 FMS, 2005 WL 1513124, at *3 (N.D. Cal. June 24, 2005).

1. Choice-of-Law

As a preliminary matter, the parties present a choice of law dispute. Movants contend that Texas alter ego law applies, whereas Forward Threat contends that California law applies.⁵

⁵ Forward Threat asserts that California law applies but states in a footnote that "[i]f the Court applies Delaware law based on the choice of law provision in the Agreement, the Delaware test is similar to the tests articulated here." Dkt. No. 34 at 24, n.4. The Court holds that the choice of law provision in the Agreement does not apply to the alter ego issue because alter ego liability is collateral to and not part of the parties' Agreement. *Wehlage v. EmpRes*

Healthcare Inc., 821 F. Supp. 2d 1122, 1127-28 (N.D. Cal. 2011).

A district court sitting in diversity jurisdiction generally applies the substantive law of the forum state, including its choice-of-law rules. *Ferens v. John Deere Co.*, 494 U.S. 516, 524–25 (1990); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Muldoon v. Tropitone Furniture Co.*, 1 F.3d 964 (9th Cir. 1993). Consistent with this general rule, at least one district court in California has held that “[i]n diversity cases, when determining whether contacts of a subsidiary may be imputed to the parent for purposes of personal jurisdiction, courts look to the choice-of-law rules of the forum state to decide which state’s substantive law on alter ego or agency applies.” *In re Hydroxycut Mktg. and Sales Practice Litig.*, 810 F. Supp. 2d 1100, 1107 (S.D. Cal. 2011).

In California, courts decide choice of law questions by applying the three-step “governmental interest” test. *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 929 (2019); see also *Schlumberger Logelco Inc. v. Morgan Equip. Co.*, No. 94-1776 MHP, 1996 WL 241951, at *3 (N.D. Cal. May 3, 1996).

First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction’s interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state’s interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be the more impaired if its law were not applied.

*8 *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 108 (2006).⁶ “Only if both [jurisdictions] have a legitimate but conflicting interest in applying its own law will the court be confronted with a ‘true conflict’ case.” *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 610 (9th Cir. 2010).

6 Movants asserts that the three-step “governmental interest” test is inapplicable. Dkt. No. 32 at 22. Yet, Movants rely on cases that apply the “governmental interest” test to argue that Texas alter ego law applies. See *id.* (citing *Leitner v. Sadhana Temple of N.Y.*, No. 13-7902 MMM, 2014 WL 12588643, at *15 (C.D. Cal. Oct. 17, 2014); *Sunnyside Dev. v. Opsys*, No. 05-553 MHP, 2015 WL 1876106, at *3 (N.D. Cal. Aug. 8, 2005)).

Under California’s governmental interest test, the Court must first determine whether the law of alter ego in Texas and in California differ. The Court concludes that there is a difference. Under Texas law, the party seeking to pierce the corporate veil must show that (1) the alter ego exercised complete control over the corporation with respect to the transaction at issue and (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil. *Bridas S.A.P.I.C. v. Gov’t of Turkmenistan*, 345 F.3d 347, 359 (5th Cir. 2003). In contrast, under California law, there are two elements that must be alleged to invoke the alter ego doctrine: “First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone.” *Neilson v. Union Bank of Cal.*, 290 F. Supp. 2d 1101, 1116 (C.D. Cal. 2003) (quoting *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 526 (2000)). In short, Texas requires fraud to hold a party liable for breach of contract based on an alter ego theory, whereas California does not. *Wild Rivers Waterpark Mgmt. LLC v. Katy WP Group, LLC*, No. 18-6522 JO, 2019 WL 6998669, at *3 (C.D. Cal. Feb. 26, 2019) (“Texas requires a plaintiff to establish that the ‘alter ego’ of a company perpetrated ‘actual fraud’ for direct personal benefit, whereas California does not”); *21X Capital Ltd. v. Werra*, No. 06-4135 JW, 2008 WL 11355549, at *4 (N.D. Cal. Aug. 13, 2008) (“Since Plaintiffs must show actual fraud to prove alter ego liability under Texas law, the Court finds that there is a meaningful conflict between the law of Texas and California on the issue.”). Therefore, the Court must next consider the second prong of the “governmental interest” test: whether there is a “true

conflict.” *Schlumberger*, 1996 WL 241951, at *3; *Leitner*, 2014 WL 12588643, at *15.

For purposes of evaluating personal jurisdiction, the Court finds that there is no “true conflict” because several Texas courts have articulated the alter ego test consistently with the California test. See *Windecker v. Hang Wei*, No. 18-898 LY, 2020 WL 4194017, at *3 (W.D. Tex. July 21, 2020) (when analyzing personal jurisdiction based on alter ego theory under Texas law, requiring unity between corporation and parent such that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice); *Newell v. Moran Towing Corp.*, No. 09-58 TJW, 2009 WL 3157475, at *2 (E.D. Tex. Sept. 28, 2009) (same); *Rolls-Royce Corp. v. Heros, Inc.*, 576 F. Supp. 2d 765, 787 (N.D. Tex. 2008) (same); *The Wimbledon Fund, SPC (Class TT) v. Graybox, LLC*, No. 15-6633 CAS, 2016 WL 7444701, at *2 n.2 (C.D. Cal. Jun 13, 2016) (“California and Texas apply substantively identical tests to determine when a party may be held liable as the alter ego of another.”); *Taurus IP, LLC v. DaimlerChrysler Corp.*, 519 F. Supp. 2d 905, 919 (W.D. Wis. 2007) (applying Texas law). Texas courts also consider a list of factors similar to California’s “unity of interest” factors in analyzing jurisdiction based on an alter ego theory. For example, in *Breckenridge Enterprises, Inc. v. Avio Alternatives, LLC*, No. 08-1782 M, 2009 WL 14698080, at *5 (N.D. Tex. May 27, 2009), the court listed the following factors as relevant to the alter ego analysis: “(1) whether the individuals completely control the corporation; (2) the level of financial integration between the individuals and the corporation; (3) whether the corporation operates with grossly inadequate capital; (4) whether the individuals use the corporation’s property as their own personal property; (5) whether the individuals use the corporation to pay personal obligations; and (6) whether the individuals act as if the corporation is an extension of their own personal interests.” In *EsNtion Records, Inc. v. Jones TM, Inc.*, No. 07-2027 SAL, 2008 WL 2415977, at *4 (N.D. Tex. June 16, 2008), the court considered the following factors as relevant to the alter ego analysis: “(1) common stock ownership; (2) common directors or officers; (3) common business departments; (4) consolidated financial statements or tax returns; (5) one corporation finances the other; (6) one corporation caused the incorporation of the other; (7) one corporation operates with grossly inadequate capital; (8) one corporation pays the salaries and other expenses of the other; (9) one corporation receives no business except that given to it by the other; (10) one corporation uses the other’s property as its own; (11) the daily operations of the two corporations are not kept separate;

and (12) one corporation does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings.” See also *Berry v. Lee*, 428 F. Supp. 2d 546, 554 (N.D. Tex. 2006) (listing factors weighing in favor of finding jurisdiction based on an alter ego theory under Texas law as “common business names, business departments, offices, directors or officers, employees, stock ownership, financing, accounting, and payment of wages by one corporation to another corporation’s employees and the rendering of services by employees of one corporation on behalf of another corporation”). Under California law, “[t]he ‘unity of interest’ element requires ‘a showing that the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former.’” *Gardner v. Starkist Co.*, 418 F. Supp. 3d 443, 462 (N.D. Cal. 2019) (quoting *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1073 (9th Cir. 2015)).

*9 California courts generally consider the following factors to determine whether the unity of interest element is satisfied: (1) the commingling of funds and other assets of the entities, (2) the holding out by one entity that it is liable for the debts of the other, (3) identical equitable ownership of the entities, (4) use of the same offices and employees, (5) use of one as a mere shell or conduit for the affairs of the other, (6) inadequate capitalization, (7) disregard of corporate formalities, (8) lack of segregation of corporate records, and (9) identical directors and officers. *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 538-39 (2000). Because Texas and California evaluate nearly indistinguishable sets of factors in evaluating personal jurisdiction based upon an alter ego theory, there is no “true conflict” and accordingly, the Court will apply California law.

2. Application of California's Unity of Interest Factors

There are several factors indicative of a unity of interest and ownership between FTC Sensors and Movants. Pridham is the CEO of all Defendants, including the parent corporation, DHE. Dkt. No. 34 at 16. FTC Sensors shares other employees with DHG. *Id.* at 17. FTC Sensors shares a principal place of business with some Movants. *Id.* FTC Sensors’s financial and license agreement records are kept by DHG. *Id.* FTC Sensors communicates with Forward Threat via DHG. *Id.* Moreover, FTC Sensors was not capitalized at its formation or at any time thereafter.

a. Control

In response, Movants do not deny that Pridham is the CEO of all Defendants. Instead, Movants deny that Pridham “controls” each entity. DelGiorno Decl. ¶ 79. Movants represent that they “are owned and managed in accordance with their corporate structures and the roles of various persons therein.” *Id.* The representation is not meaningful because not one of the Movants is a corporation. Instead, Movants are each set up as limited liability companies. *Id.* ¶ 55. Movants further assert that “Mr. Pridham is involved in the management for each of these entities consistent with his duties and responsibilities as CEO of each.” *Id.* This representation too fails to establish Pridham lacks control. After all, Pridham is a managing member of several Movants and certain Movants are managing members of other Movants, as evidenced in the 2013 Certification of Formation for DHG identifying Pridham, Conner Mowles (“Mowles”) and DelGiorno as the only managing members (Dkt. No. 34-6); the 2019 Texas Franchise Tax Public Information Report identifying DHE as the only manager of DHG (Dkt. No. 34-11); the 2013 Certification of Formation for MPH identifying Pridham, Mowles and DelGiorno as the only managing members (Dkt. No. 34-12); the 2017 and 2019 Texas Franchise Tax Public Information Reports identifying DHE as the only manager of MPH (Dkt. Nos. 34-14, 34-16); the 2015 Certification of Formation identifying MPH as the only manager MTR (Dkt. No. 34-17); the 2018 Texas Franchise Tax Public Information Report identifying MPH as the only manager of FTC Sensors (Dkt. No. 34-19); the 2019 Texas Franchise Tax Public Information Report identifying MIPF as the sole manager of FTC Sensors (Dkt. No. 34-20); the 2016 Certification of Formation identifying Pridham as the sole managing member of DHE (Dkt. No. 34-21); the 2019 Texas Franchise Tax Public Information Report identifying Pridham, DelGiorno and Lee Bradlee Sheafe as the only officers of DHE (Dkt. No. 34-24); the 2016 Certification of Formation identifying MPH as the only managing member of MIPF (Dkt. No. 34-25); and the 2019 Texas Franchise Tax Public Information Report identifying MPH as the only manager of MIPF (Dkt. No. 34-26).

Movants are correct that there must be “pervasive” control of an entity to establish it is the alter ego of another. *See Ranza*, 793 F.3d at 1073 (in the parent-subsidary context, the unity-of-interest prong “envisions pervasive control over the subsidiary”). But as discussed above, Pridham's various roles in Movants certainly give him a degree of control

over Movants. It is not unreasonable to assume at the pleading stage that this degree of control is “pervasive” control because Movants are limited liability companies with only a few managing members. Indeed, the transaction at issue exemplifies what could reasonably be characterized as pervasive control. In an attempt to down-play Pridham's control in the transaction at issue, Movants explain that Pridham was acting in his capacity as CEO of DHG on behalf of its client MPH when negotiating with FTC Sensors. DelGiorno Decl. ¶ 23. Movants also explain that MPH created and selected MTR to hold the Patents. But when these facts are construed in Forward Threat's favor⁷, they serve to underscore rather than diminish Pridham's complete control over the transaction because he admittedly acted in multiple capacities. Pridham was arguably the ultimate actor for DHG, MPH, MTR and FTC Sensors. Pridham's imprecise use of “we” and “I [sic] my client” in his emails communications with Forward Threat also provides circumstantial evidence of Pridham's ultimate authority to orchestrate the purchase as he alone deemed appropriate. The control factor supports Forward Threat's alter ego theory. *Taurus IP*, 519 F. Supp. 2d at 920-21.

⁷ When deciding a motion to dismiss for lack of personal jurisdiction, factual disputes are construed in the plaintiff's favor. *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.*, 905 F.3d 597, 602 (9th Cir. 2018).

b. Shared Employees

*10 Movants do not dispute that Monica Gutierrez, an employee of DHG, communicated with Zajac for tax and business purposes. Instead, Movants explain that it would have been within Ms. Gutierrez's responsibilities at DHG to communicate on behalf of FTC Sensors with Forward Threat about “ministerial tax and business issues relating to payments due and/or being sent or received.” DelGiorno ¶ 84. Although Movants' explanation may be reasonable, it is equally plausible that Ms. Gutierrez is a shared employee of DHG and FTC Sensors. At this stage in the proceedings, factual disputes must be construed in Forward Threat's favor. *Freestream Aircraft*, 905 F.3d at 602. This factor supports Forward Threat's alter ego theory as among Pridham, FTC Sensors and DHG.

c. Shared Offices And Equipment

Movants do not deny that some of Movants share offices and equipment. Specifically, DHG and DHE share office space and equipment in Dallas, Texas. DelGiorno Decl. ¶ 94. This lends some support to Forward Threat's theory that Pridham, DHG and DHE are alter egos. MIPF and FTC Sensors share office space and equipment in Plano, Texas (*id.*), which similarly lends some support to Forward Threat's theory that Pridham, MIPF and FTC Sensors are alter egos. All Movants, however, are not connected by shared offices and equipment. Therefore, this factor does not lend support Forward Threat's broader theory that all Movants are alter egos of FTC Sensors.

d. Company Records

Forward Threat alleges that DHG, not FTC Sensors, “maintained the books and records of licenses and revenues related to the Patents, as indicated by Pridham's representation to Plaintiff that [DHG's] financial controller would need to run the report to ascertain such information.” Compl. ¶ 54. Movants do not deny this allegation. Instead, Movants explain that they maintained FTC Sensors's financial books and records as part of the services provided by their contractual relationship and that FTC Sensors “was a small entity with no financial employees” of its own. DelGiorno Decl. ¶ 86. Movants also represent that FTC Sensors had its own bank account, and thus FTC Sensors's financial record was also maintained and updated by its bank. *Id.* Moreover, Movants represent that they keep their own company records or have contractual arrangements for such records to be kept on its behalf. *Id.* ¶ 97. Movants also represent that “[t]here has been no comingling of corporate records among the Defendant parent and subsidiary entities.” *Id.* ¶ 98. Again, Movants' explanation is not unreasonable and there is no evidence of pervasive comingling of company records among all the Movants. Nevertheless, the Court must construe the evidence in Forward Threat's favor. That DHG maintained FTC Sensors's books and records supports, although only slightly, a reasonable inference that FTC Sensors is a mere shell or conduit for the affairs of DHG and that the entities may have failed to segregate their corporate records.

e. Communications via DHG

Movants do not dispute that Pridham communicated with Forward Threat via DHG. DelGiorno Decl. ¶ 55 (“All dealings ... were conducted by phone or email from Texas, presumably from [DHG's] office in Dallas”), ¶ 85. It is also undisputed that Forward Threat was required to send notices under the Agreement to a DHG email address rather than a FTC Sensors email address. *Id.* ¶ 87. Movants, however, explain that routing communications through DHG was consistent with the fact that FTC Sensors was DHG's client. *Id.* ¶¶ 85, 87. Again, Movants' explanation is not unreasonable. Nevertheless, the absence of any communications directly between Forward Threat and FTC Sensors lends at least some support to Forward Threat's alter ego theory insofar as it suggests DHG was involved in FTC Sensors's day-to-day operations and that the two entities failed to maintain genuine separateness. *See Unocal*, 248 F.3d at 927 (stating that alter ego test is satisfied where the parent dictates every facet of the subsidiary's business—from broad policy decisions to routine matters of day-to-day operations).

f. Undercapitalization

*11 Forward Threat contends that FTC Sensors was undercapitalized because FTC Sensors was not funded when it signed the Agreement and never held enough cash to make the contractual payments of \$500,000 by October 15, 2016 and \$500,000 by October 15, 2017. Movants do not deny that FTC Sensors lacked cash assets. Instead, Movants explain that FTC Sensors “was capitalized with its patents and it has the ability to request funds form its parent entity.” DelGiorno Decl. ¶ 96. Undercapitalization, however, may be reasonably inferred from FTC Sensors's lack of ready-access to cash funds to fulfill its contractual obligations to Forward Threat. This undercapitalization strongly supports Forward Threat's alter ego theory. *Nilsson, Robbins, et al. v. Louisiana Hydroelec*, 854 F.2d 1538, 1543-1544 (9th Cir. 1988). “In fact, the California Supreme Court has held that undercapitalization alone will justify piercing the corporate veil.” *Id.* (citing *Minton v. Cavaney*, 56 Cal.2d 576, 364 P.2d 473, 15 Cal.Rptr. 641 (1961)).

Having considered the unity of interest factors above, Court finds that Forward Threat has presented evidence tending to support its alter ego theory. And although the California Supreme Court has held that undercapitalization alone will justify piercing the corporate veil, the Court finds that record is not sufficiently developed to enable the Court to determine whether the alter ego test has been met.⁸ Whether

jurisdictional discovery should be authorized is discussed separately below in section “D” of this Order.

8 Because the facts relating to the unity of interest factors are insufficiently developed to establish Movants are alter egos of FTC Sensors, it is unnecessary for the Court to continue to the second prong of the alter ego analysis.

C. Whether there is General Jurisdiction over Movants

Forward Threat next contends that aside from the forum selection clause and their alter ego status, Movants are subject to the general jurisdiction of this Court. According to Forward Threat, Movants, particularly MPH, regularly litigate in this district through subsidiaries. Dkt. No. 34 at 24 (citing *McHale* Dec. ¶¶ 7–13, Exs. 9–10). These subsidiaries allegedly file patent infringement suits asserting patents they have purchased or licensed through agreements arranged by Pridham that are similar to the Agreement at issue in this case.

Forward Threat's general jurisdiction argument is unpersuasive. Even accepting as true Forward Threat's characterization of MPH's subsidiaries as “litigating affiliates” of Movants, Forward Threat offers no legal basis for attributing these affiliates' contacts with this forum to any of the Movants or Pridham. Forward Threat's argument might have more force if the litigating subsidiaries were alter egos of the Movants or Pridham for the reasons already discussed above. But Forward Threat has made no attempt to make that showing.

D. Plaintiff's Request For Jurisdictional Discovery

“A court may permit discovery to aid in determining whether it has personal jurisdiction.” *EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1093 (C.D. Cal. 2010) (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977)). “[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...” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006) (quoting *Terracom v. Valley Nat. Bank*, 49 F.3d 555, 562 (9th Cir. 1995)). Discovery should be granted, however, “where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.” *Wells Fargo*, 556 F.2d at 430 n. 24.

Here, a more satisfactory showing of jurisdictional facts is necessary, particularly on the following subjects: the capitalization and corporate structure of Movants; their management and operations, including financial operations; the accounts of Movant; methods and procedures for maintaining corporate records and minutes; and agreements between and among Movants. A more satisfactory showing of jurisdictional facts is also necessary as to the second prong of the alter ego analysis, namely whether upholding the separateness of Movants and FTC would result in an injustice, including a fraud against Plaintiff. The allegations of siphoning are particularly weak. Discovery into these areas is appropriate. In *Ranza* and several other cases relied upon by Movants, the court authorized jurisdictional discovery before ultimately dismissing a defendant for lack of personal jurisdiction. *Ranza*, 793 F.3d at 1067 (after discovery, finding no alter ego although parent “heavily involved” in sub's operations” including ensuring consistent marketing of the brand and some sub employees reporting to parent supervisors); *see also Calvert v. Huckins*, 875 F. Supp. 674, 678 (E.D. Cal. 1995) (after authorizing discovery, holding that evidence of a parent company's ownership of its subsidiary, overlapping officers and directors, and consolidated annual financial reporting not sufficient control for disregarding corporate entity); *U.S. v. Team Finance*, No. 16-432 JRG, 2019 WL 3976364, *7 (E.D. Tex. Aug. 22, 2019) (after conducting evidentiary hearing, holding that common board members, common website and management of affiliated entities through common board members and employees insufficient for alter ego); *Wapp Tech Ltd. P'ship v. Micro Focus Intl.*, 406 F. Supp. 3d 585, 598 (E.D. Tex. 2019) (after jurisdictional discovery, holding that parent setting financial goals and requiring financial reporting from sub and parent officer on both boards insufficient); *PHC–Minden v. Kimberly–Clark*, 235 S.W.3d 163, 175 (Tex. 2007) (after parties conducted extensive jurisdictional discovery, finding no alter ego due to stock ownership, a duplication of some or all directors or officers, or an exercise of the control that stock ownership gives to stockholders).

*12 There are circumstances when jurisdictional discovery is unwarranted. For example, in *Barone v. Intercontinental Hotels Grp.*, No. 15-4990 JCS, 2016 WL 2937502, at *8 (N.D. Cal. May 20, 2016), it was “clear” that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction based on an alter ego theory. In *Bar Grp., LLC v. Bus. Intelligence Advisors, Inc.*, 215 F. Supp. 3d 524, 562 (S.D. Tex. 2017) the court denied jurisdictional

discovery because plaintiff offered only “speculation as to jurisdiction” and was waging a “fishing expedition” into jurisdictional facts. *See also De Bree v. Pacific Drilling Services*, No. 18-4711 FHS, 2019 WL 6186526, at *4 (S.D. Tex., Oct. 29, 2019) (denying jurisdictional discovery because allegations of alter ego were conclusory and there were no facts, allegations or argument set forth by plaintiff that would support or warrant further inquiry); *DVI, Inc. v. Superior Court*, 104 Cal. App. 4th 1080, 1097 (2002) (rejecting alter ego theory because “interlocking corporate officers and directors are normal”).

Here, FTC Sensors's alter ego allegations have substance, particularly as to DHG, even though at present, they are insufficient to support the exercise of jurisdiction over Movants. In addition to Pridham's various and significant roles in all of the Movants, FTC Sensors has alleged, among other things, that Forward Threat's financial and license agreement records are kept by DHG; FTC Sensors communicates with Forward Threat via DHG; and the two entities share employees. FTC Sensors also alleges that Forward Threat was not funded at its inception or any time thereafter, even though Forward Threat was contractually bound to make a \$1 million guaranteed payment to FTC Sensors. These allegations are not speculative or conclusory

and discovery may very well lead to facts that would support the exercise of personal jurisdiction over Movants as alter egos of Forward Threat. Therefore, the Court will allow jurisdictional discovery. *Harris Rutsky & Co. Ins. Servs.*, 328 F.3d at 1135 (remanding case to allow party seeking to pierce corporate veil the opportunity develop the record and make a prima facie showing of jurisdictional facts).

V. CONCLUSION

For the reasons set forth above, Movants’ motion to dismiss for lack of personal jurisdiction is DENIED without prejudice to renew the motion after Forward Threat has had a full and fair opportunity to complete jurisdictional discovery consistent with this order. Only jurisdictional discovery requests may be propounded on Movants. Any disputes regarding jurisdictional discovery are referred to the magistrate judge.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 5545156

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Exhibit 6

2020 WL 8028241

2020 WL 8028241

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

L.A. TERMINALS, INC.

v.

CITY OF LOS ANGELES, et al.

Case No. CV 18-6754-MWF (RAOx)

Filed 12/21/2020

Attorneys and Law Firms

[Richard G. Montevideo](#), [Kelsey Quist](#), Rutan and Tucker LLP, Irvine, CA, [Travis H. Van Ligten](#), Rutan and Tucker LLP, Costa Mesa, CA, for L.A. Terminals, Inc.

[Brian A. Daluiso](#), [Christopher B. Bobo](#), [Kenneth F. Mattfeld](#), San Pedro City Attorneys Office, Janet Avery Karkanen, Los Angeles City Attorney's Office, San Pedro, CA, [Christina M. Glezakos](#), [Edward R. Hugo](#), [Paul S. Atigapramoj](#), Hugo Parker LLP, [Linda Teresa Sobczynski](#), [Sarah Peterman Bell](#), [R. Christopher Locke](#), Farella Braun and Martel LLP, San Francisco, CA, [Joshua Nicholas Levine](#), Booth LLP, [Gary A. Meyer](#), [Pedram F. Mazgani](#), Parker Milliken Clark O'Hara and Samuelian, Los Angeles, CA, for City of Los Angeles, et al.

Proceedings (In Chambers): ORDER RE:
MOTION FOR SUMMARY JUDGMENT [296]

The Honorable [MICHAEL W. FITZGERALD](#), U.S. District Judge

*1 Before the Court is Third-Party Defendant Olympic Chemical Corporation's ("Olympic") Motion for Summary Judgment (the "Motion"), filed on June 4, 2020. (Docket No. 296). Third-Party Plaintiff Occidental Chemical Corporation ("Oxy"), Defendant Union Pacific Railroad Company ("Union Pacific"), and Defendant City of Los Angeles (the "City") filed separate oppositions on November 9, 2020. (Docket No. 304, 305, 308). Olympic filed a reply on November 30, 2020. (Docket No. 310).

The Court has read and considered the papers filed in connection with the motion and held a telephonic hearing on December 14, 2020, pursuant to the General Order 20-09 and the Continuity of Operations Plan ("COOP"), effective

December 9, 2020, through and including January 8, 2021, in response to the COVID-19 pandemic.

For the reasons stated below, the Motion is **DENIED**. Cross-Complainants have established that genuine issues of material fact exist with respect to each issue raised by Olympic.

I. BACKGROUND

Because the facts are well known to the parties, the Court does not repeat them in full here. The following facts are based on the evidence, as viewed in the light most favorable to the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (acknowledging that on a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor."). The Court notes any relevant putative disputes below.

At the Port of Los Angeles in Wilmington, California, there is an industrial area that contains three portions of land that are the subject of this litigation: a 13.5 acre property referred to as the "Phillips Property," a 0.74 acre property referred to as the "Sliver Site," and a small area north of the Sliver Site referred to as "Berth 155A." (*Id.* ¶ 11). Oxy (or its predecessor in interest, Hooker Chemical, herein referred to collectively as just "Oxy") operated at the Sliver Site from 1949 through 1978. (*Id.* ¶ 12). Ash-Cross-Evans Corporation ("ACE") doing business as ("dba") Olympic Chemical Corporation operated at the Sliver Site from approximately 1978 through 1982. (OCSUF ¶ 79).

LAT filed this action on August 6, 2018, to recover costs and seek contribution for the remediation of a contamination at the "Sliver Site," under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), § 101 *et seq.*, 42 U.S.C. § 9601 *et seq.* (See generally Complaint (Docket No. 1)). The Sliver Site is contaminated with the chlorinated solvents trichloroethylene ("TCE") and tetrachloroethylene ("PCE"). (*Id.*)

Oxy, the City, and Union Pacific ("Cross-Complainants") bring two types of claims against Olympic: CERCLA claims and contract claims. (OCSUF ¶¶ 68-73). That distinction aside, all claims are based on the theory that: (1) Ash-Cross-Evans Corporation ("ACE") and Olympic operated at the Sliver Site from 1978 through 1982, or (2) Olympic operated at the Sliver Site indirectly as the alter ego of ACE. (OCSUF ¶¶ 79, 82).

*2 Olympic was incorporated in Tacoma, Washington on September 1, 1976. (Olympic's Statement of Uncontroverted Facts ("OCSUF") ¶ 1 (Docket No. 296-3)). At all relevant times, Alvin Ash and Donald Evans were Olympic's only officers and owners. (*Id.* at 2).

ACE was incorporated in Tacoma, Washington on June 8, 1977. (*Id.* ¶ 21). Corporate records show that Donald Evans, Alvin Ash, and George Geoff Cross were equal shareholders in and officers of ACE. (*Id.* ¶ 22). Olympic claims that ACE conducted its business out of its office in Newport Beach, California, as indicated on its company letterhead. (*Id.* ¶ 24). Union Pacific and the City dispute this fact, asserting that ACE was headquartered in Washington, used the name Olympic Chemical Company on its letterhead, and operated at the Los Angeles Marine Terminal ("LAMT"). (*See* Union Pacific's Response to OCSUF ¶ 24 (Docket No. 307)); (The City's Response to OCSUF ¶ 24 (Docket No. 308-3)).

Olympic claims it never conducted any business, including sales or storage, in California. (*Id.* ¶ 3). Union Pacific and the City dispute this fact, asserting that Olympic operated at the Sliver Site. (*See* Union Pacific's Response to OCSUF ¶ 3); (The City's Response to OCSUF ¶ 3).

Olympic claims that Ash and Evans always kept their other business interests separate and apart from Olympic. (OCSUF ¶ 6). Union Pacific and the City dispute this fact, asserting that Olympic is an alter ego of ACE. (*See* Union Pacific's Response to OCSUF ¶ 6); (The City's Response to OCSUF ¶ 6).

Olympic claims that Richard Orth, who began working at Olympic prior to 1977, and was Olympic's sole employee for many years, had never heard of ACE until this year. (OCSUF ¶ 8). Union Pacific and the City dispute the plausibility of this assertion, especially since Orth's deposition testimony consisted of virtually nothing but "I wouldn't know." (*See* Union Pacific's Response to OCSUF ¶ 8; The City's Response to OCSUF ¶ 8).

Olympic claims it never used, stored, distributed, or manufactured chlorinated solvents, including TCE and PCE. (OCSUF ¶ 9). Union Pacific and the City dispute this fact, pointing out that ACE dba Olympic Chemical Corporation was issued a permit for operations involving both TCE and PCE. (*See* Union Pacific's Response to OCSUF ¶ 9); (The City's Response to OCSUF ¶ 9).

On ACE's permit application, ACE identified itself as the applying entity, and indicated that it did business as "Olympic Chemical Company." (OCSUF ¶ 25). The City points out that there were multiple permit applications and in some of those applications Evans indicated that the applying entity was a subsidiary of Olympic. (The City's Response to OCSUF ¶ 25).

Olympic asserts that on March 7, 1979, Permit No. 404 was issued to ACE. (*Id.* ¶ 28). Union Pacific and the City dispute this fact, asserting that Permit No. 404 was issued to "Ash-Cross-Evans Corporation, dba Olympic Chemical Corporation." (*See* Union Pacific's Response to OCSUF ¶ 28); (The City's Response to OCSUF ¶ 28).

Olympic asserts that while ACE was working through the permitting process with the City, it entered into a lease with Southern Pacific Transportation Company (now Union Pacific), on January 1, 1979, to lease the Sliver Site (the "Sliver Site Lease"). (OCSUF ¶ 29). Union Pacific and the City point out that the lease with Southern Pacific identifies the tenant as "Ash-Cross-Evans Corporation, a corporation doing business as Olympic Chemical Corporation." (*See* Union Pacific's Response to OCSUF ¶ 29); (The City's Response to OCSUF ¶ 29).

*3 Olympic asserts that ACE stored chlorine at the Sliver Site. (OCSUF ¶ 30). Union Pacific and the City point out that the City issued Permit No. 404 to ACE/Olympic for operations involving the handling of caustic soda, TCE, PCE, and 1,1,1 trichlorethane at 560 Pier "A" Place at the LAMT. (*See* Union Pacific's Response to OCSUF ¶ 30); (The City's Response to OCSUF ¶ 30).

Olympic asserts that there is no evidence that ACE stored or handled chlorinated solvents at the Sliver Site. (OCSUF ¶ 31). Cross-Complainants point out that the operators at the Sliver Site before and after Olympic stored and handled thousands of gallons of chlorinated solvents. (*Id.* ¶ 88) ("Oxy ... operated at the Sliver Site for decades and spilled thousands of gallons of chlorinated solvents during its operations).

Olympic asserts that while operating at the Sliver Site, "ACE used 'Olympic Chemical Company' as a formal DBA; however, perhaps out of confusion or informality, 'Olympic Chemical Co.,' 'Olympic Chemical Corp.' or 'Olympic Chemical Corporation' were interchangeably used as its dba by others in documents." (OCSUF ¶ 33). The City points out that no "formal dba" was ever registered by ACE. (The City's Response to OCSUF ¶ 33). The City also notes that the

suggestion that the Olympic name was used by “perhaps out of confusion or informality” is contradicted by the records, which show that Evans used the name “Olympic Chemical Corporation” on five different agreements with three different parties. (*Id.*).

In 1981, LAT entered into the Asset Purchase Agreement (“APA”) to acquire all of ACE’s assets and liabilities for the price of \$1,750,000. (OCSUF ¶ 35). These assets included all of ACE’s intellectual property, including its dba “Olympic Chemical Company.” (*Id.* ¶ 36). After the LAT’s acquisition of ACE’s assets and liabilities, ACE filed its Statement of Intent to Dissolve with the State of Washington on November 5, 1981. (*Id.* ¶ 40). On August 26, 1982, ACE’s Articles of Dissolution were filed with the State of Washington, and ACE ceased to exist. (*Id.* ¶ 41).

LAT began operating at the Sliver Site in 1981. (*Id.* ¶ 42). LAT handled PCE during its operations at the Sliver Site from approximately 1981 through 1992. (*Id.* ¶ 43). LAT first discovered the TCE and PCE contamination at the Sliver Site in or about April 1990. (*Id.* ¶ 44). Oxy and the City were made aware of the Sliver Site’s TCE and PCE contamination no later than 1991. (*Id.* ¶ 45). In January 1991, LAT advised the City that it was investigating the contamination and those responsible. (*Id.* ¶ 46). LAT’s Sliver Site remedial investigations have continued for 30 years. (*Id.* ¶ 47).

Approximately 30 years after first learning about the TCE/PCE contamination at the Sliver Site, the City filed its complaint against LAT in Los Angeles Superior Court on January 2, 2018. (*Id.* ¶ 49). Six weeks later, on March 2, 2018, the City filed its First Amended Complaint in Los Angeles Superior Court adding as defendants all of the other entities that have operated at the Sliver Site: Hooker Chemical, Oxy, and ACE. (*Id.* ¶ 50). ACE did not appear and the court entered default against ACE on August 16, 2018. (*Id.* ¶ 52).

On August 6, 2018, LAT filed this parallel action in this Court naming Occidental and the City as defendants based on the allegations that Oxy released significant quantities of TCE and PCE at the Sliver Site. (*Id.* ¶ 53). The City filed its Third-Party Complaint, naming ACE as a cross-defendant. (*Id.* ¶ 55). ACE’s insurer filed a stipulation to intervene on behalf of ACE. (*Id.* ¶ 56). ACE is thus now defended in this action in accordance with an insurance policy it purchased to cover its liability arising from its operation at the site. (*Id.* ¶ 57).

*4 Cross-Complainants have all asserted claims for contribution and declaratory relief under CERCLA and declaratory relief under California law. (OCSUF ¶ 68). Union Pacific asserted claims for contribution under California law. (*Id.* ¶ 70).

Cross-Complainants allege that ACE and Olympic operated at the Sliver Site from 1978 through 1982. (*Id.* ¶ 79). Olympic asserts that it is not a party to the Sliver Site Lease or to Permit No. 404. (*Id.* ¶ 80). Union Pacific and the City dispute this assertion, pointing to evidence suggesting that the terminal was purchased by Olympic and not ACE. (*See* Union Pacific’s Response to OCSUF ¶ 80); (The City’s Response to OCSUF ¶ 80).

II. EVIDENTIARY OBJECTIONS

The parties advance various objections to the evidence submitted in connection with the Motion. (*See generally* The City’s Response to OCSUF); (Union Pacific’s Response to OCSUF). Many of the objections are garden variety evidentiary objections based on mischaracterization of evidence, speculation, lack of foundation, hearsay, and relevance. While these objections may be cognizable at trial, on a motion for summary judgment, the Court is concerned only with the *admissibility* of the relevant *facts* at trial, and not the *form* of these facts as presented in the Motions. *See Burch v. Regents of Univ. of California*, 433 F. Supp. 2d 1110, 1119-20 (E.D. Cal. 2006) (making this distinction between facts and evidence, Rule 56(e), and overruling objections that evidence was irrelevant, speculative and/or argumentative). “If the contents of the evidence could be presented in an admissible form at trial, those contents may be considered on summary judgment even if the evidence itself is hearsay.” *O’Banion v. Select Portfolio Servs., Inc.*, No. 1:09-cv-00249-EJL, 2012 WL 4793442, at *5 (D. Idaho Aug. 22, 2012) (citing *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003)).

Accordingly, the parties’ objections are **OVERRULED**.

III. LEGAL STANDARD

In deciding a motion for summary judgment under Rule 56, the Court applies *Anderson, Celotex*, and their Ninth Circuit progeny. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the

movant is entitled to judgment as a matter of law.” [Fed. R. Civ. P. 56\(a\)](#).

The Ninth Circuit has defined the shifting burden of proof governing motions for summary judgment where the non-moving party bears the burden of proof at trial:

The moving party initially bears the burden of proving the absence of a genuine issue of material fact. Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. The non-moving party must do more than show there is some “metaphysical doubt” as to the material facts at issue. In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor.

*5 *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1259 n.2 (9th Cir. 2016) (quoting *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010)). “A motion for summary judgment may not be defeated, however, by evidence that is ‘merely colorable’ or ‘is not significantly probative.’ ” *Anderson*, 477 U.S. at 249-50.

“When the party moving for summary judgment would bear the burden of proof at trial, ‘it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.’ ” *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (quoting *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)).

IV. DISCUSSION

Cross-Complainants bring two types of claims against Olympic: CERCLA claims and contract claims. (OCSUF ¶¶ 68-73). All claims are based on the theory that: (1) ACE and Olympic operated at the Sliver Site from 1978 through 1982, or (2) Olympic operated at the Sliver Site indirectly as the alter ego of ACE. (OCSUF ¶¶ 79, 82).

CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites. [42 U.S.C. § 9601 et seq.](#) Under CERCLA, a private party may recover expenses associated with cleaning up contaminated sites. *Id.* [42 U.S.C. § 9607\(a\)](#). To establish a prima facie claim for recovery of response costs under CERCLA, a private-party plaintiff must demonstrate that:

- (1) the site on which the hazardous substances are contained is a facility under CERCLA's definition of that term;
- (2) a release or threatened release of any hazardous substance from the facility has occurred;
- (3) such release or threatened release has caused the plaintiff to incur response costs that were necessary and consistent with the national contingency plan; and
- (4) the defendant is within one of four classes of persons subject to the liability provisions of [[42 U.S.C. § 9607\(a\)](#)].

City of Colton v. American Promotional Events, Inc.-West, 614 F.3d 998, 1002-03 (9th Cir. 2010) (quotation marks and internal citations omitted). Cross-Complainants allege that Olympic was an operator of the Sliver Site within the meaning of [§ 9607\(a\)](#). (OCSUF ¶¶ 62, 63, 67, 82).

Olympic argues that it is entitled to summary judgment because Cross-Complainants cannot produce any evidence that: (1) Olympic operated at the Sliver Site; (2) Olympic is the alter ego of ACE; or (3) ACE/Olympic contributed to the PCE or TCE contamination at the Sliver Site. (Motion at 1-2).

A. Olympic Operating at the Sliver Site

2020 WL 8028241

Olympic asserts that Cross-Complainants have produced no evidence that Olympic operated at the Sliver Site. (Motion at 11).

To qualify as an “operator” under CERCLA, the defendant “must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” *U.S. v. Bestfoods*, 524 U.S. 51, 66 (1998).

Olympic maintains that ACE, not Olympic, was the operator of the Sliver Site, pointing out that the permit application indicates that ACE is the applicant. (OCSUF ¶¶ 25-27). Olympic points out that the application identifies ACE's California entity number on the application and that ACE is the contracting party on the Sliver Site Lease as well as Permit No. 404. (OCSUF ¶¶ 23, 26, 28-29).

*6 Cross-Complainants produce circumstantial evidence suggesting that Olympic operated at the Sliver Site. Specifically, Cross-Complainants present the following evidence in support of their position:

- A September 10, 1978 letter from Evans to Michael Lemke of the Port of Los Angeles, in which Evans represents that “myself and Mr. Alvin G. Ash are in the process of finalizing the purchase of Hooker Chemical's Pier A Terminal ... Mr. Ash and I each own 50% of Olympic Chemical Corporation.” (See Occidental's Opposition, Declaration of Gary Meyer (“Meyer Decl.”), Ex. C (Docket No. 304-5)). Evans concludes his letter by stating “Enclosed is a recent financial statement on Olympic Chemical Corporation.” (*Id.*).
- A September 15, 1978 City of Los Angeles Office Memorandum which reflected that Mr. Evans and Mr. Ash represented that the chemical entity which was soon to operate at the Sliver Site “apparently is undercapitalized, however it would be a *subsidiary of Olympic Chemical Corporation*, and we will require, as part of the approval ... that Olympic guarantee the required rental.” (*Id.*, Ex. D) (emphasis added).
- An October 26, 1978 Credit and Financial Report identifying Ash and Evans' chemical business that would operate at the Sliver Site as a “*subsidiary of Olympic Chemical Corp.*” (*Id.*, Ex. E) (emphasis added).

- An October 30, 1978 Harbor Department Memorandum referring to Ash and Evan's chemical business at the Sliver Site as “*a subsidiary of Olympic Chemical Corporation*” noting an assumption that “Olympic Chemical Corporation is guaranteeing rental payments.” (*Id.*, Ex. F) (emphasis added).
- A 1979 lease agreement between the City and Evans on behalf of Olympic Chemical Corporation (“Permit No. 404”), whereby ACE dba Olympic Chemical Corporation started doing business as a chemical facility at the Sliver Site. (*Id.*, Ex. A).
- A second 1979 lease agreement between Southern Pacific and Evans, again on behalf of ACE dba Olympic Chemical Corporation, in furtherance of ACE/Olympic's operation at the Sliver Site. (*Id.*, Ex. B).

The Court is satisfied that a genuine dispute of material fact exists with respect to whether Olympic operated at the Sliver Site. Establishing that ACE was a subsidiary of Olympic is sufficient to under these facts establish that Olympic operated at the Sliver Site. *United States v. Bestfoods*, 524 U.S. 51, 65, 118 S. Ct. 1876, 1886, 141 L. Ed. 2d 43 (1998) (“The fact that a corporate subsidiary happens to own a polluting facility operated by its parent does nothing, then, to displace the rule that the parent ‘corporation is [itself] responsible for the wrongs committed by its agents in the course of its business.’). Viewed in the light most favorable to Cross-Complainants, the evidence suggests that Olympic operated at the Sliver Site directly or through ACE as a subsidiary of Olympic.

Accordingly, the Motion is **DENIED** with respect to the issue of whether Olympic operated at the Sliver Site.

B. Alter Ego

Olympic next asserts that Cross-Complainants produce no evidence showing that Olympic is the alter ego of ACE. (Motion at 12-13).

“To satisfy the alter ego test, a plaintiff must make out a prima facie case (1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice.” *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1073 (9th Cir. 2015) (punctuation omitted).

*7 To satisfy the “ ‘unity of interest and ownership’ prong of [the alter ego] test requires ‘a showing that the [one entity] controls [the other] to such a degree as to render the latter the mere instrumentality of the former.’” *Id.* “This test envisions pervasive control over [the controlled entity], such as when [the controlling entity] ‘dictates every facet of the [controlled entity’s] business — from broad policy decisions to routine matters of day-to-day operation.’” *Id.* at 1073-1074 (finding no alter ego because “[t]otal ownership and shared management personnel are alone insufficient to establish the requisite level of control”).

Olympic cites to several cases for the proposition that an overlap of ownership interest and extensive control by one entity over another is insufficient by itself to establish alter ego. (*See* Motion at 14-15) (listing cases). Olympic emphasizes that ACE had its own business operations, leased its own property, had its own bank account and financial statements, and had its own general liability insurance. (OCSUF ¶ 83).

With respect to the first prong of the alter ego test, Cross-Complainants present evidence suggesting alter ego, as follows:

- Olympic’s officer treated the entities as interchangeable during its negotiations with the City. (Meyer Decl., Exs. A-F).
- In March 1979, Evans (a 50% owner and one of only two board members of Olympic) received Permit No. 404 whereby *ACE dba Olympic Chemical Corporation* started doing business as a chemical facility at the Sliver Site. (*Id.*, Ex. A) (emphasis added).
- All of the officers of Olympic were also officers of ACE. (City’s Response to OCSUF ¶ 46).
- ACE and Olympic listed the same business address on their Washington corporate filings: 702 “A” Street, Tacoma, Washington. (*Id.* ¶ 47).
- No separate meeting minutes were kept for Olympic. (*Id.* ¶ 48).
- Both Olympic and ACE were incorporated by Alvin Ash within one year of each other. (*Id.* ¶ 49). Both were Washington corporations and utilized the same law firm. (*Id.*).

The Court is satisfied that Cross-Complainants have established a genuine dispute of material fact with respect to unity of ownership and control. Contrary to Olympic’s assertion, Cross-Complainants have produced evidence showing more than a mere “overlap” of ownership interest and extensive control. Cross-Complainants present documents suggesting that Ash and Evans used ACE and Olympic interchangeably in furtherance of Ash and Evans’s business goals.

The Court also determines that the second prong of the alter ego test is satisfied here. Treating Olympic as a separate entity would lead to an inequitable result, as it would allow Olympic to escape liability for potential violations of CERCLA.

Accordingly, the Motion is **DENIED** with respect to the alter ego issue.

C. Contribution to the PCE/TCE Contamination

Olympic argues that Cross-Complainants cannot show that ACE or Olympic ever stored or handled TCE or PCE at the Silver Site. (Motion at 17-18). The Court notes for clarity that the storage and handling of chlorine is not of concern here — only the storage and handling of chlorinated solvents TCE and PCE.

1. Storage of TCE or PCE

Olympic contends that ACE was in the business of storing and distributing chlorine, not TCE or PCE. (Motion at 18). Olympic points to the deposition of Dennis Gerard, who testified that he visited the site during the time of ACE’s operation and said he understood they were just storing chlorine. (OCSUF ¶ 89).

Cross-Complainants produce evidence indicating the following:

- Oxy stored and distributed a significant amount of chlorinated solvents from approximately 1948 until the mid-1970s. (Oxy’s Statement of Undisputed Facts (“OSUF”) ¶¶ 12-20 (Docket No. 304-1)). In his negotiations with Oxy to take over the Site, Evans insisted Oxy transfer all the equipment to ACE/Olympic. (The City’s Statement of Undisputed Facts (“CSUF”) ¶ 56 (Docket No. 308-1)). Additionally, Evans’s offer was contingent on “approval of all regulatory agencies with

jurisdiction” for “handling of chlorine, caustic soda, and chlorinated solvents.” (*Id.* ¶ 57).

- ***8** • By the mid-to-late 1970s, Evans was managing the Sliver Site under the name “Olympic Chemicals.” (*Id.* ¶ 58). The chlorinated solvent tanks used by Oxy were not cleaned or decommissioned before they were transferred to Evans' management. (*Id.* ¶ 59).
- In the summer of 1976, Dennis Gerard (former Oxy employee) went to the Sliver Site on two different occasions to teach Evans how to use the pipes and valving. (CSUF ¶ 60).
- In Permit No. 404, Evans represented that the premises would be used for “the operation and maintenance of a marine terminal and storage facility *handling* ... trichloroethylene [TCE], perchlorethylene [PCE], and 1,1, 1, trichlorethane.” (*Id.* ¶ 63) (emphasis added). No other uses, including chlorine, were permitted under Permit No. 404. (*Id.* ¶ 64).
- The Permit was never amended to add chlorine to the list of permitted substances, or to take away chlorinated solvents from the list of limited permitted uses. (*Id.* ¶ 69).
- The APA described the sold assets as consisting of “chemical terminaling and chlorine distribution.” (CSUF ¶¶ 71-72). The agreement valued the chlorine distribution business at \$284,375, while the terminaling business was valued at \$1,465,625. (*Id.*).
- After Permit No. 404 was transferred to LAT in July 1981, LAT stored and distributed chlorinated solvents at the Sliver Site. (*Id.* ¶ 70).

At the hearing, Olympic pointed to the deposition of Dennis Gerard, who testified that Oxy had stopped handling chlorinated solvents in 1973 or 1974, at least a year before transferring the equipment to ACE/Olympic. (Joel Meyer Decl., Ex. F, Deposition of Dennis Gerard (“Gerard Dep.”) at 185-9:185-20 (Docket No. 297-6)). However, the Court notes that Gerard also testified that the TCE and PCE tanks normally held upwards of 100,000 gallons of chemical, and that he never saw anyone clean out the TCE or PCE tanks while he worked at the facility. (*Id.* at 129:25-130:14).

In summary, the evidence shows that Olympic took over Oxy's assets shortly after Oxy stopped handling chlorinated solvents. Gerard testified that he never saw anyone clean the TCE or PCE tanks, which could hold upwards of 100,000

gallons of TCE and PCE, respectively. Gerard also testified that the tanks were not decommissioned or cleaned before being transferred to Olympic. Olympic explicitly conditioned the purchase of Oxy's assets on regulatory agency approval of chlorinated solvents. In the ensuing permit, Olympic explicitly represented that the purpose of its tenancy was to handle chlorinated solvents and represented that it would not store other chemicals unless it had written approval. In an amendment to the permit, Olympic reiterated that one of the permitted uses was handling a chlorinated solvent.

Viewing this evidence in the light most favorable to Cross-Complainants, the evidence shows that Olympic obtained numerous, uncleaned storage tanks that previously held upwards of 100,000 gallons of PCE and TCE. This leads to the reasonable inference that Olympic possessed large tanks containing residual TCE and PCE at the Sliver Site. The Court is therefore satisfied that Cross-Complainants have produced a genuine dispute of fact as to whether ACE/Olympic stored TCE and PCE at the Sliver Site.

2. Handling and release of TCE or PCE

***9** Olympic argues that Cross-Complainants cannot produce direct evidence of a release during its alleged occupancy of the Sliver Site. (Motion at 19).

In order for an entity to be liable under CERCLA, “there must be a ‘release’ or ‘threatened release’ of a hazardous substance from the facility into the environment.” *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1074 (9th Cir. 2006). CERCLA defines a “release” as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.” 42 U.S.C. § 9601(22).

“CERCLA liability may be inferred from the totality of the circumstances; it need not be proven by direct evidence.” *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 892 (10th Cir. 2000); *see also City of Moses Lake v. United States*, 458 F. Supp. 2d 1198, 1226 (E.D. Wash. 2006) (same). Direct evidence of hazardous waste disposal activities occurring decades ago is seldom available; circumstantial evidence is thus routinely used to establish liability in CERCLA actions. *Tosco Corp.*, 216 F.3d at 892 (noting that “eyewitness testimony or other direct evidence concerning specific waste disposal practices at oil refineries during the 1940s — well

before the enactment of environmental laws — is rarely available”).

Cross-Complainants need only show that Olympic “at the time of disposal of any hazardous substance owned or operated any facility at which ... hazardous substances were disposed of.” 42 U.S.C. § 9607(a)(2). Any release is sufficient to create liability. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989) (“The plain statutory language fails to impose any quantitative requirement on the term hazardous substance, and we decline to imply that any is necessary.”).

Olympic is correct that there is no direct evidence of a release of TCE or PCE at the Sliver Site while ACE/Olympic operated there. However, there is circumstantial evidence indicating that Olympic possessed large tanks containing residual amounts of TCE and PCE at the Sliver Site. (CSUF ¶ 59). And there is ample evidence suggesting that Olympic was contemplating the handling of chlorinated solvents. For example, in Permit No. 404, Evans represented that the premises would be used for “the operation and maintenance of a marine terminal and storage facility *handling* ... trichloroethylene [TCE], perchlorethylene [PCE], and 1,1, 1, tricholorethane.” (CSUF ¶ 63) (emphasis added).

At the hearing, Olympic pointed to its balance sheet from 1979, which indicates that Olympic was not in the business

of buying or selling PCE or TCE. (Joel Meyer Decl, Ex HH). This is persuasive evidence that Olympic did not buy or sell PCE or TCE in 1979 — but the presence of large tanks containing residual PCE and TCE leaves open the possibility that Olympic cleaned out these tanks during its operations at the Sliver Site, leading to a release of PCE or TCE. (See Joel Meyer Decl., Ex F, Gerard Dep. at 125:21-130-18) (explaining that Oxy's practice was to wash tanks by spraying them with water).

Viewing the evidence in the light most favorable to Cross-Complainants, it is reasonable to infer that Olympic washed out the tanks containing the residual TCE and PCE at some point during its occupancy of the Sliver Site. The Court is satisfied that Cross-Complainants have established a genuine dispute of material fact with respect to this issue.

*10 Accordingly, the Motion is **DENIED**. The Court will set pre-trial and trial dates by separate order.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 8028241

Exhibit 7

2016 WL 3063956

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

MAPLE LEAF ADVENTURES
CORPORATION, Petitioner,

v.

JET TERN MARINE CO. LTD., and Does
1 Through 10, inclusive, Respondent.

Case No.: 15-CV-02504-AJB-BGS

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Signed 03/11/2016

Attorneys and Law Firms

James Arthur Henry Marissen, Joshua Norton, Keesal Young
& Logan, Long Beach, CA, for Petitioner.

ORDER DENYING PETITIONER'S PETITION TO CONFIRM ARBITRATION AWARD AND GRANTING REQUEST FOR JURISDICTIONAL DISCOVERY

Hon. Anthony J. Battaglia, United States District Judge

*1 Presently before the Court is Petitioner Maple Leaf Adventure Corporation's ("Maple Leaf") petition to confirm an arbitration award ("Petition") pursuant to 9 U.S.C. § 207 entered against Respondent Jet Tern Marine Co. Ltd. ("Jet Tern"). The Court finds the matter suitable for decision on the papers, without oral argument, pursuant to Local Civil Rule 7.1.d.1. For the reasons set forth below, the Court **DENIES WITHOUT PREJUDICE** Maple Leaf's Petition, (Doc. No. 1), but **GRANTS** Maple Leaf's request to conduct jurisdictional discovery, (Doc. No. 6).

BACKGROUND

Maple Leaf is a corporation organized under the laws of the Province of British Columbia, Canada with its principal place of business in Canada. (Doc. No. 1 ¶ 1.) Jet Tern is a corporation incorporated under the laws of Taiwan with shipyards in Zhuhai and Dongguan, People's Republic of China, and an office in Taiwan. (*Id.* ¶ 2.)

This case arises from Jet Tern's breach of the parties' contract under which Jet Tern agreed to build and deliver a "Young 78" 022 Catamaran Yacht ("Yacht") to Maple Leaf for the price of \$3,750,000 ("Contract").¹ Jet Tern breached the contract by failing to build the Yacht to contract specifications, stopping work on the Yacht, and demanding from Maple Leaf to be paid ahead of the build progress and a higher ultimate price. (Doc. No. 1-2 ¶ 5.) Upon this breach, Maple Leaf invoked its rights under Clause 18 of the Contract, which entitled Maple Leaf to rescission of the Contract and full refund of payments made, as well as interest thereon. (*Id.* at 18–19.) Maple Leaf informed Jet Tern of its rescission of the Contract on October 23, 2013. (Doc. No. 1 ¶ 17.) Jet Tern did not comply with Maple Leaf's request for repayment. (*Id.* ¶ 18.)

¹ On December 8, 2015, the Court ruled on Maple Leaf's *ex parte* motion seeking permission to effect service of process on Jet Tern via Federal Express, which was granted. (*See* Doc. No. 5.) In that order, the Court summarized the case's factual background. The Court assumes familiarity with that order and accordingly will recite here only those facts necessary to understand the case's current posture with respect to the instant order.

Thereafter, on November 25, 2013, Maple Leaf invoked its rights under Clause 12 of the Contract to compel arbitration of the parties' dispute. (*Id.*; Doc. No. 1-2 at 14–15 Cl. 12.2.) Maple Leaf chose Oslo, Norway as the location for arbitration. (Doc. No. 1 ¶ 18.) An arbitrator was appointed, who ultimately rendered a decision and issued an award in favor of Maple Leaf. (*Id.* ¶ 22; Doc. No. 1-2 at 62–63 ¶ 31.) While Jet Tern wholly failed to participate in the arbitration proceedings, the arbitrator stressed he did not issue the award merely because of Jet Tern's failure to participate. (Doc. No. 1-2 at 48 ¶ 24(1).) Rather, the arbitrator fulfilled his "duty to consider the submissions and evidence presented so as to be satisfied as to the merits of [Maple Leaf's] claim[.]" (*Id.*) The arbitrator also found Jet Tern "was informed of the proceedings and the case being advanced against it, and had a full opportunity of participating to defend itself had it so wished." (*Id.* ¶ 24(2).)

*2 On November 4, 2015, Maple Leaf filed the Petition in this Court, seeking an order confirming the arbitration award. (Doc. No. 1.) On December 1, 2015, Maple Leaf filed an *ex parte* motion seeking an order permitting Maple Leaf to serve Jet Tern via Federal Express pursuant to [Federal Rule of Civil Procedure 4\(f\)\(3\)](#). (Doc. No. 3.) The Court granted

that request on December 8, 2015. (Doc. No. 5 at 6–10.) At that time, the Court noted its reservations concerning whether personal jurisdiction over Jet Tern exists in this case. (*Id.* at 10–12.) The Court therefore requested supplemental briefing on the issue of personal jurisdiction over Jet Tern, (*id.*), which Maple Leaf submitted on December 22, 2015, (Doc. No. 6).

LEGAL STANDARD

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“Convention”), 9 U.S.C. § 201 *et seq.*, grants federal district courts the power to enforce arbitral awards arising from commercial transactions, contracts, or agreements entered in cases involving at least one noncitizen of the United States. *See* 9 U.S.C. §§ 202–03, 207. However, the Convention does not automatically grant courts jurisdiction over any and all persons and corporations who entered an arbitration agreement covered by the Convention. *See Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120–22 (9th Cir. 2002); *see also* 9 U.S.C. § 207 (permitting parties to apply to “any court *having jurisdiction* ... for an order confirming the award” (emphasis added)). Rather, “in suits to confirm a foreign arbitral award under the Convention, due process requires that the district court have jurisdiction over the defendant against whom enforcement is sought or his property.” *Glencore Grain Rotterdam B.V.*, 284 F.3d at 1122.

“Personal jurisdiction over a nonresident defendant is tested by a two-part analysis.” *Chan v. Soc’y Expeditions, Inc.*, 39 F.3d 1398, 1404 (9th Cir. 1994). The exercise of jurisdiction must satisfy the requirements of both the applicable state long-arm statute and federal due process. *Id.* at 1404–05. California’s long-arm statute is coextensive with the limits of due process. *Cal. Civ. Proc. § 410.10; Doe v. Unocal Corp.*, 248 F.3d 915, 923 (9th Cir. 2001). Accordingly, the Court need only consider the requirements of due process. *Fed. Deposit Ins. Co. v. British-Am. Ins. Co.*, 828 F.2d 1439, 1441 (9th Cir. 1987) (citing *Pac. Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985)).

Due process requires that a nonresident defendant have certain minimum contacts with the forum state such that the exercise of jurisdiction does not offend “ ‘traditional notions of fair play and substantial justice.’ ” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). This test is satisfied where the court in the forum state may permissibly exercise either

general or specific jurisdiction over the defendant. *Daimler AG v. Bauman*, 134 S. Ct. 746, 754–55 (2014); *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 839 (9th Cir. 1986).

While a defect in personal jurisdiction is generally a defense that may be asserted or waived by a party, *see Fed. R. Civ. P. 12(h)(1)*, “when a court is considering whether to enter a default judgment, it may dismiss an action *sua sponte* for lack of personal jurisdiction,” *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999) (citation omitted). In fact, “[w]hen entry of judgment is sought against a party who has failed to plead or otherwise defend, a district court has an affirmative duty to look into its jurisdiction over both the subject matter and the parties.” *In re Tuli*, 172 F.3d at 712 (citation omitted). The plaintiff bears the burden of establishing the court’s personal jurisdiction over a defendant. *Unocal*, 248 F.3d at 922 (citing *Cubbage v. Merchant*, 744 F.2d 665, 667 (9th Cir. 1984)). The court may decide the issue of personal jurisdiction on the basis of affidavits and documentary evidence by the parties or hold an evidentiary hearing regarding the matter. *See Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1997). If the motion is based on the former, the plaintiff need only make a prima facie showing of facts establishing personal jurisdiction. *Id.*

DISCUSSION

*3 Maple Leaf asks the Court to enforce the arbitral award entered against Jet Tern pursuant to its powers under the Convention. (Doc. No. 6 at 2; *see* Doc. No. 1-3.) Maple Leaf contends the Court has the authority to do so because the Court has general jurisdiction over Jet Tern. (Doc. No. 6 at 4–10.) Maple Leaf further argues that if the Court finds general jurisdiction does not exist, the Court should permit it to conduct jurisdictional discovery. (*Id.* at 10–11.)

I. Whether the Court May Exercise General Jurisdiction Over Jet Tern

“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.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (citing *Int’l Shoe Co.*, 326 U.S. at 317). “This is an exacting standard, as it should be, because a finding of general

jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004). “With respect to a corporation, the place of incorporation and principal place of business are ‘paradigm[m] ... bases for general jurisdiction.’” *Daimler AG*, 134 S. Ct. at 760 (citation omitted). Outside of these paradigm bases, only “in an exceptional case” should a court find a corporation’s operations in the forum to be “so substantial and of such a nature as to render the corporation at home in that State.” *Id.* at 761 n.19.

Here, Jet Tern is a Taiwanese corporation incorporated under the laws of Taiwan with its principal place of business in China and Taiwan. (Doc. No. 1 ¶ 2.) As such, to establish general jurisdiction over Jet Tern, Maple Leaf must make a prima facie showing that this is an “exceptional case” where Jet Tern’s contacts with California are “so substantial and of such a nature as to render [it] at home” in the forum. *Daimler AG*, 134 S. Ct. at 761 n.19. Maple Leaf contends it has done so here based on three theories, two of which rely on the fact that Maple Leaf’s wholly owned subsidiary, Selene California, is incorporated under the laws of the state of California with its principal place of business in San Diego, California: (1) the incorporation of a wholly owned subsidiary is, by itself, sufficient to confer general jurisdiction over the parent corporation; (2) Jet Tern is accustomed to litigation in the forum and maintains local counsel here; and (3) Selene California is Jet Tern’s alter ego, and the Court may therefore impute Selene California’s contacts with the forum to Jet Tern. (Doc. No. 6 at 4–10.) The Court will consider each argument in turn.

A. Whether Selene California’s Incorporation in the Forum Confers General Jurisdiction Over Jet Tern

Maple Leaf first argues that general jurisdiction exists over Jet Tern in California because “[c]ourts within the Ninth Circuit [may] exercise personal jurisdiction over foreign corporate defendants where the foreign corporation chooses to incorporate a controlled subsidiary in the forum and where the subsidiary’s principal place of business is in the forum.” (Doc. No. 6 at 4) (citing *Hendricks v. New Video Channel Am., LLC*, No. 2:14-cv-02989-RSWL-SSx, 2015 WL 3616983 (C.D. Cal. June 8, 2015)).

As noted above, “in an exceptional case,” a court may exercise general jurisdiction over a defendant corporation in a forum other than the paradigm bases of general jurisdiction where the “corporation’s affiliations with the State are ‘so

continuous and systematic’ as to render [it] essentially at home in the forum State.” *Daimler AG*, 134 S. Ct. at 761 & n.19 (quoting *Goodyear*, 131 S. Ct. at 2851). However, “[t]he existence of a parent-subsidiary relationship is insufficient, on its own, to justify imputing one entity’s contacts with a forum state to another for the purpose of establishing personal jurisdiction.” *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1070 (9th Cir. 2015) (citing *Unocal Corp.*, 248 F.3d at 925–26); see also *Transure, Inc. v. Marsh & McLennan, Inc.*, 766 F.2d 1297, 1299 (9th Cir. 1985) (same).

*4 In *Daimler AG*, the Supreme Court held out *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), as “the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.” ” *Daimler AG*, 134 S. Ct. at 755–56 (quoting *Goodyear*, 131 S. Ct. at 2856). In *Perkins*, the foreign corporation defendant was incorporated under the laws of the Philippines. 342 U.S. at 439. The Supreme Court nonetheless affirmed the lower court’s finding of general jurisdiction over the corporation in Ohio based on the corporation’s temporarily moving its principal place of business to Ohio to avoid the Japanese occupation of the Philippines during World War II. *Id.* at 447–48. “Although the claim-in-suit did not arise in Ohio, th[e] Supreme Court ruled that it would not violate due process for Ohio to adjudicate the controversy” because “the corporation’s president maintained his office [in Ohio], kept the company files in that office, and supervised from [that] Office ‘the necessarily limited wartime activities of the company.’ ” *Goodyear*, 131 S. Ct. at 2856 (quoting *Perkins*, 342 U.S. at 447–48).

Maple Leaf does not contend that Jet Tern has its principal place of business in San Diego, thus distinguishing this case from the “textbook” example of *Perkins*. Nor does Maple Leaf contend it does a majority—or even a sizeable portion—of its business in California through Selene California. In fact, Maple Leaf provides no information whatsoever concerning the volume of business Jet Tern conducts in California as opposed to in Taiwan, China, or one of the four other locations in the United States.² See *Royal & Sun Alliance Ins. PLC v. Castor Transport, LLC*, No. 13-cv-01811-BAS(DHB), 2016 WL 633443, at *4 (S.D. Cal. Feb. 17, 2016) (“No evidence has been presented that address Castores’ business volume in California, economic impact in California, or any solicitation of business from California residents beyond a passive website.”); see also *Int’l Shoe*, 326 U.S. at 318 (stating a corporation’s “continuous activity of some sorts within a state is not enough to support the demand

that the corporation be amenable to suits unrelated to that activity”). Cf. *Gator.Com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1074, 1078 (9th Cir. 2003) (finding general jurisdiction existed in part because defendant sold “millions of dollars worth of products” in California).

2 Maple Leaf does provide an exhibit it asserts evidences that “Jet Tern imports its Selene yachts to Selene California.” (Doc. No. 6 at 6; Norton Decl., Exh. L.) However, it is impossible to decipher from this exhibit how many yachts were imported or the time frame the exhibit covers. Even if this information were provided, Maple Leaf provides no information concerning Jet Tern’s overall sales. As such, the Court cannot conduct any meaningful comparison from which it may assess the importance of its California sales to its overall business.

Maple Leaf nonetheless argues general jurisdiction is proper in this case based exclusively on the fact that Jet Tern’s wholly owned subsidiary, Selene California, is incorporated with its principal place of business in the forum. (Doc. No. 6 at 4–7.) Maple Leaf points to many factors to establish that Selene California is Jet Tern’s wholly owned subsidiary subject to Jet Tern’s complete control: (1) Jet Tern owns the Selene trademark and copyright, (Doc. No. 6-1 [“Norton Decl.”], Exhs. F, G, K); (2) Howard Chen, Jet Tern’s Chief Executive Officer, is listed first on Selene California’s website, and his visits to California are advertised, (Norton Decl., Exhs. A, D); (3) the “About Selene” section of Selene California’s website is exclusively devoted to reciting Jet Tern’s history, (Norton Decl., Exh. B); (4) Selene California holds itself out as Selene Ocean Trawlers, the same name under which Jet Tern does business, (Doc. No. 6 at 5–6; Norton Decl., Exhs. B, K); (5) Selene California’s website advertises itself as the factory direct representative for Selene yachts, (Norton Decl., Exhs. C, H); (6) Selene California solicits business for Jet Tern in California and facilitates transactions on behalf of Jet Tern, evidenced by a letter Chen addressed to “Selene owners and future Selene owners” in which he states that “Jet Tern deals exclusively with four dealers in the USA,” (Norton Decl., Exh. E); (7) Selene California is listed on Jet Tern’s website as one of these four dealers, (Norton Decl., Exhs. F, I); (8) Jet Tern advertised Selene California’s opening, (Norton Decl., Exh. H); (9) Jet Tern has imported its Selene yachts to Selene California, (Norton Decl., Exh. L); and (10) advertisement for Selene yachts require payment FOB Hong Kong, (Norton Decl., Exh. N).

*5 Maple Leaf points to the Central District of California’s decision in *Hendricks v. New Video Channel America, LLC*, No. 2:14-cv-02989-RSWL-SSx, 2015 WL 3616983 (C.D. Cal. June 8, 2015), to support its position. In *Hendricks*, the district court concluded the plaintiff made a prima facie showing of general jurisdiction based on facts similar to this case. For example, the defendant Canadian corporation’s subsidiary was “both incorporated and has its principal place of business in California[.]” *Id.* at *3. The court substantiated its decision based on additional factors, including that the defendant’s subsidiary was its sole subsidiary; the defendant referred to its subsidiary as its “LA office” and “US office”; the same individuals controlled both corporations; and both corporations were in the same business. The district court found these facts sufficient to support its exercise of general jurisdiction over the defendant corporation. The court, however, conceded that while “the Supreme Court [did not] completely reject[] a theory of general jurisdiction based on a parent corporation’s contacts with a forum through its subsidiary, [] the bounds of such general jurisdiction are unclear.” *Id.* at *3 n.2.

While the court in *Hendricks* found facts similar to those present in this case sufficient to permit its exercise of general jurisdiction over the defendant foreign corporation, the Court declines to so find here. It is true the Supreme Court did not “completely reject[] a theory of general jurisdiction based on a parent corporation’s contacts with a forum through its subsidiary” *Id.* The Court, however, is disinclined to rely on dicta from *Daimler AG*, see 134 S. Ct. at 761 (noting that “neither [the parent corporation] nor [the subsidiary] were incorporated in California, nor [did] either entity have its principal place of business there”), that would run contrary to that opinion’s holding, see *id.* at 749, 761 (holding the proper inquiry “is whether [a] corporation’s ‘affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State” (quoting *Goodyear*, 131 S. Ct. at 2851)). The Supreme Court was clear that outside the paradigm bases for general jurisdiction—*i.e.*, a corporation’s place of incorporation and principal place of business— it is only in an “exceptional case” that courts should find general jurisdiction exists. *Id.* at 761 n.19. To find general jurisdiction permissible simply by virtue of a wholly owned subsidiary’s incorporation or principal place of business in the forum would render ordinary what was intended to be “exceptional.”

The Ninth Circuit’s post-*Daimler AG* decision, *Ranza v. Nike, Inc.*, 793 F.3d 1059 (9th Cir. 2015), supports the Court’s

conclusion. There, the Ninth Circuit addressed “under what circumstances a court may attribute a parent company’s contacts with the forum state to its foreign subsidiary for the purpose of exercising general personal jurisdiction over the subsidiary.” *Id.* at 1065. In rejecting the plaintiff’s argument that the two companies were sufficiently close to attribute the parent company’s contacts to its foreign subsidiary, the Ninth Circuit noted the Supreme Court abrogated the Ninth Circuit’s agency theory of general jurisdiction.³ *Id.* at 1075. The Ninth Circuit therefore held imputation of “a local entity’s contacts to its foreign affiliate” is permissible only where the plaintiff “demonstrates an alter ego relationship between the entities[.]” *Id.* at 1078.

³ Under the agency theory, one entity’s contacts with a forum could be imputed to a related entity where a plaintiff showed the local entity “ ‘perform[ed] services that [were] sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation’s own officials would undertake to perform substantially similar services.’ ” *Daimler AG*, 134 S. Ct. at 759 (quoting *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 920 (9th Cir. 2011)).

While *Ranza* addresses whether a local parent corporation’s contacts can properly be imputed to its foreign subsidiary, the Court finds *Ranza* dictates the same outcome where, as here, a plaintiff (or petitioner) seeks to impute a local subsidiary’s contacts to its foreign parent corporation. In rejecting the defendant foreign subsidiary’s argument that its local parent company’s contacts could not be imputed to it, the Ninth Circuit observed that “[b]ecause the parent and subsidiary a[re] ‘not really separate entities’ if they satisfy the alter ego analysis, there is no greater justification for bringing the parent into the subsidiary’s forum than for doing the reverse.” *Id.* at 1072 (citations omitted). The Ninth Circuit concluded that “the alter ego test may be used to extend personal jurisdiction to a foreign parent *or* subsidiary when, in actuality, the foreign entity is not really separate from its domestic affiliate.” *Id.* (emphasis in original).

*6 Corporate law further supports the Court’s conclusion. A basic tenant of American corporate law is that “a parent and subsidiary comprise two wholly separate entities” *United States v. Bennett*, 621 F.3d 1131, 1137 (9th Cir. 2010) (citation omitted). “As a general principle, corporate separateness insulates a parent corporation from liability created by its

subsidiary, notwithstanding the parent’s ownership of the subsidiary.” *Ranza*, 793 F.3d at 1070 (citing *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)). Accordingly, it is only where “the parent and subsidiary are not really separate entities” that “the local subsidiary’s contacts with the forum may be imputed to the foreign parent corporation.” *Unocal Corp.*, 248 F.3d at 926 (citation omitted).

Accepting Maple Leaf’s argument and imputing Selene California’s contacts with the forum to Jet Tern, based solely upon their relationship as parent and subsidiary,⁴ would run afoul of the basic tenant of American corporate law that a parent company and its subsidiary are separate entities. *Bennett*, 621 F.3d at 1137. Such a holding would be contrary to established Ninth Circuit precedent that makes clear “[t]he existence of a parent-subsidiary relationship is insufficient, on its own, to justify imputing one entity’s contacts with a forum state to another for the purpose of establishing personal jurisdiction.” *Ranza*, 793 F.3d at 1070 (citing *Unocal Corp.*, 248 F.3d at 925–26). It would also be contrary to the explicit holding of *Daimler AG*, for “[e]xercising general jurisdiction over a foreign [corporation] merely because it [has a local subsidiary in the forum] resembles the agency theory of imputed jurisdiction the [Supreme] Court rejected in *Daimler*.” *Ranza*, 793 F.3d at 1075. For all these reasons, the Court respectfully declines to follow the reasoning in *Hendricks* and rejects Maple Leaf’s argument that Selene California’s incorporation and principal place of business within California is, by itself, sufficient to make a prima facie showing of general jurisdiction over Jet Tern.

⁴ The Court acknowledges that Maple Leaf has pointed to other factors suggesting that the line between Jet Tern and Selene California as separate entities is blurred. However, “[w]hile [Maple Leaf] has pointed to various factors which indicate that [Jet Tern] exercises some control over [Selene California], ‘[t]he corporate separation, though perhaps merely formal, [is] real.’ ” *Transure, Inc.*, 766 F.2d at 1299 (quoting *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 337 (1925)). To the extent Maple Leaf suggests Jet Tern and Selene California are actually one in the same, such an issue is appropriately addressed under the alter ego theory of imputing one entity’s contacts with a forum to another. *See infra* Discussion Section I.C. Absent a prima facie showing that Selene California is Jet Tern’s alter ego, the Court declines to circumvent clear Ninth Circuit precedent. *See*

Unocal Corp., 248 F.3d at 926 (stating it is only where “the parent and subsidiary are not really separate entities” that “the local subsidiary’s contacts with the forum may be imputed to the foreign parent corporation” (citation omitted)).

B. Whether Jet Tern’s Contacts with California Renders It Essentially “At Home” in the Forum

Maple Leaf next argues general jurisdiction is proper over Jet Tern because “Jet Tern is accustomed to litigation in [California] and maintains local counsel in this forum.” (Doc. No. 6 at 7.) Maple Leaf asserts that because Jet Tern has been sued in California state court in 2009 and subsequently removed that case to the Central District of California, and because Jet Tern has had regular local counsel here since at least October 2008, the Court may exercise general jurisdiction over Jet Tern. (*Id.* at 7–8.)

*7 The Court does not agree. As an initial matter, Maple Leaf provides no support for its novel position that a party’s litigation history within the forum permits a court to exercise general jurisdiction over that party in unrelated matters. *See In re Morrissey*, 349 F.3d 1187, 1189 (9th Cir. 2003) (“the duty of the court is not [to] develop [the party’s] arguments for him [or] find the legal authority to support those arguments” (internal quotation marks omitted)).

Even had Maple Leaf done so, Jet Tern’s litigation history provides the Court with no insight into whether Maple Leaf’s contacts with California are “so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.” *Daimler AG*, 134 S. Ct. at 761 (quoting *Goodyear*, 131 S. Ct. at 2851). The Court gives no weight to the fact that Jet Tern removed the 2009 action to federal court. Jet Tern clearly stated in its removal petition that it “intend[ed] to seek dismissal for lack of personal jurisdiction” and the removal of the action did “not waive any objections or defenses they may have[.]” (Norton Decl., Exh. M ¶¶ 17–18.) Furthermore, Maple Leaf provides the Court with no information concerning how that action was ultimately adjudicated.

In sum, the Court finds that the removal of an unrelated case filed against Jet Tern in 2009, coupled with local counsel’s knowledge of this case and his representation of Jet Tern in 2008 when he registered the Selene trademark, is insufficient to support a finding of general jurisdiction over Jet Tern in the instant matter.⁵ Such sporadic litigation activity is simply “not enough to support the demand that the corporation be

amenable to suits unrelated to that activity[.]” *Int’l Shoe*, 326 U.S. at 318. For this reason, the Court rejects Maple Leaf’s second argument.⁶

5 Maple Leaf places great emphasis on the allegations in the complaint filed against Jet Tern in 2009. (*See* Doc. No. 6 at 7.) For example, the plaintiff there alleged facts that support Maple Leaf’s position that Selene California is merely an alter ego of Jet Tern. (*See id.*) However, that a private litigant levels allegations in a separate case does not somehow convert those allegations into evidence for the Court’s purposes in this case. *See Briggs v. Blomkamp*, 70 F. Supp. 3d 1155, 1166 (N.D. Cal. 2014) (“allegations in a complaint are not evidence” (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986))).

6 The Court notes that in presenting its other two arguments, Maple Leaf points to some evidence of Jet Tern’s own contacts with the forum: (1) Chen’s visits to California, (Doc. No. 6 at 5; Norton Decl., Exhs. A, D); (2) Jet Tern’s ownership and control of the Selene trademark and copyright, which is used in California, (Doc. No. 6 at 2, 5, 7; Norton Decl., Exhs. F, G, K); and (3) Jet Tern’s sales of yachts in California, (Doc. No. 6 at 6; Norton Decl., Exh. N). However, these factors do not alter the Court’s conclusion because they do not cure the deficiency already noted, namely, that Maple Leaf has proffered *no* information concerning the volume of business Jet Tern conducts in the forum. *See* discussion *supra* pp. 7–8. Without this information, the Court is hesitant to find this is an “exceptional case” permitting the Court’s exercise of general jurisdiction.

C. Whether Selene California is an Alter Ego of Jet Tern

Maple Leaf last argues general jurisdiction is proper in California because Selene California is a mere alter ego of Jet Tern. (Doc. No. 6 at 9–10.) Maple Leaf points to many factors it alleges are sufficient to make out a prima facie showing of its theory: (1) Jet Tern established Selene California as its California branch and factory direct representative, (Norton Decl., Exhs. C, H); (2) Selene California holds itself out as Selene Ocean Trawlers, the name under which Jet Tern does business, (Norton Decl., Exh. I); (3) Chen controls both Jet Tern and Selene California, (Norton Decl., Exh. B); (4) Jet

Tern is the majority owner of Selene California, has a direct hand in Selene California's operations, and has exercised the same extent of control over the three other US branches, (Norton Decl., Exhs. B, K); and (5) Jet Tern owns the Selene trademark and copyright, (Norton Decl., Exhs. F, G, K).

*8 While “[t]he existence of a parent-subsi-dary relationship is insufficient, on its own, to justify imputing one entity’s contacts with a forum state to another for the purpose of establishing personal jurisdiction,” *Ranza*, 793 F.3d at 1070 (citing *Unocal Corp.*, 248 F.3d at 925–26), a district court may nonetheless impute to a foreign corporation its local related entity’s contacts with the forum if the local entity is a mere alter ego of the foreign corporation, see *Unocal Corp.*, 248 F.3d at 926. To demonstrate that the alter ego doctrine applies, a plaintiff “must make out a prima facie case ‘(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate entities] would result in fraud or injustice.’ ” *Unocal Corp.*, 248 F.3d at 926 (quoting *Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996)).

To meet the first prong, a plaintiff must show “the parent controls the subsidiary ‘to such a degree as to render the latter a mere instrumentality of the former.’ ” *Id.* (quoting *Calvert v. Huckins*, 875 F. Supp. 674, 678 (E.D. Cal. 1995)). “This test envisions pervasive control over the subsidiary, such as when a parent corporation ‘dictates every facet of the subsidiary’s business—from broad policy decisions to routine matters of day-to-day operation.’ ” *Ranza*, 793 F.3d at 1073 (quoting *Am. Tel. & Tel. Co.*, 94 F.3d at 591).

Here, Maple Leaf contends it has made a prima facie showing that Selene California is a mere instrumentality of Jet Tern because, among other things, Chen controls both corporations, and those at Jet Tern “had a direct hand in [Selene California’s] operation” (Doc. No. 6 at 9; Norton Decl. ¶ 15.) However, Maple Leaf provides no information from which the Court may determine that Jet Tern’s control is so pervasive over Selene California that Jet Tern dictates “every facet of [Selene California’s] business—from broad policy decisions to routine matters of day-to-day operation.” *Ranza*, 793 F.3d at 1073 (quoting *Am. Tel. & Tel. Co.*, 94 F.3d at 591). The Court finds Maple Leaf’s conclusory assertion of Jet Tern having a “direct hand in [Selene California’s] operation” is insufficient to carry its burden on this Petition.

The Court similarly finds unpersuasive the fact that Chen is seemingly the CEO of both corporations.⁷ As the Supreme Court has noted, “[I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary” *Bestfoods*, 524 U.S. at 69 (citation omitted); see also *Stewart v. Screen Gems-EMI Music, Inc.*, 81 F. Supp. 3d 938, 956 (N.D. Cal. 2015) (stating “it is well-settled that common ownership is not dispositive” of whether a subsidiary is its parent’s alter ego). The Court acknowledges that Maple Leaf has pointed to other factors it argues support its position, such as Selene California being Jet Tern’s factory direct representative. (Doc. No. 6 at 9; Norton Decl., Exhs. C, H.) However, “[w]hile [Maple Leaf] has pointed to various factors which indicate that [Jet Tern] exercises some control over [Selene California], ‘[t]he corporate separation, though perhaps merely formal, is real.’ ” *Transure, Inc.*, 766 F.2d at 1299 (quoting *Cannon Mfg. Co.*, 267 U.S. at 337).

⁷ While Chen is indisputably the CEO of Jet Tern, it is unclear what Chen’s role is with respect to Selene California. Maple Leaf only presents evidence that “[t]he first person listed for ‘Selene California’s Team’ on its website is ‘Howard Chen, CEO, Jet Tern Marine’” (Doc. No. 6 at 5.)

With respect to the second prong, Jet Tern contends “injustice would result if Selene California were deemed a distinct entity” because “Jet Tern would be permitted to continue moving its assets through Selene California and profit while continuing to prevent [Maple Leaf] from being made whole through enforcement of the Award.” (Doc. No. 6 at 10.) Yet Maple Leaf provides no explanation why it cannot seek relief in an appropriate forum such as Taiwan or China, the countries in which Jet Tern is incorporated and has its principal places of business. Nor does Maple Leaf suggest in the Petition or the Norton declaration that Jet Tern purposefully keeps its corporation undercapitalized to, for example, prevent its creditors from seeking relief. See *Unocal Corp.*, 248 F.3d at 927 (“[U]nder California law, ‘inadequate capitalization of a subsidiary may alone be a basis for holding the parent corporation liable for the acts of the subsidiary.’ ” (quoting *Slottow v. Am. Cas. Co.*, 10 F.3d 1355, 1360 (9th Cir. 1993))). For all these reasons, the Court rejects Maple Leaf’s argument that it has made a prima facie showing that Selene California is Jet Tern’s alter ego.

II. Whether Maple Leaf Should be Permitted Jurisdictional Discovery

*9 Given the Court’s rejection of Maple Leaf’s arguments that general jurisdiction is proper over Jet Tern, Maple Leaf asks the Court to permit it to conduct jurisdictional discovery. (Doc. No. 6 at 10–11.) Specifically, Maple Leaf seeks to “pursue subpoenas against Selene California and its principals to obtain additional facts bearing on its relationship with Jet Tern and Jet Tern’s property in the forum.” (*Id.* at 11.) Maple Leaf contends that granting its relief is appropriate because “it has at least made ‘a sufficient start toward establishing jurisdiction by showing its position to be non-frivolous.’” (Doc. No. 6 at 11) (quoting *Hume v. Farr’s Coach Lines, Ltd.*, No. 12-CV-6378-FPG, 2015 WL 5773632, at *3 (W.D.N.Y. Sept. 30, 2015)).

Jurisdictional discovery “may appropriately be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.” *Data Disc, Inc.*, 557 F.2d at 1285 n.1. “A plaintiff who seeks jurisdictional discovery needn’t first make a prima facie showing that jurisdiction actually exists.” *NuboNau, Inc. v. NB Labs, Ltd.*, No. 10cv2631-LAB (BGS), 2011 WL 5237566, at *3 (S.D. Cal. Oct. 31, 2011). Given that such a showing is necessary on Maple Leaf’s Petition, “[i]t would ... be counterintuitive to require [Maple Leaf], *prior* to conducting discovery, to meet the same burden that would be required in order to” enforce the arbitral award. *Orchid Biosciences, Inc. v. St. Louis Univ.*, 198 F.R.D. 670, 673 (S.D. Cal. 2001) (emphasis in original).

However, Maple Leaf “must make at least a colorable showing that personal jurisdiction exists.” *NuboNau, Inc.*, 2011 WL 5237566, at *3 (citing *Mitan v. Feeney*, 497 F. Supp. 2d 1113, 1119 (C.D. Cal. 2007)). “This ‘colorable’ showing should be understood as something less than a prima facie showing, and could be equated as requiring the plaintiff to come forward with ‘some evidence’ tending to establish personal jurisdiction over the defendant.” *Mitan*, 497 F. Supp. 2d at 1119. Accordingly, a mere hunch that discovery “might yield jurisdictionally relevant facts” is insufficient. *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008).

“Courts are afforded considerable discretion in deciding whether parties may conduct discovery relating to jurisdictional issues” *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico*, No. 07cv0309 L(AJB), 2007 WL 2238900, at *2 (S.D. Cal. Aug. 2, 2007); *see also Myhre v. Seventh-Day Adventist Church Reform Movement Am. Union Int’l Missionary Soc’y*, 298 F.R.D. 633, 645 (S.D. Cal. 2014) (noting some “courts have permitted plaintiffs to

take jurisdictional discovery to support an alter ego [] theory of personal jurisdiction” (citing *Circle Click Media LLC v. Regus Mgmt. Grp. LLC*, No. 12-04000 SC, 2013 WL 57861, at *4–5 (N.D. Cal. Jan. 3, 2013))). Accordingly, a court’s denial of a plaintiff’s request for jurisdictional discovery “will not be reversed except on the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant.” *Data Disc, Inc.*, 557 F.2d at 1285 n.1.

Here, the Court finds that limited jurisdictional discovery is appropriate. While Maple Leaf has not made a prima facie showing at this time that general jurisdiction exists over Jet Tern, the Court acknowledges that Maple Leaf has “come forward with ‘some evidence’ tending to establish personal jurisdiction over [Jet Tern].” *Mitan*, 497 F. Supp. 2d at 1119. Accordingly, the Court **GRANTS** Maple Leaf leave to conduct jurisdictional discovery.

Given Jet Tern’s complete failure to participate in this action, the Court finds the most expeditious and efficient way to fully vet the issue of general jurisdiction is to permit Maple Leaf to seek some discovery from Jet Tern’s purported wholly owned subsidiary, Selene California. The Court therefore permits Maple Leaf to conduct jurisdictional discovery against Selene California, but **LIMITS** Maple Leaf’s discovery to **one** deposition of a corporate representative of Selene California pursuant to **Federal Rule of Civil Procedure 30(b)(6)** with regard to jurisdictional facts **only**. The deposition is limited to seven hours of time on the record. Maple Leaf is also given leave to subpoena records from Selene California with regard to jurisdictional facts **only**. The Court finds this limited jurisdictional discovery strikes an appropriate balance between Maple Leaf’s need for discovery and any impact on nonparty Selene California.

*10 The Court **ORDERS** Maple Leaf to complete this discovery no later than **April 25, 2016**, and to submit a supplemental brief on the issue of general jurisdiction no later than **May 9, 2016**. The Court will schedule further argument on the matter as needed.

CONCLUSION

In sum, the Court **DENIES WITHOUT PREJUDICE** Maple Leaf’s petition to confirm arbitration award. (Doc. No. 1.) The Court **GRANTS** Maple Leaf’s request for jurisdictional discovery. (Doc. No. 6.) Maple Leaf is **LIMITED** to **one** deposition of a corporate representative

of Selene California pursuant to [Federal Rule of Civil Procedure 30\(b\)\(6\)](#) with regard to jurisdictional facts **only** and to subpoena records from Selene California with regard to jurisdictional facts **only**. This discovery must be completed no later than **April 25, 2016**. The Court **ORDERS** Maple Leaf

to file a supplemental brief on the issue of general jurisdiction no later than **May 9, 2016**.

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Exhibit 8

2021 WL 541441

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

PINKERTON TOBACCO CO., LP et al

v.

THE ART FACTORY AB et al

Case No.: 2:20-cv-01322-SB-MRW

Signed 01/28/2021

Attorneys and Law Firms

Bryan C. Diner, Pro Hac Vice, Caitlin E. O'Connell, David Brian Kacedon, Elizabeth A. Niemeyer, Paul W. Townsend, Timothy J. May, Finnegan Henderson Farabow Garrett and Dunner LLP, Washington, DC, Donald L. Ridge, Clark Hill LLC, Los Angeles, CA, for Plaintiffs.

Brian J. Prew, Pro Hac Vice, Colin W. Fraser, Irvine, CA, David Spencer Bloch, San Francisco, CA, Scott J. Bornstein, Greenberg Traurig LLP, New York, NY, for Defendants.

**Proceedings: ORDER RE: MOTION
TO DISMISS (DKT. NO. 98)**

STANLEY BLUMENFELD, JR., U.S. District Judge

*1 In this case, Plaintiffs NYZ AB, Pinkerton Tobacco Co., LP, Swedish Match North America LLC, WM17 Holding GMBH allege that Defendants' DRYFT-brand nicotine pouch product infringes on a patent (the '908 patent) for nicotine pouches owned/licensed by Plaintiffs. Dkt. No. 1 (Compl.) ¶ 10. Defendants The Art Factory AB (TAF) and TillCe AB's (TillCe) have filed a motion to dismiss the patent infringement claims against them. Dkt. No. 98 (Mot.); Dkt. No. 108 (Opp.); Dkt. No. 111 (Reply).

TAF and TillCe are Swedish companies that allegedly sold DRYFT in Sweden to co-Defendants Kretek International, Inc. and DRYFT Sciences, LLC (collectively, Kretek). *See id.* ¶¶ 6-7, 13. TillCe allegedly owned a 50% share of the '908 patent but sold its right to the patent in a series of transactions in 2016 with Swedish Match North Europe (SMNE), an entity within Plaintiffs' corporate family. *Id.* ¶ 26. TAF is allegedly a former subsidiary of TillCe but has been a separate legal entity since 2018. *Id.* ¶¶ 11-12. Despite TillCe's sale of the patent,

TillCe and TAF have allegedly continued to sell DRYFT to Kretek. *Id.* ¶ 30.

Pursuant to Fed. R. Civ. P. 12(b), TillCe and TAF seek dismissal of on the grounds that the Court lacks both personal and subject matter jurisdiction.

I. RULE 12(b)(2) MOTION

TillCe and TAF first move to dismiss under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. Mot. 4-12.

Under Rule 12(b)(2), the plaintiff bears the burden of establishing jurisdiction. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011). When a court decides the motion before conducting a trial or evidentiary hearing, the plaintiff need only make a prima facie showing. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). A plaintiff makes a prima facie showing if the plaintiff produces admissible evidence which, if believed, would be sufficient to establish the existence of personal jurisdiction. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003). For a 12(b)(2) motion brought before trial or an evidentiary hearing, a court accepts as true the complaint's uncontroverted factual allegations and resolves any factual conflicts in the plaintiff's favor. *Id.* Where, as here, "the inquiry into personal jurisdiction is 'intimately involved with substance of the patent laws,' Federal Circuit law is applied." *Advantek Mktg., Inc. v. Shanghai Walk-Long Tools Co.*, No. 19-5326 PSG (AFMx), 2019 WL 8811865, at *3 (C.D. Cal. Dec. 16, 2019).

Here, TillCe and TAF contend there is no basis to exercise specific jurisdiction over them because there are no allegations that they "committed intentional acts expressly aimed at the Central District of California and causing harm in the forum state." Mot. 9. In particular, the motion emphasizes that they "are based in Sweden and conduct business in Sweden" and that they "have not made, used, offered to sell, sold within the United States, or imported into the United States the DRYFT product." Mot. 9-10 (citing Ericsson Dec. ¶¶ 2-3). Rather, sales of DRYFT "to Kretek all took place in Sweden," Reply 6, and "Kretek was responsible for any importation," Mot. 9 (citing Ericsson Dec. ¶¶ 2-4). Put simply, TillCe and TAF contend there is no specific jurisdiction over them because "[t]hey have no contacts with the state of California." Mot. 1.

*2 But the mere fact TillCe and TAF only made and sold products within Sweden is not dispositive of the question

of personal jurisdiction. “To assess minimum contacts, the Federal Circuit takes a stream of commerce approach.” *Advantek Mktg.*, 2019 WL 8811865, at *3 (citing *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1564 (Fed. Cir. 1994)). Under this analysis, due process requires only that “defendants, acting in consort, placed the accused [products] in the stream of commerce, [that] they knew the likely destination of the products, and [that] their conduct and connections with the forum state were such that they should reasonably have anticipated being brought into court there.” *Beverly Hills Fan*, 21 F.3d at 1564.

In *Beverly Hills Fan*, the Federal Circuit held specific jurisdiction existed over a foreign defendant in a patent infringement action when the defendants purposefully shipped the infringing ceiling fans into the forum state through an “established distribution channel.” 21 F.3d at 1565. Plaintiff provided evidence of least fifty-two accused ceiling fans in the forum state. *Id.* at 1564. From this record, it could be inferred that a “distribution channel” was “intentionally established, and that the defendants knew, or reasonably could have foreseen, that a termination point of the channel was [the forum state].” *Id.*

Applying this analysis, courts have routinely exercised jurisdiction over foreign defendants in infringement actions where the defendant employs an established distribution channel that ends in California. *See, e.g., Am. Induction Techs., Inc. v. KBK, Inc.*, No. SA CV11-00350 JAK (RNBx), 2012 WL 12888112, at *5 (C.D. Cal. Apr. 17, 2012) (finding specific jurisdiction when defendant established “ongoing distribution agreement” with California-based entities and had “full knowledge that each of these parties intended to sell [the] products in California”); *Monolithic Power Sys., Inc. v. Silergy Corp.*, No. CV 10-1533 CAS AGRX, 2011 WL 2470457, at *5 (C.D. Cal. June 20, 2011) (finding personal jurisdiction over foreign corporation when evidence demonstrated defendant “could reasonably foresee that its component parts would end up in California”).

That said, Plaintiffs here fall short of alleging in the complaint, or showing with evidence, the existence of an established distribution channel of infringing products to California. Plaintiffs allege:

On information and belief, Kretek and Dryft Sciences have had, and continue to have, a business relationship with

TillCe and/or TAF which involves the importation and distribution of the Accused Products. On information and belief, Kretek began its business relationship with TillCe and/or TAF at least as early as August 2016, when the Accused Products were offered for sale in the United States. On information and belief, Dryft Sciences began its business relationship with TAF at least as early as August 2019, after Dryft Sciences was formed.

Compl. ¶ 31.

Unlike in *Beverly Hills Fan*, Plaintiffs provide no indication that a high quantity of products from TillCe and TAF have travelled through the stream of commerce to California, such that the Court can infer the existence of an established distribution channel to the State. *See Kason Indus., Inc. v. Dent Design Hardware, Ltd.*, 952 F. Supp. 2d 1334, 1350 (N.D. Ga. 2013) (finding insufficient evidence of manufacturer's sales to a Georgia-based distributor to show an “established distribution channel” to Georgia absent evidence that the infringing product had “actually been sold in Georgia”). Nor is there any indication that TillCe or TAF have purposefully targeted California residents. *See Freescale Semiconductor, Inc. v. Amtran Tech. Co.*, No. A-12-CV-644-LY, 2014 WL 1603665, at *5 (W.D. Tex. Mar. 19, 2014) (finding insufficient evidence of a foreign manufacturer's “close collaboration” with its two U.S. distributors to support jurisdiction in Texas absent evidence that any of the manufacturer's activity was “specifically directed at” Texas).¹

¹ The complaint also alleges that there is “personal jurisdiction over each Defendant because each has committed acts of patent infringement and/or contributed to or induced acts of patent infringement by others in the State of California and in this District.” Compl. ¶ 17. But this conclusory assertion lacks any factual allegation sufficient to plausibly suggest jurisdiction exists over TillCe and TAF. *See Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009).

*3 While Plaintiffs have not demonstrated personal jurisdiction, the Court cannot here conclude that this failure

is fatal. To that end, Plaintiffs alternatively seek jurisdictional discovery about the nature of TillICE and TAF's "business relationship with Kretek" and their "intent and efforts" in distributing DRYFT. Opp. 14. Generally, jurisdictional discovery is permitted "where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Patent Rights Prot. Grp., LLC v. Video Gaming Techs., Inc.*, 603 F.3d 1364, 1371 (Fed. Cir. 2010) (internal quotation and citation omitted). The threshold requirement for authorizing discovery requires but a "colorable" showing "tending to establish personal jurisdiction." *Mitan v. Feeney*, 497 F. Supp. 2d 1113, 1119 (C.D. Cal. 2007). Here, TillICE and TAF confirm they have had a business relationship with California-based Kretek and that they have knowledge "the DRYFT product has been imported by Kretek." Dkt. No. 99-2 (Ericsson Decl.); see Reply 6 (confirming sales to Kretek). That provides at least a "colorable" basis to conclude specific jurisdiction may exist over TillICE and TAF under Federal Circuit law. See also *Weaver v. Johnson & Johnson, Ethicon, Inc.*, No. 16-cv-00257-GPC (BGS), 2016 WL 1668749, at *6 (S.D. Cal. Apr. 27, 2016) (granting jurisdictional discovery when the record did not "foreclose the possibility that additional discovery could reveal the facts that bear on whether the Court may exercise specific jurisdiction").

At the hearing, counsel for Defendants acknowledged that jurisdictional discovery may be appropriate as to TAF, but argued that TillCe should not be subjected to discovery because the complaint did not specifically allege that TillCe sold product into the distribution channel. But the complaint alleges that, after selling the patent, "TillCe chose to put Accused Product DRYFT on the market" in response to new regulations from the U.S. Food and Drug Administration. Compl. ¶¶ 27-28. Moreover, TillCe and TAF's own evidence indicates "TillCe caused the DRYFT product to be manufactured in Sweden and sold to Kretek in Sweden" and that "the DRYFT product has been imported by Kretek." Dkt. No. 99-2 (Ericsson Decl.) ¶¶ 3, 6. At a minimum, there is a colorable claim that TillCe sold products into Kretek's distribution channel.²

² The Court notes, however, that many of the complaint's allegations lump TillCe and TAF together. See, e.g., Compl. ¶ 31 ("Kretek and Dryft Sciences have had, and continue to have, a business relationship with TillCe and/or TAF"). After receiving the benefit of jurisdictional discovery, the forthcoming amended complaint is expected to

adequately differentiate between TillCe and TAF so that these distinct legal entities may have sufficient notice of the claims against them.

Thus, the Courts **GRANTS** leave to conduct jurisdictional discovery.³ Plaintiffs are to complete jurisdictional discovery by **March 22, 2021**. Any disputes over jurisdictional discovery shall be directed to the assigned Magistrate Judge. Plaintiffs are granted leave, once jurisdictional discovery is complete, to file an amended complaint. The amended complaint shall be filed by **April 5, 2021**.

³ Plaintiffs also alternatively seek to establish jurisdiction according to Federal Rule of Civil Procedure Rule 4(k)(2). Opp. 13. That rule allows the Court to exercise jurisdiction over a party "not subject to jurisdiction in any state's courts of general jurisdiction." Fed. R. Civ. P. 4(k)(2). The Court declines to rule on the applicability of Rule 4(k)(2) until jurisdictional discovery can better shed light on whether TillCe and TAF have contacts with the United States through the stream of commerce. See *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico*, 563 F.3d 1285, 1295 (Fed. Cir. 2009) (noting Rule 4(k)(2)'s due process analysis contemplates a defendant's contacts "with the entire United States").

II. RULE 12(b)(1) MOTION

TillCe also seeks dismissal under Federal Rule of Civil Procedure 12(b)(1) on the basis of an ongoing arbitration initiated against it by Plaintiff SMNE in Sweden. Mot. 12-14.

A. The Swedish Arbitration

The transfer of patent rights from TillCe to SMNE involved a series of three transactions, and the agreement for each transaction contained the same arbitration provision, which reads in pertinent part:

*4 Any dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof shall be finally settled by arbitration in accordance with the Arbitration Rules of the

Arbitration Institute of the Stockholm
Chamber of Commerce.

See e.g., Dkt. No. 99-3; see also Dkt. Nos. 99-4, 99-5.

Pursuant to this provision, “since December 2017, SMNE has pursued a breach of contract claim against TillCe in a Swedish arbitration proceeding.” Mot. 13. The basis of this contract claim is TillCe violated the contract by continuing to sell DRYFT product in Sweden after it transferred the patent. Dkt. No. 99-2 (Ericsson Decl.) ¶¶ 5-7.

In bringing this motion, TillCe and TAF contend that “the Court should defer to the earlier-filed Swedish arbitration” because “[t]he issues in the Swedish arbitration substantially overlap with the issues here.” Mot. 12-13. In particular, they claim that the contracts at issue in the arbitration did not transfer rights to technology unrelated to the ‘908 patent. Mot. 12; see Dkt. No. 99-2 (Ericsson Decl.) ¶¶ 5-7. They then contend that the DRYFT product was not covered by the patent, meaning that their manufacture and sale of DRYFT does not violate the contractual agreement with SMNE. *Id.*

With this in mind, TillCe and TAF argue that the patent infringement suit here is duplicative of—and thus barred by—the Swedish arbitration because both involve the question whether TillCe and TAF “were allowed to manufacture and sell DRYFT in Sweden” according to the contract with SMNE. Reply 11. Relatedly, they claim that “a defense to the breach of contract claim in Sweden is that the DRYFT product does not infringe the ‘908 patent,” which will be an important issue in this case. Mot. 13. Ultimately, according to TillCe and TAF, these overlapping questions “depend[] on the outcome of the Swedish arbitrations” and thus warrant dismissal in this forum. Reply 11.

B. No Basis for Dismissal

TillCe and TAF’s Rule 12(b)(1) motion does not provide a basis for dismissal.

To begin, it is not clear that the Rule 12(b)(1) motion, which seeks dismissal on the basis of an arbitration clause, is procedurally proper. “[T]he Ninth Circuit has not yet expressly ruled on whether a motion to dismiss based on a

binding arbitration clause is subject to a motion brought under Rule 12(b)(1).” *Munger v. Cascade Steel Rolling Mills, Inc.*, 332 F. Supp. 3d 1280, 1287 (D. Or. 2018). But the Court finds persuasive rulings concluding “that enforcement of an arbitration clause is not jurisdictional and thus not properly the subject of a motion to dismiss under Rule 12(b)(1).” *Id.* (adopting the analysis of the Seventh and Eighth Circuits); *Hernandez v. Pei Wei Asian Diner LLC*, No. 8:17-cv-00679-JLS-JCG, 2017 WL 6888260, at *2 (C.D. Cal. Oct. 2, 2017) (ruling “Rule 12(b)(1) is an improper vehicle by which to attempt to compel claims to arbitration”). *But see GT Sec., Inc. v. Klastech GmbH*, No. 13-cv-3090-JCS, 2014 WL 2928013, at *17 (N.D. Cal. June 27, 2014) (stating Rule 12(b)(1) motion is “procedurally sufficient mechanism” to enforce arbitration provision).

But even if the motion were a proper procedural device to compel arbitration, there is no basis to dismiss merely because of an ongoing arbitration with potentially similar legal or factual questions. The relevant question is whether the claims in this case are encompassed by the parties’ arbitration agreement. *Ashbey v. Archstone Prop. Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th Cir. 2015) (“A party seeking to compel arbitration has the burden ... to show ... that the agreement to arbitrate encompasses the dispute at issue.”). As to that question, the moving defendants do not make a serious attempt to show arbitrability of the claims at issue in this case. As Plaintiffs note, the motion “offers no explanation of how Plaintiffs’ U.S. patent infringement claims are claims ‘arising out of or in connection with’ the 2016 Agreements.” Opp. 17. Thus, the Court cannot conclude that TillCe and TAF have carried their burden. And in any event, it appears that “the earlier Swedish arbitration concerning liability is now over and TillCe has already been found to have breached the agreements.” Opp. 16 (citing Hope Decl. ¶¶ 6-7). In other words, the purportedly overlapping question—whether TillCe and TAF “were allowed to manufacture and sell DRYFT in Sweden,” Reply 11—has been decided against them by the Swedish arbitrator.

*5 Thus, the Court **DENIES** the Rule 12(b)(1) motion.

All Citations

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Exhibit 9

2019 WL 2994202

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

SUGAR FACTORY, LLC, a Nevada
limited liability company, Plaintiff,

v.

GLOSSY POPS, LLC, a New York limited liability
company; Glossy Pops Sourcing and Design,
LLC, a New York limited liability company;
Glossy Pops UK Limited, a United Kingdom
private limited company; Glossy Pops (Asia)
Limited, a Hong Kong private limited company;
Project Group, LLC, a New York limited liability
company; Shaul Shai Harari, an individual;
Kelly Harari, an individual; Philipp Shchekin, an
individual; and Does 1-50 inclusive, Defendants.

Case No. 2:19-cv-01438 DDP (ROAx)

Signed 07/08/2019

Attorneys and Law Firms

Dave Deonarine, Jacob Kevin Poorman, Nicholas S. Kawuka,
Patricia J. Rawlins, Procopio Cory Hargreaves and Savitch
LLP, San Diego, CA, for Plaintiff.

Elyssa J. Romino, Kenneth E. Keller, Vijay Kumar Toke,
Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA,
for Defendants.

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT

DEAN D. PREGERSON, UNITED STATES DISTRICT
JUDGE

*1 Presently before the court is Defendants Glossy Pops
Sourcing and Design, LLC (“Glossy Pops Sourcing”),
Glossy Pops UK Limited (“Glossy Pops UK”), Glossy Pops
Asia Limited (“Glossy Pops Asia”), Project Group, LLC
 (“Project Group”), Shaul Shai Harari, (“Shai Harari”), Kelly
Harari (“Kelly Harari”), and Philipp Shchekin (“Shchekin”)
(collectively Defendants)’s Motions to Dismiss for lack
of personal jurisdiction under Rule 12(b)(2). (Dkts. 32,

35.) Additionally, Defendant Glossy Pops, LLC (“Glossy
Pops”) and the above-named Defendants collectively move
to dismiss Plaintiff’s third and sixth claim for relief for Trade
Dilution under 15 U.S.C. § 1125(c) and California Business
and Professions Code § 14247 for failure to state a claim
under Rule 12(b)(6).

I. BACKGROUND

Sugar Factory, LLC (“Sugar Factory” or “Plaintiff”) is a
Nevada Limited Liability Corporation with a principal place
of business in Las Vegas, Nevada. (Compl. ¶ 4.) Sugar
Factory brings this action against Glossy Pops, Glossy
Pops Sourcing, and Project Group, all New York Limited
Liability Companies, Glossy Pops UK, a United Kingdom
Private Limited Company, Glossy Pops Asia, a Hong
Kong Limited Liability Company, Shai Harari, Kelly Harari
 (“Harari Defendants”), and Philip Shchekin (collectively
 “Defendants”). (*Id.* ¶¶ 5-12.)

The Sugar Factory brand was founded by Steve and
Charissa Davidovici in 2008. (*Id.* ¶ 15.) Sugar Factory is
an “internationally renowned business operating retail stores
and restaurants throughout the United States and in locations
around the world.” (*Id.* ¶ 15.) Sugar Factory deals “primarily
in the sale of confections and other items,” (*id.* ¶ 16),
and alleges that it “enjoys extensive and pervasive media
exposure, particularly on social media.” (*Id.* ¶ 20.) At issue
in this case, is Sugar Factory’s “Couture Pops®.” Couture
Pops® are Sugar Factory’s “premier line of products.” (*Id.*
 ¶ 21.) The Couture Pops® are both a candy and a fashion
accessory and are made of an “intricately bejeweled handle,
a rounded lollipop on a stick that is inserted into the handle,
and a dome-like top that covers the head of the lollipop.” (*Id.*
 ¶¶ 21, 22.) Couture Pops® also “feature a charm (or charms)
that is (or are) affixed to the bottom of the handle.” (*Id.* ¶ 22.)

Sugar Factory owns the registration for the mark “COUTURE
POPS®” and owns trademark registrations for its trade dress
covering the “iconic, bejeweled Couture Pop® handle,” “the
combination of the bejeweled handle and a rounded head,”
and the “combination of the Couture Pop® bejeweled handle,
rounded head, and dome-like cover.” (*Id.* ¶¶ 29-32.) Copies
of Sugar Factory’s registrations are attached to the Complaint.
(Compl., Exhs. C-F.) The registrations show that Sugar
Factory first used Couture Pops® in 2009 and registered the
mark and trade dress in 2011. (*Id.*)

Sugar Factory alleges that in September of 2014, it began
a “business relationship” with the Harari Defendants and

their business, Defendant Project Group. (*Id.* ¶ 36.) Initially, Sugar Factory contracted with the “Harari Defendants to provide products for Sugar Factory restaurants,” and during this time “the Harari Defendants became intimately familiar with Sugar Factory’s Trade Dress.” (*Id.* ¶ 37.) From May 2015 to December 2017, “Sugar Factory engaged the Harari Defendants to manufacture Couture Pops®” using the confidential Trademarked Couture Pop® design. (*Id.* ¶¶ 37-39.) Sugar Factory alleges that the “Harari Defendants worked closely with Sugar Factory, and were privy to the details of Sugar [] Factory’s business.” (*Id.* ¶ 39.) During this time, “Sugar Factory began paying [Defendant] Shchekin to do graphic design work, while he was also employed by the Harari Defendants.” (*Id.*) Sugar Factory alleges that it supplied the Harari Defendants with the “Sugar Factory Trade Dress and Sugar Factory confidential information (including a mold of the Couture Pops® created at Sugary Factory’s Expense).” (*Id.*) Sugar Factory also alleges that Mr. Davidovici communicated to Defendant Shai Harari, in confidence, “his idea for a cosmetic line of Couture Pops®” which were part of Mr. Davidovici’s “overall strategic vision for the future expansion of the Couture Pops® brand.” (*Id.* ¶¶ 40, 41.)

*2 “Sugar Factory eventually terminated its agreement with the Harari Defendants around approximately December 2017,” after the Harari Defendants failed to deliver a large quantity of Couture Pops®. (*Id.* ¶¶ 45-46.) Sugar Factory alleges that the Harari Defendants “refused to return” the Couture Pop® mold. (*Id.* ¶¶ 45-46.) Further, Sugar Factory alleges that “[n]ot more than ten months” later, the Harari Defendants launched Defendant Glossy Pops. (*Id.* ¶ 48.) The business was allegedly “devoted to selling one product— an exact copy of the Couture Pops® called ‘Glossy Pops.’ ” (*Id.*) The Complaint includes a side-by-side comparison of the trademarked Couture Pops® design and the alleged infringing Glossy Pop. (*Id.* ¶ 51.) Sugar Factory alleges that Glossy Pop’s products “infringe Sugar Factory’s trade dress by mimicking, without authorization, the design and configuration, as well as the shape, pattern color, texture, lay-out, size, and overall presentation of” Couture Pops®. (*Id.* ¶ 53.)

Sugar Factory also alleges that the Harari Defendants, who “control the Glossy Pop Defendants,” knowingly manufacture and distribute Glossy Pops which “copy a combination of several elements of the Sugar Factory’s Registered Trade Dress.” (*Id.* ¶¶ 1, 85-86.) Defendants have allegedly “blurred the sharp focus and association in the minds of consumers of Sugar Factory’s famous trade

dress” and consumers will likely “associate Defendants’ lesser quality goods with Sugar Factory.” (*Id.* ¶¶ 58, 88.) Sugar Factory alleges that it “will suffer and is suffering irreparable harm” from Defendants’ continuing infringement. (*Id.* ¶ 92.)

Based on these allegations, Plaintiff raises nine causes of action: (1) False Designation of Origin and Unfair Competition, 15 U.S.C. § 1125(a); (2) Trade Dress Infringement, 15 U.S.C. § 1114; (3) Trade Dress Dilution, 15 U.S.C. § 1125(c); (4) Common Law Trademark Infringement and Unfair Competition; (5) Statutory Unfair Competition, Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (6) Statutory Trade Dress Dilution, Cal. Bus. & Prof. Code § 14247; (7) Breach of Contract (8) Breach of Implied Contract; and (9) Conversion.

Defendants now move to dismiss for lack of personal jurisdiction and move to dismiss the third and sixth causes of action for failure to state a claim. (Dkts. 32, 35.)

II. LEGAL STANDARD

a. Motion to Dismiss under Rule 12(b)(2)

Federal Rule of Civil Procedure 12(b)(2) provides that a court may dismiss a suit for lack of personal jurisdiction. See Fed. R. Civ. P. 12(b)(2). The plaintiff has the burden of establishing that personal jurisdiction exists. See *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). Where, as here, the motion is based on written materials rather than an evidentiary hearing, “the plaintiff need only make a prima facie showing of jurisdictional facts.” *Caruth v. International Psychoanalytical Ass’n*, 59 F.3d 126, 128 (9th Cir. 1997); *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). “Although the plaintiff cannot simply rest on the bare allegations of its complaint, uncontroverted allegations in the complaint must be taken as true.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (internal quotations and citation omitted). Conflicts between parties over statements contained in affidavits must be resolved in the plaintiff’s favor. *Id.*

District courts have the power to exercise personal jurisdiction to the extent authorized by the law of the state in which they sit. Fed. R. Civ. P. 4(k)(1)(A); *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). Because California’s long-arm statute authorizes personal jurisdiction coextensive with the Due Process Clause of the United States Constitution, see Cal. Civ. Code § 410.10, this court may exercise personal jurisdiction over a nonresident defendant when that defendant has “at least ‘minimum contacts’ with the

relevant forum such that the exercise of jurisdiction ‘does not offend traditional notions of fair play and substantial justice.’” *Schwarzenegger*, 374 F.3d at 800-01 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The contacts must be of such a quality and nature that the defendants could reasonably expect to be “haled into court there.” *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

b. Motion to Dismiss under Rule 12(b)(6)

*3 A complaint will survive a motion to dismiss when it contains “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When considering a Rule 12(b)(6) motion, a court must “accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint need not include “detailed factual allegations,” it must offer “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. Conclusory allegations or allegations that are no more than a statement of a legal conclusion “are not entitled to the assumption of truth.” *Id.* at 679. In other words, a pleading that merely offers “labels and conclusions,” a “formulaic recitation of the elements,” or “naked assertions” will not be sufficient to state a claim upon which relief can be granted. *Id.* at 678 (citations and internal quotation marks omitted).

III. DISCUSSION

a. Personal Jurisdiction

Defendants Shai Harari, Kelly Harari, Philipp Shchekin, Glossy Pops Sourcing, Project Group, Glossy Pops UK, and Glossy Pops Asia contend that this court does not have general or specific personal jurisdiction over them. (Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss “MTD,” Dkt. 32-1, at 17-24; Defendant Philipp Shchekin's Memorandum of Points and Authorities in Support of Motion to Dismiss “Shchekin MTD,” Dkt. 35-1, at 6-14.) Plaintiff does not dispute lack of general jurisdiction, rather, Plaintiff argues that this court has specific jurisdiction over all defendants. (See Plaintiff Sugar Factory's Opposition to Defendants' Motion to Dismiss “Opp.,” Dkt. 37, at 16; Plaintiff's Opposition to Defendant Philipp Shchekin's Motion to Dismiss “Opp. Shchekin,” Dkt. 38, at 3).

Courts in the Ninth Circuit apply a three-prong test to establish specific jurisdiction:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger, 374 F.3d at 802. The “plaintiff bears the burden of satisfying the first two prongs of the test.” *Id.* “If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to ‘present a compelling case’ that the exercise of jurisdiction would not be reasonable.” *Id.*

In the context of claims sounding in tort, courts apply the *Calder* “effects” test to determine whether a defendant has purposefully directed activities to the forum state. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002) (citing *Calder v. Jones*, 465 U.S. 783 (1984)). Under the *Calder* effects test, the purposeful direction prong requires plaintiff to allege that a defendant has “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Dole Food*, 303 F.3d at 1111. An intentional act is “an external manifestation of the actor's intent to perform an actual, physical act in the real world.” *Wash. Shoe Co. v. A-Z Sporting Goods, Inc.*, 704 F.3d 668, 674 (9th Cir. 2012). Demonstrating that a defendant has “expressly aimed” its conduct to the forum state requires “something more” than “a foreign act with foreseeable effects in the forum state.” *A-Z Sporting*, 704 F.3d at 675 (citing *Bancroft & Masters, Inc. v. Augusta Na'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)).

iii. Personal Jurisdiction over the Harari Defendants and Shchekin

*4 The Harari Defendants argue that there is no specific jurisdiction over them because their connections to California are “non-existent.” (MTD at 22:1.) Shai and Kelly Harari argue that Plaintiff's allegations are “vague and conclusory”

and that Plaintiff only alleges “on information and belief” that they transact or have transacted business in this district and across the US without any supporting facts. (*Id.*) Defendant Philipp Shchekin also contends that the complaint alleges “no actions by [him] that are aimed or directed at California because there are none.” (Shchekin MTD at 7.) And further, that under the “ ‘fiduciary shield doctrine,’ an individual’s ‘mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit that forum to assert jurisdiction’ over the individual.” (*Id.*)

“Under the fiduciary shield doctrine, a person’s mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit that forum to assert jurisdiction over the person.” *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 520 (9th Cir. 1989). “Ninth Circuit courts have held in the context of specific jurisdiction that the corporate form does not protect an individual acting in his official capacity when either the corporation is the agent or alter ego of the individual, or where the individual controls or directly participates in the alleged activities, i.e., where there is an identity of interests between the corporation and the individual.” *Hendricks v. New Video Channel Am., LLC*, No. 2:14-CV-02989-RSWL-S, 2015 WL 3616983, at *5 (C.D. Cal. June 8, 2015) (internal citations and quotations omitted). In other words, “[defendant’s] contacts with California are not to be judged according to their employer’s activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant’s contacts with the forum State must be assessed individually.” *Calder*, 465 U.S. at 790.

1. Shai Harari and Kelly Harari

As to the first prong of the *Calder* effects test, Plaintiff sufficiently alleges that Shai and Kelly Harari controlled or directly participated in the alleged infringing activities to demonstrate intentional acts by the Harari Defendants. Plaintiff alleges that the Harari Defendants “control the Glossy Pop Defendants,” (Compl. ¶ 1), have “personally, and through the exercise of control of affiliated entities transact[] or [have] transacted business in this district,” (Compl. ¶¶ 10, 11), have “had the authority to control the designing, manufacturing, advertising, promotion, distribution, offering for sale and/or selling of Defendants’ products in the United States, ... including entering into business partnerships with entities distributing Glossy Pops branded products,” (Compl. ¶¶ 55, 56). The Complaint also provides sufficient

factual allegations to support the inference that the Harari Defendants’ controlled and directly participated in the infringing activities. For example, the Harari Defendants became “intimately familiar with Sugar Factory’s Trade Dress” during Project Group’s business relationship with Sugar Factory, the Harari Defendants would “take home free Couture Pops® after meetings,” and the “Harari Defendants wrongfully used the information they had acquired ... to create the Glossy Pops.” (Compl. ¶¶ 1, 37, 39, 49).

As to the second requirement, Defendants’ declarations in support of their motion do not controvert the allegations that they controlled, directed, or participated in the infringing activities in California. Indeed, Shai Harari’s declaration states that he traveled twice to California in connection with the Glossy Pops business, (Shaul Shai Harari Dec., Dkt. 32-2, ¶ 9), and Kelly Harari’s declaration states that she traveled once to a music festival where she “gave away some promotional Glossy Pops products,” (Kelly Harari Dec., Dkt. 32-3, ¶ 4). Because the allegations in the complaint are uncontroverted, the court must accept them as true. See *Schwarzenegger*, 374 F.3d at 800 (“uncontroverted allegations in the complaint must be taken as true”). Further, Defendant Glossy Pops has not disputed this court’s jurisdiction over it. Taken together, the uncontroverted facts are that Defendant Glossy Pops marketed and sold the infringing product in California and in this district, and that Defendants Shai Harari and Kelly Harari controlled, directed, or participated in the infringing activities in California.

*5 Finally, as to the third prong of the *Calder* test, because Defendant Project Group was formerly Plaintiff’s procurement vendor, and the Harari Defendants became intimately familiar with Plaintiff’s business, Plaintiff has shown that Shai and Kelly Harari knew harm was likely to be suffered in California. Thus, Plaintiff has sufficiently alleged that Defendants Shai and Kelly Harari purposefully directed infringing activities to California. See *Dole Food*, 303 F.3d at 1111. The first prong of the three-prong test to establish specific jurisdiction is satisfied.

Next, the court finds that the second prong is also satisfied. Plaintiff’s claims arise out of the Harari Defendants’ forum related activities. “A lawsuit arises out of a defendant’s contacts with the forum state if there is a direct nexus between the claims being asserted and the defendant’s activities in the forum.” *Advanced Skin & Hair, Inc. v. Bancroft*, 858 F. Supp. 2d 1084, 1090 (C.D. Cal. 2012). Plaintiff alleges that Defendants “control[ed] the designing, manufacturing,

advertising, promotion, distribution, offering for sale and/or selling of Defendants' products in the United States, including in this district” (Compl. ¶¶ 55, 56.) Defendants' contacts in California to market and sell the alleged infringing products, including Shai Harari's trips to California to conduct business directly related to Glossy Pops and Kelly Harari's actions at a California music festival, have a direct nexus with Plaintiff's claims of trade dress infringement.

Plaintiff has met its burden of making a prima facie showing of personal jurisdiction over Shai and Kelly Harari. Defendants do not present a compelling case that the exercise of jurisdiction would not be reasonable, therefore, this court finds that it has personal jurisdiction over Shai and Kelly Harari.

The court denies Defendants' motion to dismiss for lack of personal jurisdiction as to Defendants Shai Harari and Kelly Harari.

2. Philipp Shchekin

Plaintiff's allegations specific to Shchekin state: “Defendant Shchekin transacts or has transacted business in this district and throughout the United States,” (Compl. ¶ 12); “Defendant Shchekin assisted [Defendants] in this effort, [to design develop, and manufacture infringing Glossy Pops,] in breach of his Confidentiality Agreement with Sugar Factory,” and “Defendant breached the Confidentiality by using Sugar Factory's confidential information, and by disclosing it to the Glossy Pops Defendants.” (*Id.* ¶¶ 49, 160.) Plaintiff argues that Shchekin participated in the infringing acts by, amongst other things, designing, developing, managing the manufacture, and creating the Glossy Pops' global brand identity. (Opp. Shchekin, at 4.) Defendant argues that the allegations make “no connection between Mr. Shchekin and California and in no way even hint that Mr. Shchekin was a decision maker, principal, agent, or alter ego of the Defendants.” In other words, Defendant argues that he is merely an employee and that none of his actions can be connected to California. Based on the Complaint and the parties' briefing, the court finds that limited jurisdictional discovery as to Defendant Shchekin is appropriate. *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977) (Jurisdictional discovery “should be granted where pertinent facts bearing on the question of jurisdiction are controverted ... or where a more satisfactory showing of the facts is necessary.”).

The court denies Defendant Shchekin's motion to dismiss for lack of personal jurisdiction without prejudice. The court grants limited jurisdictional discovery for a period of ninety days from the date of this order.

ii. New York Defendants and Foreign Defendants

*6 The New York Defendants, Glossy Pops Sourcing and Project Group, and the foreign Defendants, Glossy Pops UK and Glossy Pops Asia, argue that this court does not have personal jurisdiction because they do not transact any business in California. Plaintiff does not dispute that these entities do not do business in California, rather, Plaintiff contends that the New York and foreign entities are alter egos of Shai Harari. (Opp. at 22.) Allegations of alter ego may allow a court to find that specific personal jurisdiction exists. *ADO Fin., AG v. McDonnell Douglas Corp.*, 931 F. Supp. 711, 715 (C.D. Cal. 1996) (“[I]f a corporation is the alter ego of an individual defendant, or one corporation the alter ego of another, the Court may ‘pierce the corporate veil’ jurisdictionally and attribute ‘contacts’ accordingly.”). Here, Plaintiff seeks limited jurisdictional discovery to discover information related to amongst other items, the corporate documents of all corporate entities, equity contributions, and financial information. As with Defendant Shchekin, the court finds that at this early stage, good cause exists to permit jurisdictional discovery and grants Plaintiff's request. *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977).

The court denies Defendants Glossy Pop Sourcing, Project Group, Glossy Pops UK and Glossy Pops Asia's motion to dismiss for lack of personal jurisdiction without prejudice. The court grants limited jurisdictional discovery for a period of ninety days from the date of this order.

b. Trademark Dilution

Defendants next challenge Plaintiff's third and sixth causes of action for federal and state trade dress dilution. (MTD at 7-16.) “Dilution is a cause of action invented and reserved for a select class of marks—those marks with such powerful consumer associations that even non-competing uses can impinge on their value.” *Avery Dennison Corp. v. Sumpton* 189 F.3d 868, 875 (9th Cir. 1999). To state a claim for dilution under both 15 U.S.C. § 1125(c) and California state law, a plaintiff must plead that “(1) the mark is famous

and distinctive; (2) the defendant is making use of the mark in commerce; (3) the defendant's use began after the mark became famous; and (4) the defendant's use of the mark is likely to cause dilution by blurring or dilution by tarnishment.” *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 634 (9th Cir. 2008) (citing 15 U.S.C. § 1125(c)(1)); Cal. Bus. & Prof. Code § 14330). Defendants dispute the sufficiency of the first element, whether the mark is pled to be sufficiently famous.¹

¹ Defendants argue that the first element requires distinctiveness *and* fame, and it appears to the court that Defendants only contend that fame is not sufficiently alleged. See MTD at 16:6-26. Therefore, the court's analysis is limited to whether Plaintiff has sufficiently pled fame.

To determine whether a mark is famous, courts consider the non-exclusive list of factors found in 15 U.S.C. § (c)(2)(A): “(i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties[;] (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark[;] (iii) The extent of actual recognition of the mark[;] and (iv) Whether the mark was registered.” *Jada Toys*, 518 F.3d at 634 (citing 15 U.S.C. § (c)(2)(A)).

Here, as to the first the first factor, duration, extent, and geographic reach of advertising and publicity of the mark, Plaintiff alleges that the company made “extensive efforts to promote Couture Pops®” and therefore they “garnered widespread media attention from the Today Show, Good Morning America, and other media outlets, as well as on social media.” (*Id.* ¶ 24.) Sugar Factory notes that they “invested heavily into the advertising and promotion of its products, including the Couture Pops®.” (*Id.* ¶ 19.) Plaintiff alleges that Couture Pops® have been endorsed by celebrities, and documents this through dozens of photographs in Exhibit B of their complaint. (*Id.* ¶ 23.) Plaintiff also alleges that “public media is replete with images of celebrities with Couture Pops®” and “Sugar Factory makes frequent and substantial use of these images in its advertising at its physical locations, on its website, social media accounts, and other media.” (*Id.* ¶ 23.) Physical locations where Plaintiff advertises the Couture Pops® include “Nevada, New York, Chicago, New Jersey, Washington D.C., Connecticut, Florida, California, and Virginia” as well as several internationally. (*Id.* ¶ 17.) The court finds that at the pleading stage, the

allegations above sufficiently show extensive advertising with expansive geographical reach.

*7 As to the second factor, the amount, volume, and geographic extent of sales of goods, Plaintiff alleges that it “sold significant numbers of Couture Pops® throughout the United States for years.” (*Id.* ¶ 25.) While Plaintiff does not approximate how many Couture Pops® it has sold throughout the years, such specificity is not required at the pleading stage. See, e.g., *Pendleton Woolen Mills, Inc. v. Round Up Ass'n.*, No. 3:11-cv-592-592, 2012 WL 2721856 (D. Or. July 9, 2012) (allegations that Plaintiff has used its mark “for over a century and has promoted and sold a large variety of products and services under the [mark]” was sufficient). Further, Plaintiff alleges that for two years, “from approximately May of 2015 until approximately December 2017 ... Harari Defendants manufactured at least 500,000 Couture Pops®” for Sugar Factory. (*Id.* ¶ 38.) As such, it is plausible that the amount of Couture Pops® sold throughout the United States has been significant throughout the years. Plaintiff has sufficiently pled facts as to the second factor.

The third factor, the extent of actual recognition of the trade dress, is also sufficiently pled. In conjunction with the allegations of marketing above, Plaintiff alleges that the Couture Pop® is “wildly popular among consumers.” (*Id.* ¶ 25.) Plaintiff alleges a “high degree of brand recognition ... among consumers” and “Sugar Factory's trademarks and trade dress have become well-known as indicating Sugar Factory as their source.” (*Id.* ¶ 27.) At the pleading stage, detailed factual allegations *proving* fame, including “approximate figures” on the factors above is not required. See, e.g., *In-N-Out Burgers v. Smashburger IP Holder LLC* No. 8:17-CV-1474-JLS-DFM, 2017 WL 10402610, at *3 (C.D. Cal. Dec. 21, 2017); *Third Est. LLC v. Cornerman Productions LLC*, 2:13-CV-3074-SVW- VBK, 2013 WL 12144110 at *3 (C.D. Cal. Aug. 5, 2013).

Finally, the fourth factor weighs in favor of fame and is also sufficiently pled because the Couture Pop® trade dress is registered. (Compl. ¶¶ 28-32.)

IV. CONCLUSION

The court DENIES Defendants' motion to dismiss as to Shai Harari and Kelly Harari, DENIES Defendant Shchekin's, Glossy Pop Sourcing, Project Group, Glossy Pops UK and Glossy Pops Asia motions to dismiss without prejudice, and DENIES Defendants' motion to dismiss the third and sixth claims for relief. The court further grants the parties

ninety days from the date of this order to conduct limited jurisdictional discovery.

All Citations

Not Reported in Fed. Supp., 2019 WL 2994202

IT IS SO ORDERED.

End of Document

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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
DLA Piper LLP (US)
2000 Avenue of the Stars, Suite 400 North Tower
Los Angeles, CA 90067-4704

A true and correct copy of the foregoing document entitled *Appendix of Unpublished Opinions Cited in Trustee's Motion for Limited Jurisdictional Discovery* will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On June 3, 2021, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Aaron S. Craig	acraig@kslaw.com; lperry@kslaw.com
United States Trustee	ustpreion16.la.ecf@usdoj.gov
Matthew S. Walker	matthew.walker@pillsburylaw.com; renee.evens@pillburylaw.com; docket@pillsburylaw.com
Scott H. Olson	solson@vedderprice.com; scott-olson- 2161@ecf.pacerpro.com; ecfsfdocket@vedderprice.com; nortega@vedderprice.com

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On June 3, 2021, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on June 3, 2021, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

VIA HAND DELIVERY

VIA ELECTRONIC MAIL

(Party, who is being served if different, and email address for each)

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

June 3, 2021

William L. Countryman, Jr.

/s/ William L. Countryman, Jr.

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

Date

Printed Name

Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

<u>Service via Electronic Mail</u>	
<p>Li Qi, Truly Great Global, Ltd., Universal Leader Investment Ltd., and Glove Assets Investment Ltd.</p> <p>Attn.: Michael L. Bernstein Email: michael.bernstein@apks.com</p> <p>Attn.: Charles A. Malloy Email: charles.malloy@apks.com</p> <p>Attn.: Lisa Hill Fenning Email: lisa.fenning@apks.com</p>	<p>Yuntian 3 Leasing Company Designated Activity Company f/k/a Yuntian 3 Leasing Company Limited, Yuntian 4 Leasing Company Designated Activity Company f/k/a Yuntian 4 Leasing Company Limited and Minsheng Business Aviation Limited</p> <p>Attn.: Dan T. Moss Email: dtmoss@jonesday.com</p> <p>Attn.: Joshua M. Mester Email: jmester@jonesday.com</p> <p>Attn.: David S. Torborg Email: dstorborg@jonesday.com</p>
<p>United States Trustee</p> <p>Attn.: Dare Law Email: dare.law@usdoj.gov</p> <p>Attn.: Ron Maroko Email: ron.maroko@usdoj.gov</p> <p>Attn.: Jill Sturtevant Email: jill.sturtevant@usdoj.gov</p> <p>Attn.: Peter C. Anderson Email: peter.c.anderson@usdoj.gov</p>	<p>Export Development Canada Limited</p> <p>Attn.: Scott H. Olson Email: solson@vedderprice.com</p> <p>Attn.: Michael J. Edelman Email: mjedelman@vedderprice.com</p>

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