

No. 18-

IN THE
Supreme Court of the United States

DHL SUPPLY CHAIN (NETHERLANDS) B.V.,

Petitioner,

v.

DEX SYSTEMS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ANTHONY C. WHITE
Counsel of Record
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
(614) 469-3200
tony.white@thompsonhine.com

JOHN A. CONKLE
CONKLE, KREMER & ENGEL, PLC
3130 Wilshire Boulevard, Suite 500
Santa Monica, CA 90403
(310) 998-9100

August 3, 2018

Counsel for Petitioner

282122



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

After *Walden v. Fiore*, 571 U.S. 277 (2014), may a United States court exercise personal jurisdiction over a foreign defendant where that defendant's only "virtual presence" in the forum was through electronic access to a server that the plaintiff chose to host in the forum?

PARTIES TO THE PROCEEDING

The following were parties to the proceeding in the Ninth Circuit:

1. DHL Supply Chain (Netherlands) B.V., petitioner on review, was a defendant/appellee below.
2. Deutsche Post International B.V. (“DPI”), the parent company of DHL Supply Chain (Netherlands) B.V., was a defendant/appellee below. The Ninth Circuit affirmed the district court’s dismissal of DPI for lack of personal jurisdiction, and DPI is not a party to this petition.
3. Deutsche Post AG, the parent company of DPI, was a defendant/appellee below, and is similarly situated to DPI.
4. DEX Systems, Inc., respondent on review, was plaintiff/appellant below.

CORPORATE DISCLOSURE STATEMENT

Petitioner DHL Supply Chain (Netherlands) B.V. is a wholly-owned subsidiary of Deutsche Post International B.V., which in turn is an indirectly wholly-owned subsidiary of Deutsche Post AG. Deutsche Post AG, in turn, is a publicly traded entity, more than 10% of stock in which is owned by KfW Bankengruppe.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS.....	iv
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
INTRODUCTION.....	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION.....	10
CONCLUSION	20

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 13, 2018	1a
APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DATED JUNE 24, 2016.....	7a
APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MAY 7, 2018	39a
APPENDIX D — AMENDED COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA	41
APPENDIX E — DECLARATION OF GERARD VAN SEUMEREN, DATED FEBRUARY 11, 2016	55a
APPENDIX F — DECLARATION OF JAMES CODE, DATED FEBRUARY 8, 2016. . .	60a
APPENDIX G — DECLARATION OF MAARTJE VOS, DATED AUGUST 20, 2015 . . .	62a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>AgJunction LLC v. Agrian Inc.</i> , No. 14-CV-2069-DDC-KGS, 2014 U.S. Dist. LEXIS 93301 (D. Kan. Jul. 9, 2014).....	16
<i>Amberson Holdings LLC v.</i> <i>Westside Story Newspaper, Inc.</i> , 110 F. Supp. 2d 332 (D.N.J. 2000).....	14
<i>Asahi Metal Indus. v. Super. Ct. of Cal.</i> , 480 U.S. 102 (1987).....	17, 19
<i>Axiom Foods, Inc. v. Acerchem Int’l, Inc.</i> , 874 F.3d 1064 (9th Cir. 2017).....	10, 13
<i>Bancroft & Masters, Inc. v. Augusta Nat’l Inc.</i> , 223 F.3d 1082 (9th Cir. 2000)	11
<i>Boschetto v. Hansing</i> , 539 F.3d 1011 (9th Cir. 2008).....	19
<i>Browne v. McCain</i> , 612 F. Supp. 2d 1118 (C.D. Cal. 2009).....	14
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985).....	10, 13, 17
<i>Calder v. Jones</i> , 465 U.S. 783 (1984).....	<i>passim</i>

Cited Authorities

	<i>Page</i>
<i>Dole Food Co. v. Watts</i> , 303 F.3d 1104 (9th Cir. 2002)	11
<i>Fiore v. Walden</i> , 688 F.3d 558 (9th Cir. 2012)	12
<i>Lake v. Lake</i> , 817 F.2d 1416 (9th Cir. 1987)	10
<i>MacDermid, Inc. v. Deiter</i> , 702 F.3d 725 (2d Cir. 2012)	14, 15
<i>NexGen HBM, Inc. v. ListReports, Inc.</i> , No. 16-cv-3143 (SRN/FLN), 2017 U.S. Dist. LEXIS 147033 40 (D. Minn. Sept. 12, 2017)	15
<i>Walden v. Fiore</i> , 571 U.S. 277 (2014)	<i>passim</i>
<i>Washington Shoe Co. v. A-Z Sporting Goods Inc.</i> , 704 F.3d 668 (9th Cir. 2012)	7, 11, 12
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980)	17
 STATUTES AND OTHER AUTHORITIES	
28 U.S.C. § 1254(1)	1
Google, <i>Data Center Locations</i>	16

Cited Authorities

	<i>Page</i>
Google, <i>Frequently Asked Questions</i>	16
Microsoft, <i>Where is your data located?</i>	17
Robin J. Effron, <i>Trade Secrets, Extraterritoriality, and Jurisdiction</i> , 51 Wake Forest L. Rev. 765 (2016)	15

Petitioner DHL Supply Chain (Netherlands) B.V. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–6a) is unpublished, but is available at 2018 U.S. App. LEXIS 6231 and 2018 WL 1280917. The district court’s order (App. 7a–38a) is unpublished.

JURISDICTION

The court of appeals entered its judgment on March 13, 2018, and the petition for rehearing *en banc* was denied on May 7, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall ... be deprived of life, liberty,
or property, without due process of law[.]

INTRODUCTION

This Court’s decision in *Walden v. Fiore*, 571 U.S. 277 (2014) stymied an impermissibly expansive view of jurisdiction arising from the Ninth Circuit, whereby a nonresident defendant’s contacts with a forum resident

plaintiff were conflated with contacts with the forum itself. But in *Walden*, this Court expressly declined to resolve the question of whether and when a foreign defendant who allegedly commits an intentional tort by way of the Internet may be subjected to jurisdiction in the plaintiff's home forum on a theory of virtual "presence." As this Court expressly noted at the time, *see Walden*, 571 U.S. at 290 n.9, the facts of *Walden* did not necessitate clarification of that inquiry, nor did they present an opportunity to do so. This case does both.

The court of appeals here has, in the space of a few pages, articulated a slate of specific rules in the context of electronic contacts and virtual presence that are both inconsistent with the reasoning in *Walden*, and far-reaching in potential effect. Petitioner DHL Supply Chain (Netherlands) B.V. ("DSC Netherlands"), from outside the United States, engaged in a series of allegedly unauthorized electronic contacts with Respondent DEX Systems, Inc. ("DEX"): specifically, interacting with DEX's software, which was hosted on DEX's server, in order to facilitate printing in the Netherlands. First, in the Ninth Circuit's view, even this sort of limited-scope electronic contact—which both originated, and was aimed at causing effects, outside of the United States—is tantamount to virtual presence in the forum, and sufficient to support personal jurisdiction over a foreign national. Second, the Ninth Circuit has elected to treat a foreign defendant's mere knowledge of the plaintiff's physical location in the forum as equivalent to agreeing to that location – in effect, attributing a plaintiff's forum contacts to a defendant, so long as the defendant is aware of that location before electronically contacting the plaintiff.

The decision below, and others like it, would effectively authorize an end-run around *Walden* in the context of Internet contacts, merely because this Court declined to resolve that particular issue. Doing so would have drastic effects on international commercial relationships, an area in which this Court has previously advised particular caution. This Court should grant certiorari to clarify the matter.

STATEMENT OF THE CASE

1. DSC Netherlands is a Dutch logistics company with no presence in the United States, and whose conduct at issue in this case occurred entirely in the Netherlands. *See* App. 8a–15a. On February 6, 2012, in order to facilitate printing services for a customer in Venlo, Netherlands, DSC Netherlands entered into a software licensing agreement with DEX Systems, Inc. (“DEX”), a software company located in California. App. 8a–9a. Under the parties’ arrangement, DEX’s server received electronic requests from DSC Netherlands’ users, generated print data using DEX’s software, and transmitted that data to DSC Netherlands’ printers in the Netherlands by way of the Internet and a site-to-site VPN.¹ App. 9a–14a. DEX’s software server was located in California, by DEX’s unilateral choice. *See id.* All print requests from DSC

1. A site-to-site VPN is a virtual “tunnel” that facilitates secure transmission of private data through the public Internet. Creating one is a routine matter, and is within the capabilities of most home Internet routers. The sender transmits data into the tunnel, and it is received at the other end. *See generally* App. 55a–57a at ¶¶ 6-10. The VPNs used here were one-way, delivering data from DEX to DSC Netherlands, with firewalls preventing any data from traveling in the opposite direction. App. 9a–14a; App. 57a at ¶ 12.

Netherlands' users originated outside the United States, and all printing occurred in the Netherlands. App. 4a.

The mechanics of the transmission from DEX to DSC Netherlands changed slightly over time. Initially, the process was as follows (the "Primary VPN"):

- 1) DEX sent print data from its internal network to its end of the VPN tunnel, which was hosted in Europe by a third party;
- 2) DEX transmitted the data through the front end of the VPN tunnel;
- 3) DSC Netherlands received the data at the back end of the VPN tunnel, which was hosted by a data center in Prague, Czech Republic; and
- 4) DSC Netherlands then relayed the data through a private network to the printers in the Netherlands.

App. 9a–13a; App. 55a–59a. Under this arrangement, as the parties had originally anticipated, both ends of the VPN tunnel would be located outside of the United States. Subsequently, however, DEX experienced difficulty with the first step of the process, *i.e.*, transmitting data to its front end of the VPN tunnel in Europe. In or around February of 2013, the parties adjusted by creating a second VPN (the "Secondary VPN") with a new transmission process:

- 1) Instead of being located in Europe, DEX's front end of the Secondary VPN tunnel was located in California.

- 2) DSC Netherlands was forced to have its back end of the Secondary VPN tunnel hosted in a data center owned by a third party in Phoenix, Arizona. The data center was later acquired by another third party and relocated to Ashburn, Virginia.
- 3) From the back end of the Secondary VPN tunnel in Arizona and later in Virginia, the print data was sent on through a private network to the printers in the Netherlands.

App. 9a–14a; App. 56a–57a at ¶¶ 8-9. The Primary VPN remained available after the Secondary VPN was created, with DEX holding exclusive control over which VPN was actually used to transmit the data. App. 9a–14a; App. 56a–57a at ¶¶ 8-11. No part of this realignment was done at DSC Netherlands’ request, but rather because of DEX’s technical issues.

No part of either VPN system allowed DSC Netherlands to access DEX’s internal network, which remained blocked by firewalls, nor did either system allow DSC Netherlands remote access or control over any terminal in the United States. App. 58a–59a at ¶¶ 16-20. At no time did DSC Netherlands physically enter the forum, including by way of any agent. *See* App. 9a–14a; App. 60a–63a. It owned none of the hardware or real property used to create the Secondary VPN, nor did it employ any personnel at the Arizona or Virginia data centers where its end of the Secondary VPN was located. App. 13a–14a; App. 60a–61a. It has no permanent presence in the forum of any kind. *See* App. 8a–14a; App. 60a–63a. Its only contact was with DEX, by electronic messaging, the entire purpose of

which was to facilitate printing in the Netherlands for a Dutch customer. *See id.* The arrangement continued for approximately three years.

2. DEX filed suit on May 20, 2015, alleging that the parties' software licensing agreement expired on April 1, 2015, but that DSC Netherlands continued to send print requests interacting with DEX's software until May 19, 2015. *See* DC2-3. Its claims include copyright infringement, unfair competition under California law, and a demand for equitable accounting. App. 42a–54a. DEX also included claims for vicarious copyright infringement against Deutsche Post International B.V. ("DPI"), DSC Netherlands' corporate parent in the Netherlands, and also against Deutsche Post AG ("DPAG"), DPI's German parent. *Id.*

DSC Netherlands and DPI jointly moved to dismiss for lack of personal jurisdiction, with DPAG following suit once it was served with process. *See* App. 8a–9a. After briefing on each motion, the district court heard arguments on December 14, 2015, ultimately requesting that the parties submit supplemental declarations to explain in further detail the nature of their electronic contacts; each side did so. *See* App. 11a–14a.

The district court granted all three defendants' motions on June 24, 2016. App. 8a–38a. Relying heavily on *Walden v. Fiore*, 571 U.S. 277 (2014), it found that the location of the parties' electronic communications arrangement was oriented around DEX, not the forum itself, and so did not satisfy the requirement that a defendant engage in conduct "expressly aimed" at the forum state. App. 29a–32a.

As the district court noted, this Court in *Walden* mandated this outcome by its warning that the focus of the minimum contacts analysis “is not to shift from defendant’s connection with the forum to defendant’s connection with plaintiff.” App. 27a (discussing *Walden*). DEX’s location in the forum was “the result of where DEX located its information-technology operation,” rather than a consequence of any action of DSC Netherlands. As a result, DSC Netherlands’ contact with DEX’s server was “random, fortuitous, or attenuated,” and therefore negligible as a forum contact. App. 30a. The Secondary VPN, meanwhile, the district court found incidental to the parties’ intent to send data out of the forum, and was not indicative of any attempt to reach into the forum. App. 30a–33a. On the contrary, the court noted that “[i]t is undisputed that the purpose of the VPN was to send data to printers in the Netherlands – not to reach into California.” *Id.* It correctly observed that DSC Netherlands’ electronic communications to DEX’s server “were ultimately directed to printers located in the Netherlands.” *Id.* Merely using an American server to process and relay those signals did not constitute express aiming. *See id.*

The court acknowledged that DSC Netherlands’ mere knowledge of DEX’s location in the United States, combined with an alleged intentional tort directed at DEX, would have satisfied a previous Ninth Circuit test under *Washington Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668 (9th Cir. 2012). *See* App. 20a–28a. But, as the district court noted, the Ninth Circuit’s approach in *Washington Shoe* is incompatible with the analytical framework of *Walden*, which admonishes courts to focus on contacts with the forum, rather than the plaintiff. *See*

App. 26a–28a. Under *Walden*, “[t]he question is not where the plaintiff experienced a particular injury or effect, but whether the challenged conduct connects the defendant to the forum in a meaningful way.” *Id.* Fleeting contact with DEX’s server was not enough. *See* App. 26a–27a.

DEX failed to present any material allegation as to either DPI or DPAG, and also did not demonstrate that they were alter egos of DSC Netherlands, as would be required in the Ninth Circuit to impute even DSC Netherlands’ inadequate forum contacts to them. App. 34a–37a. Both parent entities were dismissed as well.

3. The Ninth Circuit affirmed the dismissal of DPI and DPAG, but reversed as to DSC Netherlands, finding that DSC Netherlands’ contacts with DEX were sufficient to support jurisdiction in California.

a. The panel’s opinion began with a fundamental premise that for jurisdictional purposes, a foreign defendant’s “use” of a plaintiff’s software occurs on the server where the plaintiff’s software is hosted, not where the defendant user is located or where its conduct is directed. That is, although DSC Netherlands’ print requests were sent from outside of the United States, and were intended to trigger printing outside of the United States that would impact commerce only in the Netherlands, DSC Netherlands’ alleged infringement of DEX’s copyright effectively occurred wherever DEX’s server was located. App. 3a–4a (“the allegedly infringing *use* of DEX’s software occurred in California on DEX’s servers”). The panel cited no precedent for this interpretation of virtual presence.

The court of appeals also rejected the district court's holding that the location of DEX's server in California was a random, fortuitous, or attenuated contact. Instead, it reasoned that by entering into a software licensing agreement with a company it knew to be in California, DSC Netherlands had effectively formed an agreement with DEX that the server would be in California. App. 4a–5a. Citing this Court's language in *Walden* that “physical entry into the State ... is certainly a relevant contact,” the panel held that DSC Netherlands' choice to make that agreement, combined with its remote interaction with DEX's software located on that server, was sufficient to establish a substantial connection to the forum. *Id.* The district court, as noted above, directly disagreed with this proposition, observing that the necessity of sending electronic communications into the forum was “the result of where DEX located its information-technology operation.” *Id.*

The appellate panel further reasoned that the core maxim of *Walden*—that the jurisdictional analysis must focus on the defendant's contacts with the forum, rather than with the plaintiff—does not control in this context, as *Walden* “featured an alleged tort committed against a forum resident outside the forum state,” whereas the panel had construed DSC Netherlands' use of DEX's software as creating a virtual presence in the forum state. *Id.* Combined with DSC Netherlands' knowledge that DEX would suffer harm in California, the panel found the parties' electronic contacts sufficient to support jurisdiction. *Id.*

b. DSC Netherlands petitioned for panel rehearing or rehearing *en banc*. That petition was denied on May 7, 2018.

REASONS FOR GRANTING THE PETITION

The practical upshot of the court of appeals' decision in this case is to find, by applying an extraordinarily broad interpretation of virtual presence, that the principles of *Walden* do not apply in the realm of electronic contacts. As discussed below, this creates a substantial and unwieldy exception to this Court's past minimum contacts jurisprudence, which spans decades.

1. Under the test of due process, exercise of specific jurisdiction over a nonresident defendant requires the following:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or residents 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.

Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987) (citing *Burger King*, 471 U.S. at 472-76). *See also Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1067 (9th Cir. 2017). To determine whether the defendant has "purposefully directed" his activities into the forum in the

context of tort claims, such as with DEX’s claims here, the Ninth Circuit nominally applies a three-part inquiry derived from *Calder v. Jones*, 465 U.S. 783 (1984). That test is satisfied if the defendant:

- (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.

Picot, 780 F.3d at 1215. *See also Calder*, 465 U.S. at 789-90.

Before *Walden*, however, a series of decisions in the Ninth Circuit had diluted the “express aiming” prong of this “*Calder* effects test” to the point of virtual nonexistence. *See generally Washington Shoe Co. v. A-Z Sporting Goods, Inc.*, 704 F.3d 668, 679-80 (9th Cir. 2012); *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111-12 (9th Cir. 2002); *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). In *Washington Shoe*, for example, the court found that a defendant’s willful infringement of a plaintiff’s copyright, combined with knowledge that the plaintiff would suffer damages in the forum, was sufficient to establish specific jurisdiction. *Id.* at 677-79. Though it conceded that “something more” was necessary to satisfy the express aiming requirement, the court held that satisfaction of the first and third prongs of the *Calder* inquiry were sufficient to show “individualized targeting,” thereby satisfying the second prong. *Id.* at 679-80.

2. That approach failed the test of due process laid down by this Court. *Calder* had already made clear that even with intentional torts, the plaintiff cannot be the only link between the defendant and the forum. *See* 465 U.S. at 788-89. In *Calder*, the defendants' allegedly defamatory article was drawn from California sources and pertained to the California activities of a California resident, such that "California [was] the focal point both of the story and of the harm suffered." *Id.* at 789. By the nature of the libel tort, the harm to the plaintiff necessarily involved the spread of the story throughout the forum – that is, beyond the plaintiff herself. *See Walden*, 571 U.S. at 287-88 (discussing *Calder*). The defendants' intentional tort was therefore expressly aimed into the forum and had distinct effects there, not merely limited to the plaintiff who had elected to be there. *See Calder*, 465 U.S. at 789. The same could not be said for *Washington Shoe* and its ilk.

This Court's reasoning in *Walden* confirms that the Ninth Circuit's view of jurisdiction has been overly broad. In *Walden*, a Georgia police officer deputized by the Drug Enforcement Administration searched the plaintiffs' bags at an airport in Atlanta and seized a large amount of cash, despite the plaintiffs' protestations that they were professional gamblers carrying their winnings. *See* 571 U.S. at 279. The plaintiffs continued home to Nevada, and subsequently filed a *Bivens* action against the officer in the United States District Court for the District of Nevada. *Id.* at 279-80. The officer moved to dismiss the action for lack of personal jurisdiction. The district court granted the motion; the Ninth Circuit reversed, finding that the agent's "individualized targeting" of the forum resident plaintiffs was sufficient. *See Fiore v. Walden*, 688 F.3d 558, 577-78 (9th Cir. 2012).

Reversing the Ninth Circuit, this Court reasoned that the minimum contacts analysis must focus on the defendant's contacts with the forum, not with the plaintiff. A defendant does not "create sufficient contacts with [the forum] simply because he allegedly directed his conduct at plaintiffs whom he knew had [forum] connections. Such reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections 'decisive' in the jurisdictional analysis." 571 U.S. at 289. In other words, "the plaintiff cannot be the only link between the defendant and the forum," regardless of whether the plaintiff is the individualized target of an intentional tort. *Id.* at 277-78. This Court also reiterated that "random, fortuitous, or attenuated" contacts with the forum by way of the forum's residents do not suffice to support jurisdiction. *Id.* Rather, proper exercise of jurisdiction requires a showing of "continuing and wide-reaching contacts" in the forum, or a deliberate attempt to exploit a market there. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482 (1985)).

3. The Ninth Circuit has since been forced to admit that its "individualized targeting" formulation does not suffice after *Walden*. See *Axiom Foods*, 874 F.3d at 1070. In the present case, however, in the context of virtual presence, it has created a new roadmap to the same end. This Court should grant certiorari to clarify the nature of the due process inquiry in the context of electronic contacts post-*Walden*.

a. First, the court below held that when a foreign national makes any remote electronic contact with a server in the United States, that person will be deemed to have acted within the United States for purposes

of jurisdiction, sufficient to satisfy *Calder*'s "express aiming" requirement. Put another way, even a foreign actor who (i) is located outside of the United States, (ii) interacts with software in order to create a result outside of the United States, and (iii) is doing so in service to a commercial relationship outside of the United States, is nonetheless "using" the software within the United States for purposes of jurisdiction merely because the American plaintiff chose to locate its server in the United States. App. 4a–5a; *but see* App. 30a (noting that DEX unilaterally chose the location of its server).

This is an aggressive expansion of American jurisdiction over foreign citizens and businesses. Even pre-*Walden*, courts within different circuits were split on whether a server's location is jurisdictionally significant at all, much less whether remote interaction with software was tantamount to physical presence in the forum, or amounted to "use" of software in the forum. *Compare MacDermid, Inc. v. Deiter*, 702 F.3d 725 (2d Cir. 2012) (holding that a foreign defendant's misappropriation of confidential information from a server in the forum was sufficient to satisfy due process) *with Amberson Holdings LLC v. Westside Story Newspaper, Inc.*, 110 F. Supp. 2d 332, 337 (D.N.J. 2000) ("It is unreasonable that by utilizing a New Jersey server, defendants should have foreseen being haled into a New Jersey federal court. To hold otherwise would open the door to an unlimited scope of personal jurisdiction in the Internet world."); *Browne v. McCain*, 612 F. Supp. 2d 1118, 1124 (C.D. Cal. 2009) (posting an allegedly infringing video on YouTube's servers in California did not subject the defendant to jurisdiction there).

In *Walden*, this Court acknowledged that its reasoning would tend to weigh against jurisdiction in cases such as this, but declined to resolve the issue:

Respondents warn that if we decide petitioner lacks minimum contacts in this case, it will bring about unfairness in cases where intentional torts are committed via the Internet or other electronic means (e.g., fraudulent access of financial accounts or “phishing” schemes). As an initial matter, we reiterate that the “minimum contacts” inquiry principally protects the liberty of the nonresident defendant, not the interests of the plaintiff. In any event, this case does not present the very different questions whether and how a defendant’s virtual “presence” and conduct translate into “contacts” with a particular State. ... We leave questions about virtual contacts for another day.

Walden, 571 U.S. at 290 n.9 (internal citations omitted).

No consensus has emerged since *Walden* to resolve this perceived ambiguity. See Robin J. Effron, *Trade Secrets, Extraterritoriality, and Jurisdiction*, 51 Wake Forest L. Rev. 765, 777 (2016) (discussing the impact of *Walden* on *MacDermid*, and noting that “it is unclear ... that downloading computer information from a corporation in a given jurisdiction is, without other contacts, enough to constitute an express targeting of the corporation where it is located”). Compare *NexGen HBM, Inc. v. ListReports, Inc.*, No. 16-cv-3143 (SRN/FLN), 2017 U.S. Dist. LEXIS 147033, at *9-10, 39-40 (D. Minn. Sept. 12, 2017) (a defendant’s remote access of a

server from outside of the forum was not tantamount to taking action within the forum) *with AgJunction LLC v. Agrarian Inc.*, No. 14-CV-2069-DDC-KGS, 2014 U.S. Dist. LEXIS 93301, at *23-25 (D. Kan. Jul. 9, 2014) (finding the defendant's lack of knowledge of the server location to be the dispositive factor).

With this case, the Ninth Circuit has seized upon the small opening left in *Walden* and expanded it to a gaping chasm. As the district court correctly noted, DEX's server was merely a relay and processing point for electronic signals that both originated from, and were bound for, locations outside of the United States. App. 8a–14a, App. 27a–30a. According to the Ninth Circuit, even that transient interaction is sufficient to hale a Dutch company into the United States. Given the ubiquitous nature in modern commerce of this manner of fleeting electronic contacts with software servers, the effect of this precedent on international commerce cannot be overstated. A user who sends an email from Mexico City, Mexico to Paris, France through a Web-based email service may well be using software that is hosted on United States email servers.² A Panamanian business using a popular suite of office software would likely be storing data on United

2. Google, for example, hosts its “Gmail” service on servers throughout the United States. *See* Google, *Data Center Locations*, available at <https://www.google.com/about/datacenters/inside/locations/index.html> (last accessed July 5, 2018); *see also* Google, *Frequently Asked Questions*, <https://www.google.com/about/datacenters/faq/> (last accessed July 5, 2018) (“Whenever you access Gmail, edit your documents, post an image to Google+ or search for information on Google.com, you’re using one of our data centers[.]”).

States servers.³ Should the Ninth Circuit’s view prevail, these contacts would be deemed sufficient to establish express aiming into the United States, subjecting foreign entities to being haled into court here based on the barest of virtual contacts. As this Court has previously noted, particularly “careful inquiry” is appropriate in the context of a foreign defendant, coupled with “an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.” *Asahi Metal Indus. v. Super. Ct. of Cal.*, 480 U.S. 102, 115 (1987).

b. Second, in order to effectuate expansive, pre-*Walden* jurisdiction in the context of a defendant’s electronic presence in the United States, the court below was forced to address the longstanding admonishment that a defendant’s random, fortuitous, or attenuated contacts with a forum, made merely by interacting with a plaintiff who resides in or is affiliated with that forum, does not satisfy due process. *Walden*, 571 U.S. at 286; *Burger King*, 471 U.S. at 475; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980). It is axiomatic in the law of personal jurisdiction that the defendant’s forum contacts, not the plaintiff’s, must control the inquiry. *See id.* In this case, it is undisputed that DSC Netherlands has no connection with the United States independent of DEX. DSC Netherlands’ software licensing arrangement was with DEX, wherever DEX could be found. DEX unilaterally chose to locate itself in the United States.

3. Microsoft’s “Microsoft Office 365” hosts data for Panamanian users in the United States. *See* Microsoft, *Where is your data located?*, <https://products.office.com/en-us/where-is-your-data-located?geo=All> (last accessed July 5, 2018).

Accordingly, DSC Netherlands’ alleged tortious conduct was directed towards DEX in the United States, solely because that is where DEX had located itself. *See* App. 30a. The district court correctly observed that from DSC Netherlands’ perspective, DEX’s location was the very definition of a random, fortuitous, or attenuated contact, as it simply did not matter to DSC Netherlands whether DEX was located in California or in Canada. *See id.*; *Walden*, 571 U.S. at 286.

The solution reached by the court of appeals in order to find its way to reversal sets a troubling precedent in this age of electronic commerce. It held that merely by reaching an agreement with DEX, DSC Netherlands had “agreed” that DEX’s server would be located in the United States. App. 3a–5a. In other words, DSC Netherlands’ mere knowledge of a fact that was immaterial to it—that DEX was located in the United States—was held to be tantamount to a mutual decision to reach into the forum, sufficient to create an intentional virtual “presence” there. *Id.* This reasoning seems irreconcilable with this Court’s discussion in *Walden*, which clarified that in *Calder*, it was the unique “reputation-based ‘effects’ of the alleged libel” that forged the defendants’ substantial connection to the forum – that is, their mere knowledge of the plaintiff’s location there was an insufficient connection between the defendants and the forum, but was enough only when added to the plaintiff’s reputational injury “in the estimation of the California public” beyond the plaintiff herself. *Walden*, 571 U.S. at 287-88 (discussing *Calder*).

The Ninth Circuit ignored that caveat. Instead, it found a basis for jurisdiction in merely (i) the defendant’s knowledge of the plaintiff’s location and (ii) an intentional

tort aimed at the plaintiff. As with the now-defunct “individualized targeting” test, its approach here encourages later decisions to disregard the “express aiming” requirement altogether in the context of electronic presence. *See Calder*, 465 U.S. at 789.

This case presents an important issue with the potential to dramatically impact a foreign company’s decision to engage with any American company, no matter how negligible the degree of contact. Under this precedent, any foreign national defendant who engages in even a brief transaction that involves a plaintiff utilizing software that is known to be hosted in the United States would be subjecting itself to American jurisdiction. That has not been the law before now, even in the Ninth Circuit. *See Boschetto v. Hansing*, 539 F.3d 1011, 1016-19 (9th Cir. 2008) (limited-scope contract that “involved the forum state only because that is where [one party] happened to reside” did not suffice for jurisdiction, including when coupled with electronic communications incidental to the transaction); *cf. Asahi*, 480 U.S. at 115.

CONCLUSION

For the foregoing reasons, the Court should grant this
Petition for a Writ of Certiorari.

Respectfully submitted,

ANTHONY C. WHITE
Counsel of Record
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
(614) 469-3200
tony.white@thompsonhine.com

JOHN A. CONKLE
CONKLE, KREMER & ENGEL, PLC
3130 Wilshire Boulevard, Suite 500
Santa Monica, CA 90403
(310) 998-9100

Counsel for Petitioner

APPENDIX

1a

**APPENDIX A — MEMORANDUM OF THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT, FILED MARCH 13, 2018**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-56044

DEX SYSTEMS, INC., A CALIFORNIA
CORPORATION,

Plaintiff-Appellant,

v.

DEUTSCHE POST AG,
A GERMAN CORPORATION; *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
D.C. No. 2:15-cv-03841-JAK-RAO
John A. Kronstadt, District Judge, Presiding

February 16, 2018, Argued and Submitted
San Francisco, California
March 13, 2018, Filed

Appendix A

Before: BEA and N.R. SMITH, Circuit Judges, and
LASNIK,* District Judge.

MEMORANDUM**

DEX Systems, Inc. (DEX) appeals the dismissal of its copyright-infringement claims as well as its other related claims.¹ The district court concluded that DEX failed to establish personal jurisdiction over defendants Deutsche Post AG (DPAG), Deutsche Post International B.V. (DPI), and DHL Supply Chain (Netherlands) B.V. (DSC). We reverse in part and affirm in part for the reasons that follow.

1. The district court erred in dismissing claims against DSC for lack of personal jurisdiction. To evaluate the sufficiency of an alleged intentional tortfeasor's contacts with the forum to establish specific jurisdiction over the defendant, this court applies a three-element test. *See*

* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. The other claims are Unfair Competition under California law and common law Equitable Accounting/Constructive Trust. These claims are premised on the facts underlying the infringement claim. Accordingly, our determination that personal jurisdiction is proper as to DSC for the intentional infringement claim warrants similar reinstatement of personal jurisdiction to entertain these additional claims against DSC.

Appendix A

Axiom Foods, Inc. v. Acerchem Int'l, Inc., 874 F.3d 1064, 1068-69 (9th Cir. 2017). First, the defendant must have “‘purposefully direct[ed] his activities’ toward the forum.” *Id.* at 1068 (quoting *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)). Second, “the claim must be one which arises out of or relates to the defendant’s forum-related activities.” *Dole Food*, 303 F.3d at 1111. Finally, “the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.” *Id.* “The plaintiff bears the burden of satisfying the first two prongs of the test.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). “If the plaintiff meets that burden, ‘the burden then shifts to the defendant to present a compelling case that the exercise of jurisdiction would not be reasonable.’” *Axiom Foods*, 874 F.3d at 1068-69 (quoting *Schwarzenegger*, 374 F.3d at 802).

To meet the first element of the *Axiom Foods* standard, the plaintiff must show that the defendant “(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 Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011) (quoting *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010)). Here, DEX alleges that DSC committed intentional copyright infringement. Accordingly, the parties do not dispute the “intentional act” prong. *See id.*

On *de novo* review, we find sufficient record evidence to establish that DSC’s allegedly infringing conduct was expressly aimed at and occurred in California—causing

Appendix A

harm DSC knew DEX would suffer in California. Although the print requests were sent from outside the forum and the ultimate printing occurred outside the forum, the allegedly infringing *use* of DEX's software occurred in California on DEX's servers in Camarillo, California.

Specifically the record establishes the following: (1) DEX's Camarillo, California server had to be engaged and used for the software at issue to function and DSC had knowledge of this fact; (2) DSC sent print requests via VPN to DEX's California server causing the software to engage and create output data that was sent via the VPN connection to DSC's printers in Venlo, Netherlands; (3) after the expiration of the license agreement, DSC continued to access DEX's California server to activate and use the software on the California server—allegedly committing an instance of intentional copyright infringement occurring on the California servers.

Furthermore, that the software was located on DEX's California server was not merely a fortuitous occurrence. *Cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S. Ct. 559, 62 L. Ed. 2d 490 (finding no personal jurisdiction where the only contact with the forum state amounted to the “fortuitous circumstance that a single Audi automobile, sold [outside the forum to non-forum residents], happened to suffer an accident while passing through [the forum state]”). Rather, the software was located on California servers pursuant to an agreement reached by the parties. DSC and DEX actively set up the California-based VPN to facilitate printing following technical difficulties with a primary

Appendix A

VPN based in Europe. As agreed by the parties, DEX's server, which sent data to and received data from DSC through the secondary VPN, was located in California, and both the California-based VPN and the Europe-based VPN continued to be used to transmit print data.

This evidence satisfies the first two elements of the personal jurisdiction standard in *Axiom Foods* (minimum contacts and a claim arising from the contacts). The evidence likewise comports with the Supreme Court's recent decision in *Walden v. Fiore*, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014). Where *Walden* featured an alleged tort committed against a forum resident outside the forum state, *see id.* at 1119-20, DSC's allegedly infringing conduct (illegal use of DEX's software on the California server) occurred in the forum state, *cf. id.* at 1122 (noting that "physical presence in the forum is not a prerequisite to jurisdiction," but "physical entry into the State—either by the defendant in person or through an agent, goods, mail, or some other means—is certainly a relevant contact"). Though DSC certainly had limited contacts with California, its contacts include the allegedly tortious conduct in California that gave rise to DEX's claims. In such circumstances, limited contacts are sufficient to create jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 n.18, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) ("So long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction." (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957))).

Appendix A

Finally, with respect to the reasonableness of jurisdiction, DSC waived any argument on this issue, because it did not argue the issue before the district court or in its appellate brief. To the extent DSC has any argument, we find it insufficient to meet the “compelling case” requirement in *Axiom Foods*, 874 F.3d at 1068-69 (quoting *Schwarzenegger*, 374 F.3d at 802). Accordingly, we reverse the district court’s dismissal of DEX’s claims against defendant DSC.

2. With respect to DPAG and DPI, DEX acknowledged at oral argument that there is no record evidence to establish that these entities had any contacts with the forum state. Accordingly, we affirm the district court’s dismissal of all claims against DPAG and DPI.

3. DEX has not articulated how the district court abused its discretion in denying DEX’s request to seek jurisdictional discovery from DPAG or DPI.

REVERSED in part and AFFIRMED in part, both parties to bear their own costs on appeal.

**APPENDIX B — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA, DATED
JUNE 24, 2016**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. LA CV15-03841 JAK (RAOx)

DEX SYSTEM, INC.,

v.

DEUTSCHE POST AG, *et al.*

Date June 24, 2016

CIVIL MINUTES – GENERAL

Present: The Honorable JOHN A. KRONSTADT,
UNITED STATES DISTRICT JUDGE

Andrea Keifer
Deputy Clerk

Not Reported
Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

**Proceedings: (IN CHAMBERS) ORDER RE
DEFENDANTS DHL SUPPLY AND DEUTSCHE
POST INTERNATIONAL'S MOTION TO DISMISS
(DKT. 20); DEFENDANT DEUTSCHE POST AG'S
MOTION TO DISMISS (DKT. 32)**

*Appendix B***I. Introduction**

DEX Systems, Inc. (“Dex” or “Plaintiff”), a California corporation, brought this action asserting willful copyright infringement and related claims against the following foreign corporations: Deutsche Post International, B.V. (“DP International”), a Netherlands corporation; DHL Supply Chain, B.V. (“DHL”), a Netherlands corporation (collectively, the “Netherland Defendants”); and Deutsche Post AG (“DP AG” or the “German Defendant”). Dkt. 1. Plaintiff later filed a first amended complaint (“FAC”). Dkt. 10.

The Netherland Defendants filed a motion to dismiss the FAC for lack of personal jurisdiction (“Netherland Defendants’ Motion”). Dkt. 20. Plaintiff filed an opposition to the Netherland Defendants’ Motion (Dkt. 17), to which the moving Defendants filed a reply. Dkt. 30. The German Defendant also filed a motion to dismiss for lack of personal jurisdiction (“German Defendant’s Motion”). Dkt. 32. Plaintiff filed an opposition to that motion (Dkt. 36), and a reply followed. Dkt. 37.

A hearing on the Motions was held on December 14, 2015. Dkt. 41. At the hearing, Plaintiff’s counsel was directed to file, by January 15, 2016, a declaration with an explanation of certain of the claimed electronic communications or contacts by defendants in California. *Id.* Any response by the Defendants was to be filed by February 12, 2016, with a determination to be made as to whether an evidentiary hearing would be necessary or whether the matter could be decided on the basis of the parties’ respective filings

Appendix B

and arguments made at the hearing. *Id.* Plaintiff made its filing on February 2, 2016 (Dkt. 51) to which the defendants responded on February 12, 2016. Dkt. 52. Plaintiff then filed a reply on February 16, 2016 (Dkt. 53), to which Defendants responded on February 22, 2016. Dkt. 54.

Based on a review of the supplemental filings, the Court has determined that an evidentiary hearing is not required. For the reasons stated in this Order, the Motions are **GRANTED**.

II. Factual Background

A. Allegations in the FAC

The FAC alleges that Plaintiff is a private corporation. FAC, Dkt. 10 ¶ 7. It is incorporated and has its principal place of business in California. *Id.* Plaintiff is the owner of the software “DEX Systems Reverse Logistics Management Suite,” for which a U.S. copyright registration application has been filed. (“DEX Software”). *Id.* ¶ 8.

DHL is a foreign corporation that is incorporated and has its principal place of business in the Netherlands. *Id.* ¶ 6. DHL is a subsidiary of DP International. *Id.* DP International is another foreign corporation that is incorporated and has its principal place of business in the Netherlands. *Id.* ¶ 5. DP International is a subsidiary of DP AG. *Id.* DP AG is a foreign corporation that is incorporated and has its principal place of business in Germany. *Id.* ¶ 4. It is an “international courier and logistics provider” with “affiliates and business divisions situated throughout California and the world.” *Id.*

Appendix B

On February 6, 2012, Plaintiff and DHL entered into a software licensing agreement. *Id.* ¶ 12. Its term expired on April 1, 2015. *Id.* Thereafter, Plaintiff alleges that DHL intentionally and willfully continued to use the software, notwithstanding that its authority to do so had expired. *Id.* ¶ 13. On May 6, 2015, Plaintiff's General Counsel sent a letter to DHL providing notice of Plaintiff's claim that DHL was acting in violation of 17 U.S.C. § 501 through its continuing, unauthorized use of the DEX Software. Young Decl., Dkt. 27 at 45. The letter included the following statements:

Thank you for speaking with me today. In light of our discussion, I want to be very clear and reiterate that DHL's current use of DEX System's software is not authorized and constitutes a material breach of our licensing agreement which carries with it the possibility of civil damages. . . .

DHL has been notified previously of their infringing conduct and this communication shall serve as the final notice of infringement. If use continues without a consummated license agreement DEX will pursue legal action to stop further infringement and recover its damages.

You have asked under what authority DEX claims infringement. Title 17 of the United States Code, Section 501 provides that software use without a license subjects the user to statutorily authorized damages calculated

Appendix B

on the basis of the profits earned by DHL or statutory penalties. . . .

Id. at 46 (Ex. A). Plaintiff contends that after DHL received the letter, it continued its unauthorized use of the subject software. Young Decl., Dkt. 27 at 45.

The FAC also alleges that DP International and DP AG “have directly benefited financially from the use of the software as the products earned by DHL during the period of infringement are included in the profits and or revenues declared by [DP International and DP AG].” Dkt. 10 ¶ 15. The FAC then alleges that, due to the foregoing conduct, DP International and DP AG “are vicariously liable for the tortious and intentional infringement committed by DHL against DEX.” *Id.*

B. Supplemental Briefing and Declarations

As noted, the parties submitted supplemental declarations and briefing with their respective views on the facts relevant to the determination of the jurisdictional question presented by the Defendants. Because these filings provide a more comprehensive explanation of the parties’ positions as to their actions and business relationships than previously presented, they are summarized here.

1. Plaintiff’s Supplemental Declaration (Dkt. 51)

Plaintiff submitted the declaration of Rajiv Dugal (“Dugal”). Dugal Decl., Dkt. 51 at 8-11. Dugal is Plaintiff’s

Appendix B

Director of Information Technology. *Id.* ¶ 2. In this capacity, he has direct responsibility for establishing and maintaining all computer networks. *Id.*

Dugal declares that Plaintiff and DHL worked together for the purpose of carrying out a “repair and supply chain (“logistics”) service for a third party known as Plantronics.” *Id.* ¶ 3. As part of this business arrangement, Plaintiff licensed the DEX Software to DHL. *Id.* A primary component to this software is its “ability to respond to print requests that would be initiated by DHL and communicated via a private network created by DHL and then transmitted electronically to DEX Systems servers so that printing could occur from DHL printers located in Venlo, Netherlands.” *Id.*

DHL had access to the licensed DEX Software through two independently established networks, each of which was a virtual private network (“VPN”). *Id.* ¶¶ 4, 5. A VPN is a “private network between two or more parties who share electronically transmitted information in a secure environment.” *Id.* ¶ 5. This “private pathway” allows two or more “end systems/organizations to communicate over the internet.” *Id.* Here, Plaintiff and DHL agreed to set up two VPNs in order to provide “critical print services and ensure high availability to DHL” of the DEX Software. *Id.* ¶ 7. The VPNs were designed so that Plaintiff “could receive electronic communication from DHL in the form of print commands.” *Id.* ¶ 6. The first VNP connected a facility in Venlo, Netherlands and an Amazon Cloud in Ireland (“Europe VPN”). The second VPN connected a facility in Venlo, Netherlands and Camarillo, California

Appendix B

(“United States VPN”). *Id.* Print requests were initiated by DHL and transmitted from the Netherlands to California, which “routed electronic communication to DHL printers.” *Id.* ¶ 8.

During the relevant time period, both of the VPNs were “active and live,” *i.e.*, they were used to send and receive electronic communications. *Id.* ¶ 10. The distribution of printing jobs through these two VPNs was “meted out based on a concept known as ‘load balancing.’” *Id.* This was necessary due to “unpredictable latency and lag due to transmitting over the Internet.” *Id.* Both networks were “highly critical for application printing and in a round robin fashion facilitated failover for one another allowing for up to 50% of the printing request traffic to come through the [United States] VPN in Camarillo.” *Id.* ¶ 11.

DHL continued to access the networks for the purpose of carrying out print jobs as late as May 19, 2015. *Id.* ¶ 14.

2. Defendants’ Supplemental Briefing (Dkt. 52)

The Netherlands Defendants submitted two supplemental declarations. The first is by James Code (“Code”), an employee of “DPDHL IT Services, Americas.”¹ Code holds the position of “Head of Service & Supplier Management, IT Services Americas.” Code Decl., Dkt. 52 at 8 ¶ 3.

1. Defendants do not provide any additional information about “DPDHL IT Services, Americas” or its relationship to the Defendants.

Appendix B

Code declares that, during the relevant time period, DHL used certain computer and network equipment at a data center in Phoenix, Arizona to create the VPNs. *Id.* ¶ 4. The data center was owned and operated by T-Systems North America. *Id.* ¶ 5. On May 14, 2015, the equipment used for the VPNs was acquired by DHL and moved to a new data center in Ashburn, Virginia. *Id.* ¶ 6. The new data center is owned by AT&T Corporation. *Id.*

The second declaration is by Gerard Van Seumeren, a technical architect retained by DHL as an independent contractor. Van Seumeren Decl., Dkt. 52 at 11-14. Van Seumeren declares that the United States VPN is a backup VPN. *Id.* ¶ 9. Thus, the parties created the United States VPN only after experiencing technical issues with the Europe VPN. *Id.* ¶ 8. Plaintiff had “exclusive control” over which VPN was used to transmit its print data to the Netherlands. *Id.* ¶ 11. Because both of the VPNs were one-way connections, DHL could not use them to send data to Plaintiff. *Id.* ¶ 12.

Plaintiff and DHL “were each responsible for arranging their own end of both VPNs.” *Id.* ¶ 20. DHL “did not set up [Plaintiff’s] terminal in California, and provided no hardware to [Plaintiff].” *Id.* The parties “simply exchanged IP addresses to allow each end of the VPNs to locate and connect to the other.” *Id.*

3. The Supplemental Replies (Dkt. 53-54)

Plaintiff submitted a supplemental declaration by Dugal. In it he discusses two matters. First, that Van Seumeren’s

Appendix B

declaration “fails to identify the true and exact purpose of the information being sent across the VPNs and its starting point.” Dugal Supp. Decl., Dkt. 53 ¶ 2. DHL “was sending electronic communications to [Plaintiff] and the VPNs in the form of printer requests that were routed to both of the VPNs.” *Id.* He then adds that, “[w]ithout DHL dispatching electronic print requests, there would be no information for the VPNs to route back to DHL.” *Id.* Second, that DHL had an actual presence in the United States through its “US Datacenter.” *Id.* ¶ 5.

The Netherlands Defendants submitted a supplemental reply. There, they request that Plaintiff’s supplemental reply be stricken because it was filed without leave of the Court. Dkt. 54. In the alternative, Defendants present the following contentions. First, a backup VPN was created to address Plaintiff’s technical problems in sending print data to the Netherlands. *Id.* at 2. Second, Plaintiff does not dispute that it independently controlled whether each VPN was “live.” *Id.* Third, the claim by Plaintiff that Defendants had “an actual presence in the United States” through the datacenter is an unsupported legal conclusion. *Id.* The Defendants neither owned nor operated any data center in the United States. *Id.*

Each of the Supplemental Replies is **STRICKEN** because each was filed without leave. Dkt. 47.²

2. Even if the supplemental filings were considered, they would not affect the outcome of this Order. The earlier supplemental filings showed that DHL sent electronic communications to DEX in California. That a demonstrative exhibit in Defendants’ supplemental filing refers to a “US Datacenter” does not demonstrate that

*Appendix B***III. Analysis****A. Personal Jurisdiction****1. Legal Standard**

A party may move to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). The party asserting jurisdiction bears the burden of establishing it. *Mattel, Inc. v. Greiner & Hausser GmbH*, 354 F.3d 857, 862 (9th Cir. 2003). If the court does not require an evidentiary hearing, a plaintiff need make only a prima facie showing of personal jurisdiction. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). Uncontroverted allegations in the complaint must be taken as true, and “[c]onflicts between parties over statements contained in affidavits must be resolved in the plaintiff’s favor.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); *Boschetto*, 539 F.3d at 1015. However, a court “may not assume the truth of allegations in a pleading which are contradicted by affidavit.” *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011).

To establish personal jurisdiction, a party must show both that the long-arm statute of the forum state provides for personal jurisdiction over an out-of-state defendant, and that the exercise of jurisdiction is consistent with federal due process requirements. *Gray & Co. v. Firstenberg Mach. Co., Inc.*, 913 F.2d 758, 760 (9th Cir.

Defendants owned or controlled it. Further, Defendants offered evidence that they did not own or control the Datacenter.

Appendix B

1990). California’s long-arm statute is coextensive with federal due process requirements. Cal. Code Civ. Proc. § 410.10; *Roth v. Garcia Marquez*, 942 F.2d 617, 620 (9th Cir. 1991). Personal jurisdiction may be exercised over a nonresident party who has “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) (internal quotation marks omitted).

A person is subject to general jurisdiction in a state when his or her “contacts with a state are substantial or continuous and systematic” so as to “approximate physical presence” in the state. *Bancroft & Masters, Inc. v. Augusta Nat.’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (internal quotation marks omitted). Where there is general jurisdiction, a party may “be haled into court in the forum state to answer for any of its activities anywhere in the world.” *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1066 (9th Cir. 2014). The party’s contacts with the forum state need not relate to the claim asserted. *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 617-19 (1990).

A party not subject to general jurisdiction may still be subject to specific jurisdiction based on its out of forum-related activities. *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993). The Ninth Circuit has established a three-part test for determining specific jurisdiction: (i) the defendant must purposefully avail himself of the privilege of conducting activities in the forum and invoking the benefits and protections of its laws; (ii) the claim must arise out of or result from the defendant’s

Appendix B

forum-related activities; and (iii) exercise of jurisdiction must be reasonable. *Id.*; see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985). The party asserting jurisdiction bears the burden of satisfying the first two prongs of this test. *Schwarzenegger*, 374 F.3d at 802. If the first two prongs are satisfied, the burden then shifts to the party contesting jurisdiction to “present a compelling case” that the third prong of reasonableness has not been satisfied. *Id.*

B. Application**1. Specific Jurisdiction over DHL³****a) Purposeful Direction**

This element of the test for specific jurisdiction may be satisfied “by either purposeful availment or purposeful direction, which, though often clustered together under a shared umbrella, ‘are, in fact, two distinct concepts.’” *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (quoting *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006)). Courts generally apply the purposeful availment analysis in connection with contract claims and the purposeful direction analysis in tort actions. *Schwarzenegger*, 374 F.3d at 802. “Evidence of availment is typically action taking place in the forum that invokes the benefits and

3. Plaintiff does not assert general jurisdiction over any of the Defendants. Consequently, only whether there is specific jurisdiction is addressed.

Appendix B

protections of the laws in the forum. Evidence of direction generally consists of action taking place outside the forum that is directed at the forum.” *Pebble Beach*, 453 F.3d at 1155 (internal citation omitted).

Plaintiff has alleged copyright infringement. Although the challenged conduct is related to the parties’ earlier licensing contract, it nevertheless parallels what is advanced in a tort claim. Therefore, the application of the purposeful direction test is appropriate. *Brayton Purcell*, 606 F.3d at 1127; *Washington Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668 (9th Cir. 2012). *Calder v. Jones*, 465 U.S. 783 (1984) established a three-part test for the assessment of purposeful direction. Under that test, the defendant allegedly must have (i) committed an intentional act, (ii) expressly aimed at the forum state, (iii) causing harm that the defendant knows is likely to be suffered in the forum state. *Brayton Purcell*, 606 F.3d at 1128 (quoting *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir.2006)). Purposeful direction may be shown even where the defendant has not had physical contact with the forum state. *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1260 (9th Cir. 1989) (“The fact that there was no physical contact with California and that their actions all took place in Florida would not relieve them of personal jurisdiction where the effects of their Florida conduct were felt in California. . . . [W]here acts are performed for the very purpose of having their consequences felt in the forum state, the forum will have personal jurisdiction over the actor.”).

*Appendix B***(1) Intentional Act**

An intentional act is one committed with the “intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act.” *Brayton Purcell*, 606 F.3d at 1128. The “act” reflects “an external manifestation of the actor’s will and does not include any of its results, even the most direct, immediate, and intended.” *Schwarzenegger*, 374 F.3d at 806.

Here, this element is satisfied. The FAC alleges that DHL willfully infringed Plaintiff’s copyright, and continued to do so after it was given notice of the claimed infringement.

(2) Expressly Aimed at the Forum**(a) Expressly Aimed at California**

“Express aiming” is dependent, “to a significant degree, on the specific type of tort or other wrongful conduct at issue.” *Id.* at 807. The “express aiming” inquiry requires “something more” than “a foreign act with foreseeable effects in the forum state.” *Washington Shoe*, 704 F.3d at 675 (citing *Bancroft*, 223 F.3d at 1087).

In *Washington Shoe*, the plaintiff was a Washington corporation that manufactured shoes. *Id.* at 670. The defendant was an Arkansas corporation that operated a single retail store there. *Id.* at 670-71. The defendant regularly purchased shoes from Plaintiff and sold them at its retail store. *Id.* at 671. An employee of the plaintiff visited the defendant’s store and observed that the

Appendix B

defendant was selling boots that the employee believed were “knock-offs” of two of the plaintiff’s copyrighted products. *Id.* After confirming that the boots in question were not authentic, the plaintiff sent a cease-and-desist letter to the defendant. *Id.* After receiving the letter, the defendant removed the offending shoes from its store, but sold its remaining inventory to a thrift store. *Id.*

The plaintiff then brought an action against the defendant in the Western District of Washington. The defendant moved to dismiss on the ground that it was not subject to personal jurisdiction there. In analyzing whether the defendant’s conduct was expressly aimed at the forum state, *Washington Shoe* noted that the allegations in the complaint, if sustained, constituted a willful violation of the plaintiff’s copyright. Those allegations included that: (i) the parties had an “ongoing relationship”; (ii) given the ongoing relationship, the defendant was likely aware of the plaintiff’s copyright, particularly because it received catalogs or brochures that included the copyrighted boots at issue; (iii) because the infringing boots were sold in the same store as the plaintiff’s products, the infringing and copyrighted items were in “direct competition” with each other; (iv) plaintiff advised defendant of the alleged infringing activity through a cease-and-desist letter; and (v) after receiving the letter, the defendant sold the infringing shoes to a thrift store.

In finding personal jurisdiction over the defendant, *Washington Shoe* reasoned that the express aiming analysis depends, “to a significant degree,” on the “specific type of tort or other wrongful conduct at issue.” *Id.* at

Appendix B

675 (internal quotation marks omitted). It added that “[p]articularly in the case of a willful copyright infringement, the intentional act constituting the violation may occur solely within one state while the *known* impact of that copyright infringement is directed at another state.” *Id.* (emphasis in original). *Washington Shoe* concluded that when a defendant knows its willful copyright infringement will be felt in a forum state, that is “alone . . . sufficient to satisfy the purposeful availment requirement.” *Id.* at 676 (internal quotation marks omitted); *see also id.* at 675 (“We have repeatedly stated that the express aiming requirement is satisfied, and specific jurisdiction exists, when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.” (internal quotation marks omitted)).

DHL argues that *Washington Shoe* was implicitly overruled by *Walden v. Fiore*, 134 S. Ct. 1115 (2014). In *Walden*, Drug Enforcement Administration (“DEA”) agents searched two professional gamblers (“plaintiffs”) at an airport in Puerto Rico. *Id.* at 1119. The agents found \$97,000 in cash. *Id.* The plaintiffs stated that the cash was from their winnings while gambling in Puerto Rico. *Id.* After the plaintiffs boarded their flight for Atlanta, a law enforcement official in Puerto Rico notified DEA agents at the Atlanta airport about the plaintiffs and their plan to land in Atlanta, and then board a connecting flight to Nevada, where each resided. *Id.* When the plaintiffs arrived in Atlanta, they were stopped and searched by DEA agents who seized the cash. *Id.* The plaintiffs continued, as planned, to Nevada. *Id.* The DEA agent in

Appendix B

Atlanta who seized the cash later assisted in drafting an affidavit to support probable cause for the seizure of the cash. However, the cash was eventually returned to the plaintiffs. *Id.*

The plaintiffs then brought a civil action in the District of Nevada against the DEA agent in Atlanta who had seized the cash. *Id.* at 1120. They alleged that the agent had done so without probable cause and thereby violated their rights under the Fourth Amendment. *Id.* The agent moved to dismiss the action for lack of personal jurisdiction. The district court granted the motion, but the Ninth Circuit reversed. *Id.* The Supreme Court then reversed the Ninth Circuit. It found that the inquiry whether there is personal jurisdiction over a non-resident in a forum state “focuses on ‘the relationship among the defendant, the forum, and the litigation.’” *Id.* at 1121 (internal quotation marks omitted). *Walden* then discussed two related issues that are to be addressed in assessing such a relationship.

First, the relationship must arise out of contacts that the “defendant *himself* creates with the forum State.” *Id.* at 1122 (internal quotation marks omitted) (emphasis in original). The Court explained that it consistently has rejected attempts to satisfy the defendant-focused “minimum contacts” inquiry by showing contacts between the plaintiff and the forum state. *Id.*

Second, the analysis looks to the defendant’s contacts with the forum state itself, not the defendant’s contacts with those who reside there. *Id.* Accordingly, the Court explained that it has upheld a finding of personal jurisdiction over

Appendix B

defendants who have purposefully “reach[ed] out beyond their State and into another by, for example, entering a contractual relationship that “envisioned continuing and wide-reaching contacts” in the forum State, or by circulating magazines to deliberately exploi[t] a market in the forum State.” *Id.* (internal quotation marks omitted) (alterations in original). However, “the plaintiff cannot be the only link between the defendant and the forum.” *Id.* Rather, “it is the defendant’s conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.” *Id.*

Applying the foregoing principles, *Walden* concluded that the DEA agent lacked “minimal contacts” with Nevada. *Id.* at 1124. First, none of the course of conduct of the DEA agent in undertaking the challenged actions occurred in Nevada. *Id.* Instead, the agent “approached, questioned, and searched [the plaintiffs], and seized the cash at issue, in the Atlanta airport.” *Id.* Further, the DEA agent “never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada.” *Id.*

Walden rejected the plaintiffs’ argument that their claimed injury reflected a connection between the DEA agent and Nevada:

[Plaintiffs] (and only [plaintiffs]) lacked access to their funds in Nevada not because anything independently occurred there, but because Nevada is where [plaintiffs] chose to be at a time when they desired to use the funds seized by petitioner. [Plaintiffs] would

Appendix B

have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had.

Id. at 1125.

District Courts in the Ninth Circuit are divided on whether, or to what extent, *Walden* overruled *Washington Shoe* and prior Ninth Circuit decisions regarding the express aiming requirement. Compare *Erickson v. Neb. Mach. Co.*, 2015 WL 4089849, at *3 (N.D. Cal. July 6, 2015) (concluding that *Walden* “rejected the idea, inherent in *Washington Shoe*, that a defendant’s knowledge of a plaintiff’s forum connections and the foreseeability of harm there are enough in themselves to satisfy the minimum contacts analysis”) and *Under a Foot Plant, Co. v. Exterior Design, Inc.*, 2015 WL 1401697, at *4 n.1 (D. Or. Mar. 24, 2015) (suggesting that *Walden* was irreconcilable with *Washington Shoe* and applying *Walden*) and *Adobe Sys. Inc. v. Cardinal Camera & Video Ctr., Inc.*, 2015 WL 5834135, at *4 (N.D. Cal. Oct. 7, 2015) (*Walden* effectively overrides *Washington Shoe*) with *Exobox Techs. Corp. v. Tsambis*, 2015 WL 82886, at *5-6 (D. Nev. Jan. 6, 2015) (prior Ninth Circuit precedent regarding the express aiming prong is still good law because *Walden* was factually distinguishable) and *Leibman v. Prupes*, 2015 WL 898454, at *9 (C.D. Cal. Mar. 2, 2015) (despite *Walden*, the express aiming requirement is still satisfied when a defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state).

Appendix B

The Ninth Circuit has applied *Walden* in holding that the express aiming requirement is not met where a California resident brought an action here against an out-of-state defendant for tortious interference with contract, but where none of defendant's challenged conduct was linked to California. *Picot v. Weston*, 780 F.3d 1206, 1214-15 (9th Cir. 2015). *Picot* rejected the plaintiff's argument, which relied on *Washington Shoe*, that the express aiming prong was met because the defendant targeted a California resident. *Id.* at 1214. *Picot* found that such an argument was unpersuasive in light of *Walden*, which "reinforced the traditional understanding that our personal jurisdiction analysis must focus on the defendant's contacts with the forum state, not the defendant's contacts with a resident of the forum." *Id.*

This Court agrees with *Erickson*, *Under a Foot Plant* and *Adobe Systems* that the analytical framework of *Washington Shoe* is not consistent with *Walden*. See *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) ("[W]here intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority . . . district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled."). Thus, intentional conduct directed at an individual who is known to reside in a particular forum is not enough, on its own, to satisfy the express aiming requirement. The question is not where the plaintiff experienced a particular injury or effect, but whether the challenged conduct connects the defendant to the forum in a meaningful way. As noted in *Adobe Systems*, any other outcome would mean that a

Appendix B

party who owns a copyright could bring an action against an alleged infringer wherever such a plaintiff happens to reside. 2015 WL 5834135, at *4.

For these reasons, the express aiming requirement is not satisfied solely because DHL targeted its conduct at a California corporation. As *Walden* held, the focus of the minimum contacts analysis is not to shift from defendant's connection with the forum to defendant's connection with plaintiff. Even accepting as true Plaintiff's allegations that DHL intentionally infringed its copyright, all of DHL's actions took place outside of California. DHL did not reach into California; it merely used or benefited from software in which a California company held a copyright. As in *Erickson*, if the outcome were different, it would mean that Plaintiff here could bring this action in any forum in which it is located.

As an alternative basis to meet this element of the test for jurisdiction, Plaintiff argues that DHL "expressly aimed" its activities at California in three ways: (i) DHL entered into a licensing agreement with Plaintiff, which is a California corporation; (ii) DHL used a VPN, that was linked to equipment in California; and (iii) DHL sent electronic communications to California on a regular and ongoing basis.

These contacts are not sufficient to establish the express aiming requirement. To be sure, DHL entered a licensing agreement with Plaintiff and signed a non-disclosure agreement ("NDA") that has a California choice-of-law clause. However, a nonresident defendant's contract with

Appendix B

a resident of a particular forum does not constitute a *per se* basis for jurisdiction over the nonresident defendant in that forum:

If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests or on "conceptualistic . . . theories of the place of contracting or of performance." Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." It is these factors – prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing – that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478-79 (1985) (internal citations omitted); *see also Scullin Steel Co. v. Nat'l Ry. Utilization Corp.*, 676 F.2d 309, 313 (8th Cir.1982) ("Merely entering into a contract with a forum resident does not provide the requisite contacts between a [nonresident] defendant and the forum state."). *Burger*

Appendix B

King upheld the exercise of personal jurisdiction in Florida over a Michigan resident who had entered into a 20-year franchise agreement with a Florida corporation. 471 U.S. at 487. Although the Michigan resident had no physical contacts with Florida apart from his associate's brief training course in Miami, the contract had substantial links to Florida. *Id.* at 479. Among other things, the Michigan resident negotiated with a Florida corporation to purchase a franchise and obtain the benefits of affiliation with a nationwide organization. *Id.* at 479-80. The negotiations resulted in a 20-year franchise agreement that envisioned "continuing and wide-reaching contacts" with the corporation in Florida, including "long-term and exacting regulation" of the franchise from the corporation's Miami headquarters. *Id.* at 480. The franchise agreement contained a Florida choice-of-law clause. *Id.* at 481. The choice-of-law clause, together with the 20-year relationship established between the Michigan resident and the Florida corporation, "reinforced [the Michigan resident's] deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there." *Id.* at 482; *see also Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc.*, 65 F.3d 1427, 1434 (8th Cir. 1995) ("The choice-of-law clause, like the mail and telephone contacts, is insufficient standing alone to confer jurisdiction. However, when these contacts are combined with the other factors, they become wholly relevant and significant.").

The facts here are distinguishable. Unlike the 20-year franchise agreement in *Burger King*, the parties here entered into a three-year software licensing agreement

Appendix B

that has not been shown to have envisioned “continuing and wide-reaching contacts” with DEX in California. Indeed, the agreement was not renewed.

Nor does DHL’s establishment of the VPN or its electronic communications with Plaintiff in California demonstrate express aiming. It is undisputed that the purpose of the VPN was to send data to printers in the Netherlands – not to reach into California. Similarly, DHL’s electronic communications with Plaintiff, which included the transmission of certain print requests from the Netherlands to California, were ultimately directed to printers located in the Netherlands. Thus, neither the VPN nor the print requests anticipated a direct effect on commerce in California. To the contrary, the various arrangements were made so that DEX could provide services to DHL in the Netherlands.

That the electronic communications were sent into California in order to facilitate these services is the result of where DEX located its information-technology operation. “[R]andom, fortuitous, or attenuated” contacts with individuals or corporations in the forum are insufficient to support personal jurisdiction. *Walden*, 134 S.Ct. at 1123 (citing *Burger King*, 471 U.S. at 475). *Boshchetto v. Hansing*, 539 F.3d 1011 (9th Cir. 2008) is also instructive. There, the plaintiff, who resided in California, was the winning bidder of vehicle sold on eBay.com by a defendant located in Wisconsin. *Id.* at 1014. The parties communicated by email to arrange the shipment of the vehicle from Wisconsin to California. *Id.* When a dispute arose, plaintiff brought an action in California; defendant

Appendix B

argued that there was no jurisdiction here, and the Ninth Circuit agreed. *Id.* at 1015. *Boshchetto* rejected the argument that an eBay.com sale to a California resident was sufficient to establish jurisdiction here. *Id.* at 1020. The facts presented did not show that the defendant purposefully availed himself of the privilege of doing business in California because performance of the contract did not require the defendant to “engage in any substantial business in California.” *Id.* at 1017. To the contrary, the one-time contract for the sale of a vehicle involved California “only because that is where the purchaser happened to reside.” *Id.* at 1019. These principles apply here, where the limited, electronic contacts by DHL with California were simply a by-product of where Plaintiff’s computer systems were physically located. Moreover, in *Boshchetto*, there was no jurisdiction notwithstanding that the out of state defendant initiated the process that led to the sale of the vehicle to the California resident. Here, Plaintiff has not presented any evidence that would support a similar finding, *i.e.*, that Defendant initiated the process that led to the contractual relationship.⁴

Superior Edge, Inc. v. Maricopa Cty. Cmty. Coll., 509 F. Supp. 2d 786 (D. Minn. 2007) is also instructive. There, a company in Minnesota licensed its software to a user in Arizona. The licensor alleged that the licensee

4. See also *Imageline, Inc. v. Hendricks*, 2009 WL 10286181, at *3, 5 (C.D. Cal. Aug. 12, 2009) (defendant had not “purposefully directed sales into California in a sufficient manner to allow it to be sued over those sales in California” notwithstanding that 10% of its online sales, comprising 1071 transactions over an approximately eight-year period, were made to California residents).

Appendix B

continued to use the software after the expiration of the licensing agreement. *Id.* at 788-89. Under the licensing agreement, the licensor provided regular product support, which included 245 telephone calls between persons in Minnesota and Arizona over the three-year period when the agreement was in place. *Id.* at 792. It also involved training of the licensee's personnel by the licensor and a means by which the licensee could provide feedback from Arizona to the licensor in Minnesota. *Id.* The licensing agreement also contained a Minnesota choice-of-law clause. *Id.* Notwithstanding these facts, the court found that there was no personal jurisdiction over the licensee in Minnesota, noting that the law requires "more than mere effects" in the forum. *Id.* at 794-95. Use of software outside the forum, with no evidence of intent to induce commercial activity in the forum, did not satisfy the requirements of due process. *Id.* The evidence presented here shows that the contacts between DHL and Plaintiff were less substantive than those between the parties in *Superior Edge*.

For these reasons, Plaintiff has not shown that the conduct at issue was expressly aimed at California.

(b) Expressly Aimed at the United States

Plaintiff argues in the alternative that DHL is subject to the jurisdiction in California pursuant to Fed. R. Civ. P. 4(k)(2). "[I]n limited circumstances, [Rule 4(k)(2) may] be a basis for establishing jurisdiction where the United States serves as the relevant forum for a minimum contacts

Appendix B

analysis.” *Pebble Beach*, 453 F.3d at 1159. The due process analysis of the federal long-arm statute is “identical” to the one discussed above; provided, however, the relevant forum is the United States. *Id.*

Plaintiff has presented neither substantial evidence nor meaningful arguments as to contacts with the United States other than those that concern California. To be sure, the supplemental briefing mentions that DHL used certain computer and network equipment at a data center in Phoenix, Arizona in order to create the VPNs and that it later acquired the equipment and transferred it to a new data center in Ashburn, Virginia. However, it is undisputed that DHL does not own or operate either of these data centers. At most these contacts were incidental to DHL’s establishment of a VPN, whose purpose was to send data to printers in the Netherlands. Therefore, it has not been shown or alleged that DHL purposefully availed itself of the privilege of conducting activities in the United States, by receiving the benefits and protections of its laws.

.

* * *

For the foregoing reasons, Plaintiff has failed to establish personal jurisdiction over DHL. Therefore, the Netherland Defendants’ Motion is **GRANTED** as to DHL.

*Appendix B***2. Specific Jurisdiction over DP International and DP AG**

Plaintiff has failed to present any evidence or make any material allegation that DP International or DP AG (collectively, the “Parent Entities”) took any action that would subject them to jurisdiction in California. The FAC alleges that the Parent Entities “directly benefited financially from the use of the software as the products earned by DHL during the period of infringement are included in the profits and or revenues declared by [the Parent Entities].” Dkt 10 ¶ 15.

Given the absence of any evidence of contacts with California, Plaintiff must demonstrate that DHL and DP International and/or DP AG are alter egos of others over which there is such jurisdiction. Under that theory of personal jurisdiction, “if the parent and subsidiary are not really separate entities, or one acts as an agent of the other, the local subsidiary’s contacts with the forum may be imputed to the foreign parent corporation.” *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) (internal quotation marks omitted). Because DHL’s contacts with the forum fail to establish personal jurisdiction, imputing them to the parent entities fails. Therefore, the Netherland Defendants’ Motion is **GRANTED** as to DP International, and the German Defendant’s Motion is **GRANTED** as to DP AG.

*Appendix B***3. Jurisdictional Discovery**

Plaintiff requests discovery for 60 days on the issue of personal jurisdiction over one or both Parent Entities. Dkt. 36 at 5. Plaintiff has presented only conclusory statements in support of this request. “[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*, 453 F.3d at 1160 (upholding district court’s denial to allow jurisdictional discovery where “the record was sufficiently developed for the district court to rule on all remaining issues pertaining to jurisdiction,” and where additional discovery “would not be helpful”); *see also Getz v. Boeing Co.*, 654 F.3d 852, 860 (9th Cir. 2011) (upholding denial of jurisdictional discovery where plaintiffs’ allegations of jurisdictional contacts were “purely speculative”); *Boschetto*, 539 F.3d at 1020 (affirming denial of request for jurisdictional discovery “based on little more than a hunch that [discovery] might yield jurisdictionally relevant facts”).

Here, both parent corporations have submitted declarations demonstrating their attenuated connection to the relevant facts of this case. As to DP AG, Greg Gansen, the Vice President of Competition and Corporate Transactions has declared that:

DPAG is organized under the laws of Germany, and maintains its principal place of business in Germany.

Appendix B

Shares of DPAG are traded on German stock exchanges only.

DPAG is not registered to do business in any state of the United States.

DPAG does not maintain an office or other place of business in the United States.

DPAG does not advertise or solicit business in the United States.

DPAG has approximately 150,000 employees, only one (1) of whom resides and works in the United States. That employee is based in Washington, D.C.

DPAG does not maintain a telephone listing in the United States.

DPAG does not own or lease real property in the United States.

Gansen Decl., Dkt. 32-1 ¶¶ 4-11.

As to DP International, Timo Van Druten, the Director of DP International, has declared that:

DPI is organized under the laws of the Netherlands, and maintains its principal place of business there.

Appendix B

DPI is not registered to do business in California.

DPI does not maintain a registered agent for service of process in California.

DPI does not advertise, solicit business, earn direct revenues from customers, or maintain an office or any other place of business in California.

DPI has no employees residing in California.

DPI does not maintain a telephone listing, mailing address, or bank account in California.

DPI does not own or lease real property in California.

Van Druten Decl., Dkt. 20-3 ¶¶ 4-10.

Plaintiff has failed to demonstrate a basis for jurisdictional discovery over the Parent Entities. Therefore, this request is **DENIED**.

IV. Conclusion

For the reasons set forth in this Order, the Motions are **GRANTED**. Plaintiff's request for additional discovery regarding the Parent Entities is **DENIED**. Counsel shall confer in an effort to agree on a form of judgment. Defendants shall lodge a proposed judgment consistent with this Order no later than July 8, 2016. The notice

38a

Appendix B

of lodging shall indicate whether the parties agreed to the form of judgment or whether Plaintiff intends to file objections within 7 days.

IT IS SO ORDERED.

Initials of Preparer _____:_____

ak_____

**APPENDIX C — DENIAL OF REHEARING OF
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT, FILED MAY 7, 2018**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-56044

D.C. No. 2:15-cv-03841-JAK-RAO

Central District of California, Los Angeles

DEX SYSTEMS, INC., A CALIFORNIA
CORPORATION,

Plaintiff-Appellant,

v.

DEUTSCHE POST AG, A GERMAN
CORPORATION; *et al.*,

Defendants-Appellees.

ORDER

Before: BEA and N.R. SMITH, Circuit Judges, and
LASNIK,* District Judge.

* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

Appendix C

The panel voted to deny the petition for rehearing. Judge Bea and Judge N.R. Smith voted to deny the petition for rehearing *en banc* and Judge Lasnik so recommended.

The full court was advised of the petition for rehearing *en banc* and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petition for rehearing and rehearing *en banc* is **DENIED**.

41a

**APPENDIX D — AMENDED COMPLAINT OF
THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: 2:15-cv-03841-JAK-RAO

DEX SYSTEMS INC.,
A CALIFORNIA CORPORATION,

Plaintiff,

vs.

DEUTSCHE POST AG, A GERMAN CORPORATION,
DEUTSCHE POST INTERNATIONAL B.V., A
NETHERLANDS CORPORATION, AND DHL
SUPPLY CHAIN (NETHERLANDS) B.V., A
NETHERLANDS CORPORATION,

Defendants.

AMENDED COMPLAINT

1. COPYRIGHT INFRINGEMENT;
2. VICARIOUS COPYRIGHT INFRINGEMENT;
3. UNFAIR COMPETITION, CAL. BUS & PROF
CODE 17200 *et. seq.*;
4. EQUITABLE ACCOUNTING/CONSTRUCTIVE
TRUST

*Appendix D***AMENDED COMPLAINT**

1. This is an action brought by Plaintiff, DEX SYSTEMS, INC, a California corporation, to recover damages from direct and vicarious copyright infringement and associated pendant claims against Defendants, DEUTSCHE POST AG (“DP”), a Foreign corporation, DEUTSCHE POST INTERNATIONAL B.V. (“DPI”), a Foreign corporation, and DHL SUPPLY CHAIN (NETHERLANDS) B.V. (“DHL”), a Foreign corporation.

JURISDICTION AND VENUE

2. The United States District Court for the Central District of California has subject matter jurisdiction over this action under 28 U.S.C. § 1331 (federal question jurisdiction), and 28 U.S.C. § 1338(a) (jurisdiction over copyright actions). The Court also has supplemental jurisdiction over the claims arising out of state law pursuant to 28 U.S.C. § 1338(b) and §1367 because this lawsuit asserts a state law claim of unfair competition joined together with a substantial and related federal law claim under the doctrines of ancillary and pendant jurisdiction. This Court has personal jurisdiction over defendants, DP, DPI and DHL, based upon their contacts within California, or, in the alternative, based upon Fed. R. Civ. P. 4(k)(2).

3. Venue in this District is proper pursuant to 28 U.S.C. § 1391(b) where a substantial number of events giving rise to the lawsuit have occurred in this District and Defendants are all subject to personal jurisdiction in this District.

*Appendix D***THE PARTIES**

4. Defendant DP is an international courier and logistics provider organized and is a foreign corporation incorporated under the laws of the Germany. Headquartered in Bonn, Germany, DP has affiliates and business divisions situated throughout California and the world. DP's principal place of business is in Germany but is authorized and has at all times been conducting business in California.

5. Defendant DPI is a foreign corporation organized and incorporated pursuant to the laws of the Netherlands and is a subsidiary of DP. DPI's principal place of business is the Netherlands but is authorized and has at all times been conducting business in California.

6. Defendant DHL is a foreign corporation organized and incorporated pursuant to the laws of the Netherlands and is a subsidiary of DPI. DHL's principal place of business is in the Netherlands but is authorized and has at all times been conducting business in California.

7. Plaintiff DEX Systems, Inc. ("DEX") is a private corporation organized under the laws of the State of California with its principal place of business located in Camarillo California. DEX provides logistics software solutions to leading global supply chain entities.

*Appendix D***FACTS COMMON TO ALL CAUSES OF ACTION**

8. DEX is the legal and proprietary owner of internationally recognized logistics software identified as “DEX Systems Reverse Logistics Management Suite” (hereinafter “DEX Software”) for which a U.S. copyright registration application has been filed.

9. This action is brought by DEX in order to halt the continued and unlawful misappropriation, distribution, copying and or use of the DEX Software by DHL and the vicarious infringement being carried out by DP and DPI.

10. DHL has declared that they will continue to unlawfully misappropriate, distribute, copy and or use the software owned by DEX without first obtaining a license to do so.

11. The unauthorized use of the DEX Software by DHL constitutes actual, unlawful and real infringement and, as such, will continue to cause DEX irreparable injury.

12. On February 6, 2012, DEX and DHL entered into a three year software licensing agreement in the form of a letter of intent (“LOI”). That licensing agreement expired on April 1, 2015.

13. DHL admits both that the DEX software license expired April 1, 2015. and that its continued use of the software is unauthorized. DHL has refused to execute a software license agreement.

45a

Appendix D

14. DHL's unauthorized use of the software is intentional and willful.

15. DP and DPI have directly benefited financially from the use of the software as the profits earned by DHL during the period of infringement are included in the profits and or revenues declared by DP and DPI. As such, both DP and DPI are vicariously liable for the tortious and intentional infringement committed by DHL against DEX.

**COUNT ONE
INFRINGEMENT OF COPYRIGHT
(17 U.S.C. § 501 *et seq.*)**

16. This count is to remedy acts of copyright infringement arising under 17 U.S.C. § 501 *et seq.*

17. DEX repeats and realleges the allegation of each and every prior paragraph as if fully set forth herein.

18. DEX is the sole legal owner of all rights, title and interest the copyright registration and source code of the DEX Software.

18. The DEX software constitutes copyrightable subject matter.

19. DEX is the sole and exclusive owner of all rights, title and interest in and to the software, source code and copyright registration.

Appendix D

20. DEX is informed and believes that DP, DPI and DHL's infringement of DEX's copyright has and continues to be intentional, willful and without regard to DEX's copyright.

21. DEX is informed and believes that DP, DPI and DHL ("the Defendants") have gained substantial profits by virtue of their infringement of DEX's copyright.

22. DEX will suffer and is suffering irreparable harm from Defendants' infringement of DEX's copyright and other exclusive rights to reproduce, market and distribute copyrighted materials insofar as the invaluable good will which DEX has earned from the development and distribution of its copyrighted software has been being eroded by Defendants' acts. DEX has no adequate remedy at law to compensate it for the loss of business reputation, customers, market position and good will flowing from Defendants' unauthorized use and dissemination of DEX copyrighted materials. Pursuant to 17 U.S.C. § 502 is entitled to an injunction against Defendants' continued use, replication, distribution and dissemination of DEX's copyrighted materials.

23. DEX has also sustained damages as a result of Defendant's infringement of DEX's copyright in an amount to be proven at trial.

24. DEX is entitled to recover the actual damages and any profits gained by Defendants that are attributable to their acts of copyright infringement pursuant to 17 U.S.C. §504 (b). Alternatively, based on DHL's repeated acts of

Appendix D

willful infringement, DEX is entitled to seek statutory damages allowed under 17 U.S.C. §504(c) at the rate of one hundred fifty thousand (\$150,000.00) dollars per violation and DEX is informed and believes there are at least 25 separate infringement violations totaling three million seven hundred fifty thousand (\$3,750,000.00) dollars in statutory damages that DEX may recover according to proof at trial.

25. DEX is further entitled to seek and recover its full costs and reasonable attorney's fees pursuant to 17 U.S.C. §505

COUNT TWO
VICARIOUS INFRINGEMENT OF COPYRIGHT
(17 U.S.C. § 501 *et seq.*)

26. This count is to remedy acts of copyright infringement arising under 17 U.S.C. § 501 *et seq.*

27. DEX repeats and realleges the allegation of each and every prior paragraph as if fully set forth herein.

28. DEX is the sole legal owner of all rights, title and interest in the copyright registration and source code of the DEX Software.

29 The DEX software constitutes a copyrightable subject matter.

30. DEX is the sole and exclusive owner of all rights, title and interest in and to the software, source code and copyright registration.

Appendix D

31. DEX is informed and believes that DP, DPI and DHL's infringement of DEX's copyright has and continues to be intentional, willful and without regard to DEX's copyright.

32. DEX is informed and believes that DP and DPI have gained substantial profits and benefit directly by virtue of DHL's direct infringement of DEX's copyright. Further, DP and DPI had the right and ability to supervisor and control the infringing conduct of DHL and failed to do so.

33. DEX will suffer and is suffering irreparable harm from DP and DPI's vicarious infringement of DEX's copyright and other exclusive rights to reproduce, display, market and distribute copyrighted materials insofar as the invaluable good will which DEX has earned from the development and distribution of its copyrighted software is being eroded by DHL's acts. DEX has no adequate remedy at law to compensate it for the loss of business reputation, customers, market position and good will flowing from DP and DPI's vicarious use and dissemination of DEX copyrighted materials. Pursuant to 17 U.S.C. § 502 is entitled to an injunction against DP and DPI's for their vicarious use, replication, distribution and dissemination of DSEX's copyrighted materials.

34. DEX has also sustained damages as a result of DP and DPI's vicarious infringement of DEX's copyright in an amount to be proven at trial.

Appendix D

35. DEX is entitled to recover the actual damages and any profits gained by DP and DPI that is attributable to their acts of vicarious copyright infringement pursuant to 17 U.S.C. §504 (b). Alternatively, based on DHL's repeated acts of willful infringement, DEX is entitled to seek statutory damages allowed under 17 U.S.C. §504(c) at the rate of one hundred fifty thousand (\$150,000.00) dollars per violation and DEX is informed and believes there are at least 25 separate infringement violations totaling three million seven hundred fifty thousand (\$3, 750,000.00) dollars in statutory damages that DEX may recover according to proof at trial.

36. DEX is further entitled to seek and recover its full costs and reasonable attorney's fees pursuant to 17 U.S.C. §501.

COUNT THREE
UNFAIR COMPETITION UNDER
CALIFORNIA LAW
(Cal. Bus. & Prof. Code §17200 *et seq.*)

37. This count is to remedy acts of injury to business reputation, and deceptive acts or practices, and arises under California Business and Professions Code, § 17200 *et seq.*

38. DEX repeats and realleges the allegations of each and every prior paragraph as if fully set forth herein.

39. Defendants' infringement and unfair use of the software constitutes unlawful and unfair business acts and

Appendix D

practices all in violation of Cal. Bus. & Prof. Code § 17200 *et seq.*

40. DEX is informed and believes that Defendants have gained substantial profits by virtue of their acts of unfair competition.

41. DEX will suffer and is suffering irreparable injury flowing directly from Defendants' unfair competition insofar as DEX's invaluable good will is being eroded by Defendants' continuing acts of unfair competition. DEX has no adequate remedy at law to compensate it for the loss of business reputation, customers, market position, confusion of potential customers and good will resulting from Defendants' unfair competition.

42. As a direct, proximate and legal result of Defendants' intentional and tortious misconduct, DEX has been damaged in an amount to be proven at trial and which amount DEX is entitled to recover pursuant to Business and Professions Code § 17203.

43. DEX has no adequate remedy at law for the injuries currently being suffered and those injuries anticipated to be suffered as a result of Defendants' acts.

44. To halt the ever-mounting injury to DEX, DEX hereby requests that the Court issue both preliminary and permanent injunctive relief restraining Defendants' from further infringing or otherwise violating DEX's intellectual property rights as described herein where DEX has no adequate remedy at law.

Appendix D

45. DEX is entitled to recover amounts by Defendants have been unjustly enriched from their unlawful and unfair business acts and practices of unfair competition under California Business and Professions Code § 17203.

**COUNT FOUR
EQUITABLE ACCOUNTING/
CONSTRUCTIVE TRUST
(17 U.S.C. § 504)**

46. Defendants' activities as alleged above have violated DS's rights in its copyrighted software within the meaning of 17 U.S.C. § 504.

47. DEX repeats and realleges the allegations of each and every prior allegation as if fully set forth herein.

48. DEX is informed and believes that Defendants have knowingly, intentionally and in bad faith engaged in infringement of DEX's copyright. Defendants thereby have fraudulently converted DEX's intellectual property rights into Defendants' profits through the copying and use of DEX's software.

49. As a direct result of their infringement, Defendants have received unjust profits to which DEX is entitled under 17 U.S.C. § 504 and principals of equity.

50. DEX has no adequate remedy at law and is entitled to an injunction, an accounting and imposition of a constructive trust in order to determine Defendants' profits.

Appendix D

PRAYER FOR RELIEF

WHEREFORE DEX prays as follows:

1. That the Court enter judgment in favor of DEX and against Defendants on all counts;

2. That the Court enter a preliminary and permanent injunction order enjoining and restraining Defendants and their agents, servants, employees, successors and assigns, and all other persons acting in concert with or in conspiracy with or affiliated with Defendants from:

- (a) directly infringing, vicariously infringing, or authorizing infringement of DEX's copyright;
- (b) engaging in any other activity constituting unfair competition or constituting an infringement or vicarious infringement of DEX's intellectual property or constituting any damage DEX's intellectual property, reputation or goodwill.

3. That judgment be entered in favor of DEX and against Defendants based upon Defendants violation of the Copyright Act, 17 U.S.C. §501 *et seq.*;

4. That judgment be entered in favor of DEX and against Defendants' for actual damages sustained by DEX based on Defendants' copyright infringement under the Copyright Act as authorized by 17 U.S.C. §504 (b);

Appendix D

5. That judgment be entered in favor of DEX and against Defendants for all profits received due to Defendants' copyright infringement in violation of the Copyright Act as authorized by 17 U.S.C. § 504(b);

6. That judgment be entered in favor of DEX and against Defendants for the maximum statutory damages allowed based upon Defendants' willful and intentional acts of copyright infringement under the Copyright Act as authorized by 17 U.S.C. §504(c);

7. That judgment be entered in favor of DEX and against Defendants for unfair competition under California Business and Professions Code § 17200 *et seq.*;

8. That this Court issue an order requiring Defendants to pay as restitution to DEX of all sums gained by Defendants and lost by DEX as a result of Defendants' unfair business practices as authorized by California Business and Professions Code § 17203;

9. That this Court issue a constructive trust on all of Defendants' funds and assets that arise out of Defendants' infringing activities and require an accounting of and disgorgement to DEX of such assets;

10. That this Court issue an order requiring Defendants to file with this Court and serve on DEX within thirty (30) days after service of an injunction a report in writing, under oath, setting forth in detail the manner and form in which Defendants have complied with the injunction;

Appendix D

11. That this Court award DEX its reasonable attorney's fees and costs of suit incurred herein pursuant to 17 U.S.C. §505;

12. That the Court award prejudgment and post-judgment interest on the above damages award; and

13. That this Court award such other and further relief to DEX as the Court deems just and proper.

By: /s/ _____
Claude S. Young

**APPENDIX E — DECLARATION OF GERARD
VAN SEUMEREN, DATED FEBRUARY 11, 2016**

DECLARATION OF GERARD VAN SEUMEREN

I, Gerard Van Seumeren, hereby declare as follows:

1. I am over the age of twenty-one (21). I make this declaration of facts known to me and, if called upon, I could and would testify competently to the facts stated herein.

2. I give this Declaration in support of the *Supplemental Memorandum of Law in Support of Defendants' Motions to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2)*, filed contemporaneously herewith.

3. I am a technical architect and have been retained by DSC Netherlands as an independent contractor. As a result of this position, I have personal knowledge of all matters stated herein.

4. I was involved in the arrangement by which DHL Supply Chain (Netherlands) B.V. ("DSC Netherlands") and DEX Systems, Inc. ("DEX") set up a secure virtual private network (VPN) to facilitate exchange of data.

5. The purpose of the VPN connection between DEX and DSC Netherlands was to allow DEX to send print data to printers in the Netherlands.

6. A true and accurate visual representation of the dual VPN arrangement that was ultimately reached for DEX and DSC Netherlands is attached hereto as Exhibit

Appendix E

1.

7. The original arrangement involved a site-to-site VPN, which is a routine manner of securely transmitting data through a “tunnel” in the public Internet. The data was transmitted from DEX’s network to a location in Europe, where DEX had arranged for a terminal or relay point. From there, the data was transmitted via the VPN to a terminal or relay point, which was located in a data center in Prague, Czech Republic. From there, the data was transmitted through a DHL private network to DSC Netherlands. (*See Exhibit 1, Figure 1: the solid purple line demonstrates the flow of data along this “primary” VPN.*)

8. DEX experienced technical issues with transmitting its data from the United States to DEX’s end of the VPN in Europe, necessitating the creation of a backup VPN in 2013.

9. The backup VPN used new locations for each terminal or relay point. Print data was sent from DEX in California through the backup VPN to a terminal or relay point in a data center in Phoenix, Arizona. From there, the data was sent through a DHL private network to DSC Netherlands. (*See Exhibit 1, Figure 1: the dotted purple line demonstrates the flow of data along this backup VPN.*)

10. The backup VPN did not replace the primary VPN, which continued to operate. (*See Exhibit 1, Figure 1.*)

11. DEX had exclusive control over which VPN was used to transmit its print data, ultimately to the

Appendix E

Netherlands. From DSC Netherlands' end, there was no mechanism for an automatic switchover to the backup VPN if the primary VPN failed; DEX alone would be able to choose to use the backup VPN.

12. Both the backup VPN and the primary VPN were one-way connections, whereby print data was sent from DEX to DHL IT Centers and then through DHL's private network to DSC Netherlands. DSC Netherlands could not use the VPN to send data back to DEX. (*See Exhibit 1, Figure 2.*)

13. Attached hereto as Exhibit 2 is a true and accurate copy of the original request to create the primary VPN. Beginning at the bottom of Page 3 of Exhibit 2, under the heading "Access Control," is a list of rules defining what types of data would be permitted to pass through the VPN.

14. As shown in Exhibit 2, there is only one rule listed for the primary VPN. That rule specifies the source and destination IP addresses for data flowing through this VPN. The IP address listed under "Source IP Address" in Exhibit 2 belonged to DEX. The IP addresses listed under "Destination IP Address" indicate printers belonging to DSC Netherlands. As there are no other rules listed, this demonstrates that data could only be permitted to pass through the primary VPN if it originated from DEX. (*See Exhibit 2.*)

15. Attached hereto as Exhibit 3 is a true and accurate copy of the original request to create the backup VPN. Beginning at the bottom of Page 3 of Exhibit 3, under the

Appendix E

heading “Access Control,” is a list of rules defining what types of data would be permitted to pass through the VPN.

16. As shown in Exhibit 3, there is only one rule listed for the backup VPN. That rule specifies the source and destination IP addresses for data flowing through this VPN. The IP address listed under “Source IP Address” in Exhibit 2 belonged to DEX. The IP addresses listed under “Destination IP Address” indicate printers belonging to DSC Netherlands. As there are no other rules listed, this demonstrates that data could only be permitted to pass through the backup VPN if it originated from DEX. (*See* Exhibit 3.)

17. Neither party gained access to the other’s internal network by way of the VPN. DSC Netherlands did not receive any data from DEX unless DEX chose to transmit it through one of the VPNs.

18. DSC Netherlands’ firewall only permitted print data and incidental data—such as automated electronic signals meant to ensure that either end of the VPN connection was still receiving—to be received through the VPNs.

19. In both Exhibit 2 and Exhibit 3, under the heading “Access Control” and the subheading “Protocol” are listed the protocols—sets of rules for communications between devices—that were permitted for the respective VPNs. All of the listed protocols are used for print output and incidental communications, such as electronic signals for demonstrating that a device is still connected, or for

Appendix E

transmitting error messages. This demonstrates that only print data and related incidental data was able to pass through the VPNs.

20. DEX and DSC Netherlands were each responsible for arranging their own end of both VPNs. DSC Netherlands did not set up DEX's terminal in California, and provided no hardware to DEX. The parties simply exchanged IP addresses to allow each end of the VPNs to locate and connect to the other.

I declare under penalty of perjury under the laws of the State of California and United States of America that the foregoing facts are true and correct, and that this declaration was executed on February 11, 2016.

/s/
GERARD VAN SEUMEREN

[FOR EXHIBIT 1-3 SEE SUPPLEMENTAL
APPENDIX AT P. SA1]

**APPENDIX F — DECLARATION OF JAMES
CODE, DATED FEBRUARY 8, 2016**

DECLARATION OF JAMES CODE

I, James Code, hereby declare as follows:

1. I am over the age of twenty-one (21). I make this declaration of facts known to me and, if called upon, I could and would testify competently to the facts stated herein.

2. I give this Declaration in support of the *Supplemental Memorandum of Law in Support of Defendants' Motions to Dismiss Pursuant to Fed. R. Civ. P. 12 (b)(2)*, filed contemporaneously herewith.

3. I am an employee of DPDHL IT Services, Americas where I hold the position of Head of Service & Supplier Management, IT Services Americas. As a result of this position, I have personal knowledge of all matters stated herein.

4. During the majority of the 2013-2015 time period that is at issue in the *Supplemental Memorandum of Law in Support of Defendants' Motions to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2)*, Defendant DHL Supply Chain (Netherlands) B.V. ("DSC Netherlands") used certain computer and network equipment at a data center in Phoenix, Arizona in order to create a virtual private network (VPN).

5. During the time period when DSC Netherlands was using computer and network equipment there, the data center in Phoenix was owned and operated by

Appendix F

T-Systems North America. Neither DSC Netherlands, nor co-defendants Deutsche Post AG and Deutsche Post International B.V., owned the Phoenix data center, employed any personnel there, or owned any of the hardware or equipment used there.

6. On May 14, 2015, the equipment used for the VPN was acquired by DHL Information Services (Americas) Inc., and transferred to a new data center in Ashburn, Virginia owned by AT&T Corporation.

7. Neither DSC Netherlands, nor co-defendants Deutsche Post AG and Deutsche Post International B.V., owned the Ashburn data center, employed any personnel there, or owned any of the hardware or equipment used there.

I declare under penalty of perjury under the laws of the State of California and United States of America that the foregoing facts are true and correct, and that this declaration was executed on February 8, 2016.

/s/_____
James P. Code

**APPENDIX G — DECLARATION OF MAARTJE
VOS, DATED AUGUST 20, 2015**

DECLARATION OF MAARTJE VOS

I, MAARTJE VOS, hereby declare as follows:

1. I am over the age of twenty-one (21). I make this declaration of facts known to me and, if called upon, I could and would testify competently to the facts stated herein.

2. I give this Declaration in support of Defendant DHL Supply Chain (Netherlands) B.V.'s ("DSC Netherlands") Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2), filed contemporaneously herewith.

3. I am an employee of DSC Netherlands, where I hold the title of VP HR DHL Supply Chain Netherlands. As a result of this position, I have knowledge of all matters stated herein.

4. DSC Netherlands is organized under the laws of the Netherlands, and maintains its principal place of business there.

5. DSC Netherlands is not registered to do business in California.

6. DSC Netherlands does not maintain a registered agent for service of process in California.

7. DSC Netherlands does not advertise, solicit business, earn direct revenues from customers, or maintain an office or any other place of business in California.

Appendix G

8. DSC Netherlands has no employees residing in California.

9. DSC Netherlands does not maintain a telephone listing, mailing address, or bank account in California.

10. DSC Netherlands does not own or lease real property in California.

I declare under penalty of perjury under the laws of the State of California and United States of America that the foregoing facts are true and correct, and that this declaration was executed on August 20, 2015.

/s/
MAARTJE VOS