

**In the
Supreme Court of the United States**

DHL SUPPLY CHAIN (NETHERLANDS) B.V.,
Petitioner,

—v—

DEX SYSTEMS, INC.,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

BRIEF IN OPPOSITION

CLAUDE S. YOUNG
COUNSEL FOR RESPONDENT
GENERAL COUNSEL
DEX SYSTEMS
3600 VIA PESCADOR
CAMARILLO, CA 93012
(805) 388-1711
SYOUNG@DEX.COM

OCTOBER 22, 2018

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Did the Ninth Circuit correctly rule that Petitioner's own contacts in the forum including its commission of copyright infringement in the forum satisfy the standard for personal jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Respondent, DEX SYSTEMS, INC., informs the Court that Respondent is a wholly owned subsidiary of its parent corporation, Data Exchange Corporation. Data Exchange Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vi
INTRODUCTION	1
COUNTER STATEMENT	5
A. Background	5
1. The Parties	5
2. Facts	5
B. Procedural History	8
1. District Court Proceedings	8
2. Ninth Circuit Proceedings	9
REASONS FOR DENYING THE PETITION	10
I. THE PRECEDENT OF THE COURT WAS OBSERVED LEAVING NO ISSUE TO BE DECIDED	11
A. Legal Standard for Personal Jurisdiction ..	11
II. DSC MISCHARACTERIZES THE NINTH CIRCUIT’S DECISION IN AN EFFORT TO INTRODUCE NEW ARGUMENT AND CLAIMING THE DECISION IS A MATTER OF NATIONAL IMPORTANCE	18
III. DSC WAIVED REASONABLENESS IN THE LOWER COURTS	18

TABLE OF CONTENTS – Continued

	Page
IV. THE NINTH CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT.....	19
CONCLUSION.....	20

APPENDIX TABLE OF CONTENTS

Declaration of Rajiv Dugal (September 11, 2015).....	App.1
Plaintiff’s Supplemental Memorandum in Oppo- sition to Defendants Deutsche Post Interna- tional B.V. and DHL Supply Chain Netherlands B.V.’s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2); Declaration of Rajiv Dugal (February 2, 2016)	App.4
Plaintiff-Appellant DEX Systems Inc.’s Corrected Opening Brief (April 4, 2017).....	App.16
Appellees Deutsche Post AG, Deutsche Post International B.V., and DHL Supply Chain (Netherlands) B.V.’S Answering Brief (April 4, 2017)	App.39
Plaintiff-Appellant DEX Systems Inc.’s Reply Brief (June 20, 2017)	App.73

TABLE OF CONTENTS – Continued

Page

SUPPLEMENTAL APPENDIX TABLE OF CONTENTS

Exhibits to First Declaration of Rajiv Duggal (September 11, 2015) District Court Docket # 27	Supp.App.1
Exhibits to Plaintiff's Supplemental Memorandum in Opposition to Defendants Deutsche Post International B.V. and DHL Supply Chain Netherlands B.V.'s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2); Declaration of Rajiv Dugal (February 2, 2016) District Court Docket # 51	Supp.App.17

TABLE OF AUTHORITIES

	Page
CASES	
<i>Adobe Sys. Inc. v. Blue Source Group, Inc.</i> , 125 F.Supp.3d 945 (2015)	16
<i>Bancroft & Masters, Inc. v. Augusta Nat’l Inc.</i> , 223 F.3d 1082 (9th Cir. 2000)	13
<i>Brayton Purcell LLP v. Recordon & Recordon</i> , 606 F.3d 1124 (9th Cir. 2010)	13
<i>Burger King v. Rudzewicz</i> , 471 U.S. 462 (1985)	2, 3
<i>Calder v. Jones</i> , 465 U.S. 783 (1984)	12
<i>Dole Food Co. v. Watts</i> , 303 F.3d 1104 (9th Cir. 2002)	12
<i>Gen. Motors L.L.C. v. Autel. US Inc.</i> , No. 14-14864, 2016 WL 1223357 (E.D. Mich. Mar. 29, 2016).....	16, 20
<i>Gray & Co. v. Firstenberg Mach. Co.</i> , 913 F.2d 758 (9th Cir. 1990)	16
<i>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.</i> , 243 F.Supp.2d 1073 (C.D. Cal. 2003).....	11
<i>Microsoft Corp. v. Mountain West Computers</i> , 2015 WL 4479490 (W.D. Wash. July 22, 2015)	14, 15, 17, 20
<i>Panavision Int’l, L.P. v. Toeppen</i> , 141 F.3d 1316 (9th Cir. 1998)	13, 16
<i>Schwarzenegger v. Fred Martin Motor Co.</i> , 374 F.3d 797 (9th Cir. 2004)	12

TABLE OF AUTHORITIES—Continued

	Page
<i>South Dakota v. Wayfair, Inc.</i> , 548 U.S. ____ (2018)	3
<i>Third Estate LLC v. Cultivation, Ltd.</i> , 2015 WL 12426153 (C.D. Cal. Oct. 23, 2015)	17
<i>Walden v. Fiore</i> , 571 U.S. 277, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014)	passim
<i>Washington Shoe Co. v. A-Z Sporting Goods, Inc.</i> , 704 F.3d 668 (9th Cir. 2012)	11
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)	9, 10

STATUTES

17 U.S.C. § 501 et seq	8
Cal. Code Civ. Proc. § 410.10	11

JUDICIAL RULES

Fed. R. Civ. P. 12(b)(1)	8, 9
--------------------------------	------

INTRODUCTION

The Petition does not merit review because the Ninth Circuit followed the precedent of this Court leaving no issue, large or small, to be decided. In a well reasoned opinion based not only on a software licensing agreement but also, and, more importantly, a private network agreement (entitled “DHL Private Network Request”) (Res.Supp.App.2-5), the Ninth Circuit noted that the Parties agreed to the creation of a private network for the express purpose of establishing a network into California so that DSC Netherlands (“DSC”) could access DEX Server and proprietary software hosted on that server. DSC would access the DEX California network from its own California server and IP address located in Burlingame, California. The Ninth Circuit held that DSC’s decision, by agreement, to embark on the creation of a private network into California and to transact business through California servers followed by DSC activating the software without a license thus committing intentional copyright infringement demonstrably satisfied the personal jurisdiction standard announced in *Walden v. Fiore*, 571 U.S. 277 (2014).

From the vantage point of a more complete record appended by DEX, it is easily gleaned why the Ninth Circuit determined that personal jurisdiction was established with (1) a virtual private network that DSC jointly created, utilizing its own existing network with server and IP address in California; (2) the DSC California network and IP address being used as the gateway to access the DEX California server and software in order to send electronic print requests into

California; (3) this network agreement was created to ensure that DSC could have uninterrupted access to the DEX server and software; (4) brazenly, even after DSC was warned by DEX that its software license was about to expire, DSC ignored fair warning and continued to access the software even after the license expired. (Res.App.6; Pet.10a-11a). The totality of this conduct, the Ninth Circuit opined, constituted deliberate engagement with and “express aiming” into the forum. (Pet.App.3a)

DSC only now makes much of the fact that its forum contacts were virtual rather than physical. On this issue the law is well settled. Physical presence in the forum is not always determinative when reviewing a defendant’s minimum contacts. *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985). Rather, the key factor is whether the defendant has purposely “availed himself of the privilege of conducting business” in the forum and if defendants commercial efforts are purposefully directed at the forum, courts have consistently rejected the notion that an absence of physical contacts will defeat personal jurisdiction[]. *Id.* (quotation omitted). DSC “purposefully directed” itself to California, utilizing its very own existing California network infrastructure, building a network into, sending electronic transactions from its server to another California server (*i.e.* DEX) and ultimately committing infringement in California. DSC’s forum contacts were not “random, fortuitous, or attenuated,” but instead transactionally intertwined with California and with DEX in a very meaningful way. *Walden v. Fiore*, at 209. Furthermore, this Court has recently addressed physical presence in a different (taxation) context finding that the physical presence requirement is removed “from eco-

conomic reality” with businesses no longer needing to have physical presence in the state to satisfy due process. *South Dakota v. Wayfair, Inc.*, 548 U.S. ____ (2018) (citing *Burger King* at 476). The physical presence argument advanced by DSC represents new argument in the proceedings and is therefore addressed below on that basis.

In keeping with precedent, rather than broadening it as DSC now posits, the Ninth Circuit, analyzing the events through the lens of *Walden*, concluded that DSC’s own intentional and ongoing contacts into California were clearly inapposite to *Walden* where there was absolutely no contact of any kind directed into or at Nevada by the defendant. Accordingly, the Ninth Circuit’s endorsement of jurisdiction is laser consistent with *Walden*.

The Petition morphs the Ninth Circuit decision into caricature in a attempt to re-litigate facts which further underscores why the Petition is not certworthy. DSC misinterprets the decision stating that the Ninth Circuit 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. DSC’s creative distillation suggests it has not even read the decision. This transformation is also apparent upon examination of DSC’s before and after arguments thus far in these proceedings. In its exact words to the Ninth Circuit, DSC contended—“the secondary VPN and other electronic communications that DEX cites are not independent contacts with the forum, rather they are incidental to DSCs [] contact with DEX, the entire

purpose of which was to facilitate services to DSC customers outside of the United States.” The crux of that argument, said DSC, is that DSC should not be subjected to personal jurisdiction in California because DEX was incidentally a resident of California, restated, and just so happened to reside there. (emphasis added) (Res.App.50) However, in this Petition, DSCs abandons its featured argument and contends (for the first time) that the Ninth Circuit wrongly evaluated the scope of DSCs virtual contacts by broadening *Walden* and that this necessitates review “to clarify the nature of the due process inquiry in the context of electronic contacts post *Walden*.” (Pet. Opening Brief Page 13) The two arguments do not converge. Notwithstanding DSC’s latest revision, this does not alter the course with the complete record having previously been reviewed by the appellate court. Moreover, DSC’s approach in raising new argument mimics a shell game with the one true point being that a Petition for Certiorari is not the place for hiding the ball under a new rock simply because DSC is unsatisfied with the result below. And, even if DSCs latest argument is considered at face value, the outcome remains the same—DSC would fully expect (indeed, not surprised) to be haled into a California court after it committed an intentional tort anchored to the very network it agreed to create in California.

Finally, the Petition is substantively not certworthy because, as the Ninth Circuit held, DSC waived reasonableness leaving this Court with an incomplete jurisdictional analysis to consider.

Thus, for each and every reason indicated, certiorari should be denied.

COUNTER STATEMENT

A. Background

1. The Parties

Incorporated in California in 2007, DEX Systems, Inc., (“DEX”) is a California corporation with its principal place of business in Camarillo, CA. DEX is the legal and proprietary owner of internationally recognized logistics software known as “DEX Systems Reverse Logistics Management Suite” which DEX licenses to logistics companies including DSC at one point.

Deutsche Post AG (“DPAG”) is an international courier and logistics provider headquartered in Bonn, Germany. DPAG has affiliates and business divisions situated throughout California and the world. DPAG has been dismissed from the underlying action.

Deutsche Post International B.V. (“DP”) is a foreign corporation organized and incorporated pursuant to the laws of Netherlands. DP has been dismissed from the underlying action.

DHL Supply Chain Netherlands B.V., (“DSC”) is a foreign corporation organized pursuant to the laws of Netherlands.

2. Facts

The underlying infringement action, currently before the U.S. District Court for the Central District of California, arose as a result of DSC’s intentional refusal to cease and desist its use of or software

located on a server in California following the expiration of a software license that DSC accessed through a California private electronic network that DSC created.

For purposes of establishing personal jurisdiction, the facts of this case are much more poignant than in the more commonly found situations where the plaintiff learns that his intellectual property was infringed upon then seeks to file the action in its home state claiming that it where the harm was suffered juxtaposed with these facts case where DSC knowingly entered California for the purpose of setting up a network with the infringement linked to where the tort actually took place—on the DEX server in California.

On February 6, 2012, DEX and DSC executed a letter of intent (“LOI”) to implement a remote repair program in Venlo, Netherlands. During the term of the LOI, the parties, requiring the connection to the network remain live and accessible, agreed to a second network linked directly to the DEX server located in California. (Res.App.21) In order to create the network, DSC utilized its pre-existing network and electronic infrastructure in California (*i.e.* California server and IP address) to connect to the DEX network and server so that DSC could transact print requests by engaging the DEX software on the server. (Res.App.21)

Before the parties set up of the private network, they executed a Private Network Agreement titled “Deutsche Post DHL VPN Request” (hereinafter “VPN request”). (Res.App.2 and Res.Supp.App.20-23) This Agreement announced that DSC and DEX would be working in partnership toward the creation of a virtual private network to transact on a commercial basis. (Res.App.11) In creating the private network, DSC

agrees to utilize its U.S. based IP address located in Burlingame, California. (Res.App.2,13) The purpose of this secured connection was to enable DSC to have a redundant route for its printers via the VPN connection with DEX Systems data center in Camarillo, California. (Res.App.12) More particularly, these connections provided software system data messaging to run the DEX Systems software between DSC's Netherland printers and DEX server in Camarillo, California. (Res.App.1) DSC's access to the DEX California server was on a full time and continuous basis (Res.App.1)

In setting up the private network, DSC had a direct and secure connection to the DEX Server enabling DSC to perform electronic transactions using the DEX software. (Res.App.2) DSC was provided 24-7 access by the DEX IT team and, as such, was in continuous and daily email communication with DEX California for the purpose of communicating software systems performance, modifications, failures, changes and upgrades. (Res.App.2) As the VPN Agreement provides, and in order to connect to the DEX California server, DSC set up a U.S. based IP address identified as 199.41.253.14. for its external IP Primary Gateway located in Burlingame, California. (Res.App.2, 13) As part of the Venlo project, DEX California provided daily IT support to DSC. Then enabled DSC to communicate with DEX through a secured network. (Res.App.2) DSC's software license expired on April 1, 2015.

Though its license expired, DSC, between April 1, 2015 and May 19, 2015, continued to access the software without permission and repeatedly infringed upon the DEX copyright. (Res.App.14) (Res.Supp.App. 28) DEX has set forth that DSC's use was unauthorized

and constitutes intentional copyright infringement in violation of 17 U.S.C. § 501 et seq.

As mentioned, this private network connection (commonly referred to as a virtual private network or “VPN”), was carried out so that DSC could conduct commercial transactions through the DEX software hosted on the DEX California server. The VPN permitted DSC to send electronic requests via the network to the DEX Server by engaging the California software to then implement printing back in the Netherlands. In order to carry out these transactions, DSC utilized its California based IP address located in Burlingame, California to connect to the DEX server. This permitted DSC to electronically message the DEX server on the Parties’ private network. (Resp. App.2).

DSC admits it was conducting business with a third party supplier identified as T-Systems North America located in Scottsdale AZ to handle the creation of the private network between DEX and DSC. (Res. App.24)

B. Procedural History

1. District Court Proceedings

As a result of the infringement, on May 20, 2015, DEX filed its complaint for copyright infringement and related state law causes of action in the U.S. District Court for the Central District of California. DSC filed a motion to dismiss under F.R.C.P. 12(b)(1). In its Motion, DSC did not deny that it committed infringement. DSC also did not deny that its existing California network and IP address were used to create the network connection with DEX in California. On

October 26, 2015, a second 12(b)(1) was brought on behalf of DPAG and DP. On June 24, 2016, the district court granted both motions and dismissed the action.

2. Ninth Circuit Proceedings

On, August 22, 2016, DEX filed a Notice of Appeal. The matter was heard on February 22, 2018. The Ninth Circuit Panel issued its opinion on March 13, 2018, affirming in part and reversing in part. DSC filed a Petition for Panel Rehearing and Rehearing En Banc. The Motion for Rehearing and Request for En Banc review were denied.

The Ninth Circuit, in full observance of *Walden*, correctly held that DSC had through its forum contacts subject to the personal jurisdiction of the California courts because DSC; (1) set up an electronic network in California; (2) DEX's California server had to be engaged and used for the software at issue to function, and DSC had knowledge of this fact; (3) DSC sent print requests to DEX's California server causing the software to engage and create output data that was sent via the VPN to DSC's printers in Venlo, Netherlands; and (4) 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—committing intentional copyright infringement. The Ninth Circuit rightly reasoned that DSC's use of the server was not a "fortuitous occurrence." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) (single automobile passing through the forum). Rather, the software was located on California servers and accessed pursuant to the network agreement (VPN request) that the parties had set up. Specifically DSC and DEX jointly

set up the California-based VPN to facilitate printing following technical difficulties with a primary VPN based in Europe. The parties agreed to route the data through DEX's server in California. *Id.* The parties' network agreement—contemplated DSC's direct availing of DEX's California servers to facilitate printing in Netherlands.

DSC contracted to use DEX's services and knew the California server would be used to supplement the primary Europe-based VPN. It is therefore completely appreciable that DSC would understand the potential for it to be sued in California for its continued infringing use of the California-hosted software after the license expired.

Under these facts, the Ninth Circuit understandably found that "DSC's infringing conduct was expressly aimed at and occurred in California—causing harm DSC knew DEX would suffer in California" and that DSC purposefully derived benefit from its forum activities resulting in jurisdictionally significant harm in California.

REASONS FOR DENYING THE PETITION

The petition should be denied for several reasons. First, the precedent of this Court was followed leaving no issue to be decided. Second, the petition mischaracterizes the Ninth Circuit's decision in an effort to introduce new argument. Third, DSC waived reasonableness. Fourth, the decision below does not conflict with any decision of this Court or any other court.

DSC advances the myopic argument that its reasoning must be correct because the district court ruled that DSC's forum contacts were fortuitous. DSC's

premise is a flawed one and was ultimately nonprevailing. It is clear that the Ninth Circuit paid careful attention to the entire record, including the network agreement and DSC's commission of an intentional tort in California deciding that DSC satisfied the personal jurisdiction standard under *Walden*.

DSC's eschewed assertions are further witnessed in its generalized contention that DEX relied upon "over ruled precedent" in its reliance on *Washington Shoe Co. v. A-Z Sporting Goods, Inc.*, 704 F.3d 668 (9th Cir. 2012) before the lower courts. On the contrary, DEX relied upon *Walden* before the appellate court arguing that DSC's conduct satisfied the *Walden* standard based upon DSC's creation of a California network and its commission of an intentional tort on that network in California. (Res.App.32-34).

I. THE PRECEDENT OF THE COURT WAS OBSERVED LEAVING NO ISSUE TO BE DECIDED

A. Legal Standard for Personal Jurisdiction

California's long arm statute authorizes the exercise of personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Code of Civil Proc. § 410.10. "[T]he plaintiff need only make a prima facie showing of jurisdiction to survive a jurisdictional challenge on a motion to dismiss. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 243 F.Supp.2d 1073, 1082 (C.D. Cal. 2003). "The Ninth Circuit has developed a three-part test for assessing the exercise of specific personal jurisdiction over a party:

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

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797 (9th Cir. 2004).

As the Ninth Circuit held, DEX made a *prima facie* showing sufficient to satisfy the first two prongs, however, regarding the third prong, DSC waived and forfeited any argument as to reasonableness which was DSC's burden to set forth. *College Source, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1076. DSC does not argue today that the Ninth Circuit erred as to that aspect of its ruling.

To satisfy the purposeful direction prong, DEX need only show that DSC committed an intentional act, expressly aimed at California, causing harm that DSC knew would likely be suffered in California. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002) (citing *Calder v. Jones*, 465 U.S. 783 (1984)). DEX does not need to demonstrate that DSC is "physically present or ha[s] physical contacts with the forum, so long as [its] efforts are 'purposefully directed' toward forum

residents.” *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998) (the court finding that the action which arises out of or results from defendant’s forum-related activities (*i.e.* as in this case engaging in electronic commerce in the forum) where the non-resident, acting outside the state, intentionally causes injury within the state.)

1. DSC Committed Intentional Acts in the Forum Each Time It Activated DEX Software Without a License

DSC does not dispute DEX allegation that it intentionally acted each time it authorized and directed the activation of DEX software without a license. In fact, DSC appears to concede that the complaint sufficiently alleges that DSC committed an intentional tort. That is because this element is “easily satisfied.” *Brayton Purcell LLP*, 606 F.3d at 1128 (posting infringing content on website constituted intentional act); *see Schwarzenegger*, 374 F.3d at 806 (placing newspaper ad constituted intentional act); *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (sending a letter constituted intentional act). Here, DSC committed an intentional act in California when it accessed software hosted on a server located in California without a license to do so. In order to activate the software DSC was required to transmit an electronic request activating the software. Here, each of DSC’s software activations was done for the purpose of commercially transacting business both in the forum and abroad.

2. DSC Expressly Aimed Its Conduct at California

DSC purposefully aimed its activities in California when it illegally sent electronic requests to engage (activate) the software after its license expired. In *Microsoft Corp. v. Mountain West Computers*, 2015 WL 4479490 (W.D. Wash. July 22, 2015) the district court found that personal jurisdiction was also established under similar circumstances. In particular, that Court stated:

The allegations in this case are that Defendants accessed Plaintiff's computer servers to unlawfully validate unlicensed software in violation of trademark and copyright laws. Such allegations, if true, satisfy the "express aiming" element. The Defendants' alleged actions were intentional and directed at Plaintiff. The alleged actions were not merely contacts with Washington that could have foreseeable effects in Washington [because] the alleged actions were aimed at a Washington business. If the allegations are true, it was not only foreseeable but certain that [its] conduct would harm Plaintiff in Washington.

In *Mountain West, supra*, the District Court, denying defendant's motion to dismiss, in part, for lack personal jurisdiction, relied upon this Court's decision in *Walden v. Fiore. Supra*. In *Walden*, the Court held that personal jurisdiction "must arise out of contacts that the 'defendant himself' creates with the forum State" and that "the plaintiff cannot be the only link between the defendant and the forum." *Walden*, 134 S.Ct. at 1122. (emphasis added It is the defendant's

conduct that must form the necessary connection with the forum. . . . not . . . the ‘random, fortuitous, or attenuated’ contacts [defendant] makes by interacting with other persons affiliated with the State.” DSC’s conduct established the above.

By explanation, when a defendant reaches into and commits an intentional tort in the forum, the defendant has, at that point, satisfied “defendant’s own connection to the forum” because it is the defendant’s own tortious conduct causing harm to the forum that creates the link to the forum. Thus, when DSC committed the intentional tort of copyright infringement by accessing a server in California through the network it created in California this established DSC’s own contacts in the forum. *Walden, supra*.

The Ninth Circuit reached the very same conclusion reached in *Mountain West*—Like *Mountain West*, “it was not only foreseeable but certain that [DCS’s] conduct would cause harm in [California].” *Id*.

3. DSC’s Intentional Acts Caused Harm It Knew Would Be Suffered in California

DSC’s infringement of DEX copyright caused the harm to DEX’s reputation and goodwill but, more relevantly, DSC knew the sever and software were located in California and that activating the software illegally would therefore cause harm in California. DSC “knew that the harm suffered by [DEX] from [its] unlawful conduct which was aimed at [DEX] would be suffered in [California]” because that is where the software was hosted. *Mountain West*, 2015 WL 4479490 at *8. This is sufficient to satisfy the final element of the purposeful direction analysis.

4. DEX's Claims Arise Out of or Result from DSC's Forum-Related Activities

The second part of the test for specific personal jurisdiction directs that the Court determine whether the plaintiff's claims "arise out" of the defendants' forum-related activities. The Ninth Circuit has adopted the "but for" test to determine the "arising out of" requirement. *Gray & Co. v. Firstenberg Mach. Co.*, 913 F.2d 758, 761 (9th Cir. 1990) (internal citation omitted). "The Ninth Circuit has recognized that, in trademark or copyright infringement actions, if the defendant's infringing conduct harms the plaintiff in the forum, this element is satisfied." *Adobe Sys.*, 125 F.Supp.3d at 963.

By expressly reaching out to California to unlawfully access DEX' server and software, which DSC knew were located in California, DSC expressly aimed its tortious conduct at DEX in California. *See Panavision Int'l L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (purposeful direction where cybersquatter attempted to extort money from Panavision, which defendant knew was based in California); *Gen. Motors L.L.C. v. Autel. US Inc.*, No. 14-14864, 2016 WL 1223357, at *4 (E.D. Mich. Mar. 29, 2016) ("[Chinese defendant] has reached into Michigan to access GM's intellectual property located on its servers residing in Michigan. This is an example of purposeful availment.") (citation omitted). There is ample support for DEX' allegations that DSC knowingly accessed software from DEX servers located in California. DSC knew by virtue of its course of dealing with DEX that it was not merely a foreseeable impact on the forum state but a knowing one." *Id.*, citing *Third Estate LLC v. Culte-*

vation, Ltd., 2015 WL 12426153 at *5 (C.D. Cal. Oct. 23, 2015) (discussing *Walden*). DSC sending of electronic requests and activation of the software easily satisfies the standard and DEX demonstrated that “but for” DSC setting up of network and committing intentional copyright infringement via the network in California, DEX’s claims would not have arisen.

As with the defendant in *Mountain West*, here too, DEX claims against DSC “are derived from . . . DSC’s intentional contact of the [DEX] server and software located in [California] such that DEX present claims arise out of the [] violating conduct.” *Mountain West*, 2015 WL 4479490, at *8. In short, the Ninth Circuit observed the precedent of this Court finding that DSC’s own actions in the forum satisfied *Walden*.

It is DSC who conflates its conduct in the forum with the happenstance that *Walden* said would not support jurisdiction, namely stopping at an airport in one state on the way to another state. DSC misapplies *Walden*. In this case, reaching onto the forum to activate the software is the final destination in the contacts discussion. Had DEX sought jurisdiction in for example Kansas merely because the electronic signal it sent DEX passed through an internet switching facility in Kansas, then DSC would be correct to cite *Walden* because the situation would be just like the defendant in *Walden* who, by happenstance, was nabbed in a connecting airport. DSC’s final destination in committing the intentional tort was California.

II. DSC MISCHARACTERIZES THE NINTH CIRCUIT'S DECISION IN AN EFFORT TO INTRODUCE NEW ARGUMENT AND CLAIMING THE DECISION IS A MATTER OF NATIONAL IMPORTANCE

DSC mischaracterizes the decision in order to raise a new argument claiming it raises a matter of national importance. As mentioned in the introduction, DSC argued to the Ninth Circuit that it was subject to personal jurisdiction because DEX happened to be incorporated in California. Having lost on that argument, DSC now appears to have cabined that argument and feature instead that there is an issue of national importance requiring examination of due process in the context of “virtual contacts.” This is a mischaracterization of the Ninth Circuit’s decision which relied upon forum specific facts.

The facts of this case are much more forum centric than DSC cares to concede. DSC’s mischaracterization of the decision weakens the petition’s certworthiness. Under the facts, the Ninth Circuit rightly concluded that personal jurisdiction was established. Separately, there is no issue of national importance impacting the nation’s economy flowing from the appellate court’s decision in following precedent.

III. DSC WAIVED REASONABLENESS IN THE LOWER COURTS

The petition is not certworthy because it presents an incomplete jurisdictional analysis. Here, DSC waived reasonableness in both of the lower courts and, therefore, an entire segment of the personal jurisdiction analysis is not before the Court.

IV. THE NINTH CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT

The Ninth Circuit decision is a fact-bound one confined to its unique circumstances in which precedent was followed. Further, the Petition arises from a decision where all of the facts were weighed—a major vehicle problem when seeking review. Moreover, even if the appellate court had incorrectly decided the case (and, it did not) the decision would still not warrant certiorari.

According to DSC, the Ninth Circuit's decision broadened existing precedent which is going to have a seismic impact on the national economy. Pointedly, DSC criticizes the Ninth Circuit's decision citing it as an example of broad jurisdictional construct yet DSC itself overlooks basic operative facts, including, most importantly, the private network agreement which is highly relevant to DSC's own conduct in the forum. The agreement sets forth obligations and duties by both Parties, in equal measure, to create an electronic network in California and it even outlined specific IP addresses which both DSC and DEX were to utilize in California in order to securely connect to one another electronically. DSC on its own accord chose to connect to the forum.

DSC asserts that review is also necessary contending there is a split of circuit authority in the treatment of "virtual contacts" and the access of computer servers. Not so. DSC seeks to blend cases where server access is merely accidental and fortuitous versus a defendant's tortious access of the plaintiff's server. *See, Microsoft Corp. v. Mountain West Computers,*

2015 WL 4479490 (W.D. Wash. July 22, 2015) and *Gen. Motors L.L.C. v. Autel. US Inc.*, 2016 WL 1223357 (E.D. Mich. March 29, 2016) defendant reached into Michigan to access GM's intellectual property located on its servers residing in Michigan. The court found this to be an example of purposeful availment.) (citation omitted) Under these facts the courts are not in disagreement and there is no split of authority. DSC "has checked all the boxes." Accordingly, the Ninth Circuit's decision does not conflict with any decision of this Court or any other court.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

CLAUDE S. YOUNG

COUNSEL FOR RESPONDENT

GENERAL COUNSEL

DEX SYSTEMS

3600 VIA PESCADOR

CAMARILLO, CA 93012

(805) 388-1711

SYOUNG@DEX.COM

OCTOBER 22, 2018