The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2017 CO 103

Supreme Court Case No. 16SC448
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 15CA1869

Petitioner:

Align Corporation Limited,

v.

Respondents:

Allister Mark Boustred and
Horizon Hobby, Inc. d/b/a Horizon Hobby.

Judgment Affirmed
en banc
November 13, 2017

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CHIEF JUSTICE RICE delivered the Opinion of the Court.

¶1 This case requires us to examine the stream of commerce doctrine and to determine the prerequisites for a state to exercise specific personal jurisdiction over a non-resident defendant.[1] We conclude that *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), sets out the controlling stream of commerce doctrine. This doctrine establishes that a forum state may assert jurisdiction where a plaintiff shows that a defendant placed goods into the stream of commerce with the expectation that the goods will be purchased in the forum state. Applying this doctrine to the case before us, we conclude that the plaintiff made a sufficient showing under this doctrine to withstand a motion to dismiss.

I. Facts and Procedural History

¶2 In 2012, Respondent Allister Mark Boustred, a Colorado resident, purchased a replacement main rotor holder for his radio-controlled helicopter from a retailer in Fort Collins, Colorado. The main rotor holder was allegedly manufactured by Petitioner Align Corporation Limited ("Align"), a Taiwanese corporation, and distributed by Respondent Horizon Hobby,

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[1] We granted certiorari to review the following issue:

Whether the court of appeals erred in finding that petitioner's national marketing, distribution, and other activities are sufficient "minimum contacts" to exercise specific jurisdiction in Colorado under *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

Inc. ("Horizon"), a Delaware-based corporation. Align has no physical presence in the United States, but it contracts with U.S.-based distributors to sell its products to retailers who, in turn, sell them to consumers. At the time of the incident at issue here, Align sold its products throughout the United States through four U.S.-based distributors, including Horizon.

¶3 Boustred installed the main rotor holder to his helicopter and was injured in Colorado when the blades held by the main rotor holder released and struck him in the eye. He filed claims of strict liability and negligence against both Align and Horizon in Colorado.

¶4 Align filed a motion to dismiss Boustred's claims on the ground that Colorado lacked personal jurisdiction over it. The district court denied the motion, concluding that Boustred had made a prima facie showing of personal jurisdiction under Colorado's long-arm statute and the U.S. Constitution. In support of this determination, and resolving any controverted facts in favor of Boustred, the district court found that Boustred's "allegations and supporting documents show that Align injected a substantial number of products into the stream of commerce knowing that those products would reach Colorado" and that Align "took steps to market its products in the U.S. and Colorado." The district court also noted that Boustred's allegations were "supported by documents that purportedly show that Align provided marketing materials to its distributors, attended trade shows in the U.S. where Align actively marketed its products, and established channels through which consumers could receive assistance

with their Align products." The district court further determined that jurisdiction over Align was reasonable both because Align would suffer no greater burden in defending this suit in Colorado than it would in any other U.S. forum and because Colorado has a substantial interest in protecting its residents from faulty products.

¶5 Align then asked the district court to certify the personal jurisdiction question for interlocutory appeal under C.A.R. 4.2, and the district court granted the motion. A division of the court of appeals accepted jurisdiction and affirmed the district court's ruling. *Boustred v. Align Corp. Ltd.*, 2016 COA 67, ¶¶ 1-2, ___ P.3d ___. Align argued that the district court's ruling ignored *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). However, the division determined that the plurality opinion of *J. McIntyre* was not binding on Colorado courts and that instead Justice Breyer's narrower concurrence controlled. *See Boustred*, ¶¶ 23-24. Interpreting that concurrence and the concurrence in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), the division held that the U.S. Supreme Court's decision in *World-Wide Volkswagen* remains the prevailing law articulating the stream of commerce doctrine. *Boustred*, ¶ 23. Applying that doctrine, the division agreed with the district court that Boustred had made a sufficient prima facie showing of Colorado's specific personal jurisdiction over Align. *See id.* at ¶¶ 24, 27.

¶6 Align appealed, and we granted certiorari.

II. Analysis

¶7 This case presents the first opportunity for this court to address the impact of two U.S. Supreme Court plurality opinions – *Asahi* and *J. McIntyre* – on Colorado's stream of commerce jurisprudence. We begin by reviewing the law of personal jurisdiction generally and its application in stream of commerce cases specifically. We consider the three primary U.S. Supreme Court cases exploring the stream of commerce doctrine – *World-Wide Volkswagen*, *Asahi*, and *J. McIntyre* – and conclude that *World-Wide Volkswagen* remains the controlling precedent. Next, we apply the stream of commerce doctrine to the case before us and conclude that Boustred made a sufficient showing under this doctrine to withstand a motion to dismiss.

A. Standard of Review

¶8 "Whether a court may exercise personal jurisdiction over a defendant is a question of law, which we review de novo." *Griffith v. SSC Pueblo Belmont Operating Co. LLC*, 2016 CO 60M, ¶ 9, 381 P.3d 308, 312, *as modified on denial of reh'g* (Oct. 17, 2016). Similarly, when a court addresses a motion to dismiss based solely on documentary evidence, we review de novo whether a plaintiff established a prima facie case of personal jurisdiction necessary to defeat a motion to dismiss. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1192 (Colo. 2005). In doing so, we review the documentary evidence de novo. *Id.* at 1195.

B. Personal Jurisdiction

¶9 For a Colorado court to exercise jurisdiction over a non-resident defendant, the court must comply with Colorado's long-arm statute and constitutional due process. *Id.* at 1193. Colorado's long-arm statute confers "the maximum jurisdiction permitted by the due process clauses of the United States and Colorado constitutions." *Id.* (citing *Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1270 (Colo. 2002)); *see also* U.S. Const. amend. XIV; Colo. Const. art. II, § 25; § 13-1-124, C.R.S. (2017). Therefore, we engage in a constitutional due process analysis to determine whether a Colorado court may exercise jurisdiction over a non-resident defendant. *Magill v. Ford Motor Co.*, 2016 CO 57, ¶ 14, 379 P.3d 1033, 1037, *reh'g denied* (Oct. 3, 2016).

¶10 The due process clauses of the United States and Colorado constitutions operate to limit a state's exercise of personal jurisdiction over non-resident defendants. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984); *Keefe*, 40 P.3d at 1270. Specifically, due process requires that a non-resident corporate defendant have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). "The quantity and nature of the minimum contacts required depends on whether the plaintiff alleges specific or general jurisdiction." *Archangel*, 123 P.3d at 1194. Here, because no

party asserts that Align is subject to general jurisdiction, we discuss only specific jurisdiction.

¶11 "Specific jurisdiction is properly exercised where the injuries triggering litigation arise out of and are related to 'activities that are significant and purposefully directed by the defendant at residents of the forum.'" *Id.* (quoting *Keefe*, 40 P.3d at 1271). To determine whether the defendant has sufficient minimum contacts, we consider "(1) whether the defendant purposefully availed himself of the privilege of conducting business in the forum state, and (2), whether the litigation 'arises out of' the defendant's forum-related contacts." *Id.*

¶12 The "purposeful availment" requirement precludes personal jurisdiction resulting from random, fortuitous, or attenuated contacts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). The "arising out of" requirement mandates that "the actions of the defendant giving rise to the litigation must have created a 'substantial connection' with the forum state." *Archangel*, 123 P.3d at 1194 (quoting *Keefe*, 40 P.3d at 1271).

¶13 Once it is established that a defendant has the requisite minimum contacts, "these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Keefe*, 40 P.3d at 1271 (quoting *Burger King*, 471 U.S. at 476). These "fairness factors" include the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and

effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and/or the shared interest of the several states in furthering fundamental substantive social policies. *World-Wide Volkswagen*, 444 U.S. at 292.

C. Personal Jurisdiction in Stream of Commerce Cases

¶14 The U.S. Supreme Court first addressed the minimum contacts analysis in the context of non-resident manufacturers in *World-Wide Volkswagen*. There, the Court held that a "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 444 U.S. at 297-98. According to the Court, the stream of commerce referred to the formal or informal distribution networks that a manufacturer uses to "serve directly or indirectly, the market for its product in other States." *Id.* at 297. The Court further explained that if a sale of a product from a manufacturer:

> [A]rises from the efforts of the manufacturer to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject [the manufacturer] to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

Id.

¶15 But the mere possibility that a product might end up in a given state cannot constitute the purposeful availment necessary to support personal jurisdiction because "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Id.* at 295. Instead:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. at 297.

¶16 Since *World-Wide Volkswagen*, two decisions of the Court – *Asahi* and *J. McIntyre* – have addressed the stream of commerce doctrine. However, both were split decisions, and each provided internally competing analytical frameworks for determining the scope of the minimum contacts analysis in stream of commerce cases.

¶17 In *Asahi*, a Japanese parts manufacturer, Asahi Metal Industry Co., Ltd. ("Asahi"), sold a tire valve to a Japanese motorcycle manufacturer. 480 U.S. at 106. The motorcycle manufacturer sold its motorcycles in the United States, where a purchaser suffered injuries after his rear tire exploded. *Id.* at 105-07. The purchaser brought suit in California against the motorcycle manufacturer, who sought indemnification from Asahi. *Id.* It was disputed whether Asahi was aware

that the vehicles with its valves were being sold in the United States. *Id.* at 107. Asahi alleged that it did not have sufficient minimum contacts with California to sustain the state's assertion of personal jurisdiction. *Id.* at 106.

¶18 The *Asahi* four-justice plurality, in an opinion penned by Justice O'Connor, noted two approaches that courts had taken in applying *World-Wide Volkswagen*: (1) the stream of commerce test, which "allow[s] an exercise of personal jurisdiction to be based on no more than the defendant's act of placing the product in the stream of commerce" with "awareness that its [product] would be sold in" the state; and (2) the stream of commerce *plus* test, which "require[s] the action of the defendant to be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce." *Id.* at 110-11 (plurality opinion).

¶19 The plurality endorsed the stream of commerce plus test: "The 'substantial connection[]' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." *Id.* at 112 (emphasis omitted). Justice O'Connor went on to opine that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* (citations omitted). Such purposefully directed conduct may take several forms, including "designing the product for the market in the forum State, advertising in the forum State, establishing channels

for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.* According to the plurality, however, "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* Thus, the plurality concluded that California courts did not have jurisdiction to hear the case, even if Asahi knew that its products would end up in California, because Asahi did not have offices; advertise; "create, control, or employ" the distribution system for its products in California; or design its product in anticipation of sales in California. *Id.* at 112-13.

¶20 Justice Brennan, joined by three other justices, concurred in the judgment but disagreed with adopting the stream of commerce plus test. *Id.* at 116 (Brennan, J., concurring in part and concurring in the judgment). Justice Brennan "s[aw] no need for" showing "additional conduct" directed toward the forum. *Id.* at 117. Instead, he concluded that *World-Wide Volkswagen*'s articulation of the stream of commerce doctrine should not be altered. *Id.* at 120-21. According to Justice Brennan, "The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale." *Id.* at 117. Further, "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a

surprise." *Id.* Justice Brennan explained that a defendant who places goods in the stream of commerce purposefully avails itself of a forum state because it "benefits economically from the retail sale of the final product . . . and indirectly benefits from the [s]tate's laws that regulate and facilitate commercial activity."[2] *Id.*

¶21 The Court again addressed this issue in a split decision in *J. McIntyre*. There, the plaintiff was injured in New Jersey while using a metal-shearing machine that was manufactured in England by J. McIntyre Machinery Ltd. ("J. McIntyre"). 564 U.S. at 878 (plurality opinion). A U.S.-based distributor sold J. McIntyre's machines in the United States. *Id.* J. McIntyre officials attended conventions with the distributor in the United States to advertise its machinery, albeit not in the forum state of New Jersey, and no more than four of J. McIntyre's machines ended up in New Jersey. *Id.* However, J. McIntyre held patents on the technology in both the United States and Europe, and the distributor advertised in accordance with J. McIntyre's guidance when possible. *Id.* at 879. The plaintiff filed a products-liability suit in New Jersey, and J. McIntyre sought to dismiss the suit for want of personal jurisdiction. *Id.* at 878.

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[2] Ultimately, Justice Brennan concluded that while there were sufficient minimum contacts to support jurisdiction, an exercise of personal jurisdiction in the case before him "would not comport with 'fair play and substantial justice.' " *Asahi*, 480 U.S. at 116 (Brennan, J., concurring in part and concurring in the judgment) (citing *Int'l Shoe*, 326 U.S. at 320).

¶22 In a four-justice plurality, Justice Kennedy endorsed the stream of commerce plus test for products-liability cases and sought to clarify the "imprecision arising from *Asahi*." *Id.* at 881. Specifically, Justice Kennedy wrote that the principal inquiry "is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must 'purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Id.* at 882 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (alterations in original). The plurality then concluded that "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State." *Id.* Applying this rule to the facts of the case, the plurality determined that because the plaintiff had not established "conduct purposefully directed at New Jersey," New Jersey courts did not have jurisdiction over J. McIntyre. *Id.* at 886. Instead the plurality concluded that although the "facts may reveal an intent to serve the U.S. market . . . they do not show that J. McIntyre purposefully availed itself of the New Jersey market." *Id.*

¶23 Justice Breyer, joined by Justice Alito, concurred in the judgment but declined to adopt the plurality's stream of commerce plus test. *Id.* at 887-88. (Breyer, J., concurring in the judgment). Instead, Justice Breyer concluded that although commercial circumstances

may have changed since *Asahi*, such changes were not at issue in the case, meaning the case was "an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules." *Id.* at 890. Instead, the outcome of the case "require[d] no more than adhering to [the Supreme Court's] precedents." *Id.* And under such precedents, a single isolated sale was an insufficient basis for asserting jurisdiction. *Id.* In other words, as a panel on the Federal Circuit explained, the crux of Justice Breyer's concurrence is that "the Supreme Court's framework applying the stream-of-commerce theory – including the conflicting articulations of that theory in *Asahi* – had not changed" and the "law remains the same after *[J.] McIntyre*." *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012).

¶24 This court has not yet examined the impact of *Asahi* and *J. McIntyre* on Colorado's stream of commerce jurisprudence for the purposes of establishing specific jurisdiction. Both cases were plurality opinions providing no clear holding. When the U.S. Supreme Court issues such an opinion, the holding "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Therefore, we must evaluate which analysis reached its conclusion on the narrowest grounds in both *Asahi* and *J. McIntyre*.

¶25 Turning first to *Asahi*, Justice O'Connor's plurality opinion altered *World-Wide Volkswagen*'s stream of

commerce test when it embraced the stream of commerce plus test, which added the requirement that a plaintiff must prove additional conduct of a defendant beyond placing a product into the stream of commerce in order to establish sufficient minimum contacts with the forum state. *See Asahi*, 480 U.S. at 112 (plurality opinion). Justice Brennan's concurrence, however, relied on *World-Wide Volkswagen*'s prior stream of commerce test and rejected the additional requirement of Justice O'Connor's plurality opinion. *Id.* at 120-21 (Brennan, J., concurring in part and concurring in the judgment). Thus, because Justice Brennan's concurrence did not alter the existing jurisdictional framework, it represents the narrowest grounds for the judgment.

¶26 Next, turning to *J. McIntyre*, Justice Kennedy's plurality opinion adopted the stream of commerce plus test first articulated by Justice O'Connor in *Asahi*. 564 U.S. at 879 (plurality opinion). As discussed above, this test deviated from *World-Wide Volkswagen*. Justice Breyer's concurrence, on the other hand, rejected this test and explicitly based its conclusion only on existing U.S. Supreme Court precedent. *Id.* at 890 (Breyer, J., concurring in the judgment). Thus, similar to Justice Brennan's concurrence in *Asahi*, it did not depart from the Supreme Court's jurisdictional framework and represents the narrowest grounds for the judgment.

¶27 Thus, in determining the contours of Colorado's stream of commerce jurisprudence for the purposes of establishing specific jurisdiction, we are bound by the Court's majority opinion in *World-Wide Volkswagen*, the reasoning in Justice Brennan's concurrence in

Asahi, and the reasoning in Justice Breyer's concurrence in *J. McIntyre*. As noted above, *World-Wide Volkswagen* clarifies that the requisite minimum contacts may be established by showing that the defendant placed goods into the stream of commerce with the expectation that the goods will be purchased in the forum state. 444 U.S. at 297-98. Both Justice Brennan's concurrence in *Asahi* and Justice Breyer's concurrence in *J. McIntyre* followed and did not alter this approach. Therefore, in stream of commerce cases, *World-Wide Volkswagen* and its stream of commerce test continues to bind this court in determining whether a non-resident defendant has sufficient minimum contacts with Colorado for a court to assert personal jurisdiction.[3]

¶28 Having determined the proper test for specific personal jurisdiction over a non-resident defendant in stream of commerce cases, we now turn to this case and consider whether the district court properly denied Align's motion to dismiss.

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[3] The U.S. Supreme Court's recent decision in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), does not change our analysis. There, the Court held that the non-resident plaintiffs failed to establish personal jurisdiction over the defendant in California, even though the defendant clearly did business in California, because there was no connection between the plaintiffs' claims and the defendant's contacts in California. *Id.* at 1781. Specifically, the non-resident plaintiffs did not buy the product at issue in California, nor were they injured by the product in the state. *Id.* at 1778. In this case, in contrast, the plaintiff lives in Colorado, bought the product in Colorado, and was injured in Colorado. Hence, the issue implicated in *Bristol-Myers Squibb* is not implicated here.

D. Personal Jurisdiction over Align

¶29 Align is appealing the districts court's denial of its motion to dismiss for lack of jurisdiction. Because the district court considered only documentary evidence when ruling on the motion to dismiss, Boustred only had to make a prima facie showing of personal jurisdiction to defeat the motion. *Goettman v. N. Fork Valley Rest.*, 176 P.3d 60, 66 (Colo. 2007). A division of the court of appeals affirmed the district court's ruling that Boustred made a sufficient prima facie showing of Colorado's personal specific jurisdiction over Align. *Boustred*, ¶ 27. We agree.

¶30 A plaintiff makes a prima facie showing when he or she raises a reasonable inference, whether in the complaint or in other documentary evidence, that the court has jurisdiction over the defendant. *Goettman*, 176 P.3d at 66. "Documentary evidence consists of the allegations in the complaint, as well as affidavits and any other evidence submitted by the parties." *Id.* "[T]he allegations in the complaint must be accepted as true to the extent that they are not contradicted by the defendant's competent evidence, and where the parties' competent evidence presents conflicting facts, these discrepancies must be resolved in the plaintiff's favor." *Archangel*, 123 P.3d at 1192. Thus, where a plaintiff has alleged sufficient facts to support a reasonable inference that a defendant engaged in conduct meeting the threshold personal jurisdiction standard, the plaintiff has made a sufficient showing to withstand a motion to dismiss. *See World-Wide Volkswagen*, 444 U.S. at 297-98; *Goettman*, 176 P.3d at 66.

¶31 To make a prima facie showing under *World-Wide Volkswagen*, a plaintiff must allege sufficient facts to support a reasonable inference that a defendant placed goods into the stream of commerce with the expectation that the products will be purchased in the forum state. Here, the documentary evidence establishes that Boustred made such a showing.

¶32 In his complaint and supporting documentary evidence (obtained through limited discovery), Boustred alleged the following:

- Boustred is a resident of Colorado;
- He was injured in Colorado when the blades of his helicopter held by the main rotor holder released and struck him in the eye;
- Align manufactured the subject radio-controlled helicopter and subject allegedly defective main rotor holder in Taiwan where the company is based;
- Align sells its products via an international distributorship network that includes four distributors in the United States, one of which is Horizon;
- The rotor holder at issue here was distributed by Horizon and purchased in Colorado;
- Horizon has sold over $350,000 worth of Align products in Colorado;
- Align placed no limitations on where Horizon could distribute products in the United States;

- Align's products are sold throughout the United States, including Colorado;
- All four distributors have distributed Align's products in Colorado;
- All four distributors are promoted and advertised by Align, and in particular on Align's website;
- Align provided marketing materials to all of its U.S. distributors;
- Align attended trade shows in the United States where it actively marketed its products; and
- Align established channels through which consumers could receive assistance with their Align products.[4]

¶33 This documentary evidence reasonably supports an inference that the presence of the allegedly defective main rotor holder in Colorado did not result from "random, fortuitous, or attenuated" contacts with Colorado and instead was placed into the stream of commerce with the expectation that the products will be purchased in Colorado. *See World-Wide Volkswagen*, 444 U.S. at 297-98; *Archangel*, 123 P.3d at 1197. Specifically, Align placed its products into the stream of commerce by using its four distributors. Through its distributors, Align's products were distributed and

[4] Align submitted affidavits and other materials to counter Boustred's allegations, but we resolve controverted facts in favor of the plaintiff for the purposes of a motion to dismiss. *Archangel*, 123 P.3d at 1197.

sold across the United States, including Colorado, and Align placed no limitation on where Horizon could distribute. And specifically, over $350,000 worth of Align products were sold in Colorado. Given this, Align should have reasonably anticipated being haled into court in Colorado. *See World-Wide Volkswagen*, 444 U.S. at 297. Therefore, under *World-Wide Volkswagen*, Boustred has made a sufficient showing that Align had sufficient minimum contacts with Colorado. Additionally, because Boustred's injuries arose out of Align's contacts with Colorado, Boustred established a prima facie showing of specific jurisdiction over Align.[5]

¶34 We reject Align's argument that selling its products through a distributor somehow turns the distribution and sale of its products into the unilateral activity of a third party that cannot properly be considered in the minimum contacts analysis. Adopting such a position would render foreign manufacturers immune from suit in the United States so long as they sell their products in the United States through separately incorporated U.S.-based distributors. Such a result would be inequitable, as it would allow foreign manufacturers to

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[5] We note, however, that this showing only allows Boustred to survive Align's motion to dismiss. As the case proceeds, Boustred may have to meet a higher burden to definitively establish that Colorado may exercise jurisdiction over Align. *See Goettman*, 176 P.3d at 66 n.3 ("Although a prima facie showing of personal jurisdiction [over a non-resident defendant] is sufficient to overcome a motion to dismiss for lack of jurisdiction when the court rules on the motion on documentary evidence alone, the plaintiff must establish personal jurisdiction by a preponderance of the evidence if the defendant raises the challenge again prior to the close of trial.").

receive the substantial economic benefit from sales to the U.S. market without incurring resulting liabilities and costs. Other courts have come to the same conclusion. *See, e.g.*, *Cunningham v. Subaru of Am., Inc.*, 631 F. Supp. 132, 136 (D. Kan. 1986) ("While Fuji greatly profits from the sale of the Subaru Brat vehicles in the United States, it claims that it is immune from all jurisdictional claims against it in the United States. The Court views this as a company which seeks to reap all of the benefits without incurring the resulting liabilities and costs."); *Book v. Doublestar Dongfeng Tyre Co.*, 860 N.W.2d 576, 596 (Iowa 2015) (finding jurisdiction proper over a Chinese manufacturer that sold thousands of tires in Iowa through a distributor, and noting that the foreign defendant "at least indirectly served the [state's] market through [its distributor] 'with the expectation that [its tires] would be purchased by consumers in the forum State'" (quoting *World-Wide Volkswagen*, 444 U.S. at 298) (alterations in original)).

¶35 Moreover, we conclude that the assertion of personal jurisdiction over Align would be reasonable such that it would not violate "traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S at 316 (quoting *Milliken*, 311 U.S. at 463). As noted above, under *World-Wide Volkswagen*, a state court's exercise of personal jurisdiction over a non-resident defendant is reasonable if the burden on the defendant is outweighed by the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution

of controversies, and/or the shared interest of the several states in furthering fundamental substantive social policies. 444 U.S. at 292; *see also Burger King*, 471 U.S. at 476-77. Any burden on Align is simply the burden on any foreign manufacturer under similar circumstances. While this burden is real, it is precisely the type of burden reasonably imposed upon a defendant who has purposefully availed itself of the privileges of doing business in this state. Additionally, as a foreign defendant whose product is alleged to have injured a U.S. citizen, Align will suffer no greater burden in defending this suit in Colorado than it would in any other State. Moreover, Colorado has a clear interest in protecting its residents from defective products, and Boustred, a Colorado resident, has a great interest in obtaining effective relief in a Colorado court. Therefore, an assertion of personal jurisdiction over Align is reasonable.

III. Conclusion

¶36 For the foregoing reasons, we affirm the judgment of the division of the court of appeals.

COLORADO COURT OF APPEALS **2016COA67**

Court of Appeals No. 15CA1869 Larimer County District Court No. 13CV31464 Honorable C. Michelle Brinegar, Judge	DATE FILED: April 21, 2016 CASE NUMBER: 2015CA1869

Allister Mark Boustred,

Plaintiff-Appellee,

and

Horizon Hobby, Inc.,

Defendant-Appellee,

v.

Align Corporation Limited,

Defendant-Appellant.

ORDER AFFIRMED

Division A
Opinion by JUDGE FOX
Taubman and Hawthorne, JJ., concur

Announced April 21, 2016

Keating Wagner Polidori Free, P.C., Michael O'B. Keating, Deirdre E. Ostrowski, Melissa A. Hailey, Denver, Colorado, for Plaintiff-Appellee.

Hall & Evans, LLC, Kenneth H. Lyman, Ryan L. Winter, Conor P. Boyle, Denver, Colorado, for Defendant-Appellee.

The Waltz Law Firm, Richard A. Waltz, Christopher R. Reeves, Denver, Colorado, for Defendant-Appellant.

¶ 1 In this interlocutory appeal, defendant Align Corporation Limited (Align) appeals the trial court's order denying its C.R.C.P. 12(b)(2) motion to dismiss for lack of personal jurisdiction. We accepted Align's C.A.R. 4.2 petition to address the effect of the United States Supreme Court's plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. ___, 131 S. Ct. 2780 (2011), on Colorado's personal jurisdiction framework under *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187 (Colo. 2005). The Colorado Supreme Court has yet to directly address, after the *J. McIntyre* decision, the proper test to be applied when evaluating specific jurisdiction based on a stream of commerce theory.

¶ 2 We conclude that Justice Breyer's concurrence in the judgment in *J. McIntyre* – relying on the stream of commerce theory articulated in the United States Supreme Court's majority opinion in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) – constitutes the Court's holding and guides our evaluation of the specific jurisdiction question posed here. We further conclude that *Archangel* remains precedential authority in the wake of *J. McIntyre*, and consequently, we affirm the trial court's denial of Align's motion to dismiss.

I. Background

¶ 3 Align is a Taiwanese company that manufactures and sells remote control helicopters and related parts.

Align has no physical corporate presence in the United States, but it engages distributors in the United States who sell Align's products to retailers who, in turn, sell the products to consumers. When the incident at issue here arose, Align had engaged four distributors in the United States: defendant Horizon Hobby, Inc. (Horizon); Assurance Services, Inc.; Heli Wholesaler, Inc.; and GrandRC, LLC.

¶ 4 Plaintiff, Allister Mark Boustred, purchased a remote control T-Rex 450SA ARF model helicopter manufactured by Align. Boustred later purchased a main rotor holder, the part that attaches the main rotor to the helicopter, from Hobby Town Unlimited, Inc., a retail store in Fort Collins, Colorado. Align manufactured the main rotor holder, and Horizon – which has an exclusive distribution agreement with Align for the T-Rex 450SA ARF model helicopters – distributed it. Boustred alleges that the main rotor holder broke during testing and caused the main rotor to release and strike him, resulting in the loss of an eye.

¶ 5 Boustred filed strict product liability and negligence claims against Align and Horizon, among others, in Larimer County alleging that the main rotor holder allegedly malfunctioned. After Boustred served Align in Taiwan, Align asked the trial court to quash service and dismiss all claims against it for lack of personal jurisdiction under C.R.C.P. 12(b)(2). The trial court found that, under *Archangel*, it could assert specific jurisdiction over Align, and denied the motion.

¶ 6 Later, the trial court granted Align's motion for certification pursuant to C.A.R. 4.2. We accepted the appeal.

II. Personal Jurisdiction

A. Standard of Review

¶ 7 Whether a trial court has jurisdiction is a question of law that we review de novo. *Giduck v. Niblett*, 2014 COA 86, ¶ 11. We also review de novo a trial court's ruling on a motion to dismiss. *Id.*

B. Legal Principles of Specific Jurisdiction

¶ 8 A plaintiff seeking to invoke a Colorado court's jurisdiction over a nonresident must comply with the requirements of Colorado's long-arm statute and constitutional due process. *Archangel*, 123 P.3d at 1193. The General Assembly intended Colorado's long-arm statute to confer the maximum jurisdiction allowable by the Due Process Clauses of the United States and Colorado Constitutions. *Id.*; *see* § 13-1-124, C.R.S. 2015. Because our constitutional due process analysis necessarily addresses the requirements of Colorado's long-arm statute, we need not separately address them. *Archangel*, 123 P.3d at 1193.

¶ 9 To meet the requirements of due process, a defendant must have sufficient minimum contacts with the forum state so that the defendant may reasonably foresee being answerable in court there. *Id.* at 1194; *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316

(1945). The quantity and nature of the required minimum contacts depend on whether the plaintiff alleges general or specific jurisdiction. *Archangel*, 123 P.3d at 1194. Here, because Boustred's complaint only alleges that the trial court had specific jurisdiction over Align, we need not address general jurisdiction.

¶ 10 Specific jurisdiction exists when the alleged injuries resulting in litigation arise out of and are related to a defendant's activities that are significant and purposefully directed at residents of the forum state. *Id.*; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). As a result, evaluating sufficient minimum contacts for specific jurisdiction involves a two-part test, assessing (1) whether the defendant purposefully availed itself of the privilege of conducting business in the forum state, and (2) whether the litigation arises out of the defendant's forum-related contacts. *Archangel*, 123 P.3d at 1194. The first prong – purposeful availment – precludes personal jurisdiction resulting from random, fortuitous, or attenuated contacts. *Id.* The second prong – the "arising out of" requirement – tests the relationship between the defendant's actions giving rise to the litigation and the forum state. *Id.*

¶ 11 Once a plaintiff establishes that a defendant has the requisite minimum contacts with the forum state, the next inquiry involves a determination of whether a court's exercise of personal jurisdiction over the defendant is reasonable and comports with notions of fair play and substantial justice. *Id.* at 1194-95; *see also Int'l Shoe*, 326 U.S. at 316. According to Align, merely placing a product into the stream of commerce, without

more, is insufficient for a Colorado court to assert personal jurisdiction. Boustred and Horizon disagree.

C. Stream of Commerce Jurisprudence

¶ 12 In *World-Wide Volkswagen*, the Supreme Court held that a "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 444 U.S. at 297-98. The Court noted that when the sale of a product results from efforts of a manufacturer or distributor to serve, directly or indirectly, the market for its product in other states, it is not unreasonable to subject that manufacturer or distributor to suit in one of those states when the product causes injury there. *Id.* at 297.

¶ 13 Since *World-Wide Volkswagen* established the stream of commerce theory, United States Supreme Court justices have provided competing versions of the scope of the theory in plurality decisions. For example, in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 109 (1987) (plurality opinion), Justice O'Connor, writing for the plurality, dismissed a broad interpretation of *World-Wide Volkswagen*'s stream of commerce theory. *Asahi*, 480 U.S. at 110-11. Justice O'Connor's plurality opinion adopted a stricter interpretation of the stream of commerce theory:

> The placement of a product into the stream of commerce, without more, is not an act of the

> defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State. . . . But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Id. at 112.

¶ 14 Justice Brennan, joined by three other justices, concurred in the Court's judgment but refused to accept Justice O'Connor's more stringent interpretation of the stream of commerce theory. *Id.* at 116. Justice Brennan's concurrence opined that the stream of commerce does not refer to an unpredictable current which sweeps a product further than reasonably foreseeable, but instead, it consists of a "regular and anticipated flow of products from manufacture to distribution to retail sale." *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment). Additionally, a defendant who places goods into the stream of commerce "benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Id.* (Brennan, J., concurring in part and concurring in the judgment). Justice Brennan noted that *World-Wide Volkswagen* carefully differentiated between a good reaching a forum due to a distribution chain versus the unilateral act of a consumer and concluded that *World-Wide Volkswagen*'s

articulation of the stream of commerce theory should not be altered. *Id.* at 120-21 (Brennan, J., concurring in part and concurring in the judgment).

¶ 15 Most recently, a similarly divided court re-evaluated the stream of commerce approach to specific personal jurisdiction in *J. McIntyre*, 564 U.S. at ___, 131 S. Ct. at 2785 (plurality opinion). Justice Kennedy, writing for the plurality, rejected Justice Brennan's concurrence in *Asahi* and adopted Justice O'Connor's articulation of the more stringent "stream of commerce plus" approach. *Id.* at ___, 131 S. Ct. at 2789-90. Justice Breyer concurred in the Court's judgment, but he disagreed with the plurality's reliance on Justice O'Connor's stream of commerce plus theory, instead focusing his analysis on the original stream of commerce approach articulated in *World-Wide Volkswagen*. *Id.* at ___, 131 S. Ct. at 2792-93.

D. Implementation of the Stream of Commerce Theory

¶ 16 For years after the Supreme Court's decision in *Asahi*, and later in *J. McIntyre*, courts have split on the proper approach to the stream of commerce theory. *See Etchieson v. Cent. Purchasing, LLC*, 232 P.3d 301, 306 (Colo. App. 2010).

¶ 17 When "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest

grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). We therefore begin by evaluating the recent United States Supreme Court plurality opinions and concurrences to determine which analysis reached its conclusion and became the judgment of the Court on the narrowest grounds. *See id.*

¶ 18 In *J. McIntyre*, Justice Kennedy's plurality reached beyond *World-Wide Volkswagen* – the reigning majority opinion on the stream of commerce theory – and adopted the stream of commerce plus theory articulated by Justice O'Connor's plurality opinion in *Asahi*. *J. McIntyre*, 564 U.S. at ___, 131 S. Ct. at 2790. But Justice Breyer concurred only in the judgment, focusing his analysis on the accepted theory from *World-Wide Volkswagen* and cases interpreting it, that a single, isolated sale of a product in a state – even when the defendant has placed his goods into the stream of commerce – is not a sufficient basis to assert personal jurisdiction over a defendant.[1] *Id.* at 2792 (Breyer, J., concurring in the judgment). Evaluating these two opinions, we conclude that Justice Breyer's concurring opinion reached its conclusion on the narrowest grounds, and we therefore follow its guidance. *See Marks*, 430 U.S. at 193.

¶ 19 In *Asahi*, Justice O'Connor's plurality opinion abandoned *World-Wide Volkswagen*'s simpler stream

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[1] We note also that a total of five justices (one joining Justice Breyer's concurrence and three dissenting) rejected the plurality's approach in *J. McIntyre.*

of commerce approach and added the requirement that a plaintiff must prove additional conduct of a defendant, beyond placing a product into the stream of commerce, to establish sufficient minimum contacts with the forum state. *Asahi*, 480 U.S. at 112. However, Justice Brennan's concurrence relied on *World-Wide Volkswagen*'s stream of commerce analysis, rather than adopting additional requirements. *Id.* at 120 (Brennan, J., concurring in part and concurring in the judgment). Because Justice Brennan's concurrence reached its conclusion based solely on existing case law and without articulating a more stringent approach, its analysis is the narrowest, and we follow its guidance. *See Marks*, 430 U.S. at 193.

¶ 20 Justice Breyer's and Justice Brennan's respective concurrences, along with the analysis from *World-Wide Volkswagen*, reveal that a plaintiff may establish a defendant's sufficient minimum contacts by showing that the defendant placed goods into the stream of commerce with the expectation that the regular flow or regular course of sales could lead the product to the forum state. *See J. McIntyre*, 564 U.S. at ___, 131 S. Ct. at 2792 (Breyer, J., concurring in the judgment); *Asahi*, 480 U.S. at 120-21 (Brennan, J., concurring in part and concurring in the judgment); *World-Wide Volkswagen*, 444 U.S. at 297-98.

¶ 21 Even so, Align argues that adopting the analyses of the concurrences in *J. McIntyre* and *Asahi* would run afoul of our supreme court's acceptance of other United States Supreme Court plurality opinions and our state supreme court's articulated duty to follow the United

States Supreme Court's existing precedent concerning federal constitutional law. *People v. Schaufele*, 2014 CO 43, ¶ 33. However, *Schaufele* declined to follow Chief Justice Roberts's opinion in *Missouri v. McNeely*, 569 U.S. ___, ___, 133 S. Ct. 1552, 1569 (2013) (Roberts, C.J., concurring in part and dissenting in part), because the analysis proposed a new rule in addition to existing exceptions to the Fourth Amendment's warrant requirement. *Schaufele*, ¶ 32. As only two other Justices supported the new rule, it lacks majority status. *McNeely*, 569 U.S. ___, ___, 133 S. Ct. at 1569. This treatment of the fragmented *McNeely* decision is directly in line with the Supreme Court's guidance on how we should approach similar plurality decisions – that the opinion reaching its conclusion on the narrowest grounds constitutes the Court's holding. *See Marks*, 430 U.S. at 193. Our analysis here follows this approach.

¶ 22 For the same reasons, we are not persuaded by Align's reliance on *In re Adoption of C.A.*, 137 P.3d 318, 325 (Colo. 2006), for the proposition that a plurality opinion from the United States Supreme Court binds state courts. In *C.A.*, it is not clear whether the precedential value of *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion), on state court decisions was raised as an issue, and thus its treatment of *Troxel* is not instructive here. Instead, we rely on the United States Supreme Court's direction on how to evaluate the precedential value of its plurality decisions. *See Marks*, 430 U.S. at 193.

¶ 23 And we are not alone in honoring the plurality opinions in *J. McIntyre* and *Asahi* only on the narrowest rationale contained in the concurrences. *See, e.g.*, *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 178 (5th Cir. 2013) (concluding Justice Breyer's concurring opinion in *McIntyre* is controlling); *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012) (same); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992) (following the stream of commerce theory articulated in *World-Wide Volkswagen* instead of Justice O'Connor's stream of commerce plus approach); *Hatton v. Chrysler Canada, Inc.*, 937 F. Supp. 2d 1356, 1366 (M.D. Fla. 2013) (stating that *J. McIntyre* was a fragmented decision, and Justice Breyer's concurrence is the "holding"; therefore, the stream of commerce theory from *World-Wide Volkswagen* applies); *Sproul v. Rob & Charlies, Inc.*, 304 P.3d 18, 33 (N.M. Ct. App. 2012) (same); *State v. Atl. Richfield Co.*, 2016 VT 22, ¶¶ 19-21, ___ A.3d ___, ___ (Vt. 2016) (same).[2]

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[2] Some courts have adopted the stream of commerce plus approach. *See, e.g.*, *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992). However, most courts have avoided choosing one approach over the other and have decided cases based on facts in the record. *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 205 (3d Cir. 1998). Boustred and Horizon orally argued that the trial court applied Justice O'Connor's stream of commerce plus analysis when it asserted personal jurisdiction over Align and that the "something more" was satisfied by Align providing its United States distributors with marketing materials, attending trade shows, and establishing channels whereby customers could receive assistance from Align with their Align products. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987)

¶ 24 We conclude that Justice Breyer's concurrence in *J. McIntyre* and Justice Brennan's concurrence in *Asahi* are controlling and together hold that *World-Wide Volkswagen* remains the prevailing decision articulating the stream of commerce theory. Because *Archangel* was decided many years after *World-Wide Volkswagen* and based its personal jurisdiction framework on the same line of cases that *World-Wide Volkswagen* utilized, the Supreme Court's decision in *J. McIntyre* did not alter *Archangel*'s precedential value on specific jurisdiction in Colorado.

III. Personal Jurisdiction Over Align

¶ 25 When, as here, a court rules "on a motion to dismiss for lack of jurisdiction on documentary evidence alone, the plaintiff need only make a prima facie showing of personal jurisdiction to defeat the motion." *Goettman v. N. Fork Valley Rest.*, 176 P.3d 60, 66 (Colo. 2007). Documentary evidence consists of the allegations in the complaint along with any affidavits and any other evidence submitted by the parties. *Id.* The court must accept as true all allegations in the complaint to the extent they are not contradicted by the defendant's competent evidence. *Id.* Where the parties'

(plurality opinion). Because we conclude that the proper analysis is the stream of commerce test articulated in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and not Justice O'Connor's "stream of commerce plus test," we need not address this issue.

competent evidence presents conflicting facts, the discrepancies must be resolved in the plaintiff's favor. *Id.*

¶ 26 Here, the trial court found:

- Align provided marketing materials to its distributors, attended trade shows in the United States where Align actively marketed its products, and established channels through which consumers could receive assistance with their Align products.
- Align injected a substantial number of products into the stream of commerce, knowing that those products would reach Colorado.
- Align took steps to market its products in the United States and Colorado.

¶ 27 We agree with the trial court's ruling that Boustred made a sufficient prima facie showing of Colorado's personal specific jurisdiction over Align. The documentary evidence, viewed in the light most favorable to Boustred, establishes that Align purposefully availed itself of the privilege of conducting business in Colorado by placing its products into the stream of commerce – regularly using four distributors based in the United States and covering the entire country without restriction[3] – with the expectation that they would be sold to consumers in Colorado via the regular flow of commerce. *See World-Wide Volkswagen*, 444 U.S. at 298. Align's presence at United States trade

[3] During oral argument, Horizon indicated that one or more distributors were authorized by Align to sell its products throughout the United States, Mexico, and Canada.

shows and distribution of specifically designed marketing materials in the United States establish a prima facie showing that the presence of the allegedly defective main rotor holder in Colorado did not result from random, fortuitous, or attenuated contacts with Colorado. *See Archangel*, 123 P.3d at 1197. As well, Boustred's injury allegedly arose directly from Align's contacts with Colorado – the malfunction of the remote control helicopter and its replacement parts. *Id.* at 1194. Boustred has thus made a prima facie showing that Align maintains sufficient minimum contacts with Colorado so that it could reasonably foresee being subject to suit here. *Id.*

¶ 28 Similarly, we affirm the trial court's ruling that asserting personal jurisdiction over Align is reasonable and does not offend traditional notions of fair play and substantial justice. *See id.* at 1194-95; *see also* § 13-1-124(1)(a)-(b) (stating that long-arm jurisdiction is established by transacting business within the state or committing a tortious act within the state, personally or through an agent).[4] Although for Align, a Taiwanese manufacturer, to litigate in Colorado may be burdensome, the burden is outweighed by Align's election to avail itself of the benefits and protections of Colorado's laws which regulate and facilitate commercial activity. *See Asahi*, 480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment). And, Colorado's interest in protecting its residents from

[4] Colorado's long-arm jurisdiction is satisfied if constitutional due process is present. *See Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1193 (Colo. 2005).

defective products and Boustred's interest in obtaining relief lead us to conclude that an assertion of personal jurisdiction over Align is reasonable.

IV. Conclusion

¶ 29 The order is affirmed.

JUDGE TAUBMAN and JUDGE HAWTHORNE concur.

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 18, 2015 CASE NUMBER: 2015CA1869
Larimer County 2013CV31464	
Plaintiff-Appellee: Allister Mark Boustred, **v.** **Defendant-Appellee:** Horizon Hobby Inc d/b/a Horizon Hobby, **Defendant-Appellant:** Align Corporation Limited.	Court of Appeals Case Number: 2015CA1869
ORDER OF THE COURT	

Upon consideration of the petition to appeal an interlocutory order of the trial court pursuant to section 13-4-102.1, C.R.S. 2015, and C.A.R. 4.2 filed by Align Corporation Limited, the Court DEFERS ruling on whether it will accept the petition and ORDERS that the following additional submissions be filed within 21-days of the date of this order:

(1) All parties address the following question: given that the Supreme Court's decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011), is a plurality decision, what effect does it have upon the Colorado Supreme Court's

decision in *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187 (Colo. 2005), and what is the extent of this court's authority in reconciling both opinions. Defendant-petitioner Align's supplemental brief shall not exceed 5,000 words.

(2) Plaintiff-respondent Boustred and defendant-respondent Horizon Hobby, Inc., must file a response to both the petition to accept an interlocutory appeal and the merits of the petition. Such responses must address the question above and shall not exceed 9,500 words.

BY THE COURT
Taubman, J.
Hawthorne, J.
Fox, J.

DISTRICT COURT, LARIMER (FT. COLLINS) COUNTY, COLORADO Court Address: 201 Laporte Avenue, Suite 100, Fort Collins, CO 80521	DATE FILED: October 22, 2015 1:55 PM CASE NUMBER: 2013CV 31464
Plaintiff(s) ALLISTER MARK BOUSTRED v. **Defendant(s)** ALIGN CORPORATION LIMITED et al.	**Δ COURT USE ONLY Δ**
	Case Number: 2013CV 31464 Division: 4A Courtroom:
Order on Rule 4.2 Certification Motion	

The motion/proposed order attached hereto: SO ORDERED.

Issue Date: 10/22/2015

/s/ C. Michelle Brinegar

CARROLL MICHELLE BRINEGAR
District Court Judge

Attachment to Order – 2013CV31464

DISTRICT COURT, LARIMER COUNTY, COLORADO Court Address: 201 LaPorte Avenue, Suite100 Fort Collins, CO 80521	
Plaintiff(s): Allister Mark Boustred v. **Defendant(s):** Align Corporation Limited; Horizon Hobby, Inc. d/b/a Horizon Hobby; Hobby Town Unlimited, Inc. d/b/a Hobbytown USA; and Melaron, Inc.	▲ COURT USE ONLY ▲
Attorneys for Defendant Align Corporation Limited Name: Richard A. Waltz, # 11567 Christopher R. Reeves, # 44329 THE WALTZ LAW FIRM Address: 1660 Lincoln Street, Suite 2510 Denver, Colorado 80264-3103 Phone No.: (303)830-8800 Fax No.: (303)830-8850	Case Number: 2013CV 031464

E-Mail: dwaltz@waltzlaw.com creeves@waltzlaw.com	

PROPOSED ORDER

Defendant Align Corporation Ltd's Motion having timely come before this Court, and this Court having reviewed the briefing relate to said motion, this Court finds that its Order dated August 6, 2015 as to the ability of this Court to exercise jurisdiction over Defendant Align Corporation presents questions that are of such importance that their immediate appellate review will promote the orderly disposition of this litigation and also presents an unresolved question of law. This Court further finds that Defendant's Motion is not interposed to delay this litigation.

Therefore, this Court certifies for immediate review the following questions to the Court of Appeals:

QUESTIONS FOR CERTIFICATION

1) In light of the U.S. Supreme Court decision of *J. McIntyre Machinery, Ltd. v. Nicastro,* 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011) (plurality), may the State of Colorado exercise specific jurisdiction over a foreign international manufacturer under the "stream of commerce" theory where the manufacturer has no operations in the State and has never delivered product directly to the State?

2) May jurisdiction be exercised over a non-resident defendant manufacturer where the defendant

never directly delivered any product to the State of Colorado and never knew of purchases of its product, through independent vendors, until after the incident forming the basis of the lawsuit?

3) May advertising alone, either in magazines or on the internet, form the basis of exercising specific jurisdiction where no product was actually delivered/sold/contracted for by the defendant in the State of Colorado?

4) May post-incident/injury contacts with the State of Colorado be used to form the basis of exercising jurisdiction over a non-resident defendant?

FURTHERMORE, this litigation shall be stayed at the District Court level until the Court of Appeals issues its decision as to whether it will take Defendant Align Corporation's appeal.

DATED: _____

BY THE COURT:

_____
C. Michelle Brinegar
District Court Judge

DISTRICT COURT, LARIMER COUNTY, STATE OF COLORADO 201 LA PORTE AVENUE, SUITE 100 FORT COLLINS, CO 80521-2761 PHONE: (970) 494-3500	DATE FILED: August 6, 2015 3:13 PM CASE NUMBER: 2013CV 31464
Plaintiff(s): ALLISTER MARK BOUSTRED **v.** **Defendant(s): ALIGN CORPORATION LIMITED; HORIZON HOBBY, INC. d/b/a HORIZON HOBBY; HOBBY TOWN UNLIMITED, INC. d/b/a HOBBYTOWN USA; and MELARON, INC.**	⏃ FOR COURT USE _____ Case No. 13CV031464 Courtroom 4A

ORDER REGARDING ALIGN CORPORATION LIMITED'S MOTION TO QUASH SERVICE AND TO DISMISS FOR LACK OF PERSONAL JURISDICTION PURSUANT TO C.R.C.P. 12(b)

THIS CAUSE is before the Court on Defendant Align Corporation Limited's ("Align") Motion to Quash Service and to Dismiss for Lack of Personal Jurisdiction Pursuant to C.R.C.P. 12(b), filed on March 9, 2015. The Court has reviewed the Motion, Response, and Reply, and finds and orders as follows:

FACTUAL BACKGROUND

This action arose out of an injury suffered by Plaintiff Allister Mark Boustred ("Mr. Boustred") on January 7, 2012. Mr. Boustred was injured after replacing several parts in his radio controlled helicopter, a T-Rex 450 SA ARF ("the Helicopter"), with purportedly defective parts. Following the replacement of the parts, a replaced part allegedly failed while Mr. Boustred was operating the Helicopter, causing a rotor blade to enter Mr. Boustred's eye. The Helicopter that allegedly caused Mr. Boustred's injuries was manufactured by Align, a Taiwanese manufacturer, and distributed exclusively in the United States of America ("U.S.") by Horizon Hobby, Inc. ("Horizon").

Mr. Boustred initiated the instant suit on December 20, 2013, and has since amended his initial complaint on multiple occasions. Subsequent to filing the instant action, Mr. Boustred attempted to serve Align in two ways. First, Mr. Boustred served copies of the Second Amended Complaint ("the Complaint") on Weng "Andy" Yu ("Mr. Yu") and Jeff Fassbinder ("Mr. Fassbinder"). At the time of service, both Mr. Yu and Mr. Fassbinder were affiliated with Assurance Service Inc. ("Assurance"), one of Align's North American distributors. Second, Mr. Boustred served Align in Taiwan on October 16, 2014, pursuant to international law.

Align now challenges Mr. Boustred's service, asserting that the service of the Complaint on Mr. Yu and Mr. Fassbinder was procedurally improper as neither Mr. Yu nor Mr. Fassbinder are agents of Align. Align

also argues that the Court does not have personal jurisdiction over Align.

LEGAL STANDARD

The court, in addressing a C.R.C.P. 12(b)(2) motion, has discretion to rely solely on documentary evidence submitted to the court, or to conduct an evidentiary hearing in making its ruling. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1192 (Colo. 2005). If the court relies on documentary evidence, the plaintiff need only make a *prima facie* showing that personal jurisdiction is proper to defeat a motion challenging that issue. *Id.* A party makes a *prima facie* showing when it "raises a reasonable inference that the court has jurisdiction over the defendant." *Id.* In ruling on a C.R.C.P. 12(b)(2) motion based on documentary evidence, the court accepts the uncontroverted assertions contained in a plaintiff's complaint as true, and resolves otherwise disputed issues in the plaintiff's favor. *Id.*

LACK OF PERSONAL JURISDICTION UNDER C.R.C.P. 12(b)(2)

Align asserts that the Court does not have personal jurisdiction over it because Align does not have a sufficient number of minimum contacts with Colorado. Mr. Boustred disagrees, and argues that Align has a sufficient number of contacts with Colorado to grant the Court specific personal jurisdiction over Align.

As a general rule, a plaintiff must show that a Colorado court's assertion of personal jurisdiction over a non-resident defendant complies with Colorado's long-arm statute, and does not violate the due process requirements of the U.S. Constitution. *Archangel*, 123 P.3d at 1193.

Colorado's Long-Arm Statute

A Colorado court's assertion of personal jurisdiction over a non-resident defendant must comply with Colorado's long-arm statute. *Etchieson v. Cent. Purchasing, LLC*, 232 P.3d 301, 304-05 (Colo. App. 2010). Colorado's long-arm statute, C.R.S. 13-1-124, grants personal jurisdiction over a non-resident defendant under several circumstances, including when a defendant commits any tortious act within Colorado. But, the tortious act and the injury do not need to both occur in Colorado to satisfy the long-arm statute; rather, the statute is satisfied if either occurs in Colorado. *Classic Auto Sales, Inc. v. Schocket*, 832 P.2d 233, 235-36 (Colo. 1992). Here, Mr. Boustred alleges that Align committed multiple torts, including negligence and strict liability. Moreover, Mr. Boustred asserts that the main helicopter rotor holder manufactured by Align, which purportedly suffered both design and manufacturing defects, injured him in Colorado when it failed.

Accordingly, the Court finds that Mr. Boustred has made a *prima facie* showing that Align committed a tort in Colorado.

Due Process Requirements

"Due process prohibits the exercise of personal jurisdiction over a non[-]resident defendant unless the defendant has 'certain minimum contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Goettman v. N. Fork Valley Rest.*, 176 P.3d 60, 67 (Colo. 2007) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The number and nature of minimum contacts required for personal jurisdiction over a non-resident defendant depends on whether the plaintiff alleges specific or general jurisdiction. *Archangel*, 123 P.3d at 1194.

When a plaintiff alleges specific personal jurisdiction, a court's jurisdiction is limited to claims that "arise out of and relate to" the defendant's contacts with the forum state. *Etchieson*, 232 P.3d at 305. A determination of specific personal jurisdiction is effectively a two-part inquiry, evaluating whether: (1) "the defendant 'purposefully directed' his activities at the residents of the forum state[ ] and (2) whether the litigation 'arises out of' the defendant's forum-related conduct." *Goettman*, 176 P.3d at 69. The requirement that a defendant purposefully take an action aimed at the forum state is designed to prohibit an assertion of personal jurisdiction based on random or fortuitous acts, or the unilateral acts of third parties. *Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1271 (Colo. 2002).

Despite the clear requirement that a party "purposefully avail" itself of the forum state, a question remains as to what constitutes purposeful availment in the context of non-resident manufacturers. For example, in *World-Wide Volkswagen Corp. v. Woodson*, the U.S. Supreme Court held, in a plurality opinion, that an assertion of personal jurisdiction over a party does not violate due process when that party injects "products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 444 U.S. 286, 297-98 (1980). But, in *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, the U.S. Supreme Court held, again in a plurality opinion, that the mere placement of a product into the stream of commerce, despite a defendant's knowledge that it will reach the forum state, is insufficient to assert personal jurisdiction over a non-resident defendant. 480 U.S. 102, 112 (1987). Rather, the defendant must indicate some intent or purpose to serve the forum state in order for personal jurisdiction to be proper. *Id.* Nevertheless, a single act can provide the basis for an assertion of specific personal jurisdiction. *Keefe*, 40 P.3d at 1271. In fact, the Colorado Supreme Court has held that the commission of a tort in the forum state can alone be sufficient to create specific personal jurisdiction over a non-resident defendant because of the nexus between the forum state and the defendant. *Goettman*, 176 P.3d at 69.

Here, Align argues that the Court does not have specific personal jurisdiction over it because Align does not conduct any advertising, marketing, or product

promotions within Colorado, does not have any offices in Colorado, pays no taxes in Colorado, does not send employees to Colorado for business or marketing purposes, and does not have any corporate presence in the U.S. Align also submits affidavits stating that Align does not have an ownership interest in any of the three distributors that distribute Align products in the U.S.

Notwithstanding the evidence submitted by Align, Mr. Boustred's Second Amended Complaint alleges that Align is in the business of designing, manufacturing, distributing, and marketing remote controlled helicopters and components throughout the U.S. and Colorado. Mr. Boustred further alleges that Align, Horizon, and/or Grand RC distributed the faulty main rotor holder purchased by Mr. Boustred to HobbyTown USA and Melaron in Fort Collins, CO. Mr. Boustred's allegations are supported by documents that purportedly show that Align provided marketing materials to its distributors, attended trade shows in the U.S. where Align actively marketed its products, and established channels through which consumers could receive assistance with their Align products.

The Court has elected to rule on the instant motion based solely on the documentary evidence submitted to the Court. As such, Mr. Boustred need only make a *prima facie* showing that the Court has specific personal jurisdiction over Align. Mr. Boustred's allegations and supporting documents show that Align injected a substantial number of products into the stream of commerce knowing that those products would reach Colorado. Additionally, Align allegedly

took steps to market its products in the U.S. and Colorado. While Align submitted affidavits and other materials to counter Mr. Boustred's allegations, the Court must resolve any controverted facts in favor of Mr. Boustred. Thus, for the purposes of the instant motion, the Court finds that Align purposefully availed itself of Colorado, and that Mr. Boustred's injuries arose out of Align's contacts with Colorado. *See Etchieson v. Cent. Purchasing, LLC*, 232 P.3d 301 (Colo. App. 2010).

Accordingly, Mr. Boustred has made a *prima facie* showing that an assertion of specific personal jurisdiction over Align does not offend the due process requirements of the U.S. Constitution.

Reasonableness

Following a determination that a defendant has a sufficient number of minimum contacts with the forum state to assert personal jurisdiction, the court must assess whether the assertion of personal jurisdiction over the defendant would be reasonable, such that it would not violate "traditional notions of fair play and substantial justice." *Goettman*, 176 P.3d at 70-71. In determining reasonableness, the court may consider several factors, including: "the burden on the defendant, the forum state's interest in resolving the controversy, and the plaintiffs interest in attaining effective and convenient relief." *Archangel*, 123 P.3d at 1195.

Here, it is uncontroverted that Align sends its products to a limited number of distributors in the U.S., and that none of those distributors is located in

Colorado. It is also uncontroverted that Align is a Taiwanese manufacturer. As such, Align will suffer a burden by having to defend this suit in a foreign forum. But, as Align has elected to avail itself of other forums in the U.S., Align will suffer no greater burden in defending this suit than it would in any other forum. Additionally, Colorado has a substantial interest in protecting its residents from faulty products, such as the alleged faulty main rotor holder in the instant case. Finally, Mr. Boustred has a great interest in attaining effective relief in a Colorado court. While he may be able to obtain relief in another forum, it is undisputed that a Larimer County court is the most convenient forum for Mr. Boustred.

Accordingly, the Court finds that an assertion of personal jurisdiction over Align is reasonable.

INSUFFICIENT SERVICE

Align next argues that Mr. Boustred's service of Align should be quashed as it did not comply with C.R.C.P. 4(e). Align's argument focuses on the alleged procedural imperfections of Mr. Boustred's service of the pertinent documents on Mr. Yu and Mr. Fassbinder in California. Specifically, Align asserts that neither Mr. Yu nor Mr. Fassbinder are agents qualified to accept service on behalf of Align. While Align's arguments may be legally correct, the Court does not find it necessary to address them at this time as Mr. Boustred has submitted documentation to show that Align was served in Taiwan in accordance with international

law. Moreover, Align, in the instant motion, states that it assumes the service conducted in Taiwan complies with the requirements of the Hague Service Convention and the laws of Taiwan.

Accordingly, the Court does not find it necessary to rule on this issue.

CONCLUSION

For the above cited reasons, the Court denies Align Corporation Limited's Motion to Quash Service and to Dismiss for Lack of Personal Jurisdiction Pursuant to C.R.C.P. 12(b).

DATED: August 6, 2015

BY THE COURT:

/s/ C. Michelle Brinegar
C. Michelle Brinegar
District Court Judge